

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2021 /0028

BETWEEN:

THE REGISTRAR OF INSURANCE

Claimant

And

ST. LUCIA MOTOR & GENERAL INSURANCE COMPANY LTD

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Diana Thomas with Ms Cleopatra McDonald for the Claimant

Mr. Dexter Theodore QC with Ms Sueanna Frederick for the Defendant

2021: November 2, 23
December 14 (Oral Judgment)
2022: January 21 (Written Reasons)

JUDGMENT

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** On 11th May 2021, the Registrar of Insurance (the "Registrar") applied to the Court for a judicial management order, in relation to St. Lucia Motor & General Insurance Company Ltd (the "defendant").

[2] The action which commenced by way of a fixed date claim, is made pursuant to section 40 of the Insurance Act¹ ("the Act"). The main ground is that the defendant has failed to fulfil its statutory obligations under the Act, which necessitates that the company be placed under judicial management.

[3] On 14th December 2021, the Court granted the order, placed the defendant under judicial management, and appointed Mr. Richard Surage of PKF Professional Services Inc. as Judicial Manager, with immediate effect. This judgment contains the reasons for doing so.

The Issues

[4] The sole issue which arose for determination was whether the defendant should be placed under judicial management, pursuant to section 40 of the Act?

The Law

[5] In written submissions Counsel for the claimant, Ms. Cleopatra McDonald submitted that in determining whether such an order should be made the Court must be satisfied that (i) the defendant is insolvent within the meaning given in the Act, or alternatively the **Companies Act**²; and (ii) the order is reasonably likely to achieve the purpose of judicial management. It is Counsel's contention that in the absence of regulations on the implementation of judicial management for an insolvent insurance company, section 11 of the Eastern Caribbean Supreme Court (Saint Lucia) Act³ applies, and permits the Court to exercise its jurisdiction in that regard, in conformity with the law and practice for the time being administered by the High Court of Justice in England.

[6] Counsel asserts that support for this proposition is found in the authorities of **Marlon Ho Tack v British American Insurance Company Limited (In Judicial Management)** and **another**⁴ consolidated with **British American Insurance Company Limited (In Judicial**

¹ Cap 12.08 of the Revised Edition of the Laws of Saint Lucia

² Cap 13.01 of the Laws of Saint Lucia

³ Cap 2.01 of the Laws of Saint Lucia

⁴ HCVAP2010/010

Management) et al v Marlon Ho Tack and another⁵ and Hugh Marshall Snr v Antigua Aggregates Limited and others⁶. She states that these cases concerned judicial management under the Antigua Insurance Act and section 11 of Antigua Eastern Caribbean Supreme Court Act, which provisions are similar to those in the equivalent legislation in Saint Lucia. Thus, Counsel argued that English law of "administration", and the statutory regime contained in Schedule B1 of the Insolvency Act 1986, Part 2 of the Insolvency Rules 1986, and the Practice Direction for Insolvency Proceedings would apply in this jurisdiction, in comparable circumstances. Counsel remarked that in the **Hugh Marshall case**, the Court of Appeal opined that section 11 of the Supreme Court Act did not mandate a total and slavish acceptance of the English Rules, but rather only those that may with convenience be used in the respective jurisdiction, should be adopted.

- [7] Relying on Schedule B1 to the English Insolvency Act, Ms McDonald proceeded to submit that an administration order may be made once the Court is satisfied that (a) the company is or is likely to become unable to pay its debts; and (b) the administration order is reasonably likely to achieve the purpose of administration. In relation to the purpose of administration, Counsel submits that the administrator must perform his functions with the objective of (a) rescuing the company as a going concern; or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or (c) realizing property in order to make a distribution to one or more secured or preferential creditors, in order of priority. Regarding the meaning of the phrase "unable to pay its debts" Counsel referred to section 123 of the English Insolvency Act, which she says is only slightly different to section 386 of the Saint Lucia Companies Act and does not give rise to any difference in interpretation.
- [8] She invited the Court to consider section 386 of Companies Act in relation to insolvency but made no mention of sections 34 and 35 of the Act, which together define insolvency for insurance companies. Applying the criteria from the Companies Act, Ms McDonald concluded that although from the evidence the defendant is not "balance sheet insolvent" according to section 386(2), it is however "cash flow insolvent" under section 386(1)(c).

⁵ HCVAP2010/013

⁶ [2000] ECSCJ No. 50

- [9] Counsel for the defendant Mr Dexter Theodore QC in written submissions highlighted the following provisions, as being relevant to the issue at hand: (i) section 34 of the Act relating to insolvency, (ii) the power of the Registrar to intervene in the affairs of an insurance company; and (iii) the power of the Registrar having previously intervened to apply for an order for judicial management where the Registrar is of the view that it is necessary and proper to do so. Counsel submits that unlike section 385 of the Companies Act, which details the circumstances in which a company may be wound up, the Act does not indicate the circumstances under which a judicial manager may be appointed. Consequently, he referred the Court to provisions from the law of Singapore, as a leading jurisdiction in the sphere of judicial management.
- [10] Mr Theodore submitted that the Singapore provisions permits a court to make a judicial management order if satisfied that (a) a company is or is likely to become unable to pay its debts; and (b) it considers the making of the order would be likely to achieve one or more of the following purposes, namely: (i) the survival of the company, or the whole or part of its undertaking as a going concern; (ii) the approval under section 210 or 211 of a compromise or arrangement between the company and any such persons as are mentioned in that section; or (iii) a more advantageous realization of the company's assets would be effected than on a winding up. Counsel asserts that it is common ground that judicial management is intended to rehabilitate a company and the threshold requirement for such an order is that the company is unable or is unlikely to be able to pay its debts. Applying this threshold to the evidence Counsel concluded that the defendant is and has always been solvent and an order for judicial management would be disproportionate in all the circumstances, and would operate to the detriment of the defendant.
- [11] By taking different routes, both Counsels have arrived at the conclusion that to grant the order this Court must be satisfied that the defendant is or is likely to become unable to pay its debts.
- [12] I disagree with the bases advanced by either Counsel, in relation to the Court's jurisdiction to grant the order and the conditions for doing so. Whilst it is accepted that by virtue of section 11 of the Supreme Court Act, a court may have regard to the English Insolvency

