

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Civil Appeal No. 6 of 2015**

**BETWEEN:**

**CLICO INTERNATIONAL LIFE  
INSURANCE LIMITED                      Appellant**

**AND**

**OCTAVIUS JOHN  
LAURENT JOHN                              Respondents**

**Before: The Hon. Sir Marston C. D. Gibson, K.A., Chief Justice, The Hon. Sandra P. Mason and The Hon. Kaye C. Goodridge, Justices of Appeal.**

**2016: February 18, 26**

**2017: December 6**

**Mr. Ramon O. Alleyne and Mr. Michael J. Koeiman of Clarke Gittens Farmer for the Appellant**

**Ms. Zahidha I. James for the Respondents**

**DECISION**

**GOODRIDGE JA**

**Introduction**

[1] This is an appeal from the decision of **Cornelius J** given on 2 December 2014, in which she granted the respondents, Messrs. Octavius John and

Laurent John, leave to commence proceedings against the appellant, Clico International Life Insurance Limited (CLICO).

### **Background**

- [2] CLICO is an insurance company incorporated in Barbados. It conducted insurance business in Barbados and through branches across the Caribbean, including the Commonwealth of Dominica (Dominica), providing general and life insurance, investment annuities and other investment programmes.
- [3] The respondents are residents of Portsmouth, Dominica. They are now retired but had spent the majority of their working lives in New York in the United States of America. They had invested monies in CLICO by way of Executive Premium Annuity policies (EPAs).
- [4] CLICO experienced financial difficulties which led to the company being placed under judicial management by order of **Chandler J** made on 14 April 2011.
- [5] By further order made on 29 April 2011 (the directions order), the conditions under which the judicial management was to be conducted were set out. For our purposes, the relevant paragraph of the directions order is paragraph 7 which states:

"all actions and execution of all writs, summonses and other processes against...(the appellant) are hereby stayed and no

person, which shall include a body corporate, shall bring or continue a claim or proceeding against.. (the appellant) without leave of this Honourable Court."

- [6] It is to be noted that this paragraph mirrors **section 57 (4)** of the **Insurance Act, Cap. 310 (Cap. 310)** which provides:

"(4) Where a petition is presented under this section for an order in respect of any insurance company, all actions and the execution of all writs, summonses and other processes against it shall not be proceeded with without the leave of the court being first obtained or unless the court otherwise directs."

### **The Proceedings in the High Court**

- [7] On 15 August 2013, the respondents filed a notice of application in the High Court seeking leave to bring proceedings upon a judgment obtained by them against CLICO in Dominica and/or leave to enforce that judgment. This action was necessary because of paragraph 7 of the directions order set out above.
- [8] The application was supported by the affidavits of the respondents' attorney-at-law, Ms. Zahidha James and the first respondent.
- [9] According to the affidavit of the first respondent, between the years 2005 and 2007 they had invested in EPAs with CLICO as a means of securing their retirement income.

- [10] At the expiration and/or surrender of the EPAs, the entitlements to the said policies were not paid to the respondents. However, the respondents decided to reinvest, based on assurances received from agents of CLICO.
- [11] The respondents surrendered their EPAs sometime in 2009 but they did not receive any payments due.
- [12] On 15 June 2010, the respondents brought an action against CLICO in the High Court of Dominica. On 7 September 2010, that court gave judgment in default of defence and ordered CLICO to pay the respondents the sum of EC\$1,420,266.96, costs of EC\$3,062.50 together with interest.
- [13] On 4 February 2011, CLICO agreed by way of a consent order to pay to the respondents the sum of EC\$75,000.00 commencing 30 April 2011, and continuing at the end of every month until the judgment was satisfied.
- [14] CLICO did not make the payments as promised.
- [15] In her affidavit filed on 11 November 2013, Ms. James exhibited an unsigned document from the first respondent which referred to his having been diagnosed with prostate cancer requiring medical treatment in the United States of America.
- [16] Subsequently, on 10 January 2014, the first respondent filed another affidavit in which he: (i) provided details of his medical condition; (ii) confirmed that he had undergone the surgery; and (iii) stated that he

was now indebted to the persons who had assisted him. A medical report was also annexed, along with correspondence passing between CLICO's then attorney-at-law and the respondents' then attorney-at-law regarding payment of the judgment debt by installments.

