IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

APPLICATION FOR SPECIAL LEAVE TO
APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No. AL 0001 of 2005
BB Civil Appeal No. 18 of 2000

BETWEEN

BARBADOS REDIFFUSION SERVICE LIMITED APPLICANT

AND

ASHA MIRCHANDANI
RAM MIRCHANDANI
MCDONALD FARMS LTD. RESPONDENTS

Before the Honourables: Mr. Justice M.A. de la Bastide, President
Mr. Justice R. Nelson
Mr. Justice A. Saunders
Madame Justice D. Bernard
Mr. Justice D. Hayton

Appearances:

Sir Henry de B. Forde Q.C., Mr. Hal Gollop and Mr. C. Anthony Audain for the Applicant

Mr. Clement E. Lashley Q.C., Mr. David J.H. Thompson, Ms. Onika E. Stewart and Ms. Shaunita Jordan for the Respondents.

Judgment delivered on the 26th day of October, 2005,
by the President of the Court, The Rt. Hon. Mr. Justice M. de la Bastide

l. This case has the distinction of being the first to reach the Caribbean Court of Justice. It is an application for special leave to appeal to this Court from a decision of the Court of Appeal of Barbados dismissing an appeal against an order made by Husbands J. striking out the amended defence in an action for defamation brought by the respondents to this application (to whom I shall sometimes refer as 'the plaintiffs') against the applicant (to whom I shall sometimes refer as 'the defendant'). Husbands J. also ordered that judgment be entered against the defendant for damages to be assessed and costs.

2. The defamatory matter complained of in this action is contained in three calypsos which were alleged to have been played frequently by the defendant on its radio stations in June and July 1989, during the 'run-up' to the annual 'Crop Over' Festival and were broadcast live by the defendant when sung at the semi-finals and finals of the calypso competition held in connection with that festival. The nub of the plaintiffs' complaint is that all three calypsos alleged that they were selling to the public or for consumption by the public, diseased chickens which had died and not been slaughtered. The amended defence filed did not admit the broadcasts in question and contained a plea of justification.

3. The ground on which the defence was struck out, was the failure of the defendant to comply with an order made by Chief Justice Williams that if the defendant did not file by a specified date a further and better list of documents that were or had been in its possession, custody or power relating to the matters in question in the action, the defence should be struck out and judgment entered against the defendant for damages and costs.

History of the Proceedings

4. The original order for discovery was made on the summons for directions on the 7th July, 1992, by Husbands J. and required both sides to file and serve their respective lists of documents within 42 days. In fact the plaintiffs did not file their list of documents until the 15th September, 1993 and the defendant filed its list on the 23rd November, 1993.

5. The plaintiffs believing the list filed by the defendant to be incomplete, applied by summons dated the 12th October 1994, for an order inter alia that the defendant file a further and better list of documents within 14 days. The defendant not appearing, an order in terms of the application was made by Chief Justice Williams on the 24th November, 1994. The defendant not having filed any further and better list of documents within the prescribed time, the plaintiffs by summons dated the 30th December, 1994, applied for the 'unless' order which was made by the Chief Justice after hearing counsel on both sides on the 20th February, 1995.

6. The defendant filed what purported to be a further and better list of documents and a verifying affidavit within the time allowed by the 'unless' order. The only respects, however, in which the further and better list differed from the original list was that it corrected an error by substituting a 'record' of one of the calypsos for a 'tape' of that calypso in the list of documents in the defendant's possession, and added to that list four letters that were quite inconsequential.

7. The plaintiffs insisted that the defendant had, or had had, in its possession custody or power other documents which had not been disclosed, notably tapes of the three calypsos and a record in electronic or other form of the occasions when they were played on the defendant's radio stations. Accordingly, the plaintiffs applied by summons on the 13th March, 1995, for an order that the amended defence be struck out and that judgment be entered for the plaintiffs for damages and costs. The hearing of that summons by

Husbands J. was completed on the 19th September, 1996. His reserved judgment was not delivered until the 24th November, 1999, that is, more than three years later. As already indicated, he made the order sought by the plaintiffs.