Rules and Practice Directions, the circumstances in the cases cited by Ms McDonald are distinguishable from that of the present case. The **Ho-Tack cases** concerned the procedure to be followed when applying to enforce default judgments against an insurance company already under judicial management, via an attachment of debt order; and (ii) the procedure to be followed by a judicial manager when applying to stay the attachment of debt proceedings and to have default judgments set aside. These applications were made to the Master under Part 11 of the Civil Procedure Rules 2000 ("CPR"). The Court of Appeal held that because there were no regulations enacted under the Antigua Insolvency Act, and the CPR does not apply to insolvency proceedings, the applications should have been made in accordance with the English Insolvency Rules and Practice Direction, which provide for such applications to be made directly to a Judge and unless otherwise ordered, be heard in public.

- [13] The **Hugh Marshall case** concerned a petition for the winding up a company. It was accepted that the English Insolvency Rules applied because the Antigua legislation provided no such rules. However, the Court of Appeal assessed the compatibility of the English Rules against the Antigua legislation in relation to the issue being considered, and determined that the particular English rule would not apply to the extent that it was incompatible, and the Antigua provisions prevailed.
- [14] There is no lacuna in the Act regarding the conditions for granting a judicial management order. The matter concerns the application of substantive law, and not procedural law to which section 11 of the Supreme Court Act has been restricted⁷. On examining the Act as a whole, the criteria for granting a judicial management order would be the same as the grounds on which the Registrar has the power to intervene in the affairs of an insurance company, and on which the Registrar would rely to apply to the Court for such order. These grounds are wider than those for winding up under the companies and insolvency statutes, which usually hinges on the inability to pay debts. A primary objective of the Act is

⁷ See: *Panacom International Incorporated v Sunset Investments Limited et al* [1994] 47 WIR 139; *Veda Doyle v Agnes Dean* GDAHCVAP2011/ 0020

the protection of the policyholders and third parties who engage in the conduct of business with insurance companies. With that in mind stringent statutory deposits, an insurance fund, and solvency requirements are imposed by the Act. The Registrar and the FSRA have the responsibility for regulatory oversight for these requirements.

- [15] In Part 3 of the Act, under the subtitle 'Solvency and Administration' there are several pertinent provisions such as section 34 which defines insolvency; section 36 which outlines the Registrar's power to request information; the duty of confidentiality stated in section 36A; and the Registrar's power of intervention in section 37. Section 37 is paramount, as it sets out seven grounds on which the Registrar may intervene in the affairs of an insurance company which is registered to conduct insurance business under the Act. Pursuant to section 38 a notice of intention to exercise this power and the grounds for doing so must be served on the company. Section 39 allows the Registrar to impose requirements on the company as part of the intervention. This is followed by section 40, which allows the Registrar to apply to the court for an order to place an insurance company, or part of the business of such company, under judicial management, if after exercising the power of intervention, the Registrar is of the opinion that it is necessary or proper to apply for such order.

- [16] The pertinent sections are reproduced below:

"34. Solvency

A company shall be deemed to be insolvent—

- (a) in the case of a company carrying on only long term insurance business, if the value of its liabilities exceeds its assets;*
- (b) in the case of a company carrying on only general insurance business, if the excess of assets over liabilities is less than the greater of the following amounts, namely—*
 - (i) \$200,000, or*
 - (ii) 20% of its premium income in respect of its general insurance business in its last preceding financial year;*
- (c) in the case of a company carrying on both long term insurance business and general insurance business, if the excess of its total assets over its total liabilities is less than the amount specified in paragraph (b).*

37. Power of intervention

(1) Subject to subsection (2) and to section 38, the Registrar may at any time intervene in the affairs of a company registered under this Act to carry on insurance business.

(2) The power of intervention conferred by subsection (1) shall be exercisable where the Registrar is satisfied that—

- (a) **the exercise of the power is essential in order to protect policy holders or potential policy holders of the company against the risk of the company's inability to meet its liabilities or, where a company is carrying on long-term insurance business, to fulfil the reasonable expectations of policy holders or potential policy holders;**
- (b) **the company has failed to satisfy any obligation imposed on it by this Act;**
- (c) **the company has furnished misleading or inaccurate information to the Registrar under or for the purposes of this Act;**
- (d) *adequate arrangements have not been or will not be made for the reinsurance of risks against which persons are insured by the insurer and in respect of which he or she considers such arrangements to be necessary;*
- (e) **an application for registration would be refused if such an application were made at the time of the proposed intervention;**
- (f) **a company is deemed to be insolvent in accordance with section 34; or**
- (g) **after liability has been established that there has been unreasonable delay in the settlement of claims under policies issued by the company.**

38. Notice of intervention

(1) The Registrar shall, before exercising the power conferred on him or her by section 37, serve on the company a written notice that he or she is exercising the power of intervention and the grounds on which it is being exercised.

40. Application for judicial management

(1) The Registrar may apply to the court for an order that a company or any part of the business of a company be placed under judicial management **where, after exercising his or her power of intervention under section 37(1), he or she is of the opinion that it is necessary or proper to apply for such an order.**

...

(3) The company and the Registrar are both entitled to be heard on any application made to the court for an order under this section.

.....

