

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: July 16; 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 seeking leave to appeal the decision of **Beckles J (ag.)** given orally on May 14, 2012 denying an application by BIPA under **Part 19.3** of the **CPR** that BIPA be joined in the judicial management proceedings initiated by the Financial Services 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 were instituted by the Supervisor of Insurance pursuant to the provisions of *Section 57 of the Insurance Act Cap 310* (“**Cap 310**”) in which the court was petitioned for an order that a judicial manager be appointed to manage BAICO by reason of insolvency. Such an order was granted under High Court Action 1226 of 2010.
- [3] On March 2, 2012, BIPA filed an application in which it sought an order to be joined to High Court Action 1226 of 2010 and thus to be a party to the judicial management proceedings ordered in that Action. 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 order authorising the Judicial Manager to enter into insurance substitution agreements on behalf of the Respondent/Defendant with Sagicor Life Inc. to provide alternate insurance coverage for the property and health portfolios.”
- [4] BIPA’s application to be so joined was based on seven grounds. They are as follow:
- i. The first is that BIPA is a non-profit company made up of over 300 members representing the interests of the larger population of Barbadian policyholders who have invested with CLICO, BAICO’s parent company, (over 27,000 policyholders) and BAICO (over 10,000 policyholders) who have been financially affected by the insolvency of BAICO.
 - ii. The second is that BIPA has been directly affected by the actions of BAICO, its directors, employees and/or agents.
 - iii. The third, that BIPA has a series of legitimate claims against BAICO including, but not limited to, a failure of oversight exercised by BAICO in this action its Directors, its employees and/or its agents; a failure by the BAICO to maintain its Statutory Fund in accordance with and pursuant to the provisions of the Insurance Act of the Laws of Barbados; that BAICO was grossly negligent in its management and continued to sell insurance products having failed to meet its requirement in respect of the Statutory Fund; and, that BAICO is in breach of its contract with BIPA by failing to honour its commitment to

the policyholders particularly to those who wanted to surrender or receive the proceeds of their matured Executive Flexible Premium Annuities.

- iv. The fourth is that BIPA has a more than arguable claim against BAICO as has been evidenced through the reports of the Judicial Manager responsible for the management of BAICO.
- v. The fifth is that BIPA must be part of the process in drawing up and providing solutions that will properly compensate policyholders while ensuring that those who are liable for this failure and negligence are properly identified and held to account as part of the recovery process.
- vi. The sixth is that the broad policy of the law is that where there is a multiplicity of claims there should be as few actions and as few parties as possible. The ends of justice would be better served and the court's resources efficiently utilized if all the parties to a dispute are before the court by way of the application to so join
- vii. The seventh, pursuant to CPR 19.2 it is desirable to add BIPA so that the Court can resolve all matters in dispute in these proceedings as the issues involving BIPA are connected to the matters in dispute in these proceedings.

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

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

"The main issue is whether it is just and convenient or necessary for the Applicant to join the Judicial Management proceedings. Put simply would Joinder of the Applicant assist the Judicial Manager in any way.

After receiving Submission and listening to Counsels (sic) for the parties I am not satisfied that the Applicant has demonstrated that it is desirable to be separately represented in this matter or that the Judicial Manager is not competent to deal with the issue and look after the interest of the policyholders.

The Applicant has not shown that its presence is necessary to ensure that all matters in dispute would be effectually and completely determined. And, it is therefore for these reasons that the Application for Leave to Join the Judicial Management Proceedings is denied.”

- [7] On May 25, 2012 BIPA filed a notice of application seeking leave to appeal the decision of **Beckles J (ag)**. The grounds 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 that on 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 joinder as an Intervener was subject to an assessment of whether BIPA would assist the judicial manager in any way was wrong as a matter of law;
 - (iii) the decision of **Beckles J (ag)** that BIPA failed to demonstrate the desirability of its separate representation in this action was wrong as a matter of law;
 - (iv) the ruling that BIPA had failed to demonstrate that the judicial manager was incompetent to deal with the issue in the cause of action and look after the interest of the policy holders the Learned Judge erred in law; and
 - (v) by ruling that BIPA had failed to demonstrate that its presence was necessary to ensure that all matters in dispute would be effectually and completely determined the Learned Judge erred in law.

THE ISSUES

- [8] Before proceeding further, it is important to remind myself that this is not an appeal in which I am deciding the merits of BIPA’s appeal. My sole task is to decide whether BIPA should be granted leave to have its appeal determined by the Court of Appeal.
- [9] That said, the basic criteria which must guide me in determining whether or not to grant leave to appeal a decision of a lower court are not spelt out in our *CPR*. This notwithstanding, it seems to be accepted practice in this Court that the basic threshold which must be met in order to obtain leave of this Court to appeal the decision of **Beckles J (ag)** is that BIPA’s intended appeal has a realistic prospect of success: As to this, see the authoritative *Caribbean Civil Court Practice 2011 at pg 389* and Barrow JA in the Vincentian Court of Appeal case of *Sylvester v. Faelleseje, A Danish Foundation, St. Vincent and the Grenadines Civil Appeal No. 5 of 2005 at para [1]*.

