

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2010/1124

BETWEEN:

DELDRIIDGE FLAVIUS

Claimant/Judgment Creditor

and

CLICO INTERNATIONAL LIFE INSURANCE LTD.
(UNDER JUDICIAL MANAGEMENT)

Defendant/Judgment Debtor

and

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Garnishee

Before:

The Hon. Mde. Justice Rosalyn E. Wilkinson

Appearances:

Mr. Horace Fraser for the Claimant

Mr. Peter Foster Q.C. and with him Ms. Renée St. Rose for the
Defendant/Judgment Debtor.

2017: October 27th

JUDGMENT

- [1] **WILKINSON, J.:** Mr. Flavius filed his claim on December 23rd 2010, seeking \$411,660.82 for damages for unlawful dismissal, breach of the implied term of trust and confidence and for premature termination losses, all commencing on 10th September 2010.

- [2] On 12th January 2012, this matter was first stayed until further order by Master Taylor-Alexander. On 18th September 2013, Master Taylor-Alexander made a further order granting leave to Mr. Flavius to pursue his claim against CLICO under its current status of being under judicial management.
- [3] The matter thereafter took the usual course of case management, pre-trial review and reached its trial day.
- [4] The matter came on for trial on 13th May 2014. By this date CLICO had failed to file its witness statements despite an extension of time to do so. Judgement was entered for Mr. Flavius with damages to be assessed. On 10th December 2014, the Court on assessment of damages awarded Mr. Flavius damages in the sum of \$388,952.20, interest at the rate of 6 percent from September 10th 2010 and prescribed costs.
- [5] On 17th September 2015, with a view to enforcement of his judgment, Mr. Flavius filed pursuant to **CPR 2000** Part 50 an application for attachment of debts order and therein he sought the following orders (a) an interim order that the sum of money being held by First Caribbean International Bank (Barbados) Limited (“the Bank”) as garnishee in an account or accounts be attached to satisfy the judgment of the Court made on 10th December 2014, being a total sum of \$504,127.85, (b) that the Bank attend court on the hearing of the application for final order for payment and (c) costs.
- [6] On 16th November 2015, the Court made a provisional order (a) attaching the sum of EC\$553,986.25 to answer the judgment debt, and (b) ordered the Bank to attend court on 16th December 2015, the date fixed for the hearing and making of the final order.

- [7] The hearing fixed for 16th December 2015, was brought to forward 15th December 2015, due to lack of courtroom space. On this day, Counsel for Mr. Flavius revealed that the Bank had only been served that morning been served the provisional order and so the making of the final attachment order was adjourned to a date to be fixed by the Registry.
- [8] Mr. Flavius' attachment of debts application next came on for hearing on 29th February 2016. At this hearing the Court was informed that CLICO had appealed against the Court's order made on assessment and that at the Court of Appeal's sitting at February 2016, the appeal was dismissed.
- [9] The Court observed at the 29th February 2016, hearing that CLICO had filed on 23rd February 2016, skeletal argument in opposition to Mr. Flavius' application. Up to time of hearing the skeletal argument had not been served on Mr. Flavius' Counsel nor had the Court had not had sight of it. Counsel for Mr. Flavius sought an opportunity to file submissions in reply.
- [10] On 8th March 2016, CLICO filed further skeletal argument. Mr. Flavius filed submissions on March 15th 2016.
- [11] The matter next came on for hearing on June 14th 2016. The Court observed on that occasion that the Bank, notwithstanding being served a notice of hearing on 3rd June 2016, of the fixture, both failed to appear and had not filed any documents in response to the provisional order of 16th November 2015.
- [12] Both Parties at this time stated that they were prepared for the Court to render its decision after considering their respective filed skeletal argument and submissions.

