THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0069

IN THE MATTER OF AN APPLICATION BY RBTT BANK CARIBBEAN LIMITED FOR JUDICIAL REVIEW OF CERTAIN DECISIONS/DIRECTIONS OF THE FINANCIAL SERVICES AUTHORITY PURPORTEDLY MADE PURSUANTTO THE INSURANCE ACT CHAPTER 306 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES (REVISED EDITION) 2009 AS AMENDED INRELATION TO THE BRITISH AMERICAN COMPANY INSURANCE FUND.

BETWEEN:

RBTT BANK CARIBBEAN LTD **CLAIMANT**

AND

THE FINANCIAL SERVICES AUTHORITY

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES **DEFENDANTS**

Appearances:

Mr. Stanley John Q. C. with Mr. Akin John and Ms. Keisal Peters for the Claimant
Mr. Anthony Astaphan S. C. with Mr. Grahame Bollers for the Defendants
Mrs. Lucille Bascombe-Mondesir and Ms. Learona Haynes representatives for the Claimant
Ms. Geshell Peters for the First Defendant

2019: June 12
September 17

JUDGMENT

Byer, J.:

[1] This claim commenced by way of Fixed Date Claim Form filed on 13 May 2015 seeking both judicial review of a decision of the First defendant and constitutional relief with reference to the

constitutionality of amendments made to the Insurance Act CAP 306 of the Revised Laws of Saint Vincent and the Grenadines (hereinafter referred to as the Act).

[2] The relief was as follows:

i. A declaration that the decision and/or determination of the Financial Services Authority (as contained in a letter dated 10 March 2015 from the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers to the claimant) that pursuant to Section 32 of the Insurance Act, as amended by Section 2 of the Insurance (Amendment) Act, No. 27 of 2013, the Financial Services Authority or its Chief Executive Officer Mrs. Sharda Sinanan-Bollers has determined that there is a deficiency in the total assets comprising BAICO's Statutory Fund in the amount of EC$135,646,312.07 is illegal and/or unreasonable and/or an abuse of power and is accordingly unlawful;

ii. A declaration that the Notice of the Financial Services Authority (as contained in a letter dated 10 March, 2015 from the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers to the claimant) given by the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers, purportedly pursuant to Section 32 (2b) of the Insurance Act as amended, requiring the claimant to make good the deficiency in the sum of EC$135,646,312.07 in BAICO's Statutory Fund, by June 10, 2015, is illegal and/or unreasonable and/or an abuse of power and is accordingly unlawful.

iii. An order of certiorari to remove into this Honourable Court and quash the determination and/or decisions and/or notice mentioned in paragraph (1) and (2) above;

iv. A declaration (as against the Attorney General) that Section 32 of the Insurance Act as amended by Section 2 of the Insurance (Amendment) Act (No. 32) 2011 which took effect on 6 December, 2011 and Section 2 of the Insurance (Amendment) Act, No. 27 of 2013 which was passed on 4 November 2013, have contravened and/or are likely to contravene the claimant's rights under Section 6 of the Constitution and is accordingly unconstitutional and invalid and of no effect;

v. Costs certified fit for two Counsel;

vi. That all other necessary and consequential decision be given.

[3] It is this relief that this court accepts emanated from the following background facts

Background

[4] British American Insurance Company Limited (hereinafter "BAICO") wrote to the claimant by letter dated July 25, 2006 indicating that it would be submitting to the claimant a list of investments/assets, along with relevant certificates which BAICO asked the claimant to hold on BAICO's behalf for the purpose of fulfilling its Statutory Fund requirements under the St Vincent Insurance Act No. 45 of 2003.

[5] Subsequently, the claimant received a letter dated July 25, 2006 from BAICO which was carbon copied to the Supervisor of Insurance listing assets totaling XCD107,079,269.50.

[6] Enclosed with the letter dated July 25, 2006 were Investment Schedules itemizing Bonds, Debenture, Mortgages, Real Estate, Shares, Mutual funds totaling back to the amount listed in the letter as follows:-

(1) Copies of statements in relation to bonds held with Deutsche Bank and CMMB.

(2) Copes of mortgages totaling $2,200,295.46 without original deed instruments.

(3) Copy of a valuation on business premises at Egmont Street Kingstown valued at $4,172,400.

(4) Copy of the Schedules of stocks held in various companies in BAICO's name and copies of Statements of Accounts issued by the Trinidad and Tobago Central Depository Ltd.

(5) Copy of spread sheet with summary listing shares held in BAICO's name with Ryan Corban-Coban Mutual Fund and Bourse Securities Ltd/Savinvest India Asia Fund.

(6) An original Government of St. Vincent Bond certificate No. 019 Series No. 14 for XCD 834,941 recorded on the schedule as XCD 500,00 (initial purchase price).

(7) An original Government of Belize Bond Certificate No GOB1-015 for USD 491,137.86.

(8) A letter dated October 4, 2005 addressed to BAICO from RBTT Merchant Bank confirming participation of USD 3,000,000 in Princess Juliana International Airport.

(9) Copy of letter to BAICO from Raviness Asset Management advising of value of investment of USD 2,000,000.

[7] The documents received were delivered to Leela Baisden, the claimant's custodian of negotiable securities and they were placed in the safekeeping compartment in the cash vault controlled by two custodians.

[8] An Amended Trustee Agreement dated August 11, 2006 was subsequently forwarded to the claimant from BAICO. This was signed by Mr. Desmond Austin on behalf of the claimant and by the authorised signatories of BAICO.

[9] By letter dated April 26, 2007 BAICO wrote to the claimant updating the listings and enclosed an updated Investment Schedule as at December 31, 2006, (which was carbon copied to the Supervisor of Insurance), informing the claimant of the increased amount of assets totaling XCD140,384,801.32.

[10] Copies of the first list of Investment Schedules itemizing the assets which were received from BAICO on July 25, 2006 were forwarded by the claimant to the Supervisor of Insurance under a cover letter dated October 16, 2006 signed by the Securities Officer – Leela Baisden confirming receipt of the list of assets totaling XCD 107,079,269.50 and enclosing a stamped and signed copy of BAICO's said correspondence.

[11] After the claimant received BAICO's letter dated April 26, 2007 informing them of the increased amount of XCD 140,384,801.32 as at December 31, 2006 and which was carbon coped to the Supervisor of Insurance, copies of the updated list of assets and Investment Schedules provided by BAICO were sent to the Supervisor by letter dated May 7, 2007 confirming the updated listed amount of XCD 140,547,665.57.

[12] Subsequently, by letter dated April 7, 2009 the Supervisor of Insurance requested a breakdown of the existing assets, which the claimant provided by letter dated April 16, 2009 to Supervisor of Insurance signed by Leela Baisden – Securities/Authorization Officer and which enclosed the updated asset listing totaling XCD 140,547,665.57.

[13] By letter dated July 30, 2009 BAICO's court appointed Judicial Manager – Brian Glasgow (hereinafter "the JM"), wrote to the claimant advising of his appointment and enclosed a copy of the Order by which he was appointed dated 30 July, 2009 in SVG High Court Claim No. 251 of 2009.

[14] By order of the court the JM prepared a report as to the state of the finances of BAICO within the jurisdiction. It was in this report that the JM noted discrepancies in the assets declared by BAICO and what the claimant's lists provided. The claimant maintained that the major variances between the values on the updated lists and Investment Schedules received by the claimant from BAICO and submitted to the Supervisor and the values in BAICO's JM Report dated 9 June, 2009 were in relation to the bonds and shares.

[15] Apparently utilizing the report of the JM, a letter dated 15 August, 2011 penned by the Supervisor addressed to the claimant stated in summary that:

> (i) BAICO was required under the Insurance Act to establish a Statutory Fund by placing certain assets in trust and that the Supervisor of Insurance (the Supervisor) granted approval for the assets constituting BAICO's Insurance Fund to be held by the claimant as trustee to the order of or on behalf of the Supervisor.
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> (ii) That pursuant to a written agreement dated 25 May, 2006 between BAICO and the claimant, they determined that assets were transferred to the claimant. In their understanding and pursuant to this agreement the claimant had written a number of letters pursuant to Section 31 of the Insurance Act, to the Supervisor in which the claimant had identified and accepted that it held a number of assets in trust. The Supervisor noted that in fact the last such letter from the claimant had been dated 16 April, 2009 and enclosed with it an updated list of assets totaling EC $140,547,665.57 as being held in trust as at the 15 April, 2009 for the purpose of securing the statutory fund obligations of BAICO.
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> (iii) That notwithstanding these representations, Mr. Brian Glasgow BAICO's Judicial Manager had advised, that the claimant did not have physical custody or control of any of the assets purported to constitute BAICO's Statutory Fund, furthermore that the claimant had asserted that it in fact did not hold any of these assets in trust.
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> (iv) The Supervisor made it clear that as a result however of repeated representations to his office that the claimant had led him to believe that it had control of the assets, and that therefore BAICO's policy holders were protected. As far as the supervisor was therefore concerned, the claimant was therefore estopped from denying that it held the assets in trust.
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> (v) Therefore the Supervisor considered that he claimant was in breach of its duty and default and/or representations, and as such he and the persons whom he represented and the Judicial Manager were entitled to the assets, or the specific sum of EC $140,547,665.57, which represented the value of the trust assets. And the transfer of the assets or payment of that sum with interest was demanded from the claimant within 14 days of the letter.

