

**IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Application No GYCV2025/001
GY Civil Appeal Nos 190 of 2023**

BETWEEN

**SATYANAND PERSAUD
TAIJ BAHADUR**

APPELLANTS

AND

**DHAVANIE PERSAUD
DHAVANIE PERSAUD (Administrator of the
Estate of Shamsundar Persaud)**

RESPONDENTS

Before: **Mr Justice Anderson, President
Mme Justice Rajnauth-Lee
Mr Justice Jamadar
Mme Justice Ononaiwu
Mr Justice Eboe-Osuji**

Date of Judgment: **26 February 2026**

Appearances

Ms Jamela Ali SC, Mr Sanjeev Datadin and Ms Mohanie Anganoo for the Appellants

Mr Timothy M Jonas SC and Ms Kristal T Abrams for the Respondents

Practice and Procedure – Appeal – Review of refusal of application for leave to appeal – Failure to apply for extension of time to cure late application for leave to appeal – Curative power and corresponding duty of Court of Appeal – Jurisdiction – Risk of miscarriage of justice – Court of Appeal Rules, Ord 1, r 8.

SUMMARY

The appellants, Satyanand Persaud and Taij Bahadur, are the uncles of the first respondent, Dhavanie Persaud, who appears both in her personal capacity and as the representative of her late father's estate. While the underlying dispute concerns an allegation that the estate owes the first appellant a USD400,000 debt, the scope of this appeal to the Caribbean Court of Justice ('CCJ') was limited to a review of the decision of the Court of Appeal, dated 7 October 2024, refusing leave to appeal from the Full Court of Guyana to the Court of Appeal. The Court of Appeal struck out the motion for leave to appeal as it was filed out-of-time.

Despite receiving twice from the respondents advanced written notice of the lateness of the application for leave to appeal, the appellants did not file an application for an extension of time to seek leave to appeal prior to the Court of Appeal's hearing of the leave application. At the hearing, the appellants registered a desire to seek an extension of time. However, the possibility of an application for an extension of time was not entertained by the Court of Appeal, which decided the matter on the basis of the motion that had already been filed.

The appellants asked the CCJ to grant leave to appeal to the Court of Appeal against the decision of the Full Court. They alleged that the Court of Appeal had failed to recognise that an extension of time was warranted and had failed to recognise the substantial merits of their case.

This Court, by majority (Rajnauth-Lee, Jamadar, Ononaiwu and Eboe-Osuji JJ), allowed the appeal, set aside the order of the Court of Appeal and remitted the matter for fuller consideration. Having refused the appellants' request to grant leave to appeal to the Court of Appeal, the Court ordered that the parties bear their own costs of this appeal. Ononaiwu J delivered the lead opinion of the majority, and Jamadar and Eboe-Osuji JJ delivered concurring opinions. Anderson P dissented, holding that the Court of Appeal did not make any sufficiently grave error of law to warrant remittal and recommending that the appeal be dismissed with costs awarded to the respondents.

As the Court of Appeal did not render a written judgment for its decision, this Court ascertained the reasons for the Court of Appeal's decision by examining the transcript of the proceedings before that court. The transcript revealed that in handing down its decision to strike out the application, the Court of Appeal stated that it was guided by the 14-day time limit to seek leave to appeal under Ord 2, r 2(1) of the Court of Appeal Rules. The Court of Appeal also found that the application was about a month out of time and noted counsel's reluctance to withdraw and discontinue the matter. The transcript did not disclose the Court of Appeal's consideration of its discretionary power, under Ord 1, r 8 of the Court of Appeal Rules, to extend the time for applying for leave to appeal if the interests of justice so require.

The CCJ emphasised the responsibility of the appellants, as the parties in default, to take appropriate steps, at every available opportunity, to protect their interests by making a proper application for an extension of time and for leave. In the absence of a proper application for an extension of time, the Court of Appeal was under no duty to recognise that an extension of time was required in the interests of justice. In circumstances where the appellants placed no proper application for an extension of time before the Court of Appeal for its consideration, it would be inappropriate for this Court to determine whether an extension of time and leave to appeal should be granted.

The majority considered, however, that the Court of Appeal retained its jurisdiction under Ord 1, r 8 despite the appellants' failure to file an application for an extension of time. This Court found that, in circumstances where counsel for the appellants had clearly communicated a desire at the hearing to seek an extension of time, the Court of Appeal had a duty to consider the possibility of the exercise of its curative power under Ord 1, r 8. The CCJ held that the Court of Appeal erred in law by limiting itself to the non-compliance with Ord 2, r 2(1) without considering whether the remedy of that non-compliance, as contemplated by Ord 1, r 8, was available in the circumstances. Accordingly, the Court remitted the matter to the Court of Appeal for fuller consideration in accordance with the Court's judgment.

The majority departed from previous jurisprudence of this Court which suggests that the failure to file an application for an extension of time deprives the CCJ of jurisdiction to hear a late application for special leave to appeal. The Court's jurisdiction to grant special leave to appeal is conferred by statute and cannot be extinguished because a litigant filed a special leave application outside of the time period prescribed by the Court's rules without also filing an application for an extension of time. In those circumstances, the Court retains the jurisdiction to cure the procedural non-compliance if it considers this necessary to ensure justice is done in the case.

In a concurring opinion, Eboe-Osuji J stressed that procedural rules should not bar litigants from justice, and that late filings can be cured—usually by costs—unless real prejudice would result. Jamadar J in a separate opinion, outlined the contours of his agreement with the reasons given by Ononaiwu and Eboe-Osuji JJ, respectively.

In his dissenting opinion, Anderson P stated that he saw no good or sufficient reason for a remittal of the matter to the Court of Appeal, which will likely prolong the litigation unnecessarily. He stressed that the Court of Appeal's discretion under Ord 1, r 8 must be sparingly exercised and that the onus was on a litigant in non-compliance with the rules and who desires the benefit of a favourable exercise of that discretion to supply the Court in advance with all material necessary to facilitate that exercise, including strong reasons explaining the non-compliance with the procedural rules. Anderson P also endorsed the previous jurisprudence of the Court, affirming that in the absence of the risk of an injustice the Court has no jurisdiction to allow a departure from the procedural rules so as to overlook the late filing of an application for leave to appeal or special leave (as the case may be) where no application for an extension of time has been filed. To suggest that there was a contradiction between stating that the Court had no jurisdiction to hear a late application for leave to appeal and the Court's finding that it would be impermissible to entertain an application to extend time where there was no risk of miscarriage of justice in not extending time, was simply an optical illusion.

Cases referred to:

A-G of Guyana v Dipcon Engineering [2017] CCJ 17 (AJ) (GY); *Andrews v Moore* [2013] CCJ 7 (AJ) (GY); *Barbados Rediffusion Services Ltd v Mirchandani (No 2)* [2006] 1 CCJ (AJ) (BB), (2006) 69 WIR 52; *Bethell v Royal Bank of Canada (Barbados) Ltd* (BB CA, 16 February 2023); *Blackman v Gittens-Blackman* [2014] CCJ 17 (AJ) (BB), BB 2014 CCJ 5 (CARILAW); *CGI Consumers Guarantee Insurance Co Ltd v Trident Insurance Co Ltd* BB 2016 CA 6 (CARILAW), (16 February 2016); *Clarapede & Co v Commercial Union Association* [1883-1884] 32 WR 262; *Coles and Ravenshear's Arbitration, Re* [1907] 1 KB 1; *Costellow v Somerset County Council* [1993] 1 All ER 952; *Cropper v Smith* [1884] 26 Ch D 700; *Cuffy v Skerrit* [2022] CCJ 12 (AJ) DM, (2022) 104 WIR 162; *Denton v TH White Ltd* [2015] 1 All ER 880; *Finnegan v Parkside Health Authority* [1998] 1 All ER 595; *Gayadin v Republic Bank (Guyana) Ltd* [2014] CCJ 13 (AJ) (GY), (2014) 85 WIR 377; *Hing v Hing* (1978) 25 WIR 391 (GY CA); *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *Jagdeo v Ferguson* [2024] CCJ 2 (AJ) GY, GY 2024 CCJ 1 (CARILAW); *Keen Phillips (a firm) v Field* [2007] 1 WLR 686; *Ketteman v Hansel Properties Ltd* [1987] AC 189; *Knox v Deane* [2020] CCJ 5 (AJ) (BB), BB 2020 CCJ 5 (CARILAW); *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100; *McDonna v Richardson* AI 2007 CA 1 (CARILAW), (29 June 2007); *Mitchell v Wilson* [2017] CCJ 5 (AJ) (GY); *Narine (Mohan) v Persaud* [2012] CCJ 8 (AJ) (GY), GY 2012 CCJ 3 (CARILAW); *Persaud v Persaud* (GY CA, 7 October 2024); *Pound v Dueck* [2025] CCJ 1 (AJ) BZ; *Prosecutor v Ruto and Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* (International Criminal Court, Trial Chamber V(A), Case No ICC-01/09-01/11-777, 18 June 2013); *Ruhrgas AG v Marathon Oil Co* 526 US 574 (1999); *Sankar v Guyana Rice Development Board* [2019] CCJ 11 (AJ) (GY); *Singh v A-G* [2018] CCJ 3 (AJ) (GY); *Steward v North Metropolitan Tramways Co* (1886) 16 QB 556; *Watson v Fernandes* [2007] CCJ 1 (AJ) (GY), GY 2007 CCJ 3 (CARILAW).

Legislation referred to:

Canada – Federal Courts Rules 1998, Rules of Civil Procedure 1990 (Ont); **Guyana** – Caribbean Court of Justice Act, Cap 3:07, Constitution of the Co-operative Republic of Guyana, Cap 1:01; Court of Appeal Act, Cap 3:01, Court of Appeal Rules, Cap 3:01, Supreme Court (Civil Procedure) Rules 2016.

Treaties and International Materials referred to:

Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319.

Other Sources referred to:

Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024; Francis R, *Maxims of Equity : Collected from and Proved by Cases, Out of the Books of the Best Authority in the High Court of Chancery* (1727); United Nations, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006* (Vienna 2008); Williams G, ‘Language and the Law–I’ (1945) 61 L Q Rev 71.

JUDGMENT

Reasons for Judgment:

| | |
|---|-------------|
| Ononaiwu J (Rajnauth-Lee, Jamadar and Eboe-Osuji JJ concurring) | [1] – [39] |
| Eboe-Osuji J (concurring) | [40] – [85] |
| Jamadar J (concurring) | [86] – [96] |

Dissenting:

| | |
|------------|--------------|
| Anderson P | [97] – [131] |
|------------|--------------|

| | |
|--------------------|-------|
| Disposition | [132] |
|--------------------|-------|

ONONAIWU J:

Introduction

[1] This is an appeal against the decision of the Court of Appeal of Guyana, which struck out the appellants’ motion for leave to appeal against a judgment of the Full Court of the High Court. Having found that the application for leave to appeal was filed about a month out of time and noting the appellants’ reluctance to withdraw and discontinue the application, the Court of Appeal struck out the application with costs to the respondents.