8. An application for leave to appeal against that judgment was filed on the 7th December, 1999. Leave was granted and the appeal heard by the Court of Appeal on the 17th July, 2000. Judgment was reserved and was delivered by the Court of Appeal on the 20th August, 2004, that is, more than four years later. The Court of Appeal dismissed the appeal and affirmed the order of Husbands J.

9. On the 10th September, 2004, the defendant applied by motion to the Court of Appeal for leave to appeal to the Judicial Committee of the Privy Council against the judgment of the Court of Appeal. That application was heard on the 7th and 8th March, 2005. On the 23rd June, 2005, the Court of Appeal gave judgment refusing leave to appeal to the Judicial Committee. In fact, on a cross-application made by the respondents, the Court of Appeal struck out the application for leave as frivolous and vexatious and an abuse of the process of the Court. In doing so, the Court of Appeal rejected a number of technical grounds advanced by the respondents but accepted the submission that an appeal to the Privy Council was bound to fail as it sought to challenge concurrent findings of fact made by the courts in Barbados. I should state here that it is the view of this Court that the respondents' counter-motion should not have been entertained. It merely served to add unnecessarily to the costs as the same arguments by which it was supported, could and should have been used in opposition to the motion.

10. On the 15th July, 2005, the present application for special leave to appeal to this Court, was filed.

The jurisdiction issue

11. The application to this Court is based on the premise that subject to the applicant obtaining from this Court the special leave which it seeks, it has a right of appeal to this Court. The respondents never sought to challenge the existence of this right and even after the matter was raised by the Court with the applicant's counsel in the course of his oral submissions, counsel for the respondents did not accept the implied invitation to address this issue. Nevertheless, since it is an issue which goes to our jurisdiction, I think we must address it. The question put broadly is whether the legislation by which the Judicial Committee of the Privy Council was replaced by the Caribbean Court of Justice as the final court of appeal for Barbados, has any, and if so, what impact on the applicant's right to pursue an appeal against the Court of Appeal's decision affirming the order of Husbands J.

The Legislation

12. The legislation in question consists of two principal Acts. The first is the Constitution (Amendment) Act, 2003 ('the 2003 Act'). This Act amended the Barbados

Constitution firstly by substituting the words "the Caribbean Court of Justice" for the words "Her Majesty in Council" wherever the latter appeared in the Constitution. The 2003 Act also inserted in the Constitution a number of new sections numbered and lettered consecutively 79B to 79I dealing with various aspects of the Caribbean Court of Justice.

13. The new section 79C provides:

> "There is constituted a Judicature consisting of
>
> (a) The Caribbean Court of Justice Established by the Agreement; and
>
> (b) the Supreme Court of Judicature and Magistrates' Courts
>
> that shall exercise jurisdiction under the Constitution or any other law."

The Supreme Court of Judicature is defined in the amended section 80 (1) as consisting of the Court of Appeal and the High Court.

14. The new section 79D (1) provides in part:

> "The Caribbean Court of Justice
>
> (a) shall be the final court of appeal from any decision given by the Court of Appeal. …"

15. This Act was assented to by the Governor General on the 24th April, 2003, but was by section 10 to come into effect on a date to be fixed by proclamation.

16. The second principal Act was the Caribbean Court of Justice Act ('the CCJ Act'). This Act provides in section 3 that the Agreement Establishing the Caribbean Court of Justice ('the CCJ') shall have the force of law and in section 4 (1) that the CCJ shall have "appellate jurisdiction provided for in this Act as is conferred on it in accordance with the provisions of Part III of the Agreement."

17. Section 6 provides for appeals as of right to the CCJ from the decisions of the Court of Appeal in a number of different categories of case, none of which catches the instant case. Section 7 provides for an appeal to this Court with leave of the Court of Appeal inter alia "in any civil proceedings where, in the opinion of the Court of Appeal, the question is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court".

Section 8 provides:

> "Subject to section 7, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal in any civil or criminal matter".