[16] The claimant in response to these allegations categorically denied that it was the trustee of BAICO's Statutory Fund and further denied all liability for any loss resulting from the non-existence of any of the subject assets and/or for their reduction in value; as indicated in the demand letter of 15 August, 2011.

[17] In fact the claimants made it clear that given that all of the assets in the Fund were maintained in BAICO's name, the claimants requested that BAICO's JM account fully for those assets which he has taken control of under the Judicial Management, and also, that he should take steps where necessary, in the interest of the Supervisor on whose behalf assets are held for the purpose of BAICO's Statutory Fund, to protect and preserve assets that are liable to execution or dissipation.

[18] While the resolution of the matters raised were still pending an Act was published with the Government Gazette of 13 December, 2011 which sought to amend the Act titled the Insurance (Amendment) Act 2011 (the Amendment) which took effect on 6 December, 2011 and which amended Section 32 of the Insurance Act Chapter and later, the Insurance (Amendment) Act (No 27) 2013 (the Second Amendment) was passed on 4 November, 2013 to further amend the amended Section 32.

[19] Further On 14 May, 2012, without having resolved the issues as between the parties the Supervisor of Insurance instituted a claim against the claimant in SVGHC Claim No. 148 of 2012 (the 2012 claim) in which he alleged, *inter alia*, that the claimant owed the Supervisor a statutory and/or fiduciary duty of care to maintain possession and/or control over and to hold the trust assets until required by him and not to dissipate or dispose of them, without his consent of knowledge and that the claimant had recklessly and in breach of these alleged fiduciary and/or statutory duties and obligations failed to account for and hold the assets constituting BAICO's Statutory Fund and on that basis, the Supervisor claimed that the claimant must account for and deliver the assets or the monetary value of the assets held in trust in the sum of $135,646,312.07.

[20] The claimant filed a Defence to this claim on 20 July, 2012 by which it denied the claim.

[21] Without this matter proceeding to trial and without the issues raised therein being ventilated and adjudicated upon, the First defendant then wrote to the claimant by letter dated 10 March, 2015 purporting to give notice of the alleged deficiency and directing the Bank to make good that alleged deficiency in BAICO's Statutory Fund in the amount of EC $135,646,312.07.

[22] It was this letter and the actions of the First defendant that have led to this case at bar.

[23] The facts at trial were not fundamentally challenged even though there was extensive cross examination of the affiant who gave evidence on behalf of the defendants by counsel for the claimants, but in this court's mind, the evidence that was elicited during that exercise did little to assist this court in clarifying the issues which this court determines are to be considered within the context of the claim filed.

[24] In fact, when this court distilled the comprehensive and extensive submissions made by both sides this court is satisfied that the issues that were raised on this claim are in fact quite narrow.

[25] I therefore find that the following issues are for the consideration of this court:

i. Are the claimants entitled to the relief for judicial review in light of the existing claim in 148/2012 (the 2012 claim)?

a) Is there a private right or public right being enforced by this claim?

b) Is there a requirement for this court to make a determination as to the existence of a statutory trust as against the claimant before the relief can be obtained as prayed?

ii. If the claimants are entitled to judicial review, are they entitled to a finding that the letter of 10 March 2015 was ultra vires and/or illegal and /or unreasonable and/or irrational?

iii. Was the penalty imposed by Section32 of the Insurance Act as amended in December 2011 and /or November 2013 respectively, disproportionate and unconstitutional?

iv. Could the charge created by the penalty imposed pursuant to Section 32 of the Insurance Act as amended amount to a deprivation of the claimant's property and therefore be considered unconstitutional?

Issue #1: Are the claimants entitled to the relief sought for judicial review in light of the existing claim in 148/2012 (the 2012 claim)?

a) Is there a private right or public right being enforced by this present claim?

b) Is there a requirement to make a determination as to the existence of a statutory trust as against the claimant before the relief can be obtained as prayed?

[26] Before this court undertakes the examination of this issue and its sub issues, it is imperative in this court's mind to crystallize the role of the court on the hearing for judicial review.

[27] Judicial review proceedings are the process by which an aggrieved party seeks to ask the court to inquire into the functions and/or decisions of public authorities, to ensure that the "***functions of public authorities are carried out in accordance with the law and also that these bodies are held accountable for any abuse of power or unlawful or ultra vires acts ….. In a constitutional democracy, one of the roles of judicial review is the vindication of the rights of an individual against abuse of power carried out by public officials."***[1]

[28] The filing of judicial review proceedings therefore does not engage the court to stand in the stead of the decision maker or even as a tribunal in the appellate jurisdiction. The court simply operates to examine the premise upon which the decision maker has based their decision and to ultimately determine whether that tribunal could have come to the decision that they did. In other words,

[1] **Digicel (Jamaica) Limited v The Office of the Utilities Regulation** HCV2012/03318 (Jamaica) unrep

whether the decision made could have been reached by any reasonable tribunal in *all* the circumstances.

Judicial review is therefore "*not an appeal from a decision but a* ***review*** *of the manner in which the decision was made"* (my emphasis) per Lord Bingham in **Chief Constable of the North Wales Police v Evans[2].**

[29] However in doing that review, it is very clear it is not the job of this court or any Court, to determine the right or wrong of the decision itself or even to examine the basis upon which the decision was made but simply to ensure the process followed was lawful, reasonable and fair.

[30] The basis of the review can therefore only be hinged on the premise that "a public law right which [the applicant had] enjoyed had been infringed" and thus "the remedy of judicial review is only available where an issue of "public law" is involved…"[3]

[31] Having said so, it is important to note that in this case at bar the contention of the defendants throughout these proceedings has been that this is a matter that is better guided by the principles of private law, in that a determination of the status of the claimant as statutory trustee must first be established and that that issue was a matter better dealt with within the parameters of the 2012 suit.

[32] Thus in addressing their minds to the case at bar and the issues which they identified, the submission of the defendant was that with the existence of the 2012 suit , the claimants had an alternate remedy open to them and that the judicial review proceedings were therefore an abuse of the process of the court. They also stated definitively that in any event the letter that started this process that emanated from the First defendant was not a decision or a determination that was amenable to review by this court.

[33] The claimants in response to this position adopted by the defendants submitted that this posture of the defendant was not open to them to take at this stage of the proceedings.

[34] The claimants argued that the issue of whether there existed an alternate remedy was a matter that had been considered at the leave stage where it had been adequately ventilated and that the learned judge in granting leave had specifically found that there was no alternate remedy open to the claimant[4]. Having already raised it and the court having determined that leave should be given,

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[2] [1982] 3 ALL ER 141 at 155

[3] **R v Berkshire Health Authority, ex parte Walsh** [1984] 3 WLR 818 at page 824

[4] Paragraph 6.2 (2) of the Submissions of the Claimant filed on the 31/5/19 refers to the order of Lanns J on the leave application:

"AND UPON CONSIDERING the submissions of both Mr. Stanley John QC and Mr. Grahame Bollers: AND THE COURT, being satisfied, based on the material before it that a) the Applicant/Intended Claimant has the

it was now not open to the defendants to attack the grant of leave in this court having not appealed the same.

[35] With regard to the position of the defendants that there was in fact no decision that had been taken by the First defendant that was in fact reviewable, the claimants adamantly submitted that what the First defendant had purported to do was to find or make a determination that there was in fact a deficiency of a statutory trust and on that premise issued a directive to make good that deficiency. This action was a determination, the claimants submitted, which could be impugned and was therefore amenable to judicial review. They submitted that the First defendant having made this determination had made a finding that not only was the claimant a statutory trustee within the meaning of the Act but that additionally there existed a deficiency in that trust which the claimants were required to make good. This, in the claimant's submissions was the pith and substance of their case and to which they are entitled to question.

Court's Considerations and Analysis

[36] In looking at these issues it is clear in this court's opinion that these parties despite the plethora of submissions filed, lost sight of the heart of this issue. In this court's mind this must be simply: were the claimants entitled to judicial review of the actions of the First defendant who had issued the letter of 10 March 2015 (the March letter)?