- [13] The Court inquired of Counsel for CLICO as to whether CLICO had filed an application setting out its opposition and he informed that CLICO had not.
- [14] At this juncture it is noteworthy that from service of the claim form, statement of claim and supporting documents on January 11th 2011, up to June 14th 2016, the final hearing date of the matter, that CLICO has not filed a single affidavit in relation to the substantive matter (only filed affidavit for extension of time to comply with case management order and this was deposed to by Ms. Deborah Regis, administrative assistant of Counsel for CLICO.). There is therefore no evidence before the Court on behalf of CLICO.
- [15] Counsel for CLICO submitted to the Court in summary that (i) the leave granted by the Master to Mr. Flavius to pursue his suit ended when judgment was entered, (ii) enforcement procedures were a separate procedure and therefore leave from the Court was required to pursue the attachment to debt application, and (iii) the judicial manager could not act on the judgment as to do so would be to give Mr. Flavius an unfair advantage over CLICO's other creditors.

The Law

- [16] **CPR 2000** Part 50 makes provision for attachment of debts (garnishee proceedings). Rule 50.2 provides for the circumstances in which a court may make an order for attachment of debts and these include that it can only be made against a garnishee who is within the jurisdiction of the court. The Bank satisfies this condition.
- [17] Part 50 further provides that the process is a two (2) stage process. There must first be an application pursuant to rule 50.3 for the making of a provisional order. If a court is satisfied with the application, a provisional order is made and therein must be fixed a date and time for hearing on a final order.

[18] The effect of the provisional order pursuant to rule 50.9 (2) was that the order became binding on the Bank as soon as it was served on the Bank. By rule 50.9 (3) the Bank, does not then have to pay Mr. Flavius anything except to the extent that the Bank's debt to CLICO is greater than the amount of the attachment of debts order. By rule 50.9 (4) should the Bank, pay anyone other than Mr. Flavius, then the Bank may have to make further payment to Mr. Flavius in accordance with the terms of any final attachment of debts order that the Court may make.

[19] Rule 50.10 governs the hearing for making the final order. It provides that at the hearing fixed by the provisional order, if satisfied that the order has been properly served the court may do 1 of 3 things: (i) discharge the provisional order, (ii) give directions for the resolution of any dispute: or (iii) make a final attachment of debts order.

[20] The proceedings before the Court are at the hearing for making the final order and CLICO is asking that the provisional order be discharged. **CPR 2000** is silent on the requirements and or how the hearing is to be conducted where discharge of the provisional order is sought.

[21] At England, there is provision for the conduct of the hearing, **The White Book Service 2013, Vol.1** at para. 72.8.1 provides:

"The hearing

Having made the interim third party order on a without notice basis there must now be a hearing to decide whether that order should be discharged or whether a final third party debt order should be made. In practice most cases are straightforward. The third party is not prejudiced by the making of an order (see r.72.9). The third party owes the money anyway and is merely directed to pay it to the judgment creditor instead of the judgment debtor and to the same extent receives discharge of their obligations. In all cases the third party should have given notice to the court pursuant to r.72.7.

Rule 72.8 requires written evidence if either the judgment debtor or third party objects to the final order.

....

In particular a final order will be refused where it would be inequitable to prefer one creditor over another where the judgment debtor is clearly

insolvent (Pritchard v. Westminster Bank Ltd. [1969] 1 WLR 547). However it may not be inequitable to prefer a creditor who is actively pursuing their debt when others are not (FG Hemisphere Associates v. Republic of Congo (2006) The Times, February 27, 2006, Cooke J). In considering whether or not to exercise its discretion to make a final order the court must bear in mind not only the position of the judgment creditor, the judgment debtor and the third party but also the position of other creditors. The court would not make a final order if there are proceedings underway for distribution of available assets of the judgment debtor among all creditors on a percentage basis (D Wilson (Birmingham) Ltd. v. Metropolitan Property Developments Ltd. [1975] 2 AER 814; Rainbow v. Moorgate Properties Ltd. [1975] 2 AER 821 – a case on charging orders in which identical considerations apply).” (My emphasis)

- [22] As to the Bank’s absence at the hearing and opting not to file an affidavit, **Halsbury’s Laws of England Vol.17¹** provides:

536. Garnishee not appearing or not disputing liability. Where on further consideration of the matter, the garnishee does not attend, or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may, subject to certain restrictions, make a garnishee order absolute under which the garnishee is ordered forthwith to pay to the judgment creditor the amount of the debt due from him to the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the costs of the garnishee proceedings, including the costs of the garnishee....”