[17] The appellant filed an affidavit in response sworn by Mr. Patrick Toppin, representative of the judicial manager (Judicial Manager) of CLICO. According to that affidavit, the Judicial Manager's obligations under the directions order were to recommend the course of action most advantageous to the policy holders of the appellant. The affidavit also described the restructuring plan which the Judicial Manager had recommended, and asserted that the granting of the application would frustrate that plan.

### **The Judge's Decision**

[18] On 2 December 2014, **Cornelius J** gave a written decision. At paragraphs [29] and [30] of that decision, the judge stated:

"[29] Having considered my findings and comments therein, the claimants' application for leave to commence proceedings as presently constituted is refused unless the following order is satisfied

- (a) Within 21 days of the date of this decision, the written copy of which is delivered 8<sup>th</sup> December 2014, the claimant is to file an amended application along with draft copies of the substantive proceedings to be commenced.

(b) The proceedings are to continue as if started by the amended application.

[30] Should the claimant fail to file as ordered by 29<sup>th</sup> December 2014, the application will stand dismissed. The Court makes no order as to Costs."

[19] The respondents complied with the judge's order by filing an amended application on 23 December 2014.

[20] On 6 March 2015, when the amended application came on for hearing, the judge indicated that once the amended claim was filed, the appellant should file a defence and she would undertake case management.

### **The Notice of Appeal**

[21] On 20 March 2015, the appellant filed a notice of application for leave to appeal the judge's decision. On 3 June 2015, this Court granted the appellant leave and a notice of appeal was filed on 26 June 2015.

[22] In the notice of appeal, the appellant has sought an order reversing the decision of the learned trial judge and staying the respondents' claim **Civil Suit** No. 1447/2013 pending the judicial management of the appellant.

[23] The ground of appeal is that the learned judge erred in law in concluding that the respondents ought to have leave to "appeal"(sic) (proceed) against the appellant in circumstances where:

"i. The judicial management of the Appellant is at an advanced stage;

- ii. The Respondents have shown no unique prejudice which would accrue to them from the continuation of the stay and which would not equally accrue to many of the other policyholders of the Appellant;
- iii. To grant leave to the Respondents would mean that similarly entitled policyholders could obtain leave to recover their policy monies which would deplete the assets of the Appellant and defeat the scheme proposed by the judicial manager as best suited to protect the interests of the policyholders generally.

In the absence of reasons the Appellant is unable to determine whether there were other more specific errors of law or errors of fact which led to the above erroneous finding of law."

[24] Further, CLICO has asked this Court if it succeeds in its appeal, to rehear the matter as opposed to remitting the matter to the court below for a new hearing.

### **The Issue arising in this appeal**

[25] As can be seen from the above, the judge's decision is being challenged on the basis that the judge erred in law when she granted the respondents leave to commence proceedings against the appellant and that, in so doing, gave no reasons for her decision. We consider it convenient at this stage to deal with the question of failure to give reasons.

**Whether the judge failed to give reasons for her decision to grant the respondents leave to commence proceedings against the appellant**

*The Submissions of Counsel*

[26] Mr. Alleyne, counsel for the appellant, submitted that a review of the judge's written decision shows that, while she did an admirable job of listing the different arguments that were made, she did not say how she assessed any of those arguments, which arguments held sway and for what reason. Mr. Alleyne contended that this Court is therefore placed at a disadvantage in determining whether it was a fair exercise of discretion.

[27] Relying on **English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605 (English)**, Mr. Alleyne also submitted that, while a trial judge is not required to state every reason for her decision, both the appellate court and the litigants must know the basis on which the judge arrived at that decision.

[28] Counsel contended that the judge did not assess the principles of **Re Atlantic Systems Plc [1992] Ch 505 (Re Atlantic)** which both sides argued were applicable in matters for the grant of leave in administration or judicial management.

[29] It was further argued by Mr. Alleyne that the decision does not indicate whether the judge took the position that the **Re Atlantic** principles

applied or did not apply to the facts before her. In the circumstances therefore, there is no basis on which this Court or either party, after a full perusal of the decision, could analyse the reasoning that was essential to the final determination. On this ground, Mr. Alleyne concluded that the appeal should be allowed and the matter reheard by this Court, given the fact that all relevant evidence was produced in documentary form and is already before the Court.