- [2] A distinctive feature of this case is that prior to the Court of Appeal's hearing of the application for leave to appeal, the appellants did not file an application for an extension of time to seek leave to appeal, although the respondents had indicated months in advance that the application had been filed out of time and no extension had been sought. At the hearing, the appellants registered a desire to seek an extension of time to apply for leave to appeal. However, this was not entertained by the Court of Appeal, which decided the matter on the basis of the motion that had already been filed.
- [3] For the reasons that follow, the Caribbean Court of Justice ('This Court') finds that the appeal should be allowed and the matter remitted to the Court of Appeal for fuller consideration in accordance with this judgment. The Court of Appeal erred in limiting itself to Ord 2, r 2(1) of the Court of Appeal Rules, which prescribes the timeframe for seeking leave to appeal, and not considering the applicability of Ord 1, r 8, which gives the court the discretionary power to enlarge the time within which to apply for leave to appeal. To be clear, this Court is not of the view that the Court of Appeal was required to make a determination in any particular direction pursuant to Ord 1, r 8. Rather, the error of the Court of Appeal was that it directed itself exclusively to the non-compliance with Ord 2, r 2(1) without considering whether the remedy of that non-compliance, as contemplated in Ord 1, r 8, was available in the circumstances.

Background and History of Litigation

- [4] Satyanand Persaud ('Satyanand' or 'the first appellant') and Taij Bahadur ('Taij' or 'the second appellant') are brothers of the deceased, Shamsundar Persaud ('Shamsundar'). Shamsundar had four children, including Dhavanie Persaud ('Dhavanie' or the 'first respondent') and her brothers Kumar Persaud ('Kumar') and Chetram Persaud ('Chetram'), who are beneficiaries of his estate. Dhavanie is also the administrator of Shamsundar's estate, the second respondent in this matter.

- [5] The root of the litigation is an alleged debt which Satyanand has sought to recover from Shamsundar's estate. On 27 June 2010, Shamsundar and Satyanand executed a document intitled 'Promissory Note', in which Shamsundar agreed to repay Satyanand USD400,000 within four years, failing which Shamsundar would convey certain properties to Satyanand. Shamsundar died intestate on 1 June 2018 without repaying the sum.
- [6] By a Power of Attorney dated 1 June 2019, Kumar and Chetram appointed Satyanand to be their representative for a period of three years, including for the purpose of applying for letters of administration of Shamsundar's estate. Through an Act of Substitution dated 10 June 2019, Satyanand substituted Taij to be the duly constituted attorney of Kumar and Chetram. Further to an application filed by Satyanand in the High Court, Corbin-Lincoln J made an order dated 23 July 2019 for the appointment of Kumar and Chetram, represented by their duly constituted attorney Taij, as administrators ad litem of Shamsundar's estate for the purpose of defending proceedings to be brought by Satyanand for repayment of a loan of USD400,000. Satyanand later commenced those proceedings in the High Court. On 16 October 2019, Harnanan J ordered judgment in favour of Satyanand in the amount of USD400,000 when Taij appeared in person representing Kumar and Chetram and consented to the judgment.
- [7] The substantive dispute underlying this appeal was initiated by an application filed by Dhavanie and the previous Administrator of Shamsundar's estate against Satyanand and Taij on 16 May 2022. The claimants sought a stay of execution of the consent judgment and suspension of the sale of Shamsundar's properties to enforce the judgment. They alleged that Satyanand and Taij obtained the consent judgment by fraud by not drawing to the court's attention that the purported promissory note was not enforceable as such, the claim for repayment of the debt was statute-barred and Satyanand had been the duly constituted attorney of Kumar and Chetram. The claimants also alleged that Satyanand and Taij had conspired to

defraud the estate and deprive the beneficiaries of the estate in breach of their fiduciary duty to the estate. The defendants denied that they were representatives of the estate, maintaining that Satyanand's obligations to his principals, Kumar and Chetram, were extinguished once Taij was substituted as their attorney, and that Taij acted on the instructions of his principals. The defendants also contended that the debt was enforceable.

- [8] On 22 February 2023, George CJ (Ag) granted summary judgment in favour of the claimants with costs to be paid by the defendants. Having examined the pleadings and written and oral submissions of the parties, the court granted declarations that Satyanand and Taij breached their fiduciary duty to act in the best interest of the estate and safeguard the assets of the estate. The court also issued an order setting aside the consent judgment, joining Taij as a respondent in that action and giving directions for the conduct of that action as the court deemed just.
- [9] On 21 March 2023, the appellants filed a Notice of Appeal to the Full Court against the trial judge's order. On 30 October 2023, the Full Court (comprising Sewnarine-Beharry and Younge JJ) dismissed the appeal with costs to the respondents. The court upheld the trial judge's summary judgment, finding that there was no need for the judge to have taken evidence before declaring the appellants' breach of fiduciary duty to the estate as the breach was plain on the face of the record before the High Court. The Full Court further found that the purported promissory note did not satisfy the relevant statutory requirements and therefore Satyanand could not have been entitled to the consent judgment on the basis of the document being a promissory note.
- [10] On 22 December 2023, the appellants filed in the Court of Appeal a Notice of Motion for special leave to appeal the decision of the Full Court. The respondents' affidavit in answer, filed on 22 May 2024, pointed out that the motion for leave to appeal had been filed out of time. The respondents made a similar point in their written submissions filed on 18 June 2024. Prior to the Court of Appeal's hearing

of the leave application on 7 October 2024, the appellants did not file an application for enlargement of time to seek leave to appeal. The Court of Appeal (comprising Cummings-Edwards C (Ag), Gregory and Persaud JJA) found that the application for leave to appeal was filed about a month out of time and, in an order dated 7 October 2024, struck out the motion and awarded costs of GYD125,000 to the respondents.

Appeal to the Caribbean Court of Justice

- [11] On 12 March 2025, this Court granted the appellants special leave to appeal the decision of the Court of Appeal. The Notice of Appeal raised thirteen grounds of appeal, only four of which were pursued by the appellants. In the grounds advanced, the appellants alleged that the Court of Appeal erred in not granting an extension of time to apply for leave to appeal as the court failed to recognise that such an extension was warranted in the interests of justice in accordance with Ord 1, r 8 of the Court of Appeal Rules. It was also contended that the Court of Appeal erred in refusing leave to appeal as the court failed to recognise that the appellants were deprived of a fair and reasonable opportunity to present evidence in support of their defence in the High Court, which resulted in a substantial miscarriage of justice, and also failed to recognise the substantial merits of the appellants' case.
- [12] The appellants asked this Court to set aside the judgment of the Court of Appeal and grant leave to appeal to the Court of Appeal, or alternatively, to set aside the orders of the courts below and remit the matter to the High Court for trial.
- [13] In examining the correctness of the Court of Appeal's decision, this Court focused on the Court of Appeal's treatment of an extension of time to apply for leave to appeal, which would have been a precondition for the court's consideration of whether leave should be granted.

Analysis and Conclusions

Legislative Framework for Appeal against Decision of the Full Court

- [14] In civil proceedings, leave is required for an appeal to the Court of Appeal from a decision of the Full Court sitting upon appeal from a judge of the High Court. By virtue of s 6(4) of the Court of Appeal Act, such appeals may be brought with the leave of the Full Court or the Court of Appeal.¹
- [15] The Court of Appeal Rules specify the time limits for appealing a decision of the Full Court upon appeal from a High Court judge. Order 2, r 2(1) prescribes that where an appeal lies by leave only, any person desiring such leave shall apply within 14 days, which shall run from the date of the decision against which leave to appeal is sought. Order 2, r 2(2) stipulates that if leave is granted, the appeal must be brought within 14 days of the grant of leave.
- [16] The Court of Appeal Rules regulate extensions of time. In *Sankar v Guyana Rice Development Board*,² this Court held that the Court of Appeal has the discretion to enlarge the time for applying for leave to appeal, by virtue of its overarching jurisdiction under Ord 1, r 8 to enlarge time when the interests of justice so require. That rule provides as follows, ‘...the Court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply or may direct a departure from these Rules in any other way where this is required in the interests of justice.’³
- [17] The Court of Appeal’s power under Ord 1, r 8 to extend the time for applying for leave to appeal is distinct from its power specifically conferred under Ord 2, r 3 to extend the time within which an appeal may be brought. Order 2, r 3 sub-ss (3) and

¹ *Gayadin v Republic Bank (Guyana) Ltd* [2014] CCJ 13 (AJ) (GY), (2014) 85 WIR 377 at [10]; *Jagdeo v Ferguson* [2024] CCJ 2 (AJ) GY, GY 2024 CCJ 1 (CARILAW) at [28].

² [2019] CCJ 11 (AJ) (GY).

³ Cap 3:01.

(4) give a single Justice of Appeal and the Full Bench of the Court of Appeal respectively, the power to extend the time for appealing a judgment. Order 2, r 3(5) prescribes that every application for enlargement of time (whether made by summons to a judge or motion to the Court) ‘shall be supported by affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause therefor’. In *Narine (Mohan) v Persaud*,⁴ this Court held that in examining an application for an extension of time to file an appeal, the Court of Appeal should consider the length of and reasons for the delay, chance of success of the appeal and degree of prejudice.⁵

[18] In *Sankar*, Barrow J clarified that the Court of Appeal’s power to extend time under Ord 2, r 3(4) applies where a party may appeal as of right and fails to exercise the right in time.⁶ In contrast, the court’s power to enlarge time under Ord 1, r 8 arises where a party needs leave to appeal, does not seek leave in time and, as a prior step, seeks an extension of time within which to apply for leave.

[19] This Court found, in *Sankar*, that the Court of Appeal’s determination under Ord 1, r 8, of whether an enlargement of time ought to be granted in the interests of justice is a matter of discretion and must be conducted on a case-by-case basis.⁷ *Sankar* also addressed how the court should determine what is required in the interests of justice, with reference to the principles that the Court of Appeal of Guyana had laid down in *Hing v Hing*⁸ to guide the court’s exercise of its discretionary power under Ord 1, r 8. In that judgment of the Court of Appeal, Haynes C had stated:

The dominant consideration is “the interests of justice”. And it is for this court to determine in every individual case as it arises, whether recourse to the rule is demanded. It is neither possible nor desirable to attempt to define or to categorise the circumstances which can or will do so. This court’s sense of justice must be its guide. But it must be the interests of justice according to law. This consideration includes not only the interests of the

⁴ *Narine (Mohan) v Persaud* [2012] CCJ 8 (AJ) (GY), GY 2012 CCJ 3 (CARILAW).

⁵ *ibid* at [21].

⁶ *Sankar* (n 2) at [61].

⁷ *ibid* at [21].

⁸ (1978) 25 WIR 391 (GY CA).

dissatisfied litigant who wishes to pursue a right of appeal, but also those of the successful one in the satisfaction of the judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation. We have to balance the two competing interests, bearing in mind the third.⁹

[20] In *Sankar*, this Court accepted these principles and concluded as follows:

Thus, in arriving at a determination as to what is required in the interests of justice, a court should balance the interests of the dissatisfied litigant who wishes to pursue a right of appeal, on the one hand, with the interests of the successful litigant who wishes to have the satisfaction of the judgment in his favour without undue delay, on the other hand. In addition, the court should have regard to the important administrative principle against the undue protraction of litigation.¹⁰

[21] It should be recalled that where a litigant seeks an extension of time to apply for leave to appeal, no right to appeal exists, whether by statute or leave that has already been granted by the court. Accordingly, where a litigant seeks from the Court of Appeal the needed extension of time and leave to appeal, the litigant bears the burden of persuading the court not only that there are sound and cogent reasons for seeking leave out of time but also that the grant of leave to appeal is justified. To convince the court that it should exercise its discretionary power under Ord 1, r 8 to enlarge time, the applicant must show that denial of an extension of time would likely result in a clear miscarriage of justice.