- [23] Bearing in mind Counsel for CLICO submissions, provision for judicial management is found in the **Insurance Act Cap. 12.08**. Section 41 provides for the making of an order for judicial management and section 42 provides for the making of a report by the judicial manager, it states:-

“42. REPORT OF JUDICIAL MANAGER

- (1) The judicial manager shall conduct the management with the greatest economy compatible with efficiency, and shall as soon as possible after his or her appointment, file with the court a report stating which of the following courses is in the circumstances, in his or her opinion most advantageous to the general interest of the policy holders of the company –
- (a) the transfer of the business of the company to some other company in pursuance of a scheme to be prepared in accordance with this Act (whether policies of the business continue for the original sums insured, with the addition of bonuses that are attached to the policies, or for reduced amounts);

¹ 4th edition

- (b) the carrying on of its business by the company (whether the policies of the business continue for the original sums insured, with the addition of bonuses that attached to the policies, or for reduced amounts);
 - (c) the winding up of the company or of any part of the business of the company; or
 - (d) the dealing with part of the business of the company in one manner, and with another part in another manner.
- (2) The judicial manager shall, as soon as he or she has filed the report, furnish a copy of it to the Registrar and make a written application to the court for an order to give effect to the course stated in the report.
- (3) The report or a copy of it shall be open for inspection by any person during official hours at the registry of the court in which the report is filed or at such other place as the Registrar determines.”

Findings and Analysis

- [24] Referring to Counsel for CLICO submissions, as the Court sees it, the Master granted Mr. Flavius leave to pursue his suit and once having done so, no further leave is required because it is the law, that a judgment once obtained takes immediate effect. **CPR 2000** rule 42.8 states that a judgment or order takes effect from the day it is given or made unless the Court specifies that it is to take effect on a different date. If the Court were to follow CLICO's submission about further leave for enforcement then the Court would in effect be nullifying the immediate effect of Mr. Flavius' judgement.
- [25] Further, as the Court sees it, if it were to require Mr. Flavius to seek leave to file enforcement proceedings, an action only necessary because of CLICO's failure to comply with rule 42.8, then it would appear that Mr. Flavius is being disadvantaged and CLICO gains an advantage for its failure to comply with rule 42.8.
- [26] Referring to the learning in **The White Book** cited as to consideration of other creditors, there is then the matter of CLICO's failure to put any evidence before the Court be it in witness statements for trial or as permitted pursuant to Part 16 on assessment of damages. This has left the Court without knowledge of how the judicial management was being conducted, what is the anticipated route to be taken in relation to any other creditors and so forth – all matters anticipated in at

least an affidavit or a report made pursuant to section 42 of the **Insurance Act**.
This being the case, how was the Court to consider any other creditors?

[27] Finally, as observed, the Bank neither appeared at the hearing nor filed an objection to the final order. The Court will be guided by the learning cited from **Halsbury's Laws of England** as to how to treat this non-appearance.

[28] In all the circumstances, the Court will make the final attachment of debts order.

[29] **Court's Order**

- (1) It is ordered that the Bank do forthwith pay Mr. Flavius the sum of \$553,986.25 being so much of the judgment debt due from CLICO as is sufficient to satisfy the said judgment debt and costs together with \$2,500.00 the costs of the attachment of debts proceedings.

PENAL NOTICE is attached.

**JUSTICE ROSALYN E. WILKINSON
HIGH COURT JUDGE**

BY THE COURT

REGISTRAR