41. Order for judicial management

- (1) An order for the judicial management of a company or any part of the business of a company shall be subject to this section and sections 42 to 47.*
- (2) The court shall appoint a judicial manager who shall receive such remuneration from the company as it directs and it may at any time cancel the appointment and appoint some other person as the judicial manager.*
- (3) The court may, if it thinks fit, charge the remuneration charges and expenses of the judicial manager on the property of the company in such order of priority, in relation to any existing charges on that property, as it thinks fit.*
- (4) Where the court by order directs that a company or any part of the business of a company be placed under judicial management, the management of the company or of that part of its business to which the order relates shall, on and after the date specified in the order, vest exclusively in the judicial manager, who shall have complete control of the management of the company notwithstanding any appointment of a receiver prior or subsequent to the appointment of the judicial manager.*
- (5) A person who is appointed judicial manager shall not, except with the leave of the court, issue any new policies except paid up policies.*
- (6) The court shall issue to the judicial manager such directions regarding his or her powers and duties as it considers necessary.*
- (7) The judicial manager shall act under the control of the court and may at any time apply to the court for instructions as to the manner in which he or she shall conduct the judicial management or in relation to any matter arising in the course of the judicial management.*
- (8) The judicial manager shall give the Registrar such information as the Registrar may require and shall report to the Registrar whenever he or she intends to apply to the court for instructions and shall, at the same time furnish the Registrar with particulars of the application.*
- (9) The Registrar is entitled to be heard on any application made under subsection (7) and may make an application to the court to be heard on any matter relating to the conduct of the judicial management." [Emphasis added]*

- [17] The application is made under section 40 of the Act, on the premise that the Registrar after having intervened in the defendant's affairs in accordance with sections 37 and 38 of the Act, formed the opinion that it was necessary and proper to have the defendant placed in judicial management. If after having intervened and given all reasonable opportunity, the Registrar takes the view that the issues which caused the intervention have not been resolved, or that satisfactory progress is not being made towards resolution, then it would

be necessary and proper to make the application, with a view to having a judicial manager appointed, to remedy the situation.

[18] Consequently, the matters to be considered and examined when determining whether 'it is necessary and proper' to make such order, would be the same as the grounds contained in section 37 of the Act, on which the Registrar would have relied to intervene in the first place. The Court would be required to assess the evidence and circumstances pertaining to the grounds advanced by the Registrar, against the defendant's evidence and responses, in order to be satisfied that a judicial management order ought to be made.

[19] The case of **Superintendent of Insurance v Antigua Insurance Company Limited**⁸ is instructive in that regard. There the court in Antigua considered an application for a similar order, under the Antigua Insurance Act, which is in all material respects the same as the Act in Saint Lucia. Lanns J considered the grounds advanced by the Superintendent, which were equivalent to section 37(a) (b) and (h) of the Act in Saint Lucia, without resorting to English law or limiting consideration to the criteria for insolvency under the Companies Act. The court considered the grounds on which the Superintendent had intervened and concluded that those circumstances were still operating and justified granting the order. I intend to adopt the same approach, by considering the relevant grounds on which the Registrar has relied to make this application, and the defendant's evidence and responses. This will inform whether the same circumstances continue to exist and would justify placing the defendant in judicial management.

Should the defendant be placed under judicial management, pursuant to section 40 of the Act?

[20] Ms Nathalie Dusauzay and Mr. Hubert Deligny, both Chartered Accountants, testified on behalf of the claimant. Ms. Dusauzay is the Registrar of Insurance and Executive Director of the Financial Services Regulatory Authority ("the FSRA"). As Registrar she is charged with responsibility for the general administration of the Act. Mr Deligny is the Senior

⁸ ANUHCv2015/0562

Manager at the FSRA, which is the agency responsible for management of the Registrar's oversight of insurance companies, and the general administration of the Financial Services Regulatory Authority Act⁹. Mr James Hippolyte, Mr Gary Francis, and Mr Tahrik Hippolyte gave evidence for the defendant. Mr J Hippolyte is the Managing Director of the defendant; Mr. Francis is the defendant's Actuarial Consultant; and Mr T Hippolyte is the Assistant Accountant.

- [21] The claimant's evidence is that the defendant has breached its obligations under both the Act, and the Financial Services Regulatory Authority Act, in the following manner:- (i) there is a deficit in the statutory deposit and insurance fund, and insolvency exists by way of working capital deficiency; (ii) the defendant has failed to pay claims and judgments; (iii) deficiencies exist in management of its insurance and business records; and (iv) corporate governance and operational deficiencies exist. A Notice of Intervention dated 15th June 2018 ("the Notice") was served on the defendant and in the absence of any serious resolution after the intervention, the Registrar took the view that it was necessary to apply for a judicial management order.
- [22] The defendant does not dispute that the Notice was served pursuant to section 38 of the Act, which stated that the claimant would intervene in its operations effective 16th July 2018. The Notice also stated the following grounds of intervention:- (i) it was necessary to protect policyholders against the risk of the defendant's inability to meet liabilities; (ii) failure of the defendant to satisfy its obligations under the Act; and (iii) unreasonable delay in settlement of claims under policies issued by the defendant, after liability had been established. The Notice further directed the defendant to take remedial steps including satisfying the shortfall in its insurance fund and pledging additional assets, and to comply with the stipulated reporting requirements in respect of outstanding claims.
- [23] Mr. Deligny stated that after 15 months had elapsed from the date of the Notice, the defendant had made no notable progress towards resolving the issues raised in the Notice. The claimant took the view that a more stringent approach was required, therefore notice was given to the defendant of the intention to apply to the court under section 40 to

⁹ Cap 12.23 of the Laws of Saint Lucia

have the defendant placed in judicial management. The defendant was again invited to take the steps necessary to remedy the deficiencies. Notwithstanding a further intervening period of almost 18 months, the defendant still failed to address or correct the issues and continued to operate with a significant deficiency in working capital. Mr Deligny testified that the defendant is unable to satisfy its obligations relating to the statutory deposit and insurance fund requirements under sections 80 and 88 of the Act, and unreasonable delay in the settlement of claims continues, even after liability has been established.

- [24] The claimant says that these circumstances justify granting the order, because it is necessary for the protection of policyholders and third parties, and will vest the power to undertake restorative management of the defendant in an independent judicial manager. The proposed judicial manager consented to act in that capacity and has confirmed that there is no conflict of interest in that regard.