Application to the Present Appeal

[22] The appellants had 14 days from the decision of the Full Court to apply for leave to appeal. However, the motion for leave to appeal was filed more than seven weeks after the judgment and specifically 39 days out of time. On two separate occasions, the respondents had pointed out in writing that the application was out of time.

⁹ *ibid* at 397.

¹⁰ *Sankar* (n 2) at [22].

However, prior to the Court of Appeal's hearing of the application, counsel for the appellants did not file an application to enlarge time for seeking leave to appeal.

[23] The transcript of the Court of Appeal proceedings reveals that the matter of an extension of time within which to seek leave to appeal arose at the hearing. Counsel for the appellants, Mr Datadin, registered a desire to seek an extension of time. Having noted the respondents' submissions that the motion for leave to appeal had been filed out of time, counsel stated that 'my only application to the Court today, or hopeful application to the Court today, was to apply for leave for the extension of time'.¹¹ In response to the Acting Chancellor's query as to whether he was filing an application for an extension of time, counsel stated 'No, please...my only application today...was if the Court would permit me to amend the application that is before me or to file a separate application as it relates to the period of time'.¹² The possibility of an application for an extension of time was not entertained by the Acting Chancellor, who stated '[N]o Mr. Datadin. You moved this Court...So, you stand or fall by what you've presented to us.'¹³

[24] In addressing the respondents' submissions that leave was required and the application for leave had to be filed within 14 days, Mr Datadin indicated that he had thought that the relevant timeframe was 'six weeks as it was for appeals'.¹⁴ The Acting Chancellor asked whether counsel had anything else to add in relation to the application for leave, reiterating that 'your application stands on what you would have filed to us'. The Acting Chancellor thereby made it clear that the court would hear further submissions on the application for leave but not the matter of an extension of time. Counsel replied 'Guided...Your Honour. Nothing to add'.¹⁵

¹¹ Transcript of proceedings, *Persaud v Persaud* (Court of Appeal of Guyana, Civil Appeal No 190/2023, 7 October 2024) 397.

¹² *ibid* at 398.

¹³ *ibid*.

¹⁴ *ibid* at 399.

¹⁵ *ibid*.

[25] The other two Justices of Appeal sought to provide guidance to counsel. Gregory JA noted that counsel could withdraw the application for leave or the court could strike out the application because it was out of time.¹⁶ Persaud JA queried whether counsel was withdrawing the application and noted that he could file a separate application.¹⁷ Counsel accepted that the application was late. Initially, he indicated that his instructions did not permit withdrawal of the application and explained that he had therefore presented to the court the possibility of amendment of the application.¹⁸ The Acting Chancellor stated, ‘You are being given guidance by the Court and if you do not wish to follow the guidance, even at today’s date, that’s a matter for you.’¹⁹ Counsel followed up to indicate that, if permitted by the court, the appellants would withdraw the application. When invited to respond, counsel for the respondents, Mr Jonas, simply stated ‘I think it’s six of one and half a dozen of another’,²⁰ to express his view that there was no material difference between the withdrawal of the application and the striking out of the application.

[26] The order of the Court of Appeal does not disclose the reasons for the court’s decision, and no reasoned judgment of the court is available. Accordingly, this Court has relied on the transcript of the hearing, which captures the Court of Appeal’s delivery of its decision. In handing down its decision to strike out the application, the Court of Appeal stated that it was guided by the 14-day time limit to seek leave to appeal under Ord 2, r 2(1) of the Court of Appeal Rules, found that the application was about a month out of time and noted counsel’s reluctance to withdraw and discontinue the matter.²¹ The transcript shows the Court of Appeal’s consideration of Ord 2, r 2(1) but does not reveal the court’s consideration of Ord 1, r 8.

¹⁶ *ibid* 400.

¹⁷ *ibid*.

¹⁸ *ibid* 400-401.

¹⁹ *ibid* 401.

²⁰ *ibid* at 402.

²¹ *ibid* 403.

- [27] It is clear from the transcript that the Court of Appeal did not allow counsel for the appellants to make an application for an extension of time and was not prepared to hear submissions on the matter of an extension of time. There is no evidence from the transcript that counsel indicated to the court *why* an extension of time to seek leave to appeal was required in the interests of justice. Aside from counsel's belief that the applicable time limit for seeking leave to appeal was 6 weeks instead of 14 days from the judgment, no explanation was provided for the delay. There was similarly no mention of the merits of the proposed appeal or why it was necessary to grant an extension of time to avert a clear miscarriage of justice. Accordingly, the appellants had not placed before the court material on the basis of which it could properly consider whether to exercise its discretion under Ord 1, r 8 to extend time.
- [28] In the circumstances, the appellants' assertion that the Court of Appeal erred in not granting an extension of time as it 'failed to recognise' that an extension was warranted in the interests of justice is wholly misguided. It was for the appellants, as the parties in default, to take appropriate steps, at every available opportunity, to protect their interests by making a proper application for an extension of time and for leave, which stated the grounds for the application and provided the supporting evidence. In the absence of a proper application by the appellants for an extension of time to seek leave to appeal, the Court of Appeal was under no duty to examine the material before it and recognise that an extension of time was required in the interests of justice. The appellants have asked this Court to grant leave to appeal to the Court of Appeal. In circumstances where the appellants placed no proper application for an extension of time before the Court of Appeal for its consideration, it would be inappropriate for this Court to accept the appellants' invitation to determine whether an extension of time and leave to appeal should be granted.
- [29] However, counsel for the appellants clearly registered to the Court of Appeal a desire to seek an extension of time to apply for leave to appeal and consequently to invoke the court's jurisdiction under Ord 1, r 8. Therefore, the court was faced with the question of whether its discretionary power under Ord 1, r 8 to enlarge time was

available in this case. In those circumstances, the Court of Appeal had a duty to consider the applicability of its power to extend the time for applying for leave to appeal. However, the transcript does not reveal the Court of Appeal's consideration of the possibility of the exercise of its curative power under Ord 1, r 8. The court maintained that the appellants' application stood on what had already been filed, with the available options being the appellants' withdrawal or discontinuance of the application, or the court's striking out of the application. Based on the transcript of the hearing, the Court of Appeal did not consider its discretionary power to grant an extension of time in the interests of justice. This was an error of law.

- [30] In *Watson v Fernandes*,²² an appeal from Guyana, this Court expressed the following views on the consequences of non-compliance with the rules of court, having emphasised that Ord 1, r 8 of the Court of Appeal Rules requires the interests of justice to be the overriding concern in the application of the rules:

Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in *Barbados Rediffusion Services Ltd v Marchandani*. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court's ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times.²³

- [31] The Court of Appeal's jurisdiction under Ord 1, r 8 was available when counsel for the appellants accepted at the hearing that the motion for leave to appeal was filed out of time and registered a desire to seek an extension of time. In those circumstances, the Court of Appeal had a duty to consider the possibility of the exercise of its curative power. In directing its mind to the possible exercise of its

²² [2007] CCJ 1 (AJ) (GY), GY 2007 CCJ 3 (CARILAW).

²³ *ibid* at [39] (footnote omitted).

discretionary power under Ord 1, r 8 in the circumstances, the Court of Appeal could consider several factors, including the effective use of the court's and the parties' resources, any prejudice to the respondents that may result from the exercise of its curative power and the failure of counsel for the appellants to file an application for an extension of time notwithstanding that the respondents had twice adverted to the lateness of the leave application. In outlining relevant factors for the Court of Appeal's consideration, we do not suggest that the court was required to make a particular determination pursuant to Ord 1, r 8.

[32] This Court, in *Watson*, noted that there are a variety of options open to the court for dealing adequately with a procedural irregularity, including a short adjournment of the case to permit the breach to be remedied and an order made that the wasted costs be paid by the party in default or its counsel personally.²⁴ In the present case, if the Court of Appeal had determined that the appellants should be allowed to seek an extension of time, there were options available that could have positioned the court to properly consider whether the interests of justice warranted that extension. These options included permitting an application for an extension of time to be made orally, making an unless order to secure within a short timeframe, a written application for an extension of time and exploring whether any prejudice to the respondents caused by the delay could have been cured by an order as to costs. In noting these available options, we do not seek to prescribe the choice that the Court of Appeal should have made.

[33] The Court of Appeal Rules do not prescribe the form of an application for an extension of time for leave to appeal, in contrast to Ord 2, r 3(5) which stipulates that an application for the extension of time to appeal must be made by summons or motion supported by affidavit. In *McDonna v Richardson*,²⁵ a case from the Court of Appeal of the Eastern Caribbean Supreme Court, Barrow JA noted that a proper application for an extension of time for leave to appeal and for leave should

²⁴ *ibid* at [36].

²⁵ AI 2007 CA 1 (CARILAW), (29 June 2007).

be made in writing, stating the grounds for the application, and supported by evidence on affidavit. The notice of application should be served on the other side to give them an opportunity to contest the application. Barrow JA also noted that where there is an oral hearing, depending on the facts and the material before it, the court, as a matter of the exercise of judicial discretion, may properly permit an application to be made orally.²⁶ We consider this would similarly be a useful approach to adopt in relation to applications for an extension of time for leave to appeal under the rules of the Court of Appeal of Guyana.

- [34] In light of the foregoing analysis, we find that, in the particular circumstances of this case, the Court of Appeal erred by not entertaining the possibility of the exercise of its discretionary power under Ord 1, r 8 to extend the time for applying for leave to appeal in the interests of justice. Accordingly, we find that the order of the Court of Appeal should be set aside and the matter remitted to the court for fuller consideration in accordance with this judgment.

This Court's Jurisprudence on a Failure to Apply for an Extension of Time to Seek Special Leave to Appeal

- [35] In support of their submission that the Court of Appeal's decision to strike out the untimely motion for leave to appeal was beyond reproach, the respondents relied on jurisprudence from this Court that the Court has no jurisdiction to entertain an out-of-time application for special leave in the absence of an application for an extension of time to seek special leave. Having first taken this position in *Blackman v Gittens-Blackman*,²⁷ this Court held a few years later in *Mitchell v Wilson*²⁸ that it is 'settled' that the failure to apply for an extension of time to file a special leave application is a sufficient reason to dismiss the out-of-time application for special leave for 'want of jurisdiction'.²⁹ This principle was also cited in *Attorney General*

²⁶ *ibid* at [25].

²⁷ [2014] CCJ 17 (AJ) (BB), BB 2014 CCJ 5 (CARILAW) at [7].

²⁸ [2017] CCJ 5 (AJ) (GY).

²⁹ *ibid* at [4].

of *Guyana v Dipcon Engineering*,³⁰ a case in which the appellant ventured an oral application for special leave to appeal, having failed to file the necessary applications for special leave and an extension of time. The principle was applied most recently in *Pound v Dueck*,³¹ a case which involved a late application for special leave that was filed without an application for an extension of time, after the applicant had sought, out of time, leave to appeal from the Court of Appeal of Belize, which had no power to extend time.