[30] In response, Ms. James, counsel for the respondent, in her oral submissions to this Court, argued that the judge dealt with her reasons for granting leave at paras [24] to [28] of the decision. She accepted that the judge made no reference to **Re Atlantic**. However, counsel submitted that the judge, having referred to the physical and financial position of the respondents, agreed that in those circumstances persons could not be denied leave. In fact, the judge was of the view that the matter should not have come to court and that the parties should have found a way to settle the claim.

[31] Ms. James submitted further that there is a difference between no reasons and inadequate reasons. Relying on paras 17 and 26 of **English**, counsel contended that, even if it can be argued that the judge did not give adequate reasons, when this Court reviews the decision against the

background of the evidence and the submissions, it is clear what the judge's thinking was which led to her decision and the appeal should therefore be dismissed.

### **Discussion**

[32] It is the duty of a judge to give reasons for his or her decision. As was stated by **Griffiths LJ** in **Eagil Trust Co Ltd. v Piggott-Brown [1985] 3**

**All ER 119** at **122**:

"A professional judge should, as a rule, give reasons for his decision. I say 'as a general rule' because in the field of discretion there are well-established exceptions....Apart from such exceptions, in the case of discretionary exercise, as in other decisions on facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving. When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be shown that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

[33] The observations of Griffiths LJ were followed by this Court in a number of cases: see **Turney et al v Caribbean Commercial Bank Ltd Civil Appeal No. 41 of 1991**, **Bank of Nova Scotia v Elias & Co Ltd Civil Appeal No. 3 of 1991** and **Lovell v Rayside Construction Limited, Magisterial Appeal No. 16 of 2004**.

[34] In **English**, Lord Phillips MR restated the test to be applied by an appellate court in the following terms at para 19:

"It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision...."

[35] The above passage was cited with approval by **Sir David Simmons CJ** in **Greaves v Lorde Civil Appeal No. 11 of 2008 (Greaves)**.

[36] As to inadequacy of reasons, Lord Phillips MR stated at para 26 of **English**:

"Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision

that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of *Flannery in Ludlow v National Power PLC* 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial."

[37] In **Greaves, Sir David Simmons CJ** also pointed out at **para 22** that:

"...There is clear law in support of the proposition that a Court of Appeal will allow an appeal on the sole ground of inadequacy of reasons given by a trial judge-*Flannery v Halifax Estates Agencies Ltd* [2000] 1 All ER 373."

[38] The above authorities clearly indicate that when a judge fails to give any or any adequate reasons for his/her decision this amounts to an error of law.

[39] Our review of the judge's decision reveals the following. At **paras 3 to 16**, the judge accurately summarised the parties' evidence as set out in their affidavits. Between **paras 17 to 26**, the judge discussed the manner in which the application was framed, the grounds of the application, a case cited by the respondent and the ways in which a claimant can commence proceedings to enforce a judgment. At **paras 26 to 27**, reference is made to **section 57(4) of Cap. 310** and to the fact that any step against a company under judicial management is proscribed without leave of the court. At **para 28** the judge made additional comments on

the parties' failure to reach an agreement on the matter and at **paras 29** and **30**, she set out her order (which is reproduced at **para 17** of this judgment).

[40] We note however, that in the written decision no mention is made of **Re Atlantic** or of the principles which the judge considered applicable to the matter which was before her. In our opinion, no reasons were provided for her decision to grant leave. Consequently, we are unable to determine whether it was a fair exercise of the judge's discretion or whether she took relevant or irrelevant factors into consideration.

[41] Even if we accept Ms. James' argument that reasons, though inadequate, were given by the judge at **paras 24** to **28** of the decision, these paragraphs do not disclose a valid basis for the decision which was given.

[42] We have therefore concluded that the appeal should be allowed in the circumstances. However, in the interest of saving time and expense, this Court considers that the matter should not be remitted to the High Court. In view of the fact that both parties have placed extensive submissions on the matter before this Court, we will review the evidence and come to our own conclusion.

[43] In embarking on this exercise, we will (i) set out our understanding of the process of judicial management; (ii) outline the principles which we

believe should be applied in applications for leave; and (iii) determine whether this is a case in which leave should be granted.

### ***The Process of Judicial Management***

[44] Under **Cap. 310**, where the Supervisor of Insurance considers that an insurance company is unlikely to meet its obligations, or has failed to comply with certain provisions of the Act, the Supervisor may conduct an investigation into the business of the company.

