BARBADOS

[Unreported]

SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL

CIVIL DIVISION

CLAIM NO. 4/2012

IN THE MATTER of the Application by the Supervisor of Insurance of Barbados for an Order that British American Insurance Company (Barbados) Limited be placed under Judicial Management.
AND IN THE MATTER of the Insurance Act, Cap. 308.
AND IN THE MATTER of the Companies Act, Cap. 308.

BETWEEN:

FINANCIAL SERVICES COMMISSION **PETITIONER**

BIPA INC. **INTENDED/PROPOSED**
PETITIONER/CLAIMANT

APPELLANT

AND

BRITISH AMERICAN INSURANCE COMPANY

(BARBADOS) LIMITED **RESPONDENT**

BEFORE:The Honourable Andrew Burgess, Justice of Appeal

2012: July16; October 31

Mr.Tariq Khan for the Applicant

Mr.Adrian King for the Financial Services Commission

Mr.Kevin Boyce and Mr. Omari Drakes of Clarke Gittens Farmer for the Respondent

INTRODUCTION

[1] Burgess JA: This is an application under Part 62.2 of the Civil Procedure Rules (CPR) by BIPA Inc. (BIPA). In the application, BIPA is seekingleave to appeal the decision of Beckles J (ag.) given orally on May 14, 2012 denying an applicationby BIPA under Part19.3 of the CPR that BIPA be joined in the judicial managementproceedingsinitiated by the FinancialServices Commission (FSC) against British American Insurance Company (Barbados)Limited (BAICO) in Civil Claim No. 1226 of 2010.

BACKGROUND TO THE APPLICATION

[2] The judicial management proceedings wereinstituted by the Supervisor of Insurance pursuant to the provisions of ***Section57 of the Insurance Act* Cap 310 ("Cap 310")** in which the court waspetitioned for an order that a judicial manager be appointed to manage BAICO byreason of insolvency. Such an order wasgranted under High Court Action 1226 of 2010.

[3] On March 2, 2012, BIPA filed an applicationin which it sought an order to be joined to High Court Action 1226 of 2010 andthus to be a party to the judicial management proceedings ordered in thatAction. The application stated that time was of the essence "as on the 24th day of November 2011 upon an Affidavit of Urgency the Court made an orderauthorising the Judicial Manager to enter into insurance substitutionagreements on behalf of the Respondent/Defendant with Sagicor Life Inc. toprovide alternate insurance coverage for the property and health portfolios."

[4] BIPA's application to be so joined wasbased on seven grounds. They are as follow:

i. The first is that BIPA is a non-profitcompany made up of over 300 members representing the interests of the largerpopulation of Barbadian policyholders who have invested with CLICO, BAICO'sparent company, (over 27,000 policyholders) and BAICO (over 10,000policyholders) who have been financially affected by the insolvency of BAICO.

ii. The second is that BIPA has beendirectly affected by the actions of BAICO, its directors, employees and/oragents.

iii. The third, that BIPA has a series oflegitimate claims against BAICO including, but not limited to, a failure ofoversight exercised by

BAICO in this action its Directors, its employees and/orits agents; a failure by the BAICO to maintain its Statutory Fund in accordancewith and pursuant to the provisions of the Insurance Act of the Laws ofBarbados; that BAICO was grossly negligent in its management and continued tosell insurance products having failed to meet its requirement in respect of theStatutory Fund; and, that BAICO is in breach of its contract with BIPA byfailing to honour its commitment to the policyholders particularly to those whowanted to surrender or receive the proceeds of their matured Executive FlexiblePremium Annuities.

iv. The fourth is that BIPA has a more thanarguable claim against BAICO as has been evidenced through the reports of theJudicial Manager responsible for the management of BAICO.

v. The fifth is that BIPA must be part ofthe process in drawing up and providing solutions that will properly compensatepolicyholders while ensuring that those who are liable for this failure andnegligence are properly identified and held to account as part of the recoveryprocess.

vi. The sixth is that the broad policy ofthe law is that where there is a multiplicity of claims there should be as fewactions and as few parties as possible. The ends of justice would be betterserved and the court's resources efficiently utilized if all the parties to adispute are before the court by way of the application to so join

vii. The seventh, pursuant to CPR 19.2 it isdesirable to add BIPA so that the Court can resolve all matters in dispute inthese proceedings as the issues involving BIPA are connected to the matters indispute in these proceedings.