[36] In *Blackman, Mitchell* and *Pound*, the Court, having concluded that the failure to apply for an extension of time was an adequate basis for dismissing the special leave application for want of jurisdiction, went on to consider whether there would be any resulting miscarriage of justice. In *Blackman*, the Court stated that it may in a proper case grant an extension of time for compliance with the Rules or excuse delay ‘in order to avert a clear miscarriage of justice’ but observed that there was nothing to suggest the decisions of the courts below amounted to a potential miscarriage of justice.³² In *Mitchell*, the Court noted that it was required to ‘balance the public interest in the just resolution of disputes’ and expressed satisfaction that the decision of the lower court did not result in a miscarriage of justice and was not ‘manifestly unjust’.³³ In *Pound*, the Court for the sake of completeness indicated that, in any event, there was no merit in the intended grounds of appeal.³⁴ In *Dipcon*, the Court, having rejected the oral application for special leave and found that it had no jurisdiction to allow the appellant to appeal, considered that the material before it disclosed no apparent miscarriage of justice to be averted.³⁵ In those cases, the Court’s recognition that it has the power to grant an extension of time to avert a clear miscarriage of justice and consideration of whether there would be any resulting miscarriage of justice are at odds with its position that it has no jurisdiction (or is powerless to act) in the absence of an application for an extension of time.

³⁰ [2017] CCJ 17 (AJ) (GY).

³¹ [2025] CCJ 1 (AJ) BZ.

³² *Blackman* (n 27) at [6].

³³ *Mitchell* (n 28) at [4]–[7].

³⁴ *Pound* (n 31) at [23].

³⁵ *Dipcon Engineering* (n 30) at [19].

[37] Where a special leave application is filed out of time, the Court cannot exercise its jurisdiction to grant special leave to appeal without first granting an extension of time within which to apply for special leave. However, with respect, I am unable to support the position that this Court has *no jurisdiction* to treat with an out-of-time application for special leave because of a litigant's failure to file an application for an extension of time. This Court's jurisdiction to grant special leave to appeal is conferred by statute and cannot be extinguished because a litigant filed a special leave application outside of the time period prescribed by the Court's rules without also filing an application for an extension of time. In those circumstances, the Court retains the jurisdiction to cure the procedural non-compliance if it considers this necessary to ensure justice is done in the case. Jamadar and Eboe-Osuji JJ have further elaborated on why this aspect of the Court's jurisprudence is not supported in this judgment.

[38] Similarly, the jurisdiction of the Court of Appeal of Guyana to grant leave to appeal is conferred by statute. That jurisdiction is not extinguished because an applicant files a motion for leave to appeal out of time but fails to apply for an extension of time to seek leave to appeal. The Court of Appeal retains its jurisdiction under Ord 1, r 8 to permit the non-compliance with the rules to be remedied if the interests of justice so require.

Costs

[39] This Court has not granted the appellants' request for leave to appeal to the Court of Appeal but instead has remitted the matter to the Court of Appeal for fuller consideration. Accordingly, this Court considers it appropriate that the parties bear their own costs of this appeal.

EBOE-OSUJI J:

Introduction

[40] In his opening words in *Steward v North Metropolitan Tramways Co*, Lord Esher MR was ‘not certain’ that in refusing the application before his court ‘we shall be doing any *substantial harm* to the defendants.’³⁶ As here, the dispute in the *Steward* appeal was about a missed procedural step in litigation, which the defendants were seeking to rectify. Lord Esher had his finger on the knob of the matter, as should we, about substantial (in)justice that might result either way from the court’s ruling. And, as here, it is not certain that such substantial injustice would be occasioned to the appellants before us by the Court of Appeal’s refusal to grant them leave to appeal out of time. On one view, there may be no substantial injustice to the appellants if the ultimate effect of the Court of Appeal’s decision is to require a trial on the merits of the dispute between the parties, instead of allowing the appellants a hope of enjoying the fruits of an allegedly non-arms-length consent judgment, which the respondents say was a fraud on the court perpetrated by the appellants. On another view, there is a concern that certain pronouncements that the learned George CJ (Ag) (simply the ‘Chief Justice’ for present purposes) made in her declaratory judgment and decision to set aside the consent judgment may have implications on the reputation of the appellants, beyond the simple matter of having the entire case tried fully on the merits.

[41] I have read in draft the opinions of my brother and sister, Anderson P and Ononaiwu J. They have succinctly set out the material facts of the case. I shall not repeat them. I accept Ononaiwu J’s disposition of the case and her reasoning for the most part. I concur with her rejection of the earlier case law of this Court which held that the Court ‘lacks jurisdiction’ to entertain a belated application for special leave in the absence of a companion or prerequisite application for extension of time. I have difficulty accepting that the judgment of the learned Chief Justice can be

³⁶ *Steward v North Metropolitan Tramways Co* (1886) 16 QB 556 at 557 (emphasis added).

confidently characterised as a ‘summary judgment’. Evidently, Ononaiwu J does not have that difficulty. But that difference of views on that discrete point does not disturb my overall concurrence with her judgment.

[42] This appeal raises important principles of procedural law, including concerns about the correctness of an earlier line of this Court’s case law. I share my views in relation to them.

Correcting Procedural Errors

[43] It is well known that equity was devised to guard against the tendency for excessive formalism in the application of the law in ways that may cause real injustice. It is also well known that in the realms of equity, as elsewhere in human affairs, substance enjoys the right of way when in conflict with form. Prominent amongst the relevant maxims of equity is the precept that, ‘Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.’³⁷ That approach is also prominent in civil procedure. We see it in a strong line of authorities which insists that non-compliance with rules of court should be rectified, where possible, on the basis of costs awards against the defaulting party. It is not necessary to catalogue that line of case law. The authorities are many. It is enough to recall that *Clarapede & Co v Commercial Union Association*³⁸ offered a prominent early statement of the approach, in the context of a belated amendment to pleadings. Addressing the matter from the perspective of the ‘rule of conduct of the court’ (meaning procedural rules of court as opposed to statutory provisions), Sir William Brett MR (later restyled Lord Esher MR) observed as follows:

The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be

³⁷ Richard Francis, *Maxims of Equity: Collected from and Proved by Cases, Out of the Books of the Best Authority in the High Court of Chancery* (1727) 44.

³⁸ [1883-1884] 32 WR 262.

compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made.³⁹

[44] In a concurring opinion, which Lord Esher MR graciously endorsed in a subsequent case as a possibly clearer statement of the principle,⁴⁰ Bowen LJ rendered the principle in a well-known passage:

[S]uppose there is a slip or an error, it may be in omitting to take a step or adopt a line of conduct in the case, which the party cannot abandon without difficulty, what is the principle on which such a slip is to be set right? That is to be done whenever you can put the parties in the same position, for the purposes of justice, that they were in at the time when the slip was made. Sometimes to correct the error would lead to injustice which could not be cured, as when a witness who could give evidence cannot be got at, or the solvency of one party is doubtful. The question must be whether, if the slip is set right so as to enable the right question to go to trial, the parties will be put into the position they were in before the slip was made; for, if so, that should be done. In most cases it is a question of costs. The object of the court is to minimize the chances of that kind of misadventure, and to enable the parties to try the case with equal chances, so far as it can be done.⁴¹

[45] The operating principle might not compel the familiar restatement that Bowen LJ robustly gave it in another case, when he observed that in his experience ‘there is one panacea which heals *every* sore in litigation, and that is costs.’⁴² The principle in *Clarapede* is happily more nuanced. While acknowledging the general principle that the award of costs can indeed cure non-compliance with rules of procedure in most cases, it was acknowledged that there may be cases where real prejudice may be done to the opposing party beyond the healing power of costs. It only requires that the inquiry must be clear as to what that real prejudice is. The prejudice doesn’t lie in a bare claim of unfairness, let alone in the eccentric view that the compliant party should not be deprived of a procedural advantage. The advantage being deprived may be a windfall, entirely undeserving in circumstances that do not suggest wilfulness or recklessness on the part of the defaulting party.⁴³ In *Cropper*

³⁹ *ibid* at 263.

⁴⁰ See *Steward* (n 36) at 558.

⁴¹ *Clarapede* (n 38) at 263.

⁴² *Cropper v Smith* [1884] 26 Ch D 700 at 711 (emphasis added).

⁴³ See *Denton v TH White Ltd* [2015] 1 All ER 880 at [21] and [41].

v Smith, counsel had argued, “You are taking away an advantage from the Plaintiffs who have got judgment below, by making an amendment at the last moment.” Unimpressed, Bowen LJ riposted, ‘In one sense we should be taking away an advantage from them, but only an advantage which they have obtained by a mistake of the other side, contrary to the true bearing of the law on the rights of the parties.’⁴⁴

[46] In my view, ‘[t]he question must be,’ as it was put in *Clarapede*, ‘whether, if the slip is set right so as to enable the right question to go to [adjudication on the merits], the parties will be put into the position they were in before the slip was made; for, if so, that should be done.’⁴⁵ The point can be illustrated, using facts that approximate those in the present appeal. Suppose rules of court permit an appellant to file an appeal by the 14th day of the judgment of a lower court. Suppose further that the appeal is duly filed by the 14th day. In that scenario, the Court of Appeal would have that appeal on its dockets in the ensuing period, and the case would proceed in the normal course. Depending on the case, the appeal would not be disposed of within the next weeks or months following the 14th day of the decision of the lower court in which the appeal was filed on time. That being the case, I am unable to accept the outlook that a tardy appellant—especially when the omission is attributable to counsel alone—must forever be foreclosed from filing his appeal by the 15th day, the 16th day and so on after the decision of the lower court—or even a month or two after the deadline to appeal—merely *because* his tardiness was necessarily a violation of the vested right of the prospective respondent. In those circumstances, if (in the language of *Clarapede*) ‘the slip is set right so as to enable the right question to go [adjudication on the merits], the parties will be put into the position they were in before the slip was made.’

[47] But, of course, a procedural time-limit can vest a right in a party, which it may be unjust to take away. This would be along the lines of the principle that it is in the

⁴⁴ *Cropper* (n 42) at 711.

⁴⁵ *Clarapede* (n 38) at 263.

public interest to bring litigation to an end, so that the parties may get on with their lives. In the context of appeals, one significance of laying down a time-limit for appeals is that a prospective appellant would have a right to prevent an adverse dealing with the subject matter of the litigation during the time-limit for any appeal. Hence, where the successful party in the proceedings below deals adversely with the subject of the litigation after the expiry of the time-limit for an appeal—or that party has in any other way relied on the judgment in her favour in the court below and organised her life in a demonstrably irreversible way—because the prospective appellant did not appeal within the time-limit allowed by the rules, then there would be no scope for rectification of the tardiness on terms of punitive costs. That would be a proper case in which the court would decline to grant the procedural relief of an extension of time which the nonpunctual party seeks on the recompense of punitive costs awarded against him for his slothfulness.

[48] This approach is well accepted in the case law of our own court. In *Sankar v Guyana Rice Development Board*, the Court said this in that regard:

[I]n arriving at a determination as to what is required in the interests of justice, a court should balance the interests of the dissatisfied litigant who wishes to pursue a right of appeal, on the one hand, with the interests of the successful litigant who wishes to have the satisfaction of the judgment in his favour without undue delay, on the other hand. In addition, the court should have regard to the important administrative principle against the undue protraction of litigation.⁴⁶

[49] These are some of the reasons for the rule of thumb, according to which a procedural dispute arising from non-compliance with rules of court is to be resolved on the side of the party who would suffer grave injustice. That may require that the most just relief is to allow rectification of the anomaly on terms of punitive costs—but only where that is possible.

⁴⁶*Sankar* (n 2) at [22].

[50] The foregoing is amply reflected in the guiding norms of this Court. They begin with the ‘overriding objectives’ set out in r 1.3 of the Appellate Jurisdiction Rules:

- (1) The overriding objective of these Rules is to ensure that the Court is accessible, fair, and efficient and that unnecessary disputes over procedural matters are discouraged.
- (2) Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to actively manage cases and make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court.