- [10] AS BIPA’s intended appeal is against the exercise by **Beckles J (ag)** of her discretion under **Part 19.2 (3)**, BIPA needs to show that there is a realistic prospect that it will be able to persuade the Court of Appeal that **Beckles J (ag)**’s exercise of her discretion was “clearly or blatantly wrong” in the words 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 the judgment in the recent Trinidadian Court of Appeal case of *The Attorney General of Trinidad and Tobago v Miguel Regis, Civil Appeal No. 79 of 2011*. Put simply, permission will be granted if BIPA can show that there is more than a fanciful prospect of it persuading the Court of Appeal to depart from that Court’s entrenched principle of non-interference with the judicial exercise of a trial court’s discretion unless such exercise is “clearly or blatantly” or “plainly” wrong.
- [11] It appears also to be accepted practice that the court can in certain circumstances grant leave even if it is not satisfied that the appeal has a realistic prospect of success. One such example is where the court considers that the issue should, in the public interest, be examined by the Court of Appeal. Another is where the court takes the view that the case raises an issue where the law requires clarification: *Smith v Cosworth Casting Process Ltd, Practice Note [1997] 1 WLR 1538 per Lord Woolf MR*. Stated differently, if there are compelling reasons why the issues raised in a case should be heard by the Court of Appeal, leave may be granted notwithstanding that the intended appeal has no realistic prospect of success.
- [12] In light of the foregoing, two fundamental issues arise for determination by this Court in deciding whether or not leave to appeal ought to be granted to BIPA. The first is whether the intended appeal has a realistic prospect of succeeding in showing **Beckles J (ag)** to have been clearly, blatantly or plainly wrong in the exercise of her discretion. If the answer to this is no, then the second is whether there are compelling reasons why the appeal should nevertheless be heard.

ASSESSMENT INTENDED APPEAL’S PROSPECT OF SUCCESS

- [13] Turning first of all to the proposed appeal’s prospect of success. BIPA has adduced five grounds to show that the proposed appeal has a realistic prospect of succeeding before the Court of Appeal. These grounds may be subsumed under two interrelated considerations. The first is whether **Beckles J (ag)** adopted the correct joinder test. The second is, assuming that she did, was her application of that test correct. I will deal with BIPA’s grounds separately under these two heads.

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

- [14] The first ground relied on by BIPA is that **Beckles J (ag)** “was wrong as a matter of law because the Learned Judge held that on a 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 **Beckles J (ag)**, Mr. Khan, counsel for BIPA, claimed to derive support for the view that the “necessity” test

and the “just and convenient” test were the tests which Beckles had to apply from the judgment of **Williams JA** in the Court of Appeal in the case of *Johnston International Limited v Clico International General Insurance Ltd. and Everson R Elcock & Co. Ltd.*, *Civil Appeal 13 of 2006*. **Williams JA** said there at *para [36]*:

“An applicant...has to pass one of two tests before it can be added as a party to an action. First, it has to fulfill what we conveniently call the “necessary” test or secondly the “just and convenient” test. Whether or not an applicant reaches that threshold requires a judge to make a judicial assessment of the material facts and circumstances relevant to the tests...”

[15] But with all due respect, **Williams JA** was in that case stating the tests based on the then applicable rules for adding a party in **RSC Order 15 Rule 6 (2)(b)(i) and (ii)**. Those rules have been revoked by **Part 73.2** of the CPR and replaced by **Part 19.3 (3)** of the **CPR**. In fact, BIPA’s application before **Beckles J (ag)** was made pursuant to **Part 19.2 (3)**. This provides that the court may add a new party to proceedings where “(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable 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. **Beckles J (ag)** based the exercise of her discretion on an application of the tests in **Part 19.2 (3)**. So that, far from being clearly, blatantly or plainly wrong on the footing of applying the wrong tests as alleged by BIPA, she was decidedly correct. Attention must therefore now be turned to her application of these tests to the facts before her.

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

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

[18] The process is initiated by a petition to the Court by the Supervisor of Insurance or by the insurance company itself for the appointment of a judicial manager. The judicial manager is at the heart of judicial management. Broadly speaking, the role and function of the judicial manager is to manage the business of the insurance company under the court order and ultimately to produce a report setting out its recommendation to the court as to how the company should be dealt with. It is to be stressed that a judicial manager enjoys only such powers and has such duties as the court deems desirable and must always act under the control of the Court. Judicial management is therefore a management process on behalf the Court and is not aimed at resolving disputes.