Deficit in the Statutory Deposit

- [25] Mr. Deligny refers to section 80(2)(d) of the Act which requires that a local insurer who carries on motor vehicle insurance business shall maintain a deposit with the claimant of either \$50,000 or an amount equal to 40% of its premium income, net of re-insurance premium, with respect to its motor vehicle insurance business transacted during the financial year last preceding the date of deposit, whichever is greater. He states that there were shortfalls in the defendant's statutory deposit over the period 2017 to 2020.
- [26] Mr. Francis stated on behalf of the defendant that that the minimum deposit requirement for the year ending 31st July 2021 was \$1,126,674.00. At that date, the defendant had \$1,168,680 in government bonds and fixed deposits hypothecated to the claimant. Thus, the deposit maintained with the claimant exceeded the minimum requirement by \$42,006.00, and the defendant has satisfied that requirement.
- [27] In response Mr. Deligny stated that the claimant's calculation of the statutory deposit over the period 31st October 2020 to 31st July 2021 shows that the defendant has failed to consistently maintain adequate liquid assets to meet this requirement. There has been no

increased in the statutory deposit, and the excess reflected in the unaudited accounts was due to a reduction in the amount of premiums, which is subject to change, and is not on account of any effort by the defendant to address the deficit.

Ruling

[28] On the evidence, the defendant has not refuted the claimant's assertion that the statutory deposit was in deficit from 2017 to 2020. Instead, Mr. Francis points to a period after the claim was filed in which the defendant managed to meet the requirement. I note that the claimant's witnesses agreed in cross examination that on a cursory review of the audited financial statements for the year ending 31st July 2021, served on the FSRA in the week before trial, it appears that the defendant is compliant with the statutory deposit requirement for 2021.

[29] This comes after several years of non-compliance, despite the Registrar's formal intervention and the filing of this application. The defendant has not advanced a precise plan of action to demonstrate that the statutory deposit requirement can and will be maintained. I agree with Counsel for the claimant that an eleventh-hour rush to meet this requirement does not negate the fact that at the time the claim was filed, the defendant had a historical pattern of failing to comply with the statutory deposit requirement. In any event this is not the only ground on which the application is hinged, and the Court must go on to consider all the evidence in relation to the other statutory requirements and deficiencies which the Registrar has underscored.

The Motor Fund

[30] Mr. Deligny referred to section 88 of the Act, which requires a local insurer to establish an insurance fund equal to its liability and contingency reserves in respect of each class of insurance business transacted, less the amounts held on deposit. He states that there were also shortfalls in the defendant's insurance fund over the period 2017 to 2020.

[31] Section 88 states as follows:-

"88. Establishment of insurance funds

(1) Despite section 80, every insurer shall, in respect of each class of insurance business being transacted, establish an insurance fund equal to its liability and contingency reserves in that class of business less the amounts held on deposit.

(2) Within 4 months of the end of each financial year an insurer shall place in trust the assets of its long term insurance fund, and of its motor vehicle insurance fund as the case may be."

[32] The defendant accepted that the insurance fund is in deficit, but takes issue with the claimant's computation, and says that steps are being taken on an ongoing basis to address the shortfall. Mr. Francis stated that the motor fund requirement for the year ending 31st July 2021 was \$3,230,154.00. The Insurance Regulations allows 20% of that fund to be financed with real estate assets, and the remainder with cash or near cash instruments. For the defendant this means \$646,030.81 in real estate and \$2,584,123.22 in cash or near cash instruments. Subject to those requirements, the defendant had \$646,031.00 in real estate, \$1,815,553.00 in cash, \$8,960.00 in shares, and \$42,007.00 in overflow from the statutory deposit. Therefore, by the Insurance Regulations, the defendant had a shortfall in the insurance fund of \$717,603.

[33] Notwithstanding the shortfall, he says the value of actual assets which the defendant assigned to the FSRA in respect of the motor insurance fund exceeds the required assignment, as the value of the defendant's real estate property assigned to the FSRA stands at \$4.4 million. Mr Francis contends that by virtue of Schedule 4 of the Act, the FSRA has used 14.7% of the value of that property to back the motor insurance fund, which equates to 20% of that fund requirement. However, the FSRA holds the remaining 85.3% which is valued at \$3.7 million, as an unrecognized asset. Should the unrecognized assets be recognized in full, the defendant would have had excess value of \$3.0 million from this asset, in the motor fund.

[34] Mr. Francis further suggests that assigning cash to the FSRA results in the defendant paying claims twice, because the Act requires that assets be assigned to match insurance liabilities, and the FSRA has been reluctant to release those assets to settle the

corresponding insurance liabilities. Therefore, the defendant must pay claims from other resources such as premiums on renewal, and new policies. He says as of 31st July 2021, the defendant's claims liability was \$2.7 million and its cash assignment to the FSRA was \$3.0 million. If the FSRA was to release cash from the motor insurance fund to pay claims this would not impair the net value of the defendant, and the result would be a net zero movement on the defendant's net assets. Such release would have the effect of reducing the pressure on the premium dollar to pay claims and meet other liabilities.

[35] Mr Francis explained that the motor insurance fund under section 88(1) is not a solvency margin account, but rather a fund to match the expected claim payments. This he says implies that these amounts are not maintained to protect policy holders but rather to protect claimants' rights to their claims. He opined that under section 136 of the Act, the defendant must provide reserves for meeting outstanding claims and by virtue of section 88(1), the reserves under section 137 must be lodged with the claimant. Thus, if these two funds are distinct and unrelated two questions would linger, namely (i) would this not be fully providing for the same claim twice, via the deposit to the motor insurance fund according to section 88(1), and again in the creation of the outstanding claim fund in section 137; and (ii) why is the claimant not regulating the fund mentioned under section 137 of the Act, but only emphasizes the sufficiency of the fund under section 88(1).

[36] He further asserts that releasing cash to pay claims does not diminish the claimant's role in protecting the public and policyholders' interest, as payment of claims from the motor insurance fund would serve that very purpose. He says, he is not advocating that the claimant release funds from the motor insurance fund to the defendant, as section 89(2) of the Act prohibits this, but the section does not restrict release of funds to claimholders. As such, funds released to claimholders would be using the motor insurance fund for the purpose for which it was intended, which is to pay claims when they are due. Although he agreed with the claimant that releasing funds from the motor insurance fund would reduce the defendant's liquidity ratio, he says that the liquidity ratio is not the only financial statistic to be used to assess the health of the defendant, and that the gearing (indebtedness) ratio is also important.