[51] The same norm is evident enough in Ord 1, r 8 of the Rules of Court of the Court of Appeal of Guyana, which not only gives the Court of Appeal the power to ‘enlarge the time prescribed [in the] Rules for the doing of anything to which [the] Rules apply’, but also more broadly the power to ‘direct a departure from [the] Rules in any other way where this is required in the interests of justice.’ The same trend is identifiable in the rules of court in other jurisdictions.⁴⁷

[52] In that regard, it was observed in *Andrews v Moore* that the CCJ, ‘...approaches its own Appellate Jurisdiction Rules ... in the light of the principle enshrined in Rule 1.3 of the Appellate Jurisdiction Rules i.e. to enable this Court or the relevant court to deal with cases fairly and expeditiously so as to produce a just result. *Gone are the days of arid technicalities.*’⁴⁸ No doubt ‘arid technicalities’ describes literal application of rules of procedure with little or no regard to the question of real injustice that may result. Earlier in *Watson v Fernandes*, the Court reproached the Court of Appeal of Guyana for doing so, through a decision that had the effect of depriving a litigant of ‘a hearing of his appeal on its merits because the court considered that there had been a procedural irregularity.’ The Court considered that ‘it should indeed be rare that such a course should be taken, especially when there are a variety of options open to the court for dealing adequately with the technical

⁴⁷ Court of Appeal Rules, Cap 3:01. See, for instance, Ontario Rules of Civil Procedure 1990 rr 1.04, 2.01, 2.03. See also Canada Federal Courts Rules 1998 rr 56, 60.

⁴⁸ *Andrews v Moore* [2013] CCJ 7 (AJ) (GY) at [8] (emphasis added).

breach.⁴⁹ Those options might include ‘adjourn[ing] for a short period to permit the breach to be remedied and an order made that the wasted costs’ which might be levied against the defaulting party or his counsel personally.⁵⁰ ‘But to shut out the litigant entirely from arguing his appeal,’ the Court concluded, ‘could not be in the interests of justice.’⁵¹ Emphasising the cardinal place of substantive justice in the judicial process, the Court reasoned as follows:

Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in *Barbados Rediffusion Services Ltd v Marchandani*. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court’s ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times.⁵²

[53] It is possible that the idea of costs has become so iterative in the work of the bench and bar that there’s a danger of easily missing its fuller normative implication in the context of rectification of non-compliance with rules of court. The broader significance of a costs award in that context lies in its punitive incidence, an inconvenience or a burden, that is *never* imposed on a party that is within his or her right. To put it more plainly, costs in the *Clarapede* sense are never awarded against parties that comply with the rules of Court; but they may be awarded against those who don’t. That costs are imposed upon an erring party thus becomes an ample measure of relief in the average case of non-compliance with the rules of procedure. That is what this Court meant in *Watson v Fernandes* when it censured an unmerciful decision that would deprive a litigant, ‘a hearing of his appeal on its merits because the court considered that there had been a procedural irregularity’;

⁴⁹ *Watson* (n 22) at [36] (emphasis added).

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid* at [39] (footnote omitted).

while encouraging a more forgiving decision, ‘especially when there are a variety of options open to the court for dealing adequately with the technical breach.’⁵³

[54] It is true that, ‘Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy,’ as Bowen LJ observed in *Cropper v Smith*.⁵⁴ That observation is not, in my view, irreconcilable with the pronouncements of this Court in *Pound v Dueck*, where it was observed that, ‘[t]imeous filing is one component of instilling discipline in litigation and in the judicial proceedings.’⁵⁵ *Pound v Dueck* does not say that courts *do* exist for the sake of discipline any more than *Cropper v Smith* may be taken to discount entirely a court’s insistence on a disciplined approach to the litigation process. The substantive object of the work of courts is to decide disputes. Nevertheless, courts of law have an undeniable interest, albeit adjectival, in ensuring that the litigation process is conducted according to well-understood rules of procedure. The essence of those rules is to ensure a disciplined approach to dispute resolution. In that sense, it is legitimate on the part of courts to ensure that disciplined approach. What is to be avoided is a draconian outlook that would disproportionately lock a party out of justice for errors in the course of proceedings, especially when those errors are attributable to counsel.

[55] It is accepted that, ‘justice cannot always be measured in terms of money.’⁵⁶ There may indeed be situations (clearly acknowledged in *Clarapede* and its progeny) when non-compliance with rules of court may entail real injustice to the opposite party beyond what costs can cure. Still, it may be confidently said that in cases that don’t involve egregiously willful non-compliance with rules, permanent denial of substantive justice to the erring party will invariably amount to disproportionate retribution. This is particularly so in those cases where the overriding consideration is the enforcement of discipline. I feel sure that a costs award is ample panacea for any sore of indiscipline in litigation.

⁵³ *Watson* (n 22) at [36].

⁵⁴ *Cropper* (n 42) at 710.

⁵⁵ See *Pound* (n 31) at [20].

⁵⁶ See *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220.

Reconsidering Earlier CCJ Jurisprudence

[56] In their submissions, the respondents relied upon the colophon—or the second part—to a line of case law of this Court.⁵⁷ This case affords an opportunity to revisit the correctness of the main frame of those pronouncements. They involve the proposition that when a late application for special leave has been filed, this Court ‘lacks jurisdiction’ to entertain the application for special leave, if the applicant has made no application for an extension of time. I shall call this the ‘*Blackman* ratio,’ for present purposes: because the provenance of the concerned proposition is traced to *Blackman v Gittens-Blackman*, decided on 25 November 2014. The case involved the double error of missing the deadline for filing a request for special leave to appeal and a failure to request an extension of time to file it. The Court evidently felt impelled to say this:

The Applicant has exacerbated her error by not making any application for an extension of time to seek special leave to appeal. *In the absence of such an application this Court has no jurisdiction entertain the special leave application.* Therefore the decisions of the trial judge and of the Court of Appeal remain undisturbed.⁵⁸

[57] Underscoring the message, the Court added this second part (what I termed the ‘colophon’ in the preceding paragraph):

While this Court may in a proper case grant an extension of time for compliance with the Rules or excuse delay, it does so in order to avert a clear miscarriage of justice. Litigants are not free to ignore time limits and then seek refuge behind the “overriding objective.”⁵⁹

[58] It may be noted in passing that *Blackman* was decided by a panel of three judges, as is the case in all applications for special leave. The next stop in the provenance of the *Blackman* ratio came in *Mitchell v Wilson*, decided on 13 March 2017 also

⁵⁷ See Dhavanie Persaud, ‘Submissions on behalf of the Respondent’, Submission in *Persaud v Persaud*, GYCV2025/001, 30 July 2025, paras 23, 24.

⁵⁸ *Blackman* (n 27) at [5] (emphasis added).

⁵⁹ *ibid* at [6].

by a panel of three judges. They took the view that ‘[i]t is *already settled* that the failure to apply for an extension of time is a sufficient reason to dismiss the application for *want of jurisdiction*.’⁶⁰ After *Mitchell* came *Attorney General of Guyana v Dipcon Engineering*,⁶¹ decided on 15 November 2017 by a standard panel of five judges. Earlier pronouncements in *Blackman* were recalled to the effect that (a) this Court ‘lacks jurisdiction’ to entertain an application for special leave when made out of time by a party who has sought no extension of time; and, (b) although the Court may grant an extension of time in order to avert clear miscarriage of justice, parties are not free to ignore time-limits and then seek refuge behind the ‘overriding objective.’ Interestingly, the observation was added in *Dipcon Engineering* that the ‘principle was recently reiterated in *Mitchell v Wilson* at [4] when the CCJ held it is “settled” that failure to apply for an extension of time to file a special leave application is a sufficient reason to dismiss the out-of-time application for special leave, for want of jurisdiction.’⁶² The word ‘settled’ was stated in quotation marks. More recently in *Pound*, the *Blackman* ratio was recalled,⁶³ especially in these terms: ‘It is the repeated jurisprudence of this Court that in the absence of an extension of time, it has no jurisdiction to entertain a late application for special leave.’⁶⁴

[59] The sentiments motivating the *Blackman* ratio are made entirely sensible by the mischief that provoked them. Those sentiments were given fuller elaboration in *Pound* and sensibly so. However, reconsideration of the *Blackman* ratio is sorely necessary—specifically in the view that the Court *lacks jurisdiction* to entertain a tardy special leave application in the absence of a prerequisite application for extension of time. The reasons for reconsideration include these.

⁶⁰ *Mitchell* (n 28) at [4] (emphasis added).

⁶¹ *Dipcon Engineering* (n 30).

⁶² *ibid* at [9] (footnote omitted).

⁶³ *Pound* (n 31) at [16].

⁶⁴ *ibid* at [18].

[60] First, jurisdiction is the most radical notion in the administration of justice. To say that a court of inherent jurisdiction or general court of justice lacks jurisdiction in any circumstance is not a proposition to be rendered lightly.

[61] Second, indeed the anomaly of the *Blackman* ratio should be immediately apparent from its very own recognition that this Court could grant an extension of time as necessary to avert a clear miscarriage of justice. That recognition was stated as follows in *Mitchell v Wilson*:

[W]hile in the absence of an application for an extension of time it has no jurisdiction to entertain the special leave application, the Court may in a proper case grant an extension of time for compliance with the Rules or excuse delay, to avert a clear miscarriage of justice.⁶⁵

[62] The dissonance is apparent. That the Court ‘has no jurisdiction’ leaves no scope at all for the Court to grant an extension in order ‘to avert a clear miscarriage of justice.’ Lack of jurisdiction is an absolute idea that leaves a court of law entirely powerless to act, even to avert a clear miscarriage of justice.

[63] Third, it is difficult to accept that a court of law could ever lack jurisdiction because of provisions or interpretations of rules of procedure—especially when those rules are promulgated by judges or in subsidiary legislation. Jurisdiction is conferred by basic law—such as the common law, the constitution or act of parliament (for a national court) or a constitutive treaty (for an international court). It is not removed by rules of court.

[64] In that connection, careful regard must be had to the CCJ’s source of appellate jurisdiction, which is found in Article XXV of the CCJ Agreement (which agreement has the force of law in Guyana pursuant to s 3 of the Caribbean Court of Justice Act). It is necessary to set out the relevant provisions at length:

⁶⁵ *Mitchell* (n 28) at [4].

1. In the exercise of its appellate jurisdiction, the Court is a superior Court of record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party.
2. Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting Party as of right in the following cases:
 - (a) final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than twenty-five thousand dollars Eastern Caribbean currency (EC\$25,000) or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value;
 - (b) final decisions in proceedings for dissolution or nullity of marriage;
 - (c) final decisions in any civil or other proceedings which involve a question as to the interpretation of the Constitution of the Contracting Party;
 - (d) final decisions given in the exercise of the jurisdiction conferred upon a superior court of a Contracting Party relating to redress for contravention of the provisions of the Constitution of a Contracting Party for the protection of fundamental rights;
 - (e) final decisions given in the exercise of the jurisdiction conferred on a superior court of a Contracting Party relating to the determination of any question for which a right of access to the superior court of a Contracting Party is expressly provided by its Constitution;
 - (f) such other cases as may be prescribed by any law of the Contracting Party.
3. An appeal shall lie to the Court with the leave of the Court of Appeal of a Contracting Party from the decisions of the Court of Appeal in the following cases:
 - (a) final decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general

or public importance or otherwise, ought to be submitted to the Court; and

- (b) such other cases as may be prescribed by any law of the Contractual Party.
- 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.
- 5. Nothing in this Article shall apply to matters in relation to which the decision of the Court of Appeal of a Contracting Party is, at the time of the entry into force of the Agreement pursuant to the Constitution or any other law of that Party, declared to be final.
- 6. The Court shall, in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought.⁶⁶

[65] The amplitude of the *jurisdiction* of the CCJ as set out above is not diminished by virtue of the power conferred (in Article XXV(7)(1)) upon the President of the Court in consultation with five judges to make Rules of Court for ‘regulating the practice and procedure of the Court in exercise of the appellate jurisdiction conferred on the Court and, in relation to appeals brought before the Court, the practice and procedure of any court in respect of such appeals.’⁶⁷ The purposes for which such rules may be made include ‘prescribing the time within which any requirement of the rules of Court is to be complied with.’⁶⁸

[66] Fourth, in relation to special leave, r 10.13 provides:

An application for special leave to appeal may be made to the Court in writing within forty-two (42) days of the date of the judgment from which special leave to appeal is sought, or in cases in which leave to appeal has

⁶⁶ Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319, art XXV.