[37] In this court's mind the other issues raised were merely peripheral and did nothing more than result in an attempt to detract from the real issue at hand.

[38] That being said, I agree with counsel for the claimant that the defendants at this stage seeking to raise the argument that the application should be denied on the basis of the existence of an alternate remedy, that being the 2012 suit, seemed to be an attempt to launch a collateral attack on the grant of leave obtained at the inter partes hearing of the application heard since 2015.

[39] Indeed in the Court of Appeal decision of **The Police Service Commission v Gary Nelson**[5] Gordon JA stated with regard to an application filed by the appellant to strike out the respondent's claim for judicial review although the appellant had not appealed the grant of leave, made it clear that the appellant could not at that stage "… mount a collateral attack on the original grant of leave. In effect …the appellant [would be] asking the High Court to sit on appeal of itself".

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requisite standing to seek judicial review; b) there is no alternative remedy available to the Applicant/Intended Claimant; c) there has been no undue delay in the Applicant/Intended Claimant coming to the court; d) the Applicant/Intended Claimant has shown that it has an arguable case, which has a realistic prospect of success.."

[5] HCVAP2009/0011 from Antigua and Barbuda at para 6

[40] I accept that in this case at bar, that this is in indeed what this defendant attempting to do, by asking this court to find that the application at this stage should be dismissed due to the existence of an alternate remedy. In this court's mind, this argument would and should have been ventilated and canvassed at the leave stage. If the court's decision to grant leave was not agreed with, then the defendants should have availed themselves of the right to appeal the grant on that basis.

[41] This court therefore agrees with the proposition cited from *De Smith's Judicial Review* in the case of **Gary Nelson v The Attorney General and anr**[6] by Remy J. In that case she had this to say:
"Questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy."

[42] I therefore determine that the existence of the 2012 suit at this stage does not stand as a bar to the application as it is before this court however I will return to the import of this civil claim to this present claim, later in this judgment.

[43] As to the argument as to whether the March letter and its contents can give rise to judicial review, I agree with the claimants that it does.

[44] When one considers the intended purport of the March letter it is clear in this court's mind that the First defendant, had made a determination and was seeking to enforce the penalties as provided by the legislation as against the claimant based on that determination.

[45] It is therefore necessary to examine the contents of the March letter in some detail:

"10 March 2015

The Manager
RBTT Bank Caribbean Limited
81 South River Road
P. O. Box 118
Kingstown

Dear Madam:

Re: British American Insurance Company Ltd. (BAICO)

[6] ANUHCV2008/0552 at para 49

By letter dated 16th April, 2009, captioned Re: Establishment of Insurance Fund – British American (St. Vincent), RBTT Bank Caribbean Limited wrote to the Supervisor of Insurance enclosing therewith a list of assets with values totaling One Hundred and Forty Million Five Hundred and Forty-Seven Thousand Six Hundred and Sixty-five Dollars and Fifty-Seven Cents Eastern Caribbean Currency (XCD 140,547,665.57), which your Bank represented to be holding, "to cover the statutory requirement as at 15th April 2009, to be held in trust as re: Agreement for the purpose of securing statutory fund obligations".

The statutory fund obligations to which you refer in your letter, are the obligations imposed on British American Insurance Company Limited (BAICO) pursuant to Section 29 of the Insurance Act CAP 306 of the Revised Laws of St. Vincent and the Grenadines, 2009 ('the Insurance Act'). Such obligations comprise the establishment of an insurance Fund equal to its liability and contingency reserves in respect of its long term insurance business as established by its revenue account, less monies held on deposit by the Supervisor of Insurance.

Pursuant to Section 32 of the Insurance Act, as amended by Section 2 of the Insurance (Amendment) Act, No. 27 of 2013, this office has determined that there is a deficiency on the total assets comprising BAICO's Statutory fund in the amount of EC $135,646,312.07.

Notice** is hereby given pursuant to Section 32 (2b) of the Insurance Act as amended, requiring RBTT Bank Caribbean Limited to make good the deficiency in BAICO's Statutory Fund by **June 10, 2015.

Yours faithfully,
Sharda Sinanan-Bollers
Executive Director,
Financial Services Authority/
Supervisor of Insurance" (My emphasis added)

[46] When one looks at this letter it is clear that the First defendant had made a determination that there was a deficiency in the total assets comprising the Statutory fund that BAICO was required to establish under the Act and it is also clear from the letter that this determination was based on the First defendant's finding that the claimant was in fact a statutory trustee under the Act.

[47] Therefore in this court's mind, this court is satisfied that this action by the First defendant is amenable to judicial review and that the contents and purport of the March letter can engage the scrutiny of the court.

[48] It is therefore also clear to this court that the First defendant in issuing the March letter made a quantum leap by purportedly relying on the representations of the claimant to them then made a

finding that the claimant must stand in the role of statutory trustee for BAICO despite the claimant's continued dispute of the same. It is this belief that in this court's mind, has led them into error.

[49] This question of whether the claimant could or could not be considered a statutory trustee however was not before this court on the present application as it is formulated and in spite of the existence of the provisions of Part 56.13(3) CPR 2000[7] which empower a court upon the hearing of an application for an administrative order to grant *any* relief that appears justified by the facts proved before the judge whether or not such relief should have been sought by an application for an administrative order, this court refuses to make this determination within these proceedings.

[50] Thus even though this question has not been settled despite the submissions of the defendants to the contrary that the claimants must be considered a statutory trustee from the circumstances of the events that took place and that there can be no defence to that claim, in this court's mind the existence of an extant private civil suit in which this issue stands at its heart and to which the claimants have defended, is one that is better suited to examine the breadth of those claims and for a determination to be made in due course.

[51] I say all that to say this, in this court's mind, the application for judicial review as is presently formulated is not hinged on this determination. The First defendant has purported to act pursuant to powers conferred on it by the Act and it is those actions with which this application is concerned.

[52] I therefore find that the claimants are entitled to be heard on their application of judicial review there being a public right that was infringed by the decision of the First defendant and that in order for this court to determine the same, there is no prerequisite to make a finding of whether the claimant was or was not a statutory trustee.

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[7] Part 56.13(3) CPR 2000 states:

Hearing of Application for Administrative Order

56.13

(3) The judge may grant any relief that appears to be justified by the facts proved before the judge, whether or not such relief should have been sought by an application for an administrative order.

Issue #2: If the claimants are entitled to judicial review, are they entitled to a finding that the letter of 10March 2015 was ultra vires and/or illegal and /or unreasonable and/or irrational?

[53] This court already having determined that the claimants are entitled to seek the application for judicial review must now consider the March letter and the basis upon which it was issued.

[54] The submissions of the claimant in this regard are that the First defendant in purporting to make a determination or decision as to the liability of the claimants for any deficiency in the statutory fund, the First defendant had made an error in law and/or acted ultra vires the Act[8].

[55] The claimants also submitted that the First defendant having made that decision in any event acted both illegally and irrationally in having taken into consideration irrelevant matters to make the mathematical determination of a deficiency and as a result "…the said determination and directive are void and of no legal effect"[9].

[56] In response the defendants maintained that the March letter did not invoke any considerations of public law issues and therefore the nub of their argument was that there could be no determination of whether the March letter was either ultra vires/illegal or unreasonable as contended by the claimants.

Court's Considerations and Analysis

[57] In looking at the matters raised by this issue, it is necessary for this court to first establish what is required for a finding of ultra vires as against a public authority.

[58] By relying on this argument it must be incumbent on this court to consider whether the acts of the First defendant were *"beyond the scope or in excess of the legal power or authority"*[10] that is conferred on the public entity.

[59] Therefore it is imperative to examine the means by which the public authority obtained the power by which they purport to act.

[60] By the Act and in particular Section 29 thereof, provision is made for the establishment of what is termed as an insurance fund. Section 29 states:

*"**29. Establishment of Insurance Funds***

[8] Submissions of the Claimant filed 31/5/19
[9] Paragraph 8.6 of the Claimant's Submissions filed 31/5/19
[10] Merriam-Webster Dictionary

(1) Notwithstanding Section 22, every company shall, in respect of each class of insurance business being transacted, establish an insurance fund equal to its liability and contingency reserves in respect of policies in the State in that class of business as established by the revenue account of the company, less the amounts held on deposit with the Supervisor.

(2) Within four months of the end of each financial year a company shall place in trust the assets of its long-term insurance fund and of its motor vehicle insurance fund, as the case may be."