[45] On the completion of that investigation, if the Supervisor concludes that it is necessary or proper to do so, he may petition the High Court for an order that such a company be placed under judicial management on any of the following grounds:

- (i) the company is in financial difficulties;
- (ii) the insurance business of the company is not being conducted in accordance with sound business principles or practice; or
- (iii) it is otherwise in the interest of the policy holders that such an order be made.

[46] Where an order is made for the judicial management of an insurance company, the court shall appoint a judicial manager who is invested with the power to manage the business of the company. The judicial manager is required to conduct the management of the company with the greatest economy compatible with efficiency and shall, as soon as practicable, file

with the court a report stating which course is most advantageous to the general interest of the policy holders of the company. The court then makes an order which it considers to be in the best interest of the policy holders.

[47] It must be stated that, while these provisions have been in force in this jurisdiction for some time, there is little case law on judicial management.

[48] In **Financial Services Commission, BIPA Inc v British American Insurance Company Limited, Civil Application No 4 of 2012**, BIPA Inc. sought leave to appeal the decision of **Beckles J** (ag) (as she then was), denying its application to be joined in judicial management proceedings initiated by the Financial Services Commission against the respondent insurance company. There, **Burgess JA** stated:

"[17] ....It is apparent from the provisions of Cap. 310 that judicial management is a management procedure on behalf of the Court aimed at saving insurance companies from liquidation...

[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. 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...

[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 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.**”

[49] In the Federal Court of Australia, an application was made for a general insurance company to be placed under judicial management in the case of **Australian Prudential Regulation Authority v ACN 000 007 492 (Under Judicial Management) (Subject to Deed of Arrangement)** [2010] FCA 9123 (Australian Prudential). In dealing with the application, Perram J outlined the history of judicial management and reviewed earlier decisions on the subject. At para 8 of the judgment Perram J referred to *Joubert's The Law of South Africa Vol. 4* para 594 where judicial management was described as follows:

"Judicial management is an extraordinary procedure... the purpose of which is to obviate a company being placed in liquidation where by proper management or by proper conservation of its resources it will be able to meet its

obligations, remove any occasion for winding up, and become a successful concern."

[50] At para 10 Perram J referred to the decision of **Estate Loock v Graaff-Reinet Board of Executors [1935] CPD 117** where the function of a judicial manager was stated in the following terms:

"A judicial manager is appointed because the court thinks that the company, if it has a sort of moratorium - that is what a judicial management amounts to - will pull through and will be able to go on."

[51] It is clear then, that Parliament, through the process of judicial management, has established a mechanism by which efforts can be made to restore the financial wellbeing of an insurance company which is in difficulties. Critical to this process is the prohibition on the commencement or pursuit of proceedings against the company: see **section 57 (4) of Cap. 310**.

[52] In this case, the appointment of a judicial manager was intended to place CLICO in a position where "by proper management and or by proper conservation of its resources" CLICO would avoid liquidation and return to a position of profitability for the benefit of the policy holders. In keeping with this objective, **para 7** of the directions order was made to ensure that the assets of CLICO would be protected and preserved during this process.

*What are the principles which should be applied by a court in determining applications for leave*

*The Submissions of Counsel*

[53] Mr. Alleyne submitted that it was important to bear in mind the central aim of judicial management, that is, the preservation of the insurance company's resources to facilitate the plan which best serves the interest of the policy holders. In this regard, he noted that a proposal had been approved by the judge in December 2015.

[54] Mr. Alleyne submitted that guidance on the principles to be taken into account in determining an application to lift the stay could be found in **Re Atlantic**. According to him, a distinction was made in **Re Atlantic** between an application to enforce existing proprietary rights and monetary claims. It was only in exceptional circumstances that a court would grant leave to enforce a debt incurred prior to administration as this would defeat the purpose of the administration.

[55] In response, Ms. James agreed with Mr. Alleyne that **Re Atlantic** was the authority which would be of most assistance to the Court in its determination of the principles to be applied. While counsel accepted that there was a difference in approach to proprietary rights as opposed to

monetary claims, she argued that this Court should apply the principles relating to proprietary rights to claims which were monetary claims.

### **Discussion**

[56] We have examined the process of administration under the Insolvency Act 1986 (the 1986 Act) of the United Kingdom and we agree with counsel that the principles set out in **Re Atlantic** can be applied to this aspect of judicial management for the following reasons.