[5] BIPAclaimed that, for the foregoing reasons, and pursuant to **CPR 19.3** it is desirable for it to be added so that the court canresolve all the matters in dispute in the judicial management proceedings. BIPAfurther claimed that the issues in which it has an interest are connected tothe matters in dispute in the judicial management proceedings and it isdesirable that it should be added so that the court can resolve the saidissues.

[6] BIPA's applicationwas heard by **Beckles J (ag)** on May3, 2012 and on May 14, 2012, in exercise of her discretion under **Part 19.2 (3),** she gave the followingdecision:

> "The main issueis whether it is just and convenient or necessary for the Applicant to join theJudicial Management proceedings. Putsimply would Joinder of the Applicant assist the Judicial Manager in any way.
>
> After receivingSubmission and listening to Counsels (sic) for the parties I am not satisfiedthat the Applicant has demonstrated that it is desirable to be separatelyrepresented in this matter or that the Judicial Manager is not competent todeal with the issue and look after the interest of the policyholders.
>
> The Applicanthas not shown that its presence is necessary to ensure that all matters indispute would be effectually and completely determined. And, it is therefore for these reasons thatthe Application for Leave to Join the Judicial Management Proceedings is denied."

[7] On May25, 2012 BIPA filed a notice of application seeking leave to appeal thedecision of **Beckles J (ag)**. Thegrounds supporting the application were stated to be that:

(i) the decision of **Beckles J (ag)** was wrong as a matter of law because she held thaton a correct construction of the "necessity" test and the "just and convenient"test BIPA had failed to meet either standard;

(ii) the decision of **Beckles J** (ag) to interpret that the BIPA's application for joinderas an Intervener was subject to an assessment of whether BIPA would assist thejudicial manager in any way was wrong as a matter of law;

(iii) thedecision of **Beckles J (ag)** that BIPAfailed to demonstrate the desirability of its separate representation in thisaction was wrong as a matter of law;

(iv) the ruling that BIPA had failed todemonstrate that the judicial manager was incompetent to deal with the issue inthe cause of action and look after the interest of the policy holders theLearned Judge erred in law; and

(v) byruling that BIPA had failed to demonstrate that its presence was necessary toensure that all matters in dispute would be effectually and completelydetermined the Learned Judge erred in law.

THEISSUES

[8] Before proceeding further, it is important toremind myself that this is not an appeal in which I am deciding the merits ofBIPA's appeal. My sole task is to decidewhether BIPA should be granted leave to have its appeal determined by the Courtof Appeal.

[9] That said, the basic criteria whichmust guide me in determining whether or not to grant leave to appeal a decisionof a lower court are not spelt out in our ***CPR***. This notwithstanding, it seems to be acceptedpractice in this Court that the basic threshold which must be met in order toobtain leave of this Court to appeal the decision of **Beckles J (ag)** is that BIPA's intended appeal has a realisticprospect of success: As to this, see the authoritative ***Caribbean Civil Court Practice2011 at pg 389*** and Barrow JA in the Vincentian Court of Appeal caseof ***Sylvesterv. Faelleseje, A Danish Foundation, St.Vincent and the Grenadines Civil Appeal No. 5 of 2005 at para [1].***