⁶⁷ *ibid* art XXV(7)(1).

⁶⁸ See art XXV(7)(2)(i).

been sought from the court below, within twenty-one (21) days of the refusal or rescission of such leave.⁶⁹

[67] I am unable to discern any word of limitation in r 10.13 suggesting that the CCJ ‘lacks jurisdiction’ to entertain an application for special leave made out of time, in the absence of an application for extension of time.

[68] Even as a matter of interpretation of the CCJ rules of court, there has been no analysis at all—beginning with the decision in *Blackman v Gittens-Blackman*—explaining how the interpretation of the actual words and phrases in r 10.13 results (at all, let alone unavoidably) in the conclusion that the Court ‘lacks jurisdiction’ to entertain an application for special leave made out of time without a prerequisite application for extension of time. It is doubtful that such a fundamentally disabling proposition is justified merely by the mischief that it seeks to address. More importantly, the ‘overriding objective’ stated in para 2 of r 1.3 obstructs that interpretation. It is to be recalled that the overriding objective says amongst other things: ‘Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to actively manage cases and make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court.’⁷⁰

[69] Fifth, to say that an omission to comply with time-limits would deprive the Court of jurisdiction, resulting in a permanent lockout against a party, is to say that the formulation of words at a point in time in rules of court, and imperatively labelling it ‘time-limit’, would create something of a cliff, an actual thing on the plains of justice; such that a party who trips over the verbal precipice is forever lost to justice, beyond the rescuing possibility of even costs awards. It takes the idea of ‘reification of words’⁷¹ much too far, in the order of developments that Glanville Williams put quite well when he wrote of ‘errors in relation to the function of words that are so

⁶⁹ Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024.

⁷⁰ *ibid.*

⁷¹ See Glanville Williams, ‘Language and the Law—I’ (1945) 61 L Q Rev 71, 75.

frequently committed that we must suppose them to be natural ways of thinking.⁷² But, these errors are not, in my view, inevitable.

[70] Sixth, the mischief that the *Blackman* ratio seeks to address does not require a statement that this Court ‘lacks jurisdiction’ to grant the application for special leave in any circumstance. There have been many instances in which courts of law—in the fullness of jurisdiction—decline to grant the prayers of litigants because the courts were not persuaded to grant them in the particular circumstances of the given case. It is not always necessary to express the refusal to grant prayers as a matter of ‘lack of jurisdiction’ or ‘want of jurisdiction.’

[71] Seventh, where a party in litigation has failed to take a step incumbent upon it to facilitate the court in its exercise of jurisdiction, the failure of the party to take that necessary step is primarily a disability upon the party, which may warrant a forfeiture.⁷³ It is not necessarily a disability upon a court of inherent or general jurisdiction, denying it jurisdiction to do justice. At its highest, then, the proper objective of the *Blackman* ratio may be restated to say that in the absence of an application for extension of time, the Court may consider that it is not *properly seised* of the request for special leave. Depending on the circumstances, even that restated position may not absolve the Court from doing justice as needed. This may be the case where (as in this case) it would be possible to adjourn the proceedings with costs in order to allow the applicant an opportunity to apply for an extension. Nevertheless, the restated position is more defensible than the bare proposition that

⁷² *ibid* 74.

⁷³ *In Prosecutor v Ruto and Sang*, a Trial Chamber of the International Criminal Court was confronted with the question whether art 63(1) of the Rome Statute, which says that the ‘accused shall be present during the trial,’ imposed a *duty upon the Court* preventing it from proceeding with the trial where the accused chose to be absent from trial, or whether the provision imposed a *duty upon the accused to be present* during the trial. The Trial Chamber took the view that the duty was on the accused, for reasons including judicial control of the proceedings. That judicial control included the ‘the need to continue to subject accused persons to the jurisdiction of the Trial Chamber during the course of the trial.’ Hence, any failure of the accused to comply with a resulting order of the Chamber ‘may attract due sanctions and forfeitures against the accused’. Furthermore, the Trial Chamber held that ‘the provision that says that the “accused shall be present during the trial” does not implicate any apparent or implied restraint on the discretion of the Court to excuse the accused in a reasonable way from the duty imposed on him to be present during the trial.’ See *Prosecutor v Ruto and Sang (Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial)* (International Criminal Court, Trial Chamber V(A), Case No ICC-01/09-01/11-777, 18 June 2013) at [42], [43].

this Court ‘lacks jurisdiction’ to grant special leave where a party is out of time and has made no application for extension of time.

- [72] Finally, the better approach is that indicated in *Watson v Fernandes*, where the Court not only said that there is no ‘time limit on the court’s ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require’ but also that ‘[t]he court retains that jurisdiction at all times.’⁷⁴

Back to Discipline in the Litigation Process

- [73] Evidently, considerations of professional responsibility and discipline lie at the heart of the *Blackman* ratio. Although the concern was indicated in *Blackman* in terms that ‘[l]itigants are not free to ignore time limits and then seek refuge behind the “overriding objective”’,⁷⁵ the direction of the concern as a matter of legal professional responsibility and discipline was much clearer in both *Mitchell v Wilson* and *Pound v Dueck*. In *Mitchell*, it was observed as follows:

Courts rightly are tending increasingly to insist on high standards from counsel. Misunderstanding by counsel of the time limit for filing a Notice of Appeal is not considered a good reason for extending a time limit. An attorney’s ignorance of the rules will rarely, if ever, provide a good reason for failing to comply with them. Errors that cause inexcusable or reprehensible delay may amount to professional misconduct.⁷⁶

- [74] As seen earlier, in *Pound v Dueck*, it was observed in the same vein:

Timeous filing is one component of instilling discipline in litigation and in the judicial proceedings. Putting off the application serves no obvious useful function, increases delay, and can often create a risk of procedural complications. The onus is on the party who may wish to appeal to decide early whether to appeal and to act speedily upon the decision to appeal. It is not desirable to keep the other party in a state of uncertainty concerning the

⁷⁴ *Watson* (n 21) at [39].

⁷⁵ See *Blackman* (n 27) at [6].

⁷⁶ *Mitchell* (n 28) at [6] (footnotes omitted).

result of the case. It is also not in the public interest. The sooner litigation is ended, the better.⁷⁷

[75] These sentiments seem to me irreproachable. However, they do not make inevitable the proposition that the CCJ ‘lacks jurisdiction’ to grant special leave to appeal in the event of delay, if the applicant had made no application for an extension of time. It is enough to say that the Court will decline the application for special leave in those circumstances.

[76] Furthermore, the observation in *Mitchell* quoted above invites a caution against punishing clients for the errors of their lawyers. It is hard enough that a client paid a lawyer to bungle a case; there is no justice in punishing the client personally in that regard. When judges form the view that the conduct of counsel is reproachable as ‘professional misconduct,’ the proper recourse is for the court to direct punitive measures against the lawyer personally, including by admonition on the record, award of costs personally against the lawyer or referring him to the relevant professional governing body. Such measures may require *suo motu* order or action on the Court’s part; rather than an expectation of a motion or action or concurrence thereof on the part of opposing counsel, which conventional *modus videndi* or ethos of camaraderie within an intimate bar may make unavailing.

The Particular Circumstances of this Case

[77] To be clear, my position is not that in every case of non-compliance with the rules of procedure, the remedy must be to allow rectification on terms of punitive costs. Even as the focus of the inquiry must be on the ascertainment of prejudice, it remains the case that the parties must demonstrate relative injustice that may substantially occur to them. It is that substantive injustice that must be avoided. Where the party seeking rectification of his or her non-compliance demonstrates substantial injustice that will occur in the absence of rectification, then rectification

⁷⁷ *Pound* (n 31) at [20].

on terms of punitive costs should generally be allowed. But, where there is no demonstrable material injustice, it will not be appropriate to allow rectification of non-compliance with rules even on terms of punitive costs.

[78] As indicated at the outset of this opinion, on a certain view, the case before us may well fall into the category of cases where material injustice might not have been demonstrable. That might have been the case if the learned Chief Justice's decision and order had been carefully drafted to limit themselves to setting aside the consent judgment, without more, effectively allowing the entire case to be tried on the merits. It would be difficult to say that there is substantial injustice in such an outcome. The difficulty lies in the fact that the Chief Justice's declaratory judgment may entail more than merely setting aside the consent judgment. There are substantive pronouncements that may encumber the reputation of the appellants. It is for that reason that it cannot be readily said that this should not be a case that falls into the default approach of rectification on terms of costs.

[79] In his dissenting opinion, my highly esteemed and learned brother, Anderson P, contends that Mr Datadin (for the appellants) made no application for an extension of time, either during the hearing before the Court of Appeal or later. With due respect to that view, I'm constrained to say that the lead judgment of Ononaiwu J sets out the transcript of the proceedings. The transcript leaves no objective doubt that (a) Mr Datadin unmistakably communicated to the Court of Appeal his intention to seek an extension of time at the hearing; and, (b) the Chancellor unmistakably prevented him from proceeding along the lines of seeking an extension of time during that hearing. The evident interaction is equivalent to a lawyer rising with the traditional declaration of intention in the customary opener: 'If it pleases the Court, I would like to do X.' But, the presiding judge immediately says to him: 'Oh, no, Counsel. It does not please the Court for you to do X!' Any experienced lawyer who persists in saying more on the subject than 'As the Court pleases'—or 'I'm guided' as Mr Datadin said—may well be flirting with severe admonition (at least) from the Bench.

[80] It is also not reasonable, in my view, to blame counsel for not making a subsequent written application for an extension of time to apply for leave, after his application for leave had already been struck out. For one thing, it must raise concerns of vexatious proceedings were counsel to do so. What is more, it seems to me a startling waste of time for the Court of Appeal to strike out the application for leave, only to entertain a subsequent written application for extension of time for the application, which could have been dealt with orally on the spot at the first opportunity. I am not prepared to presume that order of inefficiency in the processes of the Court of Appeal.