[61] Upon the establishment of this fund the Act went on further to state that these funds were then to be held on trust as provided for by Section 31 of the Act. Section 31 states in its entirety:

*"**31. Creating a Trust***

(1) A trust referred to in Section 29(2) shall be created by trust deed the contents and the trustees of which shall be approved by the Supervisor before the trust is created.

(2) The Supervisor may, for the purpose of this section, allow the assets required to be placed in trust to be held by a bank in the State or a financial institution approved by the Supervisor to the order of or on behalf of the Supervisor and the assets shall be deemed to be placed in trust and the bank or financial institution shall be deemed to be a trustee."

[62] When one therefore considers Section 31 it is clear that it is only when the criteria are met for the establishment of a trust (Section 31 (1)) that any entity would then be deemed to be a trustee for the purposes of the Act (Section 31(2)) and the concomitant obligations that attach thereto as prescribed by Section 32[11].

[63] The provisions of Section 32 were subsequently amended by the Insurance (Amendment) Act 32/2011 (hereinafter referred to as the Amendment) and it was pursuant to these amendments that the First defendant specifically stated empowered her to issue the March letter.

[64] These amendments were far reaching and in this court's mind served the purpose of making the mathematical calculation of a deficiency to the level of what could be considered a strict liability offence. The amendments stated as follows:
"Section 32 of the Insurance Act is amended –

[11] Section 32: **Restriction on Trustee –** (1) A trustee may not deal with any assets held in trust by him without the prior general or specific approval of the Supervisor. (2) A trustee shall, as required by the Supervisor, submit a list of the assets held in trust pursuant to section 31. (3) A trustee who contravenes subsection (1) shall be under the same liability as if the appropriate policy-holder had been the beneficiary of the trust.

By inserting immediately after subsection (2) the following new subsections –

"(2a) Where pursuant to subsection (2) a list of assets has been submitted to the Supervisor and thereafter it is discovered that the value of the assets in the list no longer represents the total sum stated in the said list then in any proceedings before a court of law or other judicial or quasi-judicial body it shall be conclusively presumed that the trustee has dealt with the assets without the prior general or specific approval of the Supervisor or without an express written approval given by the Supervisor to dispose of or deal with the asset.

(2b) Where a trustee has or is deemed to have dealt with assets without the prior general or specific approval of the Supervisor or without an express written approval as referred to in subsection (2a) and there is a deficiency in the total value of the assets as contained in the list submitted pursuant to subsection (2) the Supervisor shall in writing within a time to be specified by him direct the trustee to make good the deficiency.

(2c) A trustee who fails to comply with the directions given to him by the Supervisor to make good the deficiency within the period stated shall be liable to pay a penalty of five hundred thousand dollars for every day or part thereof during which the failure continues.

(2d) The penalty imposed under subsection (2c) shall constitute a charge, in favour of the Supervisor, upon all the property of the trustee and maybe sued for and recovered in the court by the Supervisor or the Attorney General."

[65] By the inclusion of these wide sweeping amendments, the Act now operated to attach liability to an entity who was deemed a trustee to be held strictly liable for any deficit in the trust funds which they were required to hold. Thus "*…in any proceedings before a court of law or other judicial or quasi judicial body it shall be* ***conclusively presumed*** *that the trustee has dealt with the assets without the prior approval of the Supervisor…*[12]*"* Upon that presumption being considered the Supervisor was then empowered "*…in writing within a time to be specified by him direct the trustee to make good the deficiency*[13]".

[66] The final amendment made to the Act was by the Financial Services Act 33/2011 (hereinafter referred to as the FSA) in which the Financial Services Authority took on the responsibility for the

[12] Section 2 (a) of the Insurance (Amendment) Act
[13] Section 2 (b) of the Insurance (Amendment) Act

administration of the Act in the place of the Supervisor of Insurance[14] and thus the naming of the First defendant in the present suit.

[67] Thus it is that the powers of the First defendant were clearly stated.

[68] What then did the First defendant purport to do.

[69] Relying on the provisions of Section 32, as amended the First defendant informs the claimants: firstly, you are the Statutory Trustee based on the representations made by them to the Supervisor of insurance since 2009; secondly that as statutory trustee there is a deficiency for which you are liable and thirdly those sums need to be paid. In this court's mind this was a finding of fact which in 2015 was still very much in contention based on the pleadings of the 2012 suit and the continuous correspondence that flowed as between the parties.

[70] Indeed Section 31 of the Act allowed for the First defendant to deem the claimant as trustee. Indeed, this court accepts that it was within the purview of the First defendant to do so based on the information that was before them.

[71] I therefore accept that the First defendant on a strict interpretation of the law with regard to Section 31 was entitled to deem the claimant as trustee. As far as they were concerned there was a document entitled Trust Agreement between the claimant and BAICO which purported to establish the claimant as "trustee" of BAICO's "St Vincent Statutory fund"[15] in which the claimants were to ensure the "safe keeping of security items of assets held".

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[14] Section 6 of the Financial Services Act

[15] *"**Re: Amended Trustee Agreement***

We will be submitting to you a list of investments/assets, along with the relevant certificates which you will hold on our behalf for t purpose of fulfilling the Statutory Fund requirements under the provisions of St. Vincent-Insurance Act No. 45 of 2003.

As the trustee of our St. Vincent Statutory Fund you are obligated to provide the following services:

a) Reporting to the Registrar of Insurers all assets of British-American Insurance Company Limited (St. Vincent) held in trust.
b) The safe-keeping of security items of assets held
c) Monitoring and updating records on the release and renewal of the assets.
d) You must not deal with any assets held in trust without prior general or specific approval of the Supervisor of Insurance.

It is understood that the assets held in trust shall be maintained in the name of British-American Insurance Company Limited (St. Vincent) and that the duties of the Bank shall be purely custodial in nature.
*The Bank shall be entitled in respect of its services during the continuation of this arrangement to an annual fee of **EC $1,200.00** exclusive of out of pocket expenses.*
The annual fee will be made payable via a cheque/bank draft on receipt of the Annual Confirmation to the Registrar of Insurers.
All securities, once approved for release by the Registrar of Insurer, should be air mailed to the following address:

C/o Ms. Sophia Jagroop/Mr. Antoni Jagan, Investments Department
British-American Insurance Company Ltd, 11-13 Fifth St., Barataria, Trinidad

[72] This court therefore accepts that the First defendant was entitled to consider the claimant deemed as trustee for the purposes of the Act. Having done so this court further accepts that this action therefore could not be considered ultra vires the provisions of the Act. Let me quickly add that having said so, this court is not making a finding of fact that the claimant is in fact a statutory trustee. As indicated earlier this court is of the opinion that this is a matter that is better ventilated and determined in the 2012 suit.

[73] Therefore the question that must then arise is whether it was a decision that a prudent supervisor would have done given the fact that there was a clear question raised by the claimant as to whether they could be appropriately defined as a statutory trustee. There was an outstanding claim in which this very issue was to be determined. So perhaps it may not have been prudent to maintain this position given the state of play at that juncture, but this court is not concerned as to whether it was prudent of the First defendant to engage the provisions of the Act but whether what the First defendant did was in fact open to them to have done given the provisions of the Act.

[74] I do not consider therefore that the acts of the First defendant were ultra vires the Act when one looks at the strict and ordinary meaning of those words that gave them the power to deem the claimant as statutory trustee.

[75] Be that as it may however, this court cannot agree that any action taken upon this act necessarily follows must by necessity be considered valid.

[76] In fact if truth be told, one of the most investigated aspects of a decision maker's decision making process is whether the decision can withstand scrutiny from the courts as to its reasonableness.

[77] There is no doubt that the role and function of the Court is to make an assessment of the complained of decision and to investigate its reasonableness. In the case of ***Associated Provincial Picture House Limited*** *Lord Green MR had this to say: "The court is entitled to investigate the action of the local authority with a view to seeing whether they ought not to take into account or conversely have refused to take into account any matter, Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority kept within the four corners of the matter which they ought to consider they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever come to it."*

The above arrangement may be terminated by you or by the Registrar of Insurers, St. Vincent at any time on the giving one (1) month's notice on either side. …"

[78] This Court is therefore mandated to investigate whether the decision made by the defendant was one any reasonable tribunal with the evidence before it could have come to or whether they failed to take into consideration certain matters or took into consideration irrelevant matters and therefore came to a wholly unreasonable decision.

[79] The investigation therefore goes to the heart of the decision and the question is therefore whether a reasonable tribunal could have come to or have taken the decision arrived at in the present proceedings. This is the test.