18. This Act was assented to on the same day as the 2003 Act and was also to come into effect on a date to be fixed by proclamation. By proclamations contained in Statutory Instruments numbered 44 and 45 respectively of 2005, the 8th April, 2005, was the date appointed for the coming into operation of both the CCJ Act and the 2003 Act.

19. On the 14th April, 2005, the Acting Governor-General assented to two other Acts, namely:

The Constitution (Amendment) Act, 2005; and
The Caribbean Court of Justice (Amendment) Act, 2005.

The first of these Acts made certain further amendments of the Constitution, none of which has any relevance to this case. The second of them, apart from making certain amendments of the CCJ Act which also are not relevant for present purposes, corrected an omission in that Act by introducing a new section, section 25A, which repealed sections 64 and 65 of the Supreme Court of Judicature Act. Section 64 (1) of the Judicature Act provided that an appeal should lie from decisions of the Court of Appeal to Her Majesty in Council as of right in certain specified circumstances, and with leave of the Court of Appeal "if, in the opinion of the Court of Appeal, the question involved in the appeal is one that, by reason of its general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision."

This provision was quoted by the Court of Appeal in its judgment on the application for leave to appeal to the Privy Council and was applied by them to the facts of that case in coming to their decision. Yet, it is clear that before they gave that decision, that provision had been repealed.

The time sequence

20. If one superimposes the legislative time-table on the chronology of these proceedings, what emerges is that the right of appeal to this Court which the applicant is seeking to invoke, first became part of the law of Barbados on the 8th April, 2005 ('the commencement date'), while the decision against which the applicant seeks to appeal was given by the Court of Appeal on the 20th August, 2004, that is some seven and one-half months earlier. The hearing of the application for leave to appeal to the Privy Council had been completed before the commencement date and all that was outstanding on that date was the delivery of judgment by the Court of Appeal. What appeal then, if any, could the applicant pursue after the commencement date and how could it do so?

21. Unfortunately the transitional provisions contained in the 2003 Act and the CCJ Act are very basic and provide us with limited guidance. Moreover they are in one respect inconsistent. In the 2003 Act section 11 provides as follows:

> "The provisions of this Act
>
> (b) shall not affect
>
> (i) an application that has been made to the Judicial Committee of the Privy Council; or
>
> (ii) any matter that is before the Judicial Committee of the Privy Council
>
> before the date of commencement of this Act; …"

This section renders the amendments of the Constitution made by the 2003 Act inapplicable to proceedings in which an application for special leave to appeal to the Privy Council was pending on the commencement date or to any matter that was on that date "before the Judicial Committee of the Privy Council". In cases falling within this provision, the Privy Council would retain its jurisdiction to grant special leave to appeal to it and to hear appeals from the Barbados Court of Appeal in accordance with the regime in force prior to the 2003 amendments. This provision, however, does not catch cases like the present one in which what was pending on the commencement date was not an application to the Judicial Committee for special leave but an application for leave to the Court of Appeal.

22. In the CCJ Act the transitional provision is contained in section 25 which reads in part as follows:

> "(1) The provisions of section 4(1) shall not affect any proceedings pending before the Judicial Committee of the Privy Council immediately before the commencement of this Act.
>
> (2) For the purpose of this section, proceedings shall be treated as pending when leave to appeal to the Judicial Committee of the Privy Council has been granted. …"

There are two things to note about this section. The fact is that while it exempts proceedings pending before the Judicial Committee from the operation of section 4 (1), this exemption does not apply to sections 6, 7 and 8 (referred to above) or to section 25A which, as we have seen, repealed sections 64 and 65 of the Supreme Court of Judicature Act. Secondly, this section treats proceedings as pending before the Privy Council only if leave to appeal to the Judicial Committee was given prior to the commencement date. Accordingly, proceedings in which an application for special leave had been made to the Judicial Committee before the commencement date but had not on that date been determined, would not be affected by the amendments of the Constitution made by the 2003 Act, but on the other hand, would not qualify as 'pending proceedings' for the purposes of the CCJ Act, and so would be impacted by section 4 (1) of that Act by which the appellate jurisdiction of the CCJ was established. This inconsistency is not relevant on the facts of this case, and so does not have to be resolved by us in this judgment. We would point out, however, that the Constitution is the supreme law of Barbados and therefore, its provisions would prima facie prevail in the event of conflict with another law.