[57] The process of administration is similar to judicial management in that both are temporary regimes which aim to enable companies in financial difficulties to recover. Under the 1986 Act, a court is enabled to appoint an administrator to manage the affairs, business and property of a company with a view to achieving one or other of the statutory objectives.

[58] The common thread in both processes is that there is a "moratorium" on claims by creditors which allows a plan for the rehabilitation of the company to be pursued. Both regimes impose a stay of proceedings against the company, with the court having the discretion to lift the stay on the application of a creditor.

[59] In **Re Atlantic**, a company acquired computer equipment on lease on hire purchase from funders for subletting to end-users. The company ceased to be able to pay its debts and an administration order was made under

section 8(3)(d) of the 1986 Act. Thereafter, by virtue of section 11(3) of the Act, the consent of the administrators or leave of the court was required before steps could be taken to enforce any security or to repossess goods in the company's possession under any hire-purchase agreement. The headlessor applied for the stay to be lifted to enable it to terminate the lease.

[60] In determining the headlessor's application, the English Court of Appeal drew a distinction between what it termed "possession cases" where the applicant has an interest in the property which is being used by the company and cases (such as this case) where the applicant seeks leave to seize the company's property. Nicholls LJ stated that in "possession cases", in the absence of special circumstances, leave is given as of course and at page 542, the court set out twelve principles to be applied in relation to the exercise of the discretion where leave is sought to exercise existing proprietary rights against a company in administration. It is to be remembered that these principles are specifically directed at a case where a lessor of land or the owner of goods is seeking to repossess his land or goods because of non-payment of rentals, or applications to enforce a security. These principles are summarised as follows:

- (i) It is in every case for the person who seeks leave to make out a case for him to be given leave;

- (ii) The prohibition in section 11 (3) (c) and (d) is intended to assist the company, under the management of the administrator, to achieve the purpose for which the administration order was made. If granting leave to a lessor of land to exercise his proprietary rights is unlikely to impede the achievement of that purpose, leave should normally be given;
- (iii) In other cases when a lessor seeks possession the court has to carry out a balancing exercise, balancing the legitimate interests of the lessor and the legitimate interests of the other creditors of the company;
- (iv) In carrying out the balancing exercise, great importance, or weight, is normally to be given to the proprietary interests of the lessor. An administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise;
- (v) It will normally be a sufficient ground for the grant of leave if significant loss, that is, any kind of financial loss, would be caused to the lessor by a refusal. But if substantially greater loss would be caused to others by the grant of leave, that may outweigh the loss to the lessor caused by a refusal;
- (vi) In assessing these respective losses, the court will have regard to matters such as: the financial position of the company, its ability to pay the rental arrears and the continuing rentals, the administrator's proposals, the period for which the administration order has already been in force and is expected to remain in force, the effect on the administration if leave were given, the effect on the applicant if leave were refused, the end result sought to be achieved by the administration, the prospects of that result being achieved, and the history of the administration so far;

- (vii) It will often be necessary to assess how probable the suggested consequences are;
- (viii) This is not an exhaustive list;
- (ix) The above considerations may also be relevant to a decision to impose terms if leave is granted;
- (x) The above considerations will also apply to a decision on whether to impose terms as a condition for refusing leave;
- (xi) An important consideration will often be whether the applicant is fully secured. If he is, delay in enforcement is likely to be less prejudicial than in cases where his security is insufficient; and
- (xii) The court needs to be satisfied only that the applicant has a seriously arguable case.

[61] As to the second type of case, Nicholls LJ stated:

".....[P]rima facie to grant leave would be inconsistent with the purpose for which Parliament imposes the prohibition on proceedings."

[62] In **A.E.S Barry v TXU Europe Trading (In Administration) [2004]**

**EWHC 1775**, Patten J stated:

"[I]t will only be in exceptional cases....that the court gives a creditor, whose claim is simply a monetary one, a right by the taking of proceedings to override and pre-empt that statutory machinery."

[63] As can be seen from the above, the general rule is that leave will not be granted where a party seeks to enforce a debt incurred prior to administration as this would defeat the purpose of the administration.

Leave would only be granted in exceptional circumstances. A fortiori, the reasoning in **Re Atlantic** can be applied to judicial management under **Cap. 310**.