[80] What this court must assess and to satisfy itself in this regard must be whether the decision fell within "…the range of reasonable views open to the decision maker…"[16]

[81] This Court's charge when undertaking judicial review is to examine what the decision maker had before them and whether it was sufficient to come to the decision that it did. This court cannot take the place of the decision maker. It is not for *"… the Court [to] compel the public authority to exercise its power in a particular way nor can it compel it to make a decision which it believes is the correct one. The court is not concerned with whether a decision is wrong or right on its merits."*

[82] In this case at bar, it was apparent in this court's mind however that the First defendant having relied on the information almost wholesale as given by the Judicial manager in his report to them[17] and that having failed to consider the basis of that report and the change of circumstances that had occurred that the First defendant had failed to take into consideration relevant matters and considered irrelevant matters.

[83] It was indeed unfortunate that the position of the First defendant in filing evidence in this matter did not dispute the allegations raised by the claimants as to the irrelevant matters that had been taken into consideration on the determination of the deficiency and the extent of that deficiency.

[84] Thus this court is left with the uncontroverted statements contained in the affidavit of Lucille Bascombe-Mondesir who gave evidence on behalf of the claimants setting out the changes that occurred to the assets of BAICO over time which they allege were not taken into consideration[18].

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[16] **Secretary of State for Education and Science v Tameside Metropolitan Borough Council** cited with approval by Small -Davis J in **Jared Adams v COP** AXAHCV2009/89 unreported

[17] Point conceded to by the witness Mintrue Rose Providence in cross examination at trial of the matter

[18] Paragraphs 41-60 of the Affidavit of Lucille Bascombe-Mondesir filed on the 7/5/15 states:
"41. Furthermore, in BAICO's Judicial Manager's Report dated 9th October, 2009 which was submitted to this Honourable Court; a table on page 36 reproduces a balance sheet showing the position as at 30 June, 2009. This indicates that BAICO's liability in respect of traditional life policies was $20,305,598 and that in respect of annuities $139,832,975. And at page 44 it is stated that the reserves for future police owner benefits was in the sum of $177,332.695 which the actuaries revised to $16,213,477 and $147,936,763, respectively.
42. The actuarial liabilities of the entire EC Traditional Business were independently estimated by Eckler as at 31 July 2011 to be EC $105.4 million (US$39.1 million) (including a credit for negative reserves). And this was

subsequently further updated by Eckler in November 2012, based on the in-force policy listing at 30 September, 2012 to EC$100.3 million (US$37.2 million).

43. These include the following traditional policies issued by BAICO in Anguilla, Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Lucia, St. Kitts and Nevis and St. Vincent and the Grenadines:

1. *Universal life policies*
2. *Ordinary life (including term life, whole life and endowment policies)*
3. *Home service life*
4. *Group pensions*

44. This entire portfolio has been transferred to SAGICOR pursuant to a Sale and Purchase Agreement dated June 29, 2012 under which the Governments of the ECCU States have provided funding of up to US$38 million to assist in restoring value to the transferring policies.

45. Pursuant to the transfer, SAGICOR has become entitled to receive and appropriate all premiums that become payable and all rights and remedies available to BAICO in the event of non-payment of premiums and commensurately, SAGICOR is obliged to indemnify benefits and liabilities of the owners and any persons having a claim against BAICO in respect to the subject policies, and all future legal proceedings by or against BAICO will be continued by or against SAGICOR.

46. Although it is required that a copy of the Sale and Purchase Agreement should be submitted to the Court in the Judicial Management proceedings in SVGHC Claim No. 251 of 2009 none is to found on the Record. However, the St. Kitts JM Report at paragraph 4.1.2 page 7 states that the money consideration which the Judicial Managers have received for the transfer of the EC Traditional Life portfolio is EC$20.25 millions.

47. In any event, it would appear that the Regulators have found a workable solution to address the liabilities in relation to the traditional insurance policies via this arrangement for the transfer by sale of this portfolio. A full recapitalization of BAICO's traditional business was achieved via the infusion of US$38millions from the Petroleum Fund, which was established by Trinidad & Tobago.

48. Consequently, there has been no loss of policyholders within this category of business, and for all practical purposes there is no material deficiency in the Statutory Insurance Fund in respect of relevant policies; since the entire portfolio has been sold to SAGICOR, and in the course of maintaining its Statutory Insurance Fund, SAGICOR has since been obliged to establish a contingency reserve under Section 29 of the Act in relation to this traditional business portfolio.

49. In the circumstances, it would be reasonable and rational for these developments to be taken into consideration in determining the amount of any deficiency in BAICO's Statutory Fund.

50. The remaining insurance business which BAICO conducted at all material times and for which BAICO's Statutory Fund was intended to be established, include the annuitants and investment contracts made with investor policyholders, to the extent that there were insurance policies as defined under the Insurance Act. There is no official source of information regarding the actuarial liabilities of this Non-Traditional Business, upon which reliance may be properly placed by the Bank at this time.

51. The Judicial Managers have periodically over recent months published information about the ECCU Policy Holders Relief Programme, which is being funded with assistance from the Government of Trinidad & Tobago.

52. Under phase 1 policy owners holding Flexible Premium Annuity, Executive Flexible Premium Annuity (Special Edition) and Flexible Premium Annuity II Policies issued by BAICO in the ECCU with balances of EC $30,000 (just over US$10,000) or less received payments from the ECCU Governments in exchange for the termination of their policies and the extinguishment of all their rights relating to the Policy.

53. There is now no loss to these policy owners and no material deficiency in BAICO's Statutory Fund in relation to the relevant liabilities.

54. Under Phase 2, financial assistance was made available to Policy Owners or Assignees who held policy types including: Executive Flexible Premium Annuity (Special Edition) (EFPA) or Flexible Premium Annuity II (FPAII) and their principal balance is EC $30,000 or less.

55. In consideration of receipt of the Payment/s indicated above, the Owners each jointly and separately enter into an agreement in accordance with the Programme Terms with each of the ECCU Governments, BAICO and each of BAICO's Judicial Managers and Administrator that:

1. *The Policy will be terminated;*

The affiant further stated at paragraph 61: *"In all the circumstances, it would be critical for verification of all of these assets and payments and for them to be taken into consideration in determining if there is any deficiency in respect of BAICO's Statutory Fund and the amount of any such deficiency, in order for such a determination to be rational and fair. And the First Respondent failed to give any consideration to them."*

[85] The response of the defendants was simply that the allegations raised are directly relevant to the 2012 suit and should therefore be dealt with within the confines of that suit[19].

[86] Despite this very unhelpful position taken by the defendants it is clear in this court's mind that by the March letter, the First defendant having firstly determined that the claimant was a statutory trustee despite clear indications that they disputed the same, then went on to make a determination that there was a deficiency in the statutory fund and that finally this deficiency had to be rectified failing which the penalties provided for by the Act would apply.

[87] However, despite this court having found that the First defendant had not acted ultra vires the Act in making the finding of the claimant standing as statutory trustee, the court must accept on the balance of probabilities and given the state of the evidence that the First defendant had gotten it completely wrong at the stage of determining the deficiency.

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2. All debts owed by BAICO in respect of the Policy are discharged, including any right to be repaired premiums;

3. <u>They waive all their rights, claims and interest in respect of the Policy against BAICO, its assets and statutory fund;</u> and

4. They release and indemnify BAICO, the Judicial Managers or other officeholders of BAICO, and each of the ECCU Governments, together with any of their employees, contractors or agents, from any liability whatsoever in respect of the Policy and their Application under this Programme. This includes, but it is not limited to, any rights to interest, earnings or other payments under the Policy, or any consequential or other damages.

56. Similarly, since these policy owners have waived all their interests in BAICO's Statutory Fund in relation to relevant liabilities, there is no material deficiency for these amounts which have been waived.

57. Relief was paid under Phase 3 for EFPA and FPAII Policy Owners with principal balances over EC$30,000.

58. In consideration of receipt of the Payment/s under the Programme in respect of the above Policy, the Owners each jointly and separately enter into an agreement in accordance with the Programme Terms with each of the ECCU Governments, BAICO and each of BAICO's Judicial Managers and Administrator that the total amount paid under the Programme in respect of this Policy will be deducted from any amount payable by way of distributions from the BAICO Estate.

59. Upon making the Application for relief under each Phase, the Policy Owner agreed to be bound by the terms of the Programme which are contained in the Brochure published by the ECCU Governments and the Judicial Managers.

60. It was declared by the SVG Government that following Phase 3, and coming off what took place regarding the takeover of the Traditional Life Insurance policies by Sagicor and the payments made to Flexible Premium Annuity policyholders' claims would have been addressed under the Programme.

[19] Paragraph 14 of the Affidavit of Mintrue Rose Providence

[88] It appears to this court that the First defendant was cognizant of all the issues that were raised by the claimant as to the extent of the liability, if any at all, that this was still in issue in extant proceedings by way of the 2012 suit and that having failed to take into consideration, or certainly on the face of the March letter, these relevant considerations, this court is determines that the determination of the deficiency which would have led to onerous statutory obligations on the part of the claimant, has led the First defendant to err.