[37] Mr. Francis suggested that because section 93(2) of the Act allows the Minister of Finance to regulate the proportion of the real estate asset that backs the motor fund, the 20% limit on real estate value is not fixed, otherwise the law would not make provision for adjustment. He admits that he is unaware of any discussions with the Minister to increase the proportion of the motor fund allowed to be held in real estate and is unaware of how the 20% requirement was arrived at. Nonetheless he contends that assets used to match liabilities is determined by the characteristics of the liabilities. It is his view that the characteristics of insurance claims are changing throughout the Caribbean as society has become more litigious, with more claims being settled by the courts than in previous years. The time frame to settle is therefore longer, so in asset matching, the defendant should invest claims reserves in a basket of assets which match the liabilities in terms of dates and amounts for expected payments. He concludes by saying that in any event, the liquidity ratio will improve with time once the stress on the premium dollar is removed by the payment of claims from the motor insurance fund. He recommends that the better approach would be for the claimant to regulate the investment policy of the defendant, rather than only regulating the assignment of assets to the insurance fund, on the premise that other regulators within Caricom¹⁰ concentrate on the former because it is healthier for insurance companies.

[38] In response Ms. Dusauzay testified that the difference in computation of the motor insurance fund was due to the difference in the information reported by the defendant and the FSRA's records. She stated that the defendant's proposal to apply the insurance fund towards clearing liabilities is contrary to section 88 of the Act, which requires maintenance of that fund. Further, under section 82 of the Act such non-compliance would constitute a criminal offence, and the FSRA would not sanction any conduct which amounts to a criminal offence. She was of the view that to proffer such a proposal reveals that the defendant is unaware of its obligations under the Act, which further highlights the deficiencies in corporate governance, as another ground of this application.

¹⁰ Caribbean Community and Common Market

[39] Mr. Deligny testified that it was erroneous to suggest that the actual value of assets assigned to the claimant in respect of the insurance fund exceeds the required assignment. He explained that the Registrar is not in fact holding 85.3% of the defendant's real estate as an unrecognized asset. The full value has always been recognized as an allowable asset in keeping with the **Insurance (Admissible Assets and Valuation of Assets) Regulations**.¹¹ However, the types and value of assets which may form part of the insurance fund is stipulated in Schedule 4 of the Act. The very suggestion of recognizing the unrecognized value of an asset in full, to imply that the defendant has excess asset value in the fund, is clearly a misunderstanding or disregard of the provisions of the Act. His evidence is that the restrictions imposed on the quality of assets forming part of the insurance fund are intended to facilitate prudent asset management, to ensure that adequate liquid assets are available for an insurer to satisfy its obligations to policyholders and third-party creditors, within a reasonable time from receiving a claim or judgment. He considered it alarming, that Mr. Francis would suggest that provisions of the Act be amended to accommodate the defendant's illiquid status, as this would be to the detriment of policyholders and the wider public, whom the Act seeks to protect.

[40] In response to Mr. Francis suggestion that the defendant is paying claims twice, Mr. Deligny emphasized that the statement is misleading and discloses an inherent misunderstanding of the public policy objectives of the Act, which requires insurers to establish a fund to match their insurance liabilities, which in turn serves as a safety net for policyholders, in the event of company failure. To suggest that the Registrar should release assets to the defendant despite the substantial deficits in the insurance fund is a direct violation of the Act, as section 89(2) only permits the Registrar to approve the release of assets where the value of the assets in the fund exceeds the amount of the liabilities. Further, to say that release of the assets would result in a net zero movement in the defendant's net asset position is also misleading, as it ignores the impact this would have on the liquidity ratio, which is the crux of the matter on this application. The direct result would be a decrease in the defendant's liquidity ratio from 61.04% to 53.50%.

¹¹ Statutory Instrument No. 81 of 1995

Ruling

[41] Mr J Hippolyte and Mr Francis both admit that there has been a shortfall in the insurance fund. By virtue of this, the defendant has breached section 88 of the Act by failing to establish and maintain the insurance fund as required by law. Indeed, this is a criminal offence under section 82¹² of the Act, which in addition to payment of a fine on conviction, may also result in cancellation of registration by the Registrar. Yet Mr. Francis seeks to justify the breach by critiquing the Act and appears to suggest, either that the provisions of the Act be amended to accommodate the defendant's breaches, or that the statutory provisions be disregarded. It is trite that the law must be applied as it stands, until amended by Parliament. I considered these remarks to be entirely inappropriate and accordingly attached no weight to these aspects of Mr Francis evidence. The defendant was registered to conduct insurance business and knew or ought to have known of the requirements to be fulfilled under the Act. The defendant is also expected to ensure that it manages its business in a manner that would allow full compliance at all times and by failing to do so the defendant has acted imprudently.

[42] The defendant's suggestion of a release from the insurance fund to be applied towards clearing liabilities in these circumstances is also contrary to subsection 89(2) of the Act which states as follows:-

"89. Restriction on the use of assets in a fund

(1) The assets representing the long term insurance fund or the motor vehicle insurance fund shall not be applied directly or indirectly to any class of insurance business other than that in respect of which the fund was established and is maintained.

(2) Where the value of the assets in an insurance fund exceeds the amount of the liabilities attributable to the classes of insurance business referred to in section 88(2) the trustee, may, with the approval of the Registrar release the assets held in excess of the requirement of the fund. [Emphasis added]

¹² "82. Failure to make deposits - Any insurer or insurance broker who fails to comply with section 80 and section 88 of this Act commits an offence and is liable on summary conviction to a fine of \$10,000, and in addition to any other punishment, is liable to have his or her certificate of registration cancelled by the Registrar."