[10] ASBIPA's intended appeal is against the exercise by **Beckles J (ag)** of herdiscretion under **Part 19.2 (3)**, BIPAneeds to show that there is a realistic prospect that it will be able topersuade the Court of Appeal that **BecklesJ (ag)**'s exercise of her discretion was "clearly or blatantly wrong" in thewords of Barrow JA in ***Sylvester v. Faelleseje, A Danish Foundation, St. Vincent and the Grenadines(supra)*** or "plainly wrong" as was said at ***para [10]*** of thejudgment in the recent Trinidadian Court of Appeal case of ***The Attorney General of Trinidadand Tobago v Miguel Regis, Civil Appeal No. 79 of 2011***. Put simply, permission will be granted if BIPAcan show that there is more than a fanciful prospect of it persuading the Courtof Appeal to depart from that Court's entrenched principle of non-interferencewith the judicial exercise of a trial court's discretion unless such exerciseis "clearly or blatantly" or "plainly" wrong.

[11] It appears also to be accepted practicethat the court can in certain circumstancesgrant leave even if it is not satisfied that the appeal has a realistic prospectof success. One such example is wherethe court considers that the issue should, in the public interest, be examinedby the Court of Appeal. Another is wherethe court takes the view that the case raises an issue where the law requiresclarification: ***Smith v Cosworth Casting Process Ltd, Practice Note [1997] 1 WLR 1538per Lord Woolf MR.*** Stated differently, if there are compelling reasonswhy the issues raised in a case should be heard by the Court of Appeal, leavemay be granted notwithstanding that the intended appeal has no realisticprospect of success.

[12] In light of the foregoing, twofundamental issues arise for determination by this Court in deciding whether ornot leave to appeal ought to be granted to BIPA. The first is whether the intended appeal has arealistic prospect of succeeding in showing **Beckles J (ag)** to have been clearly, blatantly or plainly wrong inthe exercise of her discretion. If theanswer to this is no, then the second is whether there are compelling reasonswhy the appeal should nevertheless be heard.

ASSESSMENTINTENDED APPEAL'S PROSPECT OF SUCCESS

[13] Turning first of all to the proposed appeal'sprospect of success. BIPA has adducedfive grounds to show that the proposed appeal has a realistic prospect of succeedingbefore the Court of Appeal. These grounds may be subsumed under twointerrelated considerations. The first is whether **Beckles J (ag)** adopted the correct joinder test. The second is, assuming that she did, was herapplication of that test correct. I will deal with BIPA's grounds separatelyunder these two heads.

Was the JoinderTest Applied by Beckles J (ag) the Correct Test?

[14] Thefirst ground relied on by BIPA is that **BecklesJ (ag)** "was wrong as a matter of law because the Learned Judge held that ona correct, construction of the 'necessity' test and the 'just and convenient'test the Appellant had failed to meet either standard" in its application to join the judicial management proceedings. Before **BecklesJ (ag)**, Mr. Khan, counsel for BIPA, claimed to derive support for the viewthat the "necessity" test and the "just and convenient" test were the testswhich Beckles had to apply from the judgment of **Williams JA** in the Court of Appeal in the case of ***JohnstonInternational Limited v Clico International General Insurance Ltd. and EversonR Elcock & Co. Ltd., Civil Appeal 13 of 2006.*** **WilliamsJA** said there at ***para[36]:***

> *"An applicant…has to pass one of two tests before itcan be added as a party to an action. First, it has to fulfill what we conveniently call the "necessary" testor secondly the "just and convenient" test. Whether or not an applicant reaches that threshold requires a judge tomake a judicial assessment of the material facts and circumstances relevant tothe tests…"*

[15] Butwith all due respect, **Williams JA**was in that case stating the tests based on the then applicable rules foradding a party in **RSC Order 15 Rule 6(2)(b)(i) and (ii)**. Those rules havebeen revoked by **Part 73.2** of the CPRand replaced by **Part 19.3 (3)** of the **CPR**. In fact, BIPA's applicationbefore **Beckles J (ag)** was madepursuant to **Part 19.2 (3)**. Thisprovides that the court may add a new party to proceedings where "(a) it isdesirable to add the new party so that the court can resolve all the matters indispute in the proceedings; or (b) there is an issue involving the new partywhich is connected to the matters in dispute in the proceedings and it isdesirable to add the new party so that the court can resolve that issue."