23. These rather sparse transitional provisions, which are inapplicable to the instant case, are to be contrasted with the much fuller treatment given to this aspect of the matter in New Zealand's Supreme Court Act, 2003, by which appeals to the Privy Council were abolished and replaced by appeals to a new indigenous court called the Supreme Court with effect from the 1st January, 2004. One finds in sections 42, 50, 51, 52, 53 and 54, of that Act detailed provisions specifying what is to happen in a variety of situations in which persons who wished to pursue or were in the course of pursuing an appeal against a decision of the Court of Appeal of New Zealand, found themselves on the lst January, 2004.

General Principles of Construction

24. We are forced to fall back therefore on general principles of construction to determine the question of jurisdiction in the instant case. First of all, we adopt the view that the substitution of one court of final resort for another is to be regarded as a procedural rather than a substantive change in the law. The proper approach to construction in such cases is formulated in Bennion on Statutory Interpretation, 4th edition, page 269, section 98, as follows:

> "Because a change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings. This presumption does not operate where, on the facts of the instant case, to apply it would contravene the principle that persons should not be penalized under a doubtful enactment".

In our view, therefore, the presumption against legislation which changes the substantive law having a retrospective effect has no application here. It cannot be argued therefore that the new legislation should not be interpreted in a way which would affect a right of appeal that had already accrued.

25. In the passage just quoted Bennion refers to the principle that persons should not be penalized under a doubtful enactment. One should therefore avoid a construction of the new legislation which would lead to the result that a party is deprived of a right to make or pursue an application for leave to appeal to the Judicial Committee without at the same time acquiring a corresponding right to apply for leave to appeal to this Court. It must be assumed that in all those cases in which the effect of the legislation was to abrogate an existing right of appeal to the Judicial Committee whether that right was qualified or unqualified, it intended to confer a corresponding right of appeal, similarly qualified or unqualified, to the Caribbean Court of Justice. Otherwise persons would be penalized under a doubtful law.

26. Further, Parliament has by the transitional provisions set out above expressly defined the circumstances in which an existing right to pursue an appeal to the Judicial Committee shall be preserved after the commencement date. It is reasonable to infer that Parliament intended that in any case falling outside the ambit of that provision, an appeal would no longer lie to the Judicial Committee after the commencement date, but instead an appeal would lie to this Court, subject of course to the fulfilment of the conditions and the procedural requirements imposed by the new legislations.

27. For these reasons, we are satisfied that subject to the applicant obtaining special leave from this Court upon an application made within the relevant time-limit and in compliance with such procedural requirements as may be applicable, the applicant has a right of appeal to this Court. We would have reached the same conclusion even if the Court of Appeal had purported to give him leave to appeal to the Judicial Committee or if he had made no application for leave to appeal to the Court of Appeal, but the time for doing so had not expired before the commencement date. The position of course would be different in the case of a person who on the commencement date had no possibility of

pursuing an appeal to the Privy Council. His right of further appeal having died, could not be resurrected on or after the commencement date by the new legislation.

***In limine* objection**

28. I turn now to an *in limine* objection to the application for special leave taken by counsel for the respondents. He submitted that it was a pre-condition of applying to this Court for special leave that application should first be made to the Court of Appeal for leave to appeal to this Court. He referred to sections 7 and 8 of the CCJ Act which, as we have seen, provide respectively for appeals to this Court with the leave of the Court of Appeal and with special leave of this Court. He placed great reliance on the words "subject to section 7" by which section 8 was introduced. He argued that those words made it compulsory in every case for an application to be made under section 7 before one was made under section 8.