- [43] Thus, the Registrar may only approve a release of assets where the value of the assets in an insurance fund exceeds the amount of the liabilities. As the defendant's motor insurance fund is in deficit, it means that the value of the assets in that fund falls below the required threshold and there is nothing to be released.
- [44] Concerning Mr Francis' lingering questions on the assumption that there are two distinct and separate funds, and that the defendant may be providing for claims twice, Counsel for the defendant was correct in submitting that it is not the case that there is one fund established under section 88 (which is lodged with the Registrar) and another under section 137 (for the purpose of meeting outstanding claims). However, I do not agree with Counsel's assertion that the wording of section 137 leads to the conclusion that the fund established under section 88 is for the purpose of meeting outstanding claims, and not for buffering shocks to the defendant.
- [45] The relevant sections are reproduced below :-

"136. Reserves for unexpired risks

Every company shall, in respect of its outstanding unexpired policies, include in its liabilities in its annual statement deposited with the Registrar reserves computed to the satisfaction of the Registrar.

137. Reserves for outstanding claims

Every company shall, in addition to the reserves required to be included under section 136, provide reserves for meeting outstanding claims.

138. Methods for calculating reserves

(1) Every company shall furnish to the Registrar details of the methods used in calculating the reserves to be provided under sections 136 and 137.

(2) The Registrar may disallow any method used in calculating the reserves referred to in subsection (1) where he or she is satisfied that the method does not result in the provision of adequate reserves."

- [46] In my opinion, sections 136 and 137 do not establish funds but dictate what should be included in an insurer's annual statement deposited with the Registrar. Under section 136 the annual statement should include reserves in respect of outstanding unexpired policies,

and under section 137 in addition to the requirement of section 136, it should include reserves for meeting outstanding claims. There is no other fund in addition to the insurance fund. Section 89(2) of the Act states unequivocally that the insurance fund, must be calculated using a method allowed by the Registrar, and it shall not be released unless the value of the assets in that fund exceeds the amount of the liabilities. The Act makes no provision for this fund to be released to the insurer or directly to policy holders or third-party claimants, and such interpretation cannot be implied from section 89(2). Any such provision would have to be explicitly stated in the Act, and that is clearly not the case here.

- [47] Thus, the evidence establishes the continued existence of a significant deficit in the motor insurance fund, and confirms that the ground stated in section 37(2)(b) of the Act, that the defendant has failed to satisfy the obligations imposed by section 88 of the Act continues to exist. In that regard the defendant's indifferent attitude and blatant disregard for the legislative requirements which governs its operations would justify granting an order for judicial management.

Solvency/ Liquidity / Working Capital Deficiency

- [48] Mr. Deligny testimony is that the defendant breached Schedule 4(B)(a) of the Act which provides that real estate assets should not exceed 20% of the insurance fund. He says that between 2017 and 2020, illiquid investment properties accounted for about half of the defendant's total assets, consequently its liquid assets were insufficient to meet current liabilities. Based on the audited accounts up to the fiscal year 2020 the defendant remained illiquid and insolvent by cash flow measurements, and was unable to pay its debts, namely insurance claims and judgments as they became due. Despite the claimant directing the defendant to take corrective action to remedy the shortfalls in its working capital deficiency, to date the insurance fund remains in deficit.
- [49] He says the defendant has been unable to secure a bank loan, or liquidate its investment assets, or achieve a capital injection from a third party. In November 2020, the defendant informed the FSRA of the prospective sale of immovable property, from which the

proceeds of sale would be applied towards the shortfall. Throughout the period the defendant continued to operate with a significant working capital deficiency and the defendant requested that the claimant forbear on making the application for judicial management until 29th January 2021. Mr Deligny says up to the time the claim was filed in May 2021, the claimant was not aware of any such sale having taken place.

[50] Mr J Hippolyte's evidence is that the defendant is and has always been solvent. He says there has never been a cash flow or liquidity problem and relies on the defendant's actuarial report for the year 2016-2017. He provides an excerpt from the report, which in essence states that the defendant has assets which exceed its liabilities, and while legally solvent, the asset to liability ratio is too low for the comfort of a prudent insurer. Similarly, the defendant's liquidity is below expectation. A liquidity ratio of 2 or more is reasonable for a general insurance company however, the defendant has a ratio of just about 1. Moreover, a sizable portion of its liquid assets is ceded to the regulator, and should these assets be removed from the liquidity computation, the liquidity ratio would be closer to zero (0). In the circumstances, the report strongly recommended that the defendant immediately employ mechanisms to improve its liquidity, otherwise it stands a greater chance of ruin. It was considered prudent that the defendant explore options to increase its capital and thus its solvency. The report also recommends that although the defendant meets the legal capital requirements, given the defendant's risk exposure and its current level of capital, it should perform a minimum capital test from a risk perspective.

[51] Mr. Hippolyte further stated that the defendant experienced a worsening of its liquidity problem on the closure of S&A Brokerage Firm without turning over to the defendant almost \$0.5 million in premiums, on policies written by this broker. Notwithstanding this the defendant has had to honour all claims from those policies. Additionally, there has been embezzlement by employees, who have since been dismissed, and the matter was reported to the police. He indicates that although the defendant's premium income has been steadily increasing, these funds, which would normally be used to settle current claims, are being used to settle old claims. He suggested that if it were possible to apply the insurance fund to clear old liabilities, this would allow current claims to be settled

faster, and the defendant would be in a position to build back its cash assets. Liquidity would be further enhanced through the sale of some of the defendant's immovable properties which have been listed for sale. However, despite the defendant's best efforts, this has failed to achieve the desired result, thus far.

[52] Mr. Francis testimony in that regard is that in accordance with section 34(b) of the Act, the defendant will be deemed to be insolvent if its assets do not exceed its liabilities by the greater of \$200,000 or an amount equal to 20% of its premium income, net of reinsurance premium, with respect to motor vehicle insurance business transacted in the last preceding fiscal year. He says the defendant has always had assets in excess of the minimum requirement. In each of the six years prior, the defendant's solvency ratio exceeded minimum and never fell below seven times the minimum required solvency. Thus, the defendant is solvent and has never been insolvent. He considered that liquidity measures the ability to finance liabilities which are due within 12 months from cash or near cash assets. A liquidity ratio which falls below 1.0 suggests that there is not enough cash or near cash assets to settle all liabilities which become due within 12 months.