[89] In this court's mind it was within the purview of the First defendant, even in the position that they considered themselves to be, that this was not a matter amenable to judicial review, to satisfy the court that even if the court considered that there may have been considerations that had not been taken into account that the deficiency was still relevant and there it may have simply been a matter of a revision of figures. This was not the position of the First defendant and I find myself in agreement with the case of **In R v Secretary of State for Work and Pensions**, in which Lord Neuberger MR stated:

> *"Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held to be invalid unless the factor played no significant part in the decision-making exercise. ... Even where the irrelevant factor played a significant or substantial part in the decision-maker's thinking, the decision may, exceptionally, still be upheld, provided that the court is satisfied that it is clear that, even without the irrelevant factor, the decision-maker would have reached the same conclusion".*

In fact he went on to state further at paragraph 81 that it was "…[a] *high hurdle that has to be crossed by the decision-maker before he can persuade the court that his decision would have been the same if he had ignored a factor which he illegitimately had taken into account".*

[90] In this court's mind this hurdle has not been overcome by the First defendant in its answer to this court and to the claim.

[91] This is so in this court's mind when the decision of the finding was compounded by what this court considers to have been manifest procedural unfairness on the part of the First defendant. This court also accepts that even though this ground was not specifically argued or claimed that it was tangentially raised on the case before the court in that the claimants argued this as a constitutional point which I will deal later on in this judgment.

[92] Thus this court must accept that even where there is no mechanism enshrined in the provisions of the legislation under which the First defendant purported to act, it is clear to this court's mind, that once the First defendant had made a determination, which meant that the entity or body against whom the determination had been made would automatically be saddled with financial liabilities under the Act that they needed to adequately and properly consider the position of the claimant.

[93] Thus the observation of Lord Denning in the case of **Kanda v Government of Malaya** must be of relevance here. Denning LJ had this to say: *"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict him." (My emphasis added)*

[94] Thus before the issuance of the March letter there should have been, in this court's mind, an opportunity for the claimant to receive "…adequate information to enable them [the claimants] to challenge the accuracy of any facts…" and for them to challenge "… the validity of any argument which can be seen by the decision making body as truly likely to influence it in its decision making process"[20].

[95] However what is clear is that the claimants were not given an opportunity to weigh in on the method used for the calculations relied upon by the First defendant or to express an opinion as to how this sum was in fact determined. The claimants were instead presented with a *fait accompli*, in circumstances in which not only was liability still in issue (as far as the claimants were concerned) but also the extent of the deficiency.

[96] This court finds that this was an untenable situation and one which should not in the face of all the surrounding circumstances be allowed to stand.

[97] I therefore find that the declarations sought for with regard to the March letter are to be granted and certiorari is granted of the same. The March letter is therefore quashed.

[98] In making this finding, I categorically state that despite the First defendant having been empowered by the Amendment to take certain action that they then failed to take into consideration relevant matters with regard to any outstanding liability of the claimants including all the matters regarding the change in circumstances of the assets of BAICO. This failure together with the failure to adhere to the principles of natural justice or procedural fairness resulted in a decision that this court finds was unreasonable and was not one that a reasonable tribunal could have come to in all the circumstances.

[99] Before I leave this part of the proceedings, I wish to make a comment on the case relied on heavily by the defendants in these proceedings. This is the case of **Jemima Bacchus and ors v RBTT Bank Caribbean Limited**[21] and the decision of Actie M as she then was. The defendants have seemingly relied on this case to submit to this court that the Learned Master made a determination

[20] **Virgin Islands Environmental Council v The Attorney General and anr** per Hariprashad-Charles BVIHCV2007/0185 at para 32

[21] SVGHCV2011/0254; **Dr Linton Lewis v RBTT Bank Caribbean Limited** SVGHCV2011/280; **Isaac Legair v RBTT Bank Caribbean Limited** SVGHCV2011/0330

as to the existence of a trust with the claimant herein as the trustee as required under the Act. At paragraph 56 of her judgment in examining the provisions of the Act and in particular Sections 29, 31 and 32 the Learned Master had this to say: *"Section 29 of the Act makes provisions for the insurance funds to be established equal to the insurer's liability and contingency reserves to be placed in trust for the benefit of the Supervisor who is the administrator of the Act to ensure compliance with the Act. The defendant's capacity as trustee of the assets is expressly subject to the power and control of the Supervisor of Insurance."*

[100] Indeed it would appear that the Learned Master may have made such a determination but the context of this decision must be bourne squarely in mind. The claimants in those matters sought to bring a claim as individual policy holders seeking to recoup their losses on their policies to be paid from the trust funds that were to be held by the trustee for BAICO. It was upon the application of the defendants, the claimant herein, to strike out the claims on the basis that the claim had to be brought by the Supervisor of insurance that the Learned Master looked at the nature of the obligation that would have been created by the existence of a trust deed in the circumstances of the Act and found that it was certainly the Supervisor who was entitled to bring any claim for the breach of an existing trust.

[101] There does not appear on the judgment the stage at which the application for strike out was filed but there was certainly mention in the judgment that the defendants (the claimants herein) had made it clear that there had been no acknowledgement that they considered themselves as trustee but merely for the sake of the application and for the sole purpose of deciding the claimants locus standi in the matters, accepted the assumption that the defendants (the claimants herein) were deemed trustee under the Act[22]. The sole question therefore for the court on that decision was therefore whether the claimants had locus standi to bring the claims as filed given the parameters of the Act. It would appear that upon the decision having been issued by the court that the 2012 suit was then issued in the name of the proper party, the Supervisor at the time, and which would have been the proceedings in which the determination of the defendant's position would have been adequately ventilated. I therefore do not ascribe the import attached to this case as by the defendants to these present proceedings.

Issue #3: Was the penalty imposed by Section 32 of the Insurance Act as amended in December 2011 disproportionate and unconstitutional and/or denial of a fair hearing?

Issue #4: Could the charge created by the penalty imposed pursuant to Section 32 of the Insurance Act as amended amount to a deprivation of the claimant's property and is therefore unconstitutional?

[22] Paragraph 26 of the **Jemima Bacchus Case**

[102] In looking at this issue it was clear to this court that despite the claimants having referred to Section 6 of the Constitution within the confines of their Fixed Date Claim Form dated 13 May 2015[23], that the question of the constitutionality of the Act and its amendments also spanned the rights derived under Section 8 of the Constitution of this State.

[103] In the speaking notes of the claimant[24] it was acknowledged that even though there was no specific mention of Section 8 (1) of the Act, they submitted to this court that the facts pleaded and the facts as contained in the affidavits in support of this relief also raised the issue of the "unconstitutionality of the process for the determination of the deficiency and the imposition of the penalty/charge"[25].

[104] Additionally, the defendants in response to this challenge have also confined their arguments to the issues surrounding the amendment that created the "conclusive presumption" that attached to a trustee where there was an issue of deficiency of trust funds.

[105] Indeed the defendants accepted that the Amendment as drafted by the creation of a finding of a conclusive presumption against a trustee must raise the issue of the constitutionality of the process to do so. This would therefore, they conceded, present an offence to the provisions of Section 8(8)/8(10) of the constitution. This court accepts this proposition and also accepts that the Amendment having made specific provision for the creation of a penalty that stands as a charge over all the property of the trustee also addresses the provisions of Section 6 and the right with regard to the deprivation of property.

[106] Therefore in addressing my mind to the issues identified, in spite of its not being specifically pleaded I accept that the nub and gravamen of the case of the claimants requires me to address my mind to both sections of the constitution.

[107] In this regard the submissions of the claimants were two-fold. With regard to the provisions of Section 8 (right to a fair hearing) the claimants submitted that the fact that the Amendment to the Act, allowed for the First defendant to conclusively presume that the trustee had dealt with the assets without their consent, and that the trustee without more would be directed to make good the deficiency offended the trustee's (if indeed they were a trustee) access to a fair hearing. This was a fundamental right and that the power given to the First defendant could and should not stand. In response, the defendants although ultimately disagreeing that the Act as amended could not be considered unconstitutional, conceded in the most obtuse way possible, that the inclusion of the word "conclusively" may be "prima facie unconstitutional"[26].