[64] It must be stressed that in judicial management, the primary focus is on the best decision in the interest of all policy holders, not creditors. Indeed, the Judicial Manager is empowered to cancel contracts and not pay creditors all in the effort to protect the interest and rights of policy holders.

[65] The respondents' position is that they have a judgment and that they are owed money by CLICO. However, in our view, the respondents do not have a proprietary right to the money they are claiming. They have a judgment but that judgment does not create a proprietary right. Consequently, the twelve principles outlined by Nicholls LJ would be inapplicable to the respondents' case.

[66] In our opinion, in order for the respondents to obtain leave to enforce the claim for a debt/monetary claim incurred prior to judicial management:

- (i) exceptional prejudice to the respondents by the continuation of the stay would have to be established;
- (ii) such loss would have to be shown to outweigh the potential consequences for the policyholders of leave being granted; and

(iii) the respondents would have to establish that their claim is unlikely to be addressed by the proposed scheme or arrangement.

***Should the respondents be granted leave***

*The Submissions of Counsel*

[67] In his opposition to the grant of leave to the respondents, Mr. Alleyne contended that the conduct of CLICO's officers prior to judicial management was irrelevant to the stay. He argued that the respondents did not establish that they would suffer unique prejudice if their application for leave was refused because their position was not dissimilar to that of other policy holders of CLICO. In addition, no hardship was alleged by the second respondent at all, and the first respondent has already received the life saving treatment and merely seeks to repay his benefactors out of the monies owed by CLICO.

[68] Counsel also submitted that the grant of leave would enable the respondents to recover all monies due to them under the EPAs in priority to other policy holders of their class who must either receive a discounted portion of their entitlement, in liquidation of the appellant or wait until their policies are vested in the new company under the proposed restructuring plan, before they can receive their money.

[69] Mr. Alleyne contended further that to grant leave would prejudice the interests of the hundreds of other policy holders, not only in Barbados but across the region who have been similarly out of their monies during CLICO's judicial management and must patiently await its outcome.

[70] In response, Ms. James submitted that, prior to the stay, CLICO through its agents had engaged in trickery in that it had made representations that it was financially sound so that the respondents were persuaded to reinvest. Then, when judicial management was imminent, it falsely represented that the respondents' claims would be met so as to dissuade them from taking action to enforce their judgment. Ms. James relied on **Ho-Tack v British American Insurance Company Limited ANUHCV 2009/0323**, a decision of the High Court of Antigua and Barbuda to support her submission.

[71] Ms. James also contended that the stay operated to cause the respondents especial prejudice in that the first respondent needed the monies due under the judgment to defray medical expenses, and both respondents "are generally dependent on family members for subsistence having invested all of their savings with the .....[appellant's] annuity plans."

[72] It was finally contended by counsel that, by virtue of the consent order, CLICO was estopped from arguing that it was financially incapable of

satisfying the judgment, since by giving consent to the order for payment by instalments, it represented that it was capable of meeting them. No authority was cited by counsel to support this contention.

## **Discussion**

[73] There is no gainsaying that the respondents have suffered prejudice by not being able to have access to their money. But have they suffered exceptional prejudice such that we ought to grant them leave? There is a monetary claim against CLICO. The question we have asked ourselves is what places this claim above the other monetary claims of a similar nature relating to pensions, health and life insurance payments.

[74] It must be recalled that CLICO is an insurance company, which provides diverse services to its many policy holders. Because of its financial difficulties and the extent of its business throughout the Caribbean, it is reasonable to assume that there are many thousands of policy holders who are suffering because they have been unable to recover their monies.

[75] If the respondents are granted leave they would be able to recover all of their money in priority to the other policy holders who have to wait until the proposed restructuring plan approved by the court is implemented. To grant leave would diminish the assets of CLICO and would not be in the best interests of the remaining policy holders. There is also the likelihood

that if the respondents are successful, other policy holders might be emboldened to make similar applications.

[76] Further, the respondents have not established that their claim is unlikely to be addressed by the proposed plan.

[77] We therefore do not consider that the respondents have established exceptional prejudice. In the circumstances, we have therefore concluded that this is not an appropriate case for the grant of leave.

### **Disposal**

[78] For all the foregoing reasons the appeal is allowed. Leave to commence proceedings against the appellant is refused. There is no order as to costs.

**Chief Justice**

**Justice of Appeal**

**Justice of Appeal**