[53] Mr Francis says that as of 31st July 2021 the defendant had a liquidity ratio of 64%, however, the defendant does not depend on its liquid reserves to meet its liabilities, as it has assigned its liquid assets to the FSRA. Therefore, it uses premium income on current and potential policies to pay liabilities. Consequently, the defendant's low liquidity ratio is not because of poor fiduciary management but rather because of its investment policy of diverting excess cash into real estate, which has been known to protect the real value of investments and over time produces higher yields over cash assets. Realizing the FSRA's demand to improve liquidity, the defendant attempted to dispose of some of its real estate. However, as these circumstances would equate to a forced sale, the defendant runs the risk of yielding far less than the current value of these assets, when compared to selling without duress.

[54] In response Mr. Deligny testified that the defendant's solvency position, using total assets to total liabilities ratio is not in issue. Rather the issues relate to the defendant's illiquid position, which has resulted in unreasonable delay in the settlement of claims under issued

policies, and this is a ground for cancellation of its registration under section 20(1)(f) of the Act. Additionally, the defendant's non-compliance with sections 80 and 88, being the requirement to satisfy the statutory deposit and insurance fund, also makes the defendant liable to have its certificate of registration cancelled by the Registrar, under section 82.

- [55] Mr Deligny stated that it is incorrect to say that the defendant's policy of investing a disproportionate amount of its excess cash in real estate is a prudent one. True prudence would be to ensure that defendant's investment policy is in keeping with the provisions of the Act and that policyholders' premiums over which the defendant has a fiduciary responsibility, are invested in a manner that would allow the defendant to satisfy policyholders claims as soon as they become due. He testified that the defendant's liquidity ratio is reflective of poor fiduciary management, and the real issue for consideration is the defendant's assets held in the insurance fund and not the manner in which the defendant invests in other assets.

Ruling

- [56] I found the defendant's evidence to be contradictory on the issue of liquidity and cash flow insolvency. On one hand Mr J Hippolyte says the defendant has never had a liquidity problem but refers to an actuarial report prepared by Mr. Francis, which unmistakably says otherwise. The report very clearly states that the defendant had a severe liquidity problem. Thereafter, Mr Hippolyte proceeds to acknowledge a worsening of the defendant's liquidity problem, which he initially said did not exist, and confirms Mr. Deligny's evidence of his proposal to resolve the liquidity problem by sale of immovable property belonging to the defendant. He confirmed that an offer which was accepted in December 2020 did not materialize, and says that several properties are now listed with two real estate agencies.
- [57] Mr Francis is adamant that the defendant has never been insolvent by virtue of the value of its assets relative to its liabilities. However, balance sheet insolvency has never been the claimant's case, which has always been in relation to cash flow and the ability to settle claims as they fall due. He has blamed the defendant's illiquid position on the provisions of the Act, which does not allow more than 20% of the fund to be backed by real estate.

According to him the effect is to deprive the defendant of cash and to fail to recognize or approve of the defendant's 'better' investment policy. As already indicated, the Court will not countenance Mr. Francis' criticisms of the Act, but rather apply the law as it stands. Contrary to what Mr. Francis says, it is indeed poor fiduciary management to adopt an investment policy which flouts the legislation by which the defendant's operations are regulated, and which does not readily facilitate the conversion of investment properties to liquid cash, to meet liabilities in a timely manner.

[58] I accept the claimant's evidence that the defendant has maintained most of its assets in illiquid form (i.e. investment properties). The defendant's own evidence demonstrates that it has been unable to secure a viable sale for any of its investment properties, so as to remedy its working capital deficiencies. Mr J Hippolyte's evidence is that the board accepted a deposit of US\$100.00 to take a substantial property off the market, while the buyer awaited funds to be wired to the defendant for the purchase price of US\$1.2 million. In my view this was not indicative of a serious intention to sell, and unsurprisingly that sale did not materialize. Additionally, Mr Hippolyte agreed in cross examination that the board of the defendant, comprising himself and other family members, take all decisions concerning disposal of assets. Mr Deligny's countervailing testimony, which I accept, is that significant claims continue to remain unpaid, and since filing the application the FSRA has continued to receive new complaints about non-payment, up until October 2021.

[59] On the evidence, the defendant has continued to experience working capital deficits, despite the Registrar exercising the power of intervention to protect policy holders or potential policy holders of the defendant against the risk of the defendant's inability to meet its liabilities. The current liquidity ratio of 64% as stated by Mr Francis, means that the defendant is struggling to meet its short-term liabilities, which is evident from the inordinate delays in the payment of claims to policyholders and third-party claimants. These conditions are unacceptable for an insurance company and would undoubtedly justify an order for judicial management.

Failure to Pay Claims and Judgments

- [60] Mr. Deligny stated that section 91 of the Motor Vehicles Insurance Third Party Risks Act¹³ imposes a duty on insurers to satisfy judgments against persons insured for third party risks. Additionally, section 20(1)(f) of the Insurance Act imposes an obligation on insurers to settle claims payable under policies issued by it without unreasonable delay. In or around October 2017, the claimant became aware of increased complaints against the defendant of non-settlement of claims and unreasonable delay in settlement of claims or settlement by sporadic installments. As a result, the defendant was placed under ongoing monitoring by the FSRA, and the defendant was required to submit detailed monthly claims settlement reports. Upon review of the reports the claimant discovered that outstanding judgments against the defendant stood at approximately \$985,240.00.
- [61] Mr. Hippolyte's evidence contains a table which lists 12 claims and their status, with the majority being settled or partially settled, of which two were subject to court proceedings, with only one outstanding to be settled. He says the defendant has always been making payments to policyholders and third parties through a structured settlement approach, albeit with some difficulty. He states that the defendant is confident that under the guidance of a judicial manager and the court, its liquidity will be restored.
- [62] In response Ms. Dusauzay stated that Mr. Hippolyte's table does not contain an exhaustive list of judgments filed against the defendant and is only a subset of those for which the FSRA received documented complaints regarding settlement. The record of unpaid judgments was not with the FSRA, but with the defendant and the FSRA did not have the means to verify the information, as judgments are seldom registered against insurance companies unless, the company is sued.