[16] The tests in **Part 19.2 (3)** were the applicable tests and not the **RSC Order 15 Rule 6 (2)(b)(i) and (ii)** tests stated by **Williams JA** as contended by BIPA. **BecklesJ (ag)** based the exercise of her discretion on an application of the testsin **Part 19.2 (3)**. So that, far frombeing clearly, blatantly or plainly wrong on the footing of applying the wrongtests as alleged by BIPA, she was decidedly correct. Attention must therefore now be turned to herapplication of these tests to the facts before her.

Did Beckles J(ag) Correctly Apply the Joinder Test?

[17] Determinationof whether **Beckles J (ag)** correctlyapplied the joinder tests to the facts of this case is predicated on a properunderstanding of the juridical nature of judicial management. It is apparent from the provisions of Cap 310that judicial management is a management procedure on behalf the Court aimed atsaving insurance companies, like BAICO, from liquidation. Cap 310established a statutory regime for a petition for an order that aninsurance company be placed under the management of the court.

[18] The process is initiated by a petitionto the Court by the Supervisor of Insurance or by the insurance company itselffor the appointment of a judicial manager. The judicial manager is at the heartof judicial management. Broadlyspeaking, the role and function of the judicial manager is to manage thebusiness of the insurance company under the court order and ultimately toproduce a report setting out its recommendation to the court as to how thecompany should be dealt with. It is tobe stressed that a judicial manager enjoys only such powers and has such dutiesas the court deems desirable and must always act under the control of theCourt. Judicial management is therefore a management process on behalf theCourt and is not aimed at resolving disputes.

[19] This understanding of judicialmanagement accords with the understanding adumbrated, after extensive reviewand analysis, in the Australian case of ***Australian Prudential Regulation Authority vACN 000 007 492 (Under Judicial Management) (Subject to Deed of CompanyArrangement) [2010] FCA 912.*** This case is important in assisting inunderstanding judicial management since the judicial management procedure is animportation into **Cap. 310** from ***Division8 of Part III*** of the Australian ***Life Insurance Act 1945 (Cth)*** and ***PartVB*** of their ***Insurance Act 1973 (Cth)***. It is also worthwhile noting that the sameunderstanding of judicial management is to be found in the Supreme Court ofSingapore High Court case of **Re Wan SoonConstruction Pte Ltd [2005] SGHC 102.**

[20] Giventhe nature of judicial management, it is easy to see why the application by **Beckles J (ag)** of the **Part 19.2 (3)** joinder test in this caseis fully justified in law. There are atleast four good reasons which support her application of the **Part 19.2 (3)** joinder test in thiscase.

[21] First,the operation of Part **19.2 (3)** isexpressly limited to allowing the court to "resolve all the matters in disputein the proceedings". Thus, a criticalelement of the tests set down in **Part19.2 (3)** is that there must be shown to be "matters in dispute" before aparty can be joined under that **Part**. In the Supreme Court of New South Walescase of **Re Great Eastern CleaningServices Pty. Ltd (1978) 2 NSWLR 278 at 281,** the expression "matters indispute" was thought to mean "what could be considered to be the issues in theproceedings". But, as was seen in para [18]of this judgment, judicial management does not involve "matters in dispute" inthis sense.

[22] With due respect to the submission by BIPAthat the policyholders were previously disadvantaged by the failure of theOffice of the Supervisor of Insurance to properly exercise its duty under thelaw cannot amount to "matters in dispute" in judicial management proceedings.Further, none of the grounds set out in BIPA's application before **Beckles J (ag)** constitute "matters indispute" in the judicial management proceedings. Consequently, **Beckles J (ag)** was right in holdingthat BIPA's contention that it should be joined failed because the crucialrequirement of **Part 19.2 (3)** thatthe proceedings must concern "matters in dispute" was not satisfied.