29. We do not agree that the words "subject to section 7" have that effect. It is true that when one provision is expressed to be subject to another, the effect is to make the first provision subordinate to the second, so that to the extent that full force and effect cannot be given to both provisions without a conflict between them arising, the first provision must yield to the second. The impact of these words, therefore, depends very much on the content and scope of each provision. In the instant case both sections 7 and 8 provide different routes by which a party aggrieved by a decision of the Court of Appeal may reach this Court. The route via section 7 involves the obtaining of leave from the Court of Appeal on certain grounds which are specified in that section. The route via section 8 involves obtaining special leave from this Court on grounds which are unspecified but are left to be determined by us. Notwithstanding the use of the words "subject to section 7" in section 8, these two routes are separate and independent of each other and do not intersect. The limitations imposed by section 7 on the grant of leave by the Court of Appeal do not apply to the grant of special leave by this Court under section 8. Clearly the words "subject to section 7" do not have that effect. Similarly, it would be reading far too much into those words to construe them as requiring that every application made to this Court for special leave under section 8, must be preceded by an (unsuccessful) application for leave under section 7. If that had been the intention, one would have expected the draftsman to so provide in clear and explicit terms.

30. There are moreover, two factors which militate against construing the words "subject to section 7" in the way suggested by counsel for the respondents. The first is that such a construction would in some cases at best produce an absurd result. It would mean for instance that in criminal matters, in which the Court of Appeal has no power to grant leave under section 7, but this Court may grant special leave under section 8, a would-be appellant would have to make a patently hopeless application for leave to the Court of Appeal simply to be able to apply to this Court for special leave. A similar absurdity would occur in any case in which the ground on which leave to appeal was sought, was not one which would entitle the applicant to leave under section 7.

31. Secondly, the proposed construction would give rise to an internal inconsistency in the CCJ Act itself. I have already in this judgment referred to section 4 (1) (b) of the

CCJ Act. This provides that the Court shall have appellate jurisdiction "provided for in this Act as is conferred on it in accordance with the provisions of Part III" of the Agreement Establishing the Court. Now, Part III of that Agreement contains the following provision in Article XXV.4:

> "Subject to paragraph 2, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter".

Paragraph 2 of the same Article to which reference is made, provides for an appeal to this Court as of right in specified categories of case. It is in fact reproduced in section 6 of the CCJ Act, while paragraph 3 of Article XXV of the Agreement deals with appeals with the leave of the Court of Appeal and is reproduced in section 7 of the CCJ Act. When one reads Article XXV, therefore, side by side with sections 6, 7 and 8 of the CCJ Act, it seems likely that the Parliamentary draftsman by inadvertence made section 8 'subject to section 7' instead of 'subject to section 6'. Be that as it may, if one gives to those words "subject to section 7" the meaning contended for by the respondents, it would have the effect of significantly altering the appellate jurisdiction conferred on the Court "in accordance with the provisions of Part III of the Agreement" and thus give rise to a serious inconsistency between two provisions of the same Act. Such a construction is to be avoided unless the provisions giving rise to it are clear and unambiguous. That is certainly not the case here.

32. It is difficult to see what purpose, if any, is served by the words "subject to paragraph 2" in paragraph 4 of Article XXV. They appear to be unnecessary and to state the obvious. It is equally doubtful whether the words 'subject to section 7' at the beginning of section 8 serve any purpose other than to emphasise that the right to seek leave from the Court of Appeal to appeal to this Court on any of the grounds specified in section 7 is in no way diminished or impaired by the right to apply to this Court for special leave on any ground, regardless of whether or not it is one of those specified in section 7. One consequence of this is that if an applicant without good reason by-passes the Court of Appeal and applies to us for special leave on grounds on which the Court of Appeal might have granted leave, then he can expect at the very least to be penalized in costs. In the instant case it would be unreasonable to expect or require the applicant to have applied to the Court of Appeal for leave given that Court's rejection of the respondent's application for leave to appeal to the Judicial Committee.

33. Although this cannot be used as an aid to the interpretation of the CCJ Act, it is to be noted that the rule-making authority has proceeded on the assumption that a party may apply to this Court for special leave either after having made or without having made, an application for leave to the Court of Appeal. Rule l0.4 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2005 ("the Appellate Jurisdiction Rules") provides alternative time-limits for the making of an application for special leave depending on whether or not such an application has been preceded by an unsuccessful application for leave to the Court of Appeal. These time-limits are 42 days from the date of the

judgment from which special leave to appeal is sought or 21 days from the refusal of leave to appeal by the Court of Appeal.