¹³ Cap 8.02 of the Laws of Saint Lucia

Ruling

[63] The Court accepts the claimant's evidence that significant outstanding claims and judgments against the defendant continue in existence. No weight is given to the 11 claims which the defendant indicates it has managed to settle, especially where it is not denied that more claims exist, to the value of approximately \$985,240.00, as asserted by the claimant. Given that one of the primary purposes of the Act is to protect policy holders and the general public, this deficiency establishes the ground contained in section 37(2)(g) which gives the claimant the power to intervene, to protect existing and potential policyholders against the risk of the defendant's inability to meet its liabilities. The defendant's evidence has not disclosed any measurable improvement in that regard, as the claimant continues to receive complaints about unsettled claims. Mr Hippolyte's casual response is that these liabilities are being settled by structured payments, which includes post-dated cheques to be deposited at later dates.

[64] It is my considered opinion that policyholders and third-party claimants should not be subjected to these inconveniences, for payment of claims and is a clear violation of the standard expected of an insurer. In keeping with subsection 37(2) (g) of the Act, such infraction provides a sound basis for making a judicial management order.

Deficiencies in Management of the Insurance and Business Records

[65] Mr Deligny stated that the claimant conducted an onsite inspection at the offices of the defendant on 18th October 2019 and notified the defendant of its findings which included: (i) inadequate/poor maintenance of claim files which resulted in inaccuracies in calculating total claim liabilities, tracking and forecasting claims provisions, and delays in financial reporting; (ii) inconsistencies between estimates in the claims bordereaux and the information on the defendant's claim files/records due to omissions, which runs the risk of inaccurate reporting on the true nature of the insurance claims liabilities and the overall financial position of the defendant; (iii) a pattern of under-reserving of claims evident by reduction of provisioning without indication of the grounds for so doing, which causes

inconsistencies in the reported financial position and performance of the defendant, with the records showing knowledge and concurrence of the management of the defendant.

[66] The claimant says that despite dialogue with the defendant, these deficiencies persisted and further deficiencies in the management of the defendant's business became apparent including (i) inadequate or inconsistent records for statement of the insurance business carried on; (ii) inadequacies and inconsistencies in claims outstanding information; (iii) failures to submit audited accounts for the years ending 31st July 2018 and 31st July 2019 within the statutory timeframe and to settle penalty fees in full and on time; (iv) failure to submit on a timely basis quarterly accounts and monthly statements for claims bordereaux schedule of claim payments for each month, list of status of payments on structured settlements of claims, and monthly projections for income expenditure and cash flow. As a result, the FSRA determined that there was a significant discrepancy between the liabilities reported in the financial statements and the defendant's claims bordereaux.

[67] Mr J Hippolyte noted that the actuarial report for 2019 indicated that the defendant does not have a dedicated electronic information system for managing its claims and recommended the implementation of a claims processing module to its underwriting software. He says he is confident that by doing so, the defendant can achieve greater efficiency in its claim management operations.

Ruling

[68] The defendant's only evidence in this regard is an acknowledgement of the deficiencies alleged in the management of its business records. These deficiencies signal an overall mismanagement of the business affairs of the defendant, which goes towards establishing a basis for the claimant's intervention under section 37(2)(a) and (c) of the Act. As the defendant has not demonstrated that these matters have been satisfactorily addressed, the appointment of a judicial manager would be necessary, to arrest further deterioration and to restore integrity to the defendant's operational processes and procedures.

Corporate Governance and Operational Deficiencies

[69] Mr. Deligny says the FSRA conducted an onsite inspection at the offices of the defendant on 17th March 2021 to assess the defendant's operations given that the defendant had not submitted its audited returns, quarterly returns, or monthly reports. The key findings from the inspection revealed that requisite corporate governance structures remained lacking as (i) board meetings remained infrequent and the issue of production of minutes of these meetings persisted; (ii) the management structure required formalizing as the former manager/accountant/compliance officer operated part time and remotely without documented duties; (iii) the new accountant was employed as a remote employee; and (iv) the complaints handling process remained undocumented.

[70] In cross examination Mr J Hippolyte gave the directors of the defendant as his wife Mrs Berlanda Hippolyte, his daughter Ms Tohyla Hippolyte and himself. It was said that there are also two independent directors who are no longer functioning, and their replacement is yet to be addressed. Thus, the Board currently comprises of Mr Hippolyte and his family members, who take decisions on behalf of the defendant. However, Mr Hippolyte says in the decision-making process the board relies heavily on reports from experts.

Ruling

[71] None of the defendant's witnesses satisfactorily addressed the matters raised by the claimant in relation to governance and operational deficiencies. As the allegations were not denied, I accept them to be true in the absence of any contrary indication. These deficiencies reflect poorly on the overall management of the affairs of the defendant. When considered with all the other deficiencies already mentioned, the need to appoint a judicial manager becomes even more apparent, to protect policy holders and the public from the overall failures of the defendant.

Conclusion

[72] On the evidence I am satisfied that from 2017 to present, the defendant has:

- (i) maintained a deficit in the statutory deposit (except for 2021), and in the insurance fund, and continues to remain cash flow deficient;
- (ii) failed to pay claims and judgments to policy holders and third parties as they become due or within a reasonable time;
- (iii) failed to definitively address deficiencies in the management of its insurance records and the conduct of its business; and
- (iv) failed to decisively address corporate governance and operational deficiencies.

[73] The Registrar and the FSRA have been collaborating with the defendant to improve its overall fiscal, management and governance position from 2018. It is only under the threat of a looming order for judicial management, that the defendant has scurried to show some level of compliance, despite the Registrar intervening and giving directions and reasonable opportunity to address the problems.

[74] The application was therefore necessary to (i) protect policyholders against the risk of the defendant's inability to meet liabilities; (ii) remedy the defendant's breaches of its obligations under the Act; and (iii) cure unreasonable delay in settlement of claims under policies issued by the defendant after liability has been established

[75] Based on the foregoing, it was necessary and proper to issue the order made on 14th December 2021, which placed the defendant under judicial management. Mr Richard Surage of PKF Professional Services Inc. was appointed judicial manager, with immediate effect. All pertinent directions, including costs, were addressed in the said order.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]



Registrar