Whether the Appeal to the Court of Appeal was of a ‘Summary Judgment’

[81] As a final matter, I must say that as a matter of procedural law, one difficulty that I see in this appeal is with the characterisation of the learned Chief Justice’s decision as the kind of ‘summary judgment’ that is captured by s 6(4) read together with s 6(2)(a)(i) of the Court of Appeal Act. The point of that characterisation is that the 14-day time limit, being the lesser time limit, applies to summary judgments for purposes of the required leave to appeal decisions of the Full Court. The difficulty which I see with that characterisation arises chiefly from the fact that the respondents applied for a declaratory judgment together with a decision setting aside the consent judgment issued by Harnanan J. In that application, the respondents duly alleged the grounds on which they rely. It seems to me that the full mandate of the Court in the determination of that application was to issue the declaratory judgment and to set aside the earlier consent judgment. That was what the learned Chief Justice did. Given that her decision may be seen as a final ‘judgment’ that wholly or partly determined the rights of the parties in substantive ways—pursuant to the definition of ‘judgment’ in r 2.03(1) of the Civil Procedure Rules of the Supreme Court of Guyana—there is a question whether her judgment falls within the remit of s 6(2)(c) of the Court of Appeal Act, which appears to preclude ‘an order declared by rules of court to be of the nature of a final order’

from the remit of s 6(2)(a)(i). The question may not be a simple one, given how some of the relevant provisions are drafted.⁷⁸ But the question assumes significance in the appropriate case, considering that subrules (5) to (7) of r 15.02 of the Civil Procedure Rules signal that some summary judgments are interlocutory in the sense that they do not bring the overall case to an end. From that perspective, it may be possible to separate summary judgments between (a) those that (though summary) are in the nature of final judgments (because they bring the overall case to an end with the possibility that appeals in relation to them are arguably as of right); and, (b) those that are merely interlocutory (and which undoubtedly require leave to appeal). In judicial proceedings the reason that leave is required to appeal interlocutory rulings, decisions and orders is generally because judicial economy recommends that such appeals can, in most instances, wait until the final judgment in the case. That approach allows all the rulings, decisions and orders rendered in the case are appealed together, rather than have a multiplicity of appeals in the course of the same case.

[82] I merely raise the question for completeness. It is not necessary to resolve that construction in this case; for, the resolution will not at all alter the outcome arrived at by Ononaiwu J. For one thing, counsel for the appellants did *seek leave* to appeal to the Court of Appeal, rather than insist on appeal as of right. What is more, he would still be out of time to appeal the judgment of the Full Court, whether or not the Chief Justice's decision is correctly described as 'summary judgment.'

⁷⁸ For instance, there may be need for construction in relation to s 6(4) of the Court of Appeal Act, Cap 3:01. It is not clear if it is saying that leave is required to appeal any decision of the Full Court in respect of an order of a High Court. If so, why does the same provision single out, as requiring leave, decisions of the Full Court upon appeal from a judge of the High Court in respect of an order referred to in paragraphs (i) to (iii) of s 6(2)(a)?

Conclusion

[83] It has not been necessary to invoke in the main, a well-known dictum of Collins MR in *Re Coles and Ravenshear*,⁷⁹ although it remains profoundly instructive in the proper understanding of the relationship between the judicial function and rules of procedure. The point was, perhaps, just as appropriately expressed in the early case law of this Court as ‘Gone are the days of arid technicalities.’⁸⁰

[84] That principle is, in my view, well reflected in the opinion of Ononaiwu J with which I concur. In the outcome, I agree with disposition of the appeal as well as the order as to costs.

JAMADAR J:

[85] I have read the opinions of Anderson P, Ononaiwu J and Eboe-Osuji J. I agree with the disposition proposed by Ononaiwu J and with aspects of the reasoning of both Ononaiwu and Eboe-Osuji JJ. This short opinion describes the contours of my agreement.

[86] I specifically agree with Ononaiwu J’s analysis and reasoning that:⁸¹

The Court of Appeal’s jurisdiction under Ord 1, r 8 was available when counsel for the appellants accepted at the hearing that the motion for leave to appeal was filed out of time and registered a desire to seek an extension of time. In those circumstances, the Court of Appeal had a duty to consider the possibility of the exercise of its curative power. In my own analysis the logic of this is irrefutable.

⁷⁹ *Re Coles and Ravenshear* [1907] 1 KB 1 at 4: ‘Although I agree that a Court cannot conduct its business without a code of procedure,’ he said, ‘I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.’ Collins MR’s message would be just as resonant in terms that rules of court are a very useful butler in the household of justice, but they are not the overlord.

⁸⁰ *Andrews* (n 48) at [8].

⁸¹ At [31]. Referencing Ord 1, r 8 of the Court of Appeal Rules, Cap 3:01.

- [87] Given (i) the source and existence of the Court of Appeal's *jurisdiction* (s 6(4) of the Court of Appeal Act), and (ii) the *discretionary powers* conferred on it by Ord 1, r 8 (of the Court of Appeal Rules), (iii) a *consequential duty* arose to duly entertain, consider and judiciously determine – in accordance with those powers and that duty (whether at the actual hearing or otherwise and on such terms as it thought appropriate) – the appellants' counsel's clear intimation that he wanted to make an application to extend time for his clients' application for leave to appeal. It is that failure by the Court of Appeal (to duly entertain, consider and judiciously determine) that constitutes, in my estimation, a manifest error of law in this appeal, which, as per this Court's jurisprudence, amounts to a failure to act in the interests of justice.⁸²
- [88] A fundamental overarching policy of common law courts of justice is to determine cases on their merits in so far as that is reasonably and fairly possible and required. To deal with cases justly means, among other things, to always strive to do exactly this. Procedural rules regulate the processes needed to facilitate this outcome efficiently and effectively, and include coercive and punitive powers, including powers to strike out and dismiss proceedings for procedural defaults in appropriate circumstances.
- [89] There is no inconsistency in these constraining powers and the stated overarching policy, once it is clear to a decision maker (and demonstrated) that they are subject to the objectively reasonable and fair prioritising of the policy when exercising judicial discretion. Thus, the broad and encompassing curative power and its incumbent duty that is explicitly vested in and expected of the Court of Appeal by Ord 1 r 8. It is a duty, which once triggered, cannot be fulfilled without due consideration of relevant factors on available evidence.
- [90] To foreclose that opportunity, as occurred in this matter, is to deny the moving party the protection of the law - including access to justice and the benefits of a fair

⁸² See *Watson* (n 22) at [39].

hearing - which are entitlements under the Constitution of Guyana that the judicial arm of the State is obliged to uphold.⁸³ Moreover, it is to deny the court access to potentially relevant information that facilitates the due exercise of judicial discretion under Ord 1 r 8.

[91] I therefore specifically agree that ‘the Court of Appeal erred by not entertaining the possibility of the exercise of its discretionary power under Ord 1, r 8 to extend the time for applying for leave to appeal in the interests of justice.’⁸⁴

[92] I also agree with Ononaiwu J that: ‘I am unable to support the position that this Court has *no jurisdiction* to treat with an out-of-time application for special leave because of a litigant’s failure to file an application for an extension of time.’⁸⁵ Such a position or proposition (of an assumed lack of jurisdiction in those circumstances of default), reflects a misunderstanding and misapplication of the juridic notion of what constitutes a superior court’s jurisdiction.

[93] In this regard, I specifically associate myself with the analysis and reasoning of Eboe-Osuji J at [56] to [72] of his opinion.

[94] The simple fact is that both before the Court of Appeal⁸⁶ and likewise before this Court,⁸⁷ the *jurisdiction* of the court is rooted in its statutorily conferred legal authority to entertain applications for leave to appeal. The jurisdiction afforded, and under examination in this matter, is in relation to subject matter – a category of applications (for leave to appeal). For the purposes of this appeal, matters outside of that category are properly *outwith* or beyond the scope of the court’s jurisdiction in this regard. However, the courts have jurisdiction (the power ‘to speak the law’⁸⁸) to adjudicate cases and to make and enforce orders within the defined subject matter

⁸³ See Constitution of the Co-operative Republic of Guyana, Cap 1:01.

⁸⁴ At [34].

⁸⁵ At [37].

⁸⁶ See Court of Appeal Act, Cap 3:01, s 6(4).

⁸⁷ See Agreement Establishing the CCJ (n 66), art XXV and Caribbean Court of Justice Act, Cap 3:07, s 3 (GY).

⁸⁸ Latin Roots: *Jus/iuris* (‘law’) + *dictio* (‘a saying’ or ‘declaration’); hence ‘to speak the law’ or ‘to say/declare the law’.

category. Procedural rules designed for invoking that jurisdiction, neither create nor negate it.

[95] As to whether the jurisdiction conferred is exercised favourably or not, or at all, is a matter of judicial discretion exercised pursuant to relevant powers and duties and as prescribed or constrained by various rules (including rules pertaining to time). However, a failure to comply with procedural rules to access the court's jurisdiction, as in these circumstances for leave to appeal, does not divest a court of its jurisdiction *per se*. This is so, even though deficiencies in the application may disentitle a party to the benefit of an exercise of powers under that jurisdiction.

[96] As with both Ononaiwu and Eboe-Osuji JJ, I therefore agree, in relation to this Court's jurisprudence in this area, that 'the better approach is that indicated in *Watson v Fernandes*, where the Court not only said that there is no "time limit on the court's ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require" but also that "[t]he court retains that jurisdiction at all times."⁸⁹

ANDERSON P:

Introduction

[97] I very much regret that I am unable to agree with my colleagues that this matter should be remitted to the Court of Appeal. In my opinion, there is no good or sufficient reason for sending the case back for further consideration. In consequence, a remittal risks the useless prolongation of an already aging litigation. Unnecessary litigation odysseys have definite but insufficiently appreciated debilitating effects on Caribbean economic development and Caribbean legal culture. These are in addition to the negative effect of such litigation on the backlog in our court systems as well as the drain they have on judicial resources.

⁸⁹ At [73] (Eboe-Osuji J).

Background

- [98] It is accepted on all sides that Shamsundar Persaud died intestate in June 2018. He left four children all of whom are beneficiaries of his estate. The due administration of that estate has been mired in litigation over the past eight years. The genesis of that litigation is the allegation by the brother of the deceased, Satyanand Persaud, who is the first appellant in this case, that Shamsundar died without repaying a June 2010 loan of USD400,000.
- [99] On 1 June 2019, two of Shamsundar's four children, Kumar Persaud and Chetram Persaud, appointed the first appellant by a Deed of Power of Attorney to be their representative. Included in the various powers contained in that Deed was the competence of the first appellant to apply on behalf of Kumar and Chetram for Letters of Administration to Shamsundar's estate. By a Deed of Substitution dated 10 June 2019, the first appellant substituted his brother Taij Persaud, the second appellant in this case, to be the duly constituted attorney of Kumar and Chetram.
- [100] On 16 October 2019, the first appellant obtained judgment in the sum of USD400,000. This occurred when his brother and second appellant appeared in person on behalf of Kumar and Chetram and consented to the judgment. The consent judgment was challenged on 16 May 2022, when Dhavanie Persaud, the third child of the deceased Shamsundar, together with the Estate, sued the first and second appellants. The suit alleged a failure to make material disclosure and challenged the validity of the alleged promissory note for the alleged debt. The suit also alleged that any claim for repayment of the alleged loan was statute-barred.
- [101] In the High Court, Roxane George CJ (Ag) took into consideration the pleadings, as well as the written and oral submissions of both parties. On 22 February 2023, she issued judgment in favour of Dhavanie Persaud and the Estate. The learned Chief Justice found that the 16 October 2019 judgment had been obtained by fraud and in breach of fiduciary duty.