[23] Paragraph 4 of the Fixed Dated Claim Form as filed
[24] Produced at trial of the matter at paragraph 49
[25] Paragraph 49 of the Speaking Notes of the Claimant
[26] Paragraph 36 of the Submissions of the Defendants filed on the 30/11/18

[108] The second aspect of the argument by the claimants was that in any event the imposition of the penalty for failure to make good the discrepancy as provided for by the amendments which amounted to a charge over the property of the trustee was one which was disproportionate to what was needed in the spirit of the legislation and the purposes envisioned by the legislation. The submission of the claimants therefore was that all that could and should be required is any trustee who is found to have a deficiency is to make good that deficiency. The charge that would attach to the property of any trustee would be excessive and needlessly intrusive and would not in any way advance the purpose of the Act. The defendants did not respond to this issue.

Court's Analysis and Considerations

[109] In order for this court to address its mind to the two issues as identified above it is necessary to identify exactly what provisions within the Constitution that this amendment is said to have offended and then to look at the words of the amendment itself.

[110] Section 8(8) of the Constitution of the State protects the following right:
"Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a ***fair hearing*** *within a reasonable time." (Emphasis mine)*

[111] The purportedly concomitant offending portion of the

Amending Act is as follows:

> *"(2a) Where pursuant to subsection (2) a list of assets has been submitted to the Supervisor and thereafter it is discovered that the value of the assets in the list no longer represents the total sum stated in the said list then in any proceedings before a court of law or other judicial or quasi judicial body it shall be* ***conclusively presumed*** *that the trustee has dealt with the assets without the prior general or specific approval of the Supervisor or without an express written approval given by the Supervisor to dispose of or deal with the asset.*

[112] In this court's mind, it is clear that this power to conclusively presume the misfeasance of a trustee where there is a noted deficiency without giving that trustee an opportunity to be heard on whether that finding is justified, is without more an offence to the fundamental right that an entity (individual or corporate body) must be given a fair hearing within a reasonable time.

[113] Unlike the case of **First St Vincent Bank Limited v The Eastern Caribbean Central Bank and anr**[27] where my brother Cottle J determined that the provisions of the Banking Act which he had under consideration did not allow for enforcement of the penalties attached to the failure to comply with the requirements of having banking license without there first being an action to recover the debt[28], there was no such safeguard in the mind of this court in the wording of the Amendment.

[114] The words as stated in the Amendment make it clear that in any proceedings (judicial or quasi judicial) without the need to prove that fact, the presumption was made (not a rebuttable one) but a conclusive presumption that the trustee the subject of those proceedings had contravened the Act by dealing with the assets entrusted to them without the approval of the First defendant.

[115] In this instance I agree with the proposition by the defendants and agreed to by the claimants that unless it is absolutely required, the striking down of an entire act, is a power to be used sparingly but instead that the court should use the "*power of modification to bring it into conformity with the constitution is implied in the well accepted presumption of constitutionality."*[29]

[116] Indeed as the Privy Council by Lord Diplock noted in their judgment in **The Attorney General of the Gambia v Momodou Jobe**[30] *"in passing the Act by the procedure appropriate for making ordinary law for the good government of The Gambia without the formalities required for a law that amended Chapter III of the Constitution the intention of Parliament cannot have been to engage the futile exercise of passing legislation that contravened provisions of Chapter III of the Constitution and was thus incapable of creating the legal obligations for which it purported to provide."*

[117] In the case at bar I accept that indeed the Amendment was intended to assist what at that time was a financial disaster for hundreds if not thousands of investors within the state and regionally with the collapse of the parent company of BAICO, CL Financial Limited[31] however the contravention of the constitution could certainly not in this court's mind, have been the intention.

[118] Therefore I am prepared to invoke the provisions of Section 101 of the Constitution which clearly states that the constitution is the Supreme law of the land and I find that the word "conclusively" offends the protection provided by Section 8(8) and therefore Section 32(2)(a) is to be read as modified as simply "presumed" by which the same is by law a rebuttable presumption allowing for access to a fair hearing on behalf of any person who falls within the parameters of being a statutory trustee under the Act.

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[27] SVGHCV2018/0056
[28] Paragraph 25 Op cit
[29] British American Insurance Company Limited v The Attorney General of Antigua and Barbuda Civil Appeal No 20/2002 Antigua and Barbuda per Byron CJ at paragraph 23
[30] [1984] AC 689 at 702
[31] Report of the Judicial Manager filed on the 8/4/19

[119] That being said this court must also consider whether the penalty imposed and the charge attached to that penalty are also contrary to the constitution as amounting to an unlawful deprivation of property and should be struck out.

[120] Section 6 of the constitution provides as follows:

"6. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation.

(2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

(a) *determining the nature and extent of that interest or right;*

(b) *determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorising the taking of possession or acquisition;*

(c) *determining what compensation he is entitled to under the law applicable to that taking of possession or acquisition;*

(d) *obtaining that compensation:*

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) or (c) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief justice may make rules with respect to the practice and procedure of the High Court or, subject to such provision as may have been made in that behalf by Parliament, with respect to the practice and procedure of any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) of this section or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

(4) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation in the form of a sum of money or, as the case may be, has received any such amount in some other form and has converted any of that amount into a sum of money, the whole of that sum of money (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Saint Vincent and

the Grenadines.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (4) of this section to the extent that the law in question authorises the attachment, by order of a court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party; the imposition of reasonable restrictions on the manner in which any sum of money is to be remitted; or the imposition of reasonable restrictions upon the remission of any sum of money in order to prevent or regulate the transfer to a country outside Saint Vincent and the Grenadines of capital raised in Saint Vincent and the Grenadines or in some other country or derived from the natural resources of Saint Vincent and the Grenadines.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(i) in satisfaction of any tax, rate or due;

(ii) by way of penalty for breach of any law or forfeiture in consequence of breach of any law;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plant;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement' that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be ***reasonably justifiable in a democratic society****; or*

(b) to the extent that the law in question makes provision for the taking of possession or

acquisition of any of the following property (including an interest in or right over property), that is to say-

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or property subject to a trust, for the purpose of vesting the

(iv) ***property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.***

(7) Nothing contained in or done under the authority of any law enacted by Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision for the compulsory taking of possession of any property, or the compulsory acquisition of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no monies have been invested other than monies provided by Parliament.

(8) In this section-

"acquisition", in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right."

"property" means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional;"

[121] The applicable parts of Section 6 for the purposes of this issue however are Subsection (6) (a)(ii), (a)(vii), (b)(iv) and Subsection 8 as shown by my emphasis.

[122] The Amendment at Section 2(c) and (d) impose a penalty of $500,000.00 every day that the deficiency that is found to be existing is not paid and all such sums are held to be a charge on the property of the trustee who is in default. Section 2(c) and (d) states:

(2c) A trustee who fails to comply with the directions given to him by the Supervisor to make good the deficiency within the period stated shall be liable to pay a penalty of five hundred thousand dollars for every day or part thereof during which the failure continues.

(2d) The penalty imposed under subsection (2c) shall constitute a charge, in favour of the Supervisor, upon all the property of the trustee and maybe sued for and recovered in the court by the Supervisor or the Attorney General."

[123] In looking as to whether this penalty as imposed by the legislature is a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights[32], the essence of the test must be proportionality.

[124] In determining whether the provisions of the Amendment are indeed "reasonably justifiable" for the purpose of the Act this court is satisfied that the provisions under consideration must be assessed on a three part process by which three questions must be addressed.

[125] In the case of **Nyambirai v National Social Security Authority**[33] the Supreme Court of Zimbabwe considered the mandatory nature of contributions pursuant to newly passed social security legislation and the court led by Gubbay CJ established a regime of three questions to be asked.

[126] However, before determining the nature of those questions, the court considered what was the meaning of the words "reasonably justified". At page 75 of the judgment, Gubbay CJ said this quoting from the case of **Woods v Minister of Justice, Legal and Parliamentary Affairs**[34] in which the same court had considered the words had this to say "…*what is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the Courts. There is no legal yardstick save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual".*

[127] Therefore it is for the person who challenges the provision to show that it is outside what is required to enforce the mischief being captured by the legislation.

[128] Thus the claimants have submitted that not only is the penalty excessive, in that not only would the offending trustee have to make up any deficiency found to be owing but that additionally they would have further financial obligations of the penalty which may in every sense cause undue hardship. Together with the fact that the sum owing would amount to a charge on the property without it being part and parcel of any subsisting "mortgage, charge or incumbrance"[35] recognized by law the

[32] **Sporring v Sweden** [1982] 5 EHRR 35
[33] [1996]1 LRC 64
[34] [1994]1 LRC 359
[35] Section 23 of the Civil Procedure Code CAP 81

claimants submitted that this charge would amount to an excessive intrusion on the "commercial viability" of a trustee[36].