- [19] This understanding of judicial management accords with the understanding adumbrated, after extensive review and analysis, in the Australian case of *Australian Prudential Regulation Authority v ACN 000 007 492 (Under Judicial Management) (Subject to Deed of Company Arrangement)* [2010] FCA 912. This case is important in assisting in understanding judicial management since the judicial management procedure is an importation into **Cap. 310** from *Division 8 of Part III* of the Australian *Life Insurance Act 1945 (Cth)* and *Part VB* of their *Insurance Act 1973 (Cth)*. It is also worthwhile noting that the same understanding of judicial management is to be found in the Supreme Court of Singapore High Court case of **Re Wan Soon Construction Pte Ltd** [2005] SGHC 102.
- [20] Given the 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 case is fully justified in law. There are at least four good reasons which support her application of the **Part 19.2 (3)** joinder test in this case.
- [21] First, the operation of **Part 19.2 (3)** is expressly limited to allowing the court to “resolve all the matters in dispute in the proceedings”. Thus, a critical element of the tests set down in **Part 19.2 (3)** is that there must be shown to be “matters in dispute” before a party can be joined under that **Part**. In the Supreme Court of New South Wales case of **Re Great Eastern Cleaning Services Pty. Ltd (1978) 2 NSWLR 278 at 281**, the expression “matters in dispute” was thought to mean “what could be considered to be the issues in the proceedings”. But, as was seen in para [18] of this judgment, judicial management does not involve “matters in dispute” in this sense.
- [22] With due respect to the submission by BIPA that the policyholders were previously disadvantaged by the failure of the Office of the Supervisor of Insurance to properly exercise its duty under the law 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 in dispute” in the judicial management proceedings. Consequently, **Beckles J (ag)** was right in holding that BIPA’s contention that it should be joined failed because the crucial requirement of **Part 19.2 (3)** that the proceedings must concern “matters in dispute” was not satisfied.
- [23] Second, the absence of “matters in dispute” in the judicial management proceedings also rendered otiose consideration of the desirability of adding BIPA “to ensure all matters in dispute in the case would be effectually and completely determined” as was argued by BIPA. Accordingly, the authority of **Gurtner v Circuit** [1968] 2 QB 587 cited by Mr. Khan was correctly distinguished by **Beckles J (ag)** on the ground that in **Gurtner v Circuit** the requirement that there be “matters in dispute” was satisfied.
- [24] Third, considering that the judicial manager acts on behalf of and under the control of the Court, it could scarcely be doubted that it was open to the Court to consider whether BIPA would be able to assist the judicial manager in the judicial management of BAICO or not. Thus, contrary to BIPA’s contention, It was open to **Beckles J (ag)** to find that it

was not necessary, just or convenient, or desirable for BIPA to be a party 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 the judicial manager was incompetent to deal with the issue in the “cause of action” and to look after the interest of the policyholders; (ii) that as a matter 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 in the judicial management process.

CONCLUSION ON BIPA’S PROSPECT OF SUCCESS

- [26] The conclusion which flows from the foregoing analysis is obvious. The joinder test relied on by **Beckles J (ag)** was the right one and application of this test to the facts of this case was clearly correct. BIPA has not shown that **Beckles J (ag)**’s exercise of her discretion was blatantly, clearly or plainly wrong and so rebutted the presumption that **Beckles J (ag)** was right. In the circumstances, BIPA has not established that there is a realistic prospect of success of the intended appeal before the Court of Appeal.

COMPELLING REASON TO BE HEARD

- [27] Attention must therefore now turn to the question whether, despite the fact that that the intended appeal is unlikely to succeed, there is a compelling reason why the intended appeal should be heard. As regards this, Mr. Khan argues that the intended appeal raises questions of great public interest and importance and of general policy. The impact of the disaster that has befallen BAICO has had societal ramifications not least of which is the effect on a number of policyholders whose futures are blighted.
- [28] Mr. Boyce, counsel for BAICO, argues that the judicial management procedure in Cap 310 is itself a statutory attempt to forestall the inevitable chaos of a race to recover by the policyholders of an insolvent insurance company. As such, Mr. Boyce rather attractively argues that the judicial management procedure initially vests the protection of the policyholders in the court but allows an opportunity to policyholders to be heard prior to the court approving the final recommendations of the judicial manager. For these reasons, he argues that the law and policy established in Cap 310 is clear and not in any need of clarification. Mr. King, counsel for the FSC, fully supports Mr. Boyce’s submissions.
- [29] The arguments on both sides bear tremendous persuasion. In my view, however, the case undeniably raises for the first time at least the narrow but important question of who, other than the Supervisor of Insurance and the company in question, may be parties in judicial management proceedings after the appointment of a judicial manager. The intended appeal affords an opportunity for the Court of Appeal to clarify the law 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 of this matter, be no order as to costs.
- [31] I would add by way of conclusion that I have given reasons for my decision to grant leave for the purpose of identifying for benefit of the parties in this case and for the Court of Appeal why it was thought right to grant leave. This was recommended in *Smith v Cosworth Casting Process Ltd, Practice Note (supra)*. I hasten to add, however, that I do not apprehend the issue mentioned by me as to why leave was granted denies that there may be other issues to be determined on appeal.
- [32] Finally, I wish to express my sincere appreciation of the outstanding quality of the oral and written submissions of counsel on all sides in this case. This has contributed in no small way to this judgment.

Justice of Appeal.