Time-limit

34. No point was taken by the respondents that this application was out of time, and rightly so. But given the length of time which elapsed between the delivery on the 20th August, 2004, of the judgment against which it is sought to appeal and the filing of this application on the 15th July, 2005, it would be as well to explain why the application is not out of time. The reason is to be found in Part 19 of the Appellate Rules, which reads as follows:

> "In the case of appeals from judgments delivered before the coming into force of these Rules the time for doing any act required by these Rules shall not begin to run until the day after that on which these Rules come into force."

Under Rule l.1(b) the Appellate Rules came into force on the 14th June, 2005. Accordingly, the application for special leave, having been filed on the 15th July, 2005, was within the 42 day limit prescribed by Rule l0.4. Needless to say, Part 19 will only apply in cases in which there is a substantive right of appeal to this Court, whether conditional or unconditional, in accordance with the principles enunciated above.

The central issue

35. We come now to the central issue in this case. Ought we to grant special leave to appeal to this Court in the circumstances of this case? As I have pointed out, section 8 of the CCJ Act has no doubt quite deliberately, left it entirely to this Court to formulate the principles by which it will be guided in determining whether to grant or to refuse special leave to appeal to it. We do not propose at this early stage to attempt to make any comprehensive formulation of those principles. We propose rather to deal with the matter on a case by case basis and to limit ourselves to articulating in each case the principle by which we have been guided in granting or refusing special leave to appeal. Secondly, in shaping these principles we will of course pay attention to the practice adopted by the Judicial Committee, but we will not feel bound to adhere strictly to it. We will also pay attention to the practice and principles adopted by final courts of appeal in other Commonwealth countries, but we will develop our own jurisprudence in this area incrementally on an "as needed" basis.

Counsel's Submissions

36. There were passages in both the written and oral submissions of counsel for the applicant in which he seemed to be treating this application as though it were an appeal from the refusal of leave by the Court of Appeal and more particularly from that Court's ruling that the question involved in the appeal was not one that by reason of its general or public importance ought to have been submitted to Her Majesty in Council for decision pursuant to section 64 (1) (b) of the Supreme Court of Judicature Act. As I have already pointed out, when leave to appeal to this Court has already been refused by the Court of Appeal, an application to this Court for special leave to appeal is not an appeal against the refusal of leave by the Court of Appeal. A fortiori, when the application to the Court

of Appeal was for leave to appeal to Her Majesty in Council. This, however, does not preclude the applicant in such circumstances from arguing in support of an application to this Court for special leave that in the words of section 7 (a) of the CCJ Act "the question is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court". It is true that strictly speaking, the better course of making that argument first to the Court of Appeal was not followed, but it would have been a futile exercise to repeat before the same Court the same argument which had failed to persuade it to grant leave to appeal to the Privy Council.

37. This argument was in fact advanced before us by the applicant. As I understood the argument, the great general or public importance of "the question" derived from the fact that the business practices allegedly imputed to the plaintiffs by the calypsos complained of would have created a serious risk to the health of the public in Barbados. Further, the calypsos were alleged to have been broadcast on the occasion of the semi-finals and finals of the calypso competition held as part of the cultural celebration of the biggest national festival in Barbados. The "question" to which these circumstances would lend importance, was presumably how they impacted on the liability of the defendant and the scope of defences based on the interest of the public in hearing the calypsos. But although these words are omitted from section 7(a) of the CCJ Act, the "question" whose importance is to be assessed, must be the question "involved in the appeal", and the question involved in the appeal which the applicant seeks leave to pursue, has nothing whatever to do with the law of defamation. The question involved in the proposed appeal is whether the exercise of the judge's discretion in barring the defendant from contesting liability because of its failure to comply with an "unless" order, was so flawed as to justify an appellate court setting it aside. That *per se* is not a question of great general or public importance. We therefore reject this submission by the applicant.