[129] Thus this court must ask itself the following: 1) whether the legislative objective is sufficiently important to justify limiting a fundamental right; 2) whether the measures designed to meet the legislative objective are rationally connected to it and 3) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

[130] In relation to question one- *whether the legislative objective is sufficiently important to justify limiting a fundamental right.* In looking at this question it is without a doubt in this court's mind that the intention of the legislature in passing this Amendment was in response to the gaping hole left by the collapse of BAICO and the financial ramifications that would have ultimately rested at the foot of the entity considered the trustee and the Government of the State saddled with the burden of buying out the affected policy holders.

[131] In this court's mind it was therefore clear that what had happened after the collapse of BAICO was not to reoccur and that any trustee who was given the responsibility of ensuring that any insurance company would be financially viable to meet its liabilities would have meaningful obligations. I therefore answer the first question in the affirmative.

[132] The second question- *whether the measures designed to meet the legislative objective are rationally connected to it.*

[133] In looking at this question it is clear to this court that in order to have an obligation imposed on a trustee and to ensure that he adheres to them, there must be a sanction attached. To do so would be to have the most ferocious looking guard dog that is unable to bite due to the fact that he has no teeth or worse yet his jaw is wired shut.

[134] In fact, to allow the trustee who is now the guardian of the assets of an insurance company who offers their business to the general public to be effectively bound only by its moral fiber, would in this court's mind defeat the entire purpose of what the legislative arm of Government sought to achieve with the passage of the Amendment. Therefore, this court also answers this question in the affirmative.

[135] The third and final question -*whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*

[136] As the court in **Nyambirai[37]** stated and which was agreed to by the court in the Northern Ireland case of **In Christian Institute & ors, Re Judicial Review[38]** the inquiry that is undertaken at this

[36] Paragraph 4.6 of the Claimant's Submissions filed on 5/7/19

third stage, is essentially an inquiry into the means by which the objective is attained or an assessment of the balance of public and private interests by considering the weighing of the impact of the limitation as against the right and importance of the objective in limiting the right. Or as was stated succinctly again by the court in **Dagenais v Canadian Broadcasting Corporation**[39] that this consideration must also include a balance between the deleterious effects of a measure and the beneficial effects of a measure.

[137] It is therefore recognized by this court that this question must therefore entail a close scrutiny of the complained of section of the Amendment.

[138] It is clear, that the Amendments 2(c) and 2(d) impose a harsh financial burden attached to the failure to comply with the requirements of the Act as statutory trustee. In this regard, I have to agree with my learned brother in the case of **First St Vincent Bank**[40] in which as I have already identified he was dealing with the provisions under the Banking Act which created similar sanctions for non compliance of an institution who sought to operate within the Eastern Caribbean currency union. In finding that the complained of statute was not disproportionate in its sanction, Cottle J had this to say *"the ECCB is required to safeguard the financial wellbeing of the banking sector. To this end it has adopted international standards to ensure that only sound banking institutions operate within the currency union. The quantum of the penalty incurred by the claimants is a function of their own inability or unwillingness to comply with the capital requirements to operate a bank…The quantum increases each day the claimants choose to operate without satisfying the relevant statutory obligation…."*

[139] Having said so I also find that it is not for this court to direct the Legislature as to the extent of the penalty that should attach to the non -compliance of an entity entrusted with what has become, as history has shown, more than simply an administrative function. Rather it is for this court to support the requirement that there be a tangible asset base which is kept isolated for the purposes of covering the liabilities of an ongoing concern offering insurance business to the general public. I therefore do not find that the quantum of the fine is no more than was needed to ensure that the object of the Act is maintained.

[140] Unfortunately I do not agree that that is the position with regard to the portion of the Amendment that actually would result in the deprivation of property for the failure of the payment of the penalty[41].

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[37] Op Cit
[38] [2007] NIQB 66
[39] [1994] 3 SCR 835
[40] OP Cit
[41] Section 2 (d) of the Amending Act

[141] On a real construction of the Section 2(d), the First defendant, without due process of law is enabled to place a charge on the property of the defaulting statutory trustee, while or until a decision is made to sue or recover the amounts due. In this court's mind this interference in the right conferred by Section 6 to the citizens of this country is in fact greater than is required "*to meet the legitimate object which the state seeks to achieve"*[42].

[142] This court having accepted that there is a requirement to ensure that the obligation on a statutory trustee can should also be adequately enforced, it cannot however agree that the outstanding sums that may be found to be owing as a penalty should be enforced by the attachment or charge on the property of that same statutory trustee bearing in mind that the definition in Section 6(8) is not restricted to land but anything that can be owned.

[143] I therefore agree with the submissions of the claimant in this regard that "such a charge would exert[s] on the commercial viability of a trustee and the unjust impact on its creditors"[43] especially in the context of a bank whose customers are in fact the creditors of the bank.

[144] In relation to the operative part of Section 2(d) in which the same states that those outstanding sums stand as a charge on all the property of the trustee, I find that this is disproportionate to the object that the Act and the Amendment seek to achieve and I must answer that the means in this section are more than is necessary to accomplish the objective.

[145] I therefore grant the declaration as sought in part and declare that Section 32 of the Act as amended by Section 2 of the Amendment and in particular Section 2(d) thereof has contravened or is likely to contravene the claimant's rights under Section6 of the Constitution and is accordingly unconstitutional and invalid and of not effect.

[146] Before I leave this matter I wish to go on record and thank Counsel on both sides of this matter for the invaluable assistance rendered to the court and for the comprehensive submissions provided.

Costs

[147] In the determination of this court, the claimant/applicant is entitled to their costs even though they were only partially successful on their claim.

[148] By Part 56.13 CPR 2000 states that once a court determines that a party is entitled to costs[44], it is "…*the judge [who] must assess them"*[45]*.* This Rule has now been considered by our Court of

[42] **R v Shayler** [2003] 1 AC 247 per Lord Bingham at paragraph 26
[43] Paragraph 4.6 Submissions by the Claimant filed 5/7/19
[44] Part 56.13 (4)

Appeal in the case of **Friar Tuck Ltd and Anr v International Tax Authority**[46] in which the judgment of Michel JA made it clear that the costs that a court awards on the hearing of a judicial review application must be assessed by the judge who heard the matter pursuant to Part 65.12 (2)[47].

[149] This case as cited also made it clear that the judge must have the necessary material upon which to make any such assessment.

[150] In the case at bar neither side have made any such submissions as to the quantum of costs and this court determines that it has no material to assess such costs.

[151] Therefore the order of the court is that the claimant/applicant is to file a bill of costs with supporting submissions within 21 days of today's date if the parties fail to agree on the said costs.

[152] The defendants will therefore if the said is filed have an opportunity to respond within 14 days thereafter and the hearing of the assessment of costs will take place on the first available chamber day before this court in January 2020 unless the parties notify the Registrar that the same is not required.

The order of the court is therefore as follows:

1. The declaration that the decision and/or determination of the Financial Services Authority (as contained in a letter dated 10 March 2015 from the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers to the claimant) that pursuant to Section 32 of the Insurance Act, as amended by Section 2 of the Insurance (Amendment) Act, No. 27 of 2013, the Financial Services Authority or its Chief Executive Officer Mrs. Sharda Sinanan-Bollers has determined that there is a deficiency in the total assets comprising BAICO's Statutory Fund in the amount of EC$135,646,312.07 is unreasonable and is accordingly unlawful is granted.

2. The declaration that the Notice of the Financial Services Authority (as contained in a letter dated 10 March, 2015 from the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers to the claimant) given the Chief Executive Officer of the Financial Services Authority Mrs. Sharda Sinanan-Bollers, purportedly pursuant to Section 32 (2b) of the Insurance Act as amended, requiring the claimant to make good the deficiency in the sum of EC$135,646,312.07 in BAICO's Statutory Fund, by June 10, 2015 is unreasonable and is accordingly unlawful is granted.

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[45] Part 56.13 (5)
[46] BVIHCVAP2017/0003
[47] Op Cit at paragraph 19 and 20

3. The declaration for an order of certiorari to remove into this Honourable Court and quash the determination and/or decisions and/or notice mentioned in paragraph (1) and (2) above is granted.

4. The declaration (as against the Attorney General) that Section 32 of the Insurance Act as amended by Section 2 of the Insurance (Amendment) Act (No. 32) 2011 which took effect on 6 December, 2011 and Section 2 of the Insurance (Amendment) Act, No. 27 of 2013 which was passed on 4 November 2013, have contravened and/or are likely to contravene the claimant's rights under Section 6 and section 8 of the Constitution and is accordingly unconstitutional and invalid and of no effect is granted in part as to the removal of the word "conclusive" and that the provision that the sum due stand as a charge over the property of the trustee should also be removed.

5. Costs to the claimants to be assessed upon application if not agreed.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar