

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Appeal No BBCV2018/005
BB Civil Appeal No 6 of 2015**

BETWEEN

**OCTAVIUS JOHN
LAURENT JOHN**

APPELLANTS

AND

**CLICO INTERNATIONAL LIFE
INSURANCE LIMITED**

RESPONDENT

JUDGMENT SUMMARY

Judicial Management pursuant to the Insurance Act of Barbados – stay against proceedings pursuant to s. 57(4) of the Insurance Act – factors to be considered when granting leave to enforce a judgment debt against a company under judicial management – what amounts to an exceptional case in these proceedings– whether the court has jurisdiction to hear the claim.

- [1] The Appellants, Octavius John and Laurent John, (“the John brothers”) invested in several “Executive Premium Annuity” policies with the Respondent, Clico International Life Insurance Limited (“CLICO”), a Barbadian company in the business of general and life insurance, investment annuities and other investment programmes. At the expiration of these policies, CLICO did not pay the John brothers their entitlements, intended by them to be relied upon for their retirement needs, having retired to Dominica after working in New York and one brother with prostate cancer having expensive medical costs.
- [2] After much prevarication from CLICO, the John brothers were driven to take legal proceedings to recover the money due to them, so that on 7 September 2010 they obtained default judgment against CLICO in the High Court of Dominica in the sum of ECD 1,423,329.46 and interest. After further stalling for time by CLICO, the John brothers obtained a court consent order on 4 February 2011 by which CLICO undertook to pay to

This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court’s reasons.

the brothers ECD 75,000.000 a month, commencing 30 April 2011 and continuing until final satisfaction of the said judgment. CLICO also undertook to pay costs and interest pursuant to the judgment. However, as a result of proceedings brought on 14 April 2011, CLICO was placed under judicial management pursuant to the Insurance Act of Barbados and no payment was made to the John brothers. The John brothers therefore sought to enforce their Dominican judgment debt against CLICO by converting it into a judgment debt in the High Court of Barbados.

- [3] Pursuant to section 57(4) of the Insurance Act, “all actions and the execution of all writs, summonses and other processes” against CLICO were stayed and could “not proceed without the leave of the court being first obtained or unless the court otherwise directs.” The John brothers therefore filed an application seeking leave from the Barbadian High Court to “be at liberty to begin proceedings against [CLICO] to recover” the amount due under the Dominican judgment.
- [4] The application was heard by Cornelius J who granted the application, paving the way for the matter to proceed to case management. CLICO, however, appealed to the Court of Appeal which allowed the appeal on the basis that Cornelius J had failed to provide reasons for her decision to grant leave to the John brothers to commence proceedings. The Court of Appeal, having the documentary evidence before it, in the interest of saving time and expense and with the aid of extensive submissions on case law concerned with leave to enforce claims, considered it fit to determine the application itself, treating the application as covering both leave to commence a claim and leave to enforce it.
- [5] After considering relevant case law, the Court of Appeal refused leave to the John brothers to enforce their claim. In the court’s opinion, given the financial difficulties of CLICO and the extent of its business throughout the Caribbean, it was reasonable to assume there were thousands of policy holders who were similarly prejudiced because they were unable to recover their monies. If leave were to be granted to the John brothers, (i) they would be able to recover all their monies in priority to the other policy holders who had to wait until the Judicial Manager’s proposed restructuring plan was approved by the court and satisfactorily implemented; (ii) CLICO’s assets would be diminished to the disadvantage of the remaining policy holders; and (iii) there was a likelihood that other policy holders

would make similar applications. Further, the John brothers had not established that their claim was unlikely to be addressed by the proposed plan.

- [6] The Court of Appeal granted the John brothers leave as of right to appeal to the CCJ without any objection from CLICO. Before the CCJ, CLICO filed an application to strike out the appeal long after the John Brothers had filed their Notice to Appeal pursuant to a Certificate of Compliance given by the Court of Appeal. CLICO submitted that the Court had no jurisdiction to hear the appeal on the basis that the Court of Appeal erred in allowing the John brothers to appeal as of right to the CCJ. This was because, in CLICO's opinion, the Court of Appeal's decision was an interlocutory decision and could only be appealed by special leave from the CCJ. There were therefore two issues for the CCJ's consideration: (i) whether the court had jurisdiction to hear the appeal; and (ii) whether leave should be granted to the John brothers to enforce the Dominican judgment debt and CLICO directed to pay it.
- [7] The CCJ noted that normally, a foreign judgment creditor should first seek leave to bring summary proceedings for the amount of the judgment debt to become an enforceable local judgment debt in his favour. Leave should then be sought to enforce the judgment. However, the Court opined that section 57(4) was broad enough to cover one leave application for both proceedings and that this latter approach was appropriate in the special circumstances of this case, where there was a clear debt accepted by CLICO in agreeing to a court consent order for monthly payments in satisfaction of a judgment debt and not disputed in the current proceedings. This also appeared to be the unarticulated assumption upon which the decision of the Court of Appeal was based. Thus, if leave were granted, the court was in a position to give a final judgment for the amount of the debt, while if leave were refused that would finally determine the proceedings. In these circumstances, the Court found that these proceedings were 'final' and not 'interlocutory' and therefore the Court of Appeal had not erred in granting leave as of right. The CCJ, however, added that even if the proceedings had been interlocutory it would have exercised its power to grant special leave under s 8 of the Caribbean Court of Justice Act, the John brothers having been innocently misled by the Court of Appeal and CLICO until CLICO's strike out application late in the day.

- [8] The CCJ agreed with the Court of Appeal that judicial management was aimed at restoring, for the benefit of policy holders, the financial wellbeing of an insurance company, over a reasonably short period, to avoid, if possible, the company being placed in liquidation. This was done by the Judicial Manager's proper management or proper conservation of its resources. The Court noted, however, that a Judicial Manager has more flexible powers than that of a liquidator or trustee in bankruptcy dealing with an insolvent company under strict statutory priority rules. Under s 59(5) and (6) of the Insurance Act, the court could issue directions to the Judicial Manager as to his powers and duties "as it seems desirable in the circumstances of the case" and the Judicial Manager was required to act under the control of the court. Section 61(1) of the Act, as well as an Order of the Barbados High Court dated 29 April 2011, also conferred extensive powers upon CLICO's Judicial Manager, including the power to process claims against the Company, to pay any class of creditor and any claims, settlements and expenses in part or in full and to rank, manage, adjust and pay claims against the Company and/or its policy holders.
- [9] The Court also agreed with the Court of Appeal that the prohibition on the commencement or pursuit of proceedings against the troubled company was critical to the process of judicial management. In order to enforce their monetary claim against CLICO, the starting point for the John brothers was for them to show, as held by the Court of Appeal, that (i) they would suffer exceptional prejudice by the continuance of the stay; (ii) such loss would outweigh the potential consequences to other policy holders if leave were to be granted; and (iii) their claim was unlikely to be addressed by the Judicial Manager's proposed scheme or arrangement. Account also needed to be taken of the flexibility afforded to the court by s 59(5) and (6) of the Insurance Act.
- [10] The Court was satisfied that the John brothers had made out an almost certainly unique case for leave to be granted. Of significant weight to the Court's ruling was that (i) the brothers were vigilant enough to do all they could to extract their money from CLICO before a realistic possibility of its collapse happened; (ii) they obtained judgment in their favour and a court consent order for CLICO to make monthly payments satisfying the amount of the judgment debt; (iii) CLICO's actions encouraged the brothers not to take steps to obtain a charging order over CLICO's property or a garnishee order over CLICO's income; (iv) CLICO does not dispute the validity of the brothers' claims established under the

Dominican judgment debt; and (v) the brothers, who had actively done all they could to protect their interests, now find this has counted against them, making themselves worse off than the ‘passive’ policy holders, since the Judicial Manager conceded in the hearing before the CCJ that it no longer ranked them as policy holders, having exchanged their policies for a judgment debt, but as mere ordinary unsecured creditors for whom no provision had been made under the plans of the Judicial Manager, so that their claims would not be addressed.

[11] Furthermore, the Court emphasised how significantly handicapped it had been by the Judicial Manager’s lack of evidence before the Court here and below as to the progress of the judicial management. While acknowledging that it was self-evident from the excessive length of the judicial management over the last eight years that there must be significant financial deficiencies remaining to be addressed, the Court was of the opinion that in these adversarial proceedings, in balancing the exceptional prejudice suffered by the brothers against potential consequences to other policy holders, the brothers satisfied the evidential burden of raising a prima facie favourable case, so that the evidential burden passed to the Judicial Manager on CLICO’s behalf to upset that case. This burden had not been discharged in the absence of evidence as to CLICO’s current position under the judicial management.

[12] In the unique circumstances of this case, the Court felt obliged to resolve the issue between the parties without wasting time and costs in further proceedings. The Court therefore directed the Judicial Manager to recognise and pay the debt of ECD 1,423,329.46 to the John brothers within ten days of the Court’s judgment, after which interest shall run at the judgment rate applicable in Barbados. Having regard to s 59(5) and (6) of the Insurance Act, the Court did not consider itself in a position to direct that any interest be payable before such ten days: claims to capital need to be satisfied before claims to interest. No order as to costs was made, just as no order as to costs was made in the court below when the brothers lost their claim.