38. Another submission made by counsel for the applicant was that the order for a further and better list of documents was wrongly made. It was submitted that the affidavit verifying a list of documents is conclusive and that a party is not entitled to apply for a further and better list unless it appears on the face of the list provided or on the face of the disclosed documents or on an admission, that in all probability the party has or has had other relevant documents beyond those disclosed. It was further submitted that given the allegations made by the first respondent in her affidavits, the respondents should have applied for an order requiring the defendant to state whether certain specified documents were or had been in its possession, custody or power and not for an order requiring a further and better list of documents. There was no appeal, however, against the order made for the filing of a further and better list of documents by the applicant. The applicant therefore cannot ask for its disobedience (if any) of that order to be excused on the ground that as a matter of law that order was wrongly made. The question of the conclusiveness of the original list of documents and the further and better list filed by the applicant and the affidavits verifying them, is relevant however, to the question whether there was compliance by the applicant with the orders made. This question is at the very heart of the matter.

Judgments of the Courts below

39. Husbands J. found that there had been a failure by the defendant to comply with the "unless" order of the Chief Justice and that that failure was intentional and contumelious. It was on that basis that he made the order striking out the defence. His judgment contains no analysis of the evidence with regard to the existence of those undisclosed documents which were alleged to be or to have been in the applicant's possession, custody or power and no identification of these documents.

40. The Court of Appeal in its judgment did examine the two affidavits sworn by Mr. Fernandes in support of the applicant's contention that it had made full disclosure. The Court drew an inference from these affidavits that the applicant had had log tapes kept on a daily basis which recorded everything that had been played on the applicant's station during the relevant period but that those tapes had been destroyed. The Court held that these tapes should have been but had not been disclosed in the list of documents which had been in the applicant's possession. The Court was obviously sceptical of Mr. Fernandes' principal affidavit which it described as "carefully and cleverly drawn". The Court of Appeal also concluded on a balance of probability that the applicant had recordings or tapes of the live broadcasts of the semi-finals and finals of the calypso competition but may have recycled or otherwise disposed of them. Again, it held that the applicant should have but had not disclosed these recordings or tapes as documents which had once been in its possession. On the basis of these findings the Court of Appeal held that the applicant did not comply with the "unless" order of the Chief Justice. In the absence of any satisfactory explanation or excuse provided by the applicant for its failure to comply, the Court of Appeal held that that failure was intentional and contumelious. They therefore could find no fault with the exercise of the Judge's discretion and upheld his order striking out the amended defence.

41. Counsel for the respondents submitted that this was not a proper case in which to grant special leave to appeal as the Judge had exercised his discretion on the basis of facts which were the subject of concurrent findings made by the Judge and the Court of Appeal. This was a case therefore, in which an appellate court would in accordance with a well established principle and practice, refuse to interfere with the exercise of the Judge's discretion. Insofar as that argument relies on concurrent findings of fact, however, we must point out that (a) the judgment of Husbands J. does not disclose what findings of fact he made with regard to the non-disclosure issue, far less the basis for them; (b) such findings of fact as were made by the Court of Appeal consisted of inference from the documentary evidence and (c) neither the Judge nor the Court of Appeal had the advantage of seeing and hearing the deponents give their evidence and be cross-examined on it. In those circumstances, an appellate court is in as good a position as the Judge of first instance to make findings of fact and is entitled to review those made in the courts below. We do not accept, therefore, the submission that special leave should be refused because the appeal is bound to fail.

This Court's decision

42. Our function on this application is a very limited one. Our concern is only whether there is some special feature of this case which would warrant our giving special

leave to appeal to this Court in these circumstances in which there is no appeal as of right and no basis on which the Court of Appeal could have granted leave to appeal to us. Given our limited function at this stage, it would be quite wrong for us to attempt to come to any conclusion as to whether we are satisfied that there is such a flaw in the exercise of the Judge's discretion as would justify our interfering with it and quashing the order he has made. Indeed, we are not in a position to do so anyway, as two of the affidavits sworn by the first respondent and filed on the 9th October, 1995, and the 10th January, 1996, respectively, were not put before us.