[23] Second, the absence of "matters indispute" in the judicial management proceedings also rendered otiose considerationof the desirability of adding BIPA "to ensure all matters in dispute in thecase would be effectually and completely determined" as was argued by BIPA. Accordingly, the authority of **Gurtner v Circuit [1968] 2 QB 587** citedby Mr. Khan was correctly distinguishedby **Beckles J (ag)** on the ground thatin **Gurtner v Circuit** the requirementthat there be "matters in dispute" was satisfied.

[24] Third,considering that the judicial manager acts on behalf of and under the controlof the Court, it could scarcely be doubted that it was open to the Court toconsider whether BIPA would be able to assist the judicial manager in thejudicial management of BAICO or not. Thus, contrary to BIPA's contention, Itwas open to **Beckles J (ag)** to findthat it was not necessary, just or convenient, or desirable for BIPA to be aparty to the judicial management process.

[25] Fourth,for the same reason, **Beckles J (ag)**was entitled to comment (i) that BIPA had failed to demonstrate that thejudicial manager was incompetent to deal with the issue in the "cause ofaction" and to look after the interest of the policyholders; (ii) that as amatter of fact that the judicial manager was competently performing its duties;and (iii) that as such it was not desirable for any other party to assist inthe judicial management process.

CONCLUSIONON BIPA'S PROSPECT OF SUCCESS

[26] The conclusion which flows from theforegoing analysis is obvious. The joinder test relied on by **Beckles J (ag)** was the right one andapplication of this test to the facts of this case was clearly correct. BIPAhas not shown that **Beckles J (ag)**'sexercise of her discretion was blatantly, clearly or plainly wrong and sorebutted the presumption that **Beckles J(ag)** was right. In thecircumstances, BIPA has not established that there is a realistic prospect ofsuccess of the intended appeal before the Court of Appeal.

COMPELLINGREASON TO BE HEARD

[27] Attention must therefore now turn tothe question whether, despite the fact that that the intended appeal isunlikely to succeed, there is a compelling reason why the intended appealshould be heard. As regards this, Mr. Khan argues that the intended appealraises questions of great public interest and importance and of general policy.The impact of the disaster that has befallen BAICO has had societalramifications not least of which is the effect on a number of policyholderswhose futures are blighted.

[28] Mr. Boyce, counsel for BAICO, argues thatthe judicial management procedure in Cap 310 is itself a statutory attempt toforestall the inevitable chaos

of a race to recover by the policyholders of aninsolvent insurance company. As such,Mr. Boyce rather attractively argues that the judicial management procedureinitially vests the protection of the policyholders in the court but allows anopportunity to policyholders to be heard prior to the court approving the finalrecommendations of the judicial manager. For these reasons, he argues that the law andpolicy established in Cap 310 is clear and not in any need of clarification. Mr. King, counsel for the FSC, fully supportsMr. Boyce's submissions.

[29] The arguments on both sides beartremendous persuasion. In my view, however, the case undeniably raises for thefirst time at least the narrow but important question of who, other than theSupervisor of Insurance and the company in question, may be parties in judicialmanagement proceedings after the appointment of a judicial manager. Theintended appeal affords an opportunity for the Court of Appeal to clarify thelaw on this matter.

DISPOSITION

[30] For the reasons set out at paras [27] to[29] of this judgment leave to appeal to the Court of Appeal is granted. There will, in the overall circumstances ofthis matter, be no order as to costs.

[31] Iwould add by way of conclusion that I have given reasons for my decision togrant leave for the purpose of identifying for benefit of the parties in thiscase and for the Court of Appeal why it was thought right to grant leave. Thiswas recommended in ***Smith v Cosworth Casting Process Ltd, Practice Note (supra).*** Ihasten to add, however, that I do not apprehend the issue mentioned by me as towhy leave was granted denies that there may be other issues to be determined onappeal.

[32] Finally, I wish to express my sincereappreciation of the outstanding quality of the oral and written submissions ofcounsel on all sides in this case. Thishas contributed in no small way to this judgment.

Justice of Appeal.