43. It has been said that the Judicial Committee will grant special leave to appeal if there has been either an "egregious" error of law or a substantial miscarriage of justice. In this case there is no egregious error of law involved, but the question does arise whether in the circumstances of this case there exists a real risk that allowing the order barring the applicant from defending this action to stand, without being exposed to further scrutiny by this Court, will result in a serious miscarriage of justice. The sanction imposed on the applicant is a drastic one as it denies it the opportunity to defend the action on its merits. The applicant has always manifested a serious intention to contest liability in this action and there is at least the possibility that if liability is established, the damages in this action will be substantial.

44. We are certainly not in a position to hold, and do not hold, that the sanction imposed was wrongly imposed. We have, however, come to the conclusion that in the circumstances of this case the possibility that it may have been wrongly or unfairly imposed is significant enough to warrant the issue being fully and finally ventilated before this Court. Obviously we do not wish to say very much at this stage as what we say may be misconstrued as indicative of the likely outcome of the appeal. We would indicate, however, that in concluding that there is a more than negligible risk of a miscarriage of justice, we have a concern whether it was open to the courts below on the evidence before them and in the context of interlocutory proceedings for discovery, to find that there was a contumelious failure by the applicant to comply with the "unless" order.

Because of this concern we have come to the conclusion that we should grant special leave to appeal in order to eliminate the risk that leaving matters as they are, may result in a miscarriage of justice.

Delay

45. We are very conscious of the enormous delay which has occurred in this case and about which both sides have complained. The parties themselves have contributed to some extent to the delay. The respondents and the applicant took over 12 and 14 months respectively to file lists of documents which they had been ordered to file within 42 days. After the applicant had filed its list of documents, it took the respondents 11 months to apply for a further and better list. But these delays are dwarfed by the delays of Husbands J. and the Court of Appeal in giving their respective judgments. The periods for which these judgments remained undelivered total more than seven years. We would be failing in our duty if we did not express our strong disapproval of judicial delays of

that order. They deny parties the access to justice to which they are entitled and undermine public confidence in the administration of justice. We would like to think that such delays are now a thing of the past in Barbados. We realize that the effect of our decision may be to postpone, either minimally or substantially, depending on the outcome of the appeal, the final resolution of this matter. It would be unfair, however, to the applicant to deny it the special leave to which it is otherwise entitled, because of delay in the proceedings for which it is not for the most part responsible. It is to be hoped that the history of delay in this case will serve to accelerate the pace at which the matter proceeds from now on. We will certainly do whatever we can to ensure that.

Bias

46. Before concluding this judgment we should mention that it was submitted by junior counsel for the applicant as a ground on which special leave should be granted, that Mr. Justice Chase who was one of the three Judges who heard the appeal from Husbands J. in the Court of Appeal, was disqualified by virtue of bias. The allegation of bias was based on the fact that Mr. Justice Chase had before his elevation to the Court of Appeal, dealt with the respondents' summons to strike out the defence by adjourning that summons, fixing a time for the filing of an affidavit by the defendant and ordering the costs of the day to be paid by the defendant. No objection to Mr. Justice Chase sitting was taken in the Court of Appeal although junior counsel for the applicant was present both then and when Mr. Justice Chase dealt with the summons. We accept counsel's explanation that he had in fact forgotten about Mr. Justice Chase's earlier involvement in the matter. His failure to recall it, however, underlines the insignificance of that involvement which did not require Mr. Justice Chase to consider, far less to pronounce on, the merits of the application. In our view, no reasonable person could in those circumstances have got the impression that Mr. Justice Chase might show partiality to one side or the other when dealing with the appeal. There is no merit therefore in this submission and we would like to make it clear that this special leave which we have given to the applicant to appeal to this Court, does not extend to this allegation of bias and we will not permit it to be raised again before us.

For these reasons, we granted the applicant special leave to appeal and reserved the costs of this application to the hearing of the appeal. An order was made accordingly in terms agreed by counsel on both sides on the 9th August, 2005.

M.A. de la Bastide (President)

Justice Rolston Nelson

Justice Adrian Saunders

Justice Désireé Bernard

Justice David Hayton