- [102] The Full Court of the High Court, comprising Sewnarine-Berry and Younge JJ, refused the appeal by the first and second appellants, to set aside the order of the Chief Justice. The Full Court agreed that each of the appellants owed a fiduciary duty to the estate which included an obligation to act in the best interest of the estate and to safeguard its assets. It found that the first appellant did not extinguish his duty to the estate when he substituted the second appellant as the attorney for the two children, Kumar and Chetram. The court also found that the purported promissory note did not satisfy the legal requirements for a promissory note.
- [103] On 22 December 2023, the appellants filed a Notice of Motion for leave to appeal the decision of the Full Court. The respondents' affidavit in answer included the point that the Motion for leave had been filed out of time. Subsequent written submissions of the respondents again and similarly pointed out the untimely delay in the application for leave to appeal. No application to extend the time to apply for leave to appeal was made. On 7 October 2024, the Court of Appeal heard arguments on the application and refused to grant leave to appeal holding that the application was out of time. The Motion for leave to appeal was struck out and costs of GYD125,000 were awarded to the respondents.
- [104] It is with this decision of the Court of Appeal that the majority in this Court finds fault and would remit for further consideration by the Court of Appeal. I examine, below, the reasons given by the majority for adopting this course of action. Before that, however, it should first be noted that it is universally accepted by this Bench that a remittal to the Court of Appeal cannot be for that court to consider whether to grant the application for leave to appeal the decision of the Full Court. This is because the application for leave to appeal was clearly out of time; a fact conceded by the appellants. Further, this Bench unanimously agrees that the Court of Appeal cannot properly be directed to consider an application for extension of time to apply for leave to appeal the decision of the Full Court as no such application was ever made to the Court of Appeal.

Failure to Consider Exercise of Discretion under Ord 1, r 8

[105] My colleagues consider that the first and second appellants ‘registered’ to the Court of Appeal ‘a desire to seek’ an extension of time to apply for leave to appeal. Based on this premise, the majority consider that the Court of Appeal was ‘Therefore’ under a duty to consider whether to exercise its power under Ord 1, r 8 of the Court of Appeal Rules to extend the time for applying for leave to appeal. As the transcript did not reveal the Court of Appeal’s consideration of the possibility of the exercise of its curative power under Ord 1, r 8, the matter must be remitted to the Court of Appeal for that court’s reconsideration.

[106] With the greatest of respect, I am not persuaded by this line of reasoning. First, a ‘desire to seek’ an extension of time does not an application for an extension of time make. There are many desires of which the law takes no cognisance. To be cognisable, desires must be expressed or registered in forensic form. It is not sufficient for counsel to hint or allude orally in court that an alternative to the course thus far taken by him (one that counsel was repeatedly warned against) might be for counsel to seek an extension of time. To register the desire to make an application for an extension of time, an attorney must actually make the application for an extension of time. The court may or may not allow an oral application. That is a matter entirely within the discretion of the court. The attorney can always make a written application unless expressly forbidden by the court from doing so. In this case, the Court of Appeal issued no order forbidding counsel from making a written application for time to be enlarged. The Court of Appeal made pellucidly clear, on the occasion of the hearing of the application for leave, that the application for leave was the only one it was prepared to deal with on that occasion. It in no way foreclosed a separate application for an extension of time, and, indeed, members of the bench suggested this alternative to counsel.

[107] It is worth emphasising that the general rule is that an application must be made in writing save in excepted cases, one of which is ‘with the permission of the court’:

Keen Phillips (a firm) v Field.⁹⁰ This was repeated in *McDonna v Richardson*,⁹¹ a case from the Court of Appeal of the Eastern Caribbean Supreme Court, where Barrow JA noted that a proper application for an extension of time for leave to appeal and for leave should be made in writing, stating the grounds for the application, and supported by evidence on affidavit. The judge did allow *en passant*, that the court retained a discretion to allow an oral application. Even in the absence of a specific rule, the party asking the court to exercise a discretion in their favour should do so in writing and provide the court with the evidentiary material necessary to facilitate an exercise of that discretion. In the present case, the appellants through their attorney, were provided advice from opposing counsel and guidance from the Bench that an application seeking an extension of time, separate from the late application for leave to appeal, was required.

[108] Second, I do not agree that we can safely move from the premise that the transcript disclosed no consideration of Ord 1 r 8, to the conclusion that Ord 1 r 8 was not considered. This was a case presided over by the Acting Chancellor of the Judiciary of Guyana and two senior Justices of Appeal of the Judiciary of Guyana. All of these judges, it can be reasonably presumed, are intimately familiar with the Court of Appeal Rules of Guyana. It is also a fair presumption that they would also have been familiar with the facts and intricacies of the case as evident on the record for application of leave to appeal before them. The Court of Appeal deliberated after the hearing; a hearing that was captured (if imperfectly) by the transcript.

[109] To be sure, it is unfortunate that a fully reasoned judgment has not been made available for the purposes of this appeal. This Court, the parties, and the public are entitled to the fullest confidence of the Court of Appeal. However, in the absence of a fully reasoned judgment, it is not necessarily accurate to say that the Court of Appeal gave no consideration to Ord 1 r 8. This Court simply does not *know* whether the Court of Appeal considered Ord 1 r 8, again, certainly an unfortunate

⁹⁰ [2007] 1 WLR 686.

⁹¹ *McDonna* (n 25).

circumstance. The point is that it would be more accurate for there to be a remittal to the Court of Appeal to seek clarification of whether it had considered the relevance of Ord 1 r 8, and if it had not, to direct it to consider the relevance of that provision.

[110] In this connection, it is noteworthy that the Court of Appeal would have been aware of several pertinent facts. These include but are not restricted to the following. (1) The attorney for the appellants had indicated in his oral submissions to the Court of Appeal that the reason for his non-compliance was his lack of familiarity with the procedural rules⁹²; a circumstance which this Court has said does not justify an extension of time.⁹³ (2) The attorney for the appellants had been warned twice in writing on separate occasions, weeks before the hearing by opposing counsel for the respondents, that an application to extend time was necessary, warnings which counsel for the appellants seemingly ignored. (3) When given the opportunity to augment his oral submissions including therefore the possibility of arguing that it was in the interest of justice to depart from the rules governing applications for leave to appeal, the attorney for the appellants stated that he had nothing further to add to his submissions.⁹⁴ (4) It appears from the transcript of the hearing before the Court of Appeal that it was made tolerably clear by two members of that bench that a separate application would be necessary to enlarge the time within which to apply for leave. In the words of the Acting Chancellor in the Court of Appeal, ‘You are being given guidance by the Court and if you do not wish to follow the guidance, even at today’s date, that’s a matter for you.’⁹⁵ Counsel never followed up to make the separate application.

[111] Third, remittal of this matter places more weight on Ord 1 r 8, than it was crafted to bear. As far as is relevant to the present appeal, Ord 1, r 8 states that, ‘... the

⁹² See Transcript of proceedings, *Persaud v Persaud* (Court of Appeal of Guyana, Civil Appeal No 190/2023, 7 October 2024) 399.

⁹³ *Mitchell* (n 28) at [6].

⁹⁴ Transcript of proceedings, *Persaud v Persaud* (Court of Appeal of Guyana, Civil Appeal No 190/2023, 7 October 2024) 399.

⁹⁵ *ibid* 6.

Court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way where this is required in the interests of justice.’

[112] The principles for the proper application of Ord 1, r 8 were discussed decades ago by the Court of Appeal of Guyana in *Hing v Hing*.⁹⁶ In that case, Haynes C stated that:

... O. 1 r. 8 is to be sparingly exercised ... The dominant consideration is “the interests of justice”. And it is for this court to determine in every individual case as it arises, whether recourse to the rule is demanded. It is neither possible nor desirable to attempt to define or to categorise the circumstances which can or will do so. This court’s sense of justice must be its guide. But it must be the interests of justice according to law. This consideration includes not only the interests of the dissatisfied litigant who wishes to pursue a right of appeal, but also those of the successful one in the satisfaction of the judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation. We have to balance the two competing interests, bearing in mind the third. And in so doing it is not irrelevant to recognise that a right of appeal is not one to which a litigant is entitled as a matter of natural justice. It is a statutory right exercisable subject to compliance with the conditions prescribed by the statute or statutory instrument. The litigant who does not comply and so is unable to stand in this court and challenge the judgment of the court below, is not thereby deprived of a right to do so. What has happened is that he has not qualified to exercise the right and a legal bar arises as a result of such non-compliance.⁹⁷

[113] This basic statement of principles has been accepted and acted upon by this Court.⁹⁸ In the context of the opinions expressed by my colleagues, it may be worth emphasising some of the foundational premises evident in this seminal statement guiding the exercise of discretion under Ord 1, r 8. The following enumeration is not necessarily exhaustive.

⁹⁶ *Hing* (n 8).

⁹⁷ *ibid* at 397.

⁹⁸ *Sankar* (n 2) at [21] – [22].

[114] (1) Order 1, r 8 embodies a generic and residual discretion in the Court of Appeal to extend time and otherwise depart from the Court of Appeal Rules in the interest of justice. There are no pre-ordained categories for the exercise of the Ord 1 r 8 discretion. It is for the court to determine in every case whether resort to the rule is warranted. Similar rules are to be found in the rules of court of other Caribbean Community jurisdictions.⁹⁹ To my mind, these rules codify and reflect a deep and inherent discretion that lies at the heart of the exercise of judicial authority and one long recognised in the common law.¹⁰⁰ If this is so, then that inherent discretion is both compatible with and sustained by Article XXV(1) of the CCJ Agreement which provides that this Court has ‘such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party.’ Article XXV(1) has been given the force of law in the five States accepting the Court’s appellate jurisdiction. In the case of Guyana, the incorporating legislation is the Caribbean Court of Justice Act 2004.¹⁰¹

[115] A court of law must necessarily act in the interest of justice even if this means departure from procedural rules. This was eloquently expressed by this Court in *Watson v Fernandes*,¹⁰² when we stated that:

Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in *Barbados Rediffusion Services Ltd v Marchandani*. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court’s ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times.¹⁰³

⁹⁹ See example, Supreme Court (Civil Procedure) Rules 2008 r 62.1(2) (BB) discussed by Burgess JA in *CGI Consumers Guarantee Insurance Co Ltd v Trident Insurance Co Ltd* BB 2016 CA 6 (CARILAW), (16 February 2016).

¹⁰⁰ See for example, *Finnegan v Parkside Health Authority* [1998] 1 All ER 595.

¹⁰¹ Cap 3:07.

¹⁰² *Watson* (n 22).

¹⁰³ *ibid* at [39] (footnote omitted).

[116] (2) The discretion given under Ord 1 r 8 must be sparingly exercised. Article XXV(7)(1) of the CCJ Agreement, which is given the force of law in Guyana by s 3 of the CCJ Act of 2004, authorises the President in consultation with five other Judges of the Court to ‘make Rules of Court for regulating the practice and procedure of the Court in exercise of the appellate jurisdiction conferred on the Court and, in relation to appeals brought before the Court, the practice and procedure of any court in respect of such appeals.’ A similar statutory authority exists for the making of the Court of Appeal Rules of Guyana.¹⁰⁴ Order 1, r 8 is one of those rules. Therefore, the very first principle must be that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, are to be observed. As was stated by Sir Thomas Bingham MR in *Costellow v Somerset County Council*, ‘The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met.’¹⁰⁵ No doubt the court may depart from the requirements in appropriate cases. However, to justify the invocation of the plenary discretion of the court, a departure from governing procedural rules must be demonstrably necessary in the interest of justice.

[117] To emphasise, Ord 1, r 8 contains residual discretion to ensure the ends of justice, but this overriding jurisdiction is to be used parsimoniously lest it overwhelms the system of procedural rules and denudes them of real meaning and effect. The discretion cannot be exercised solely on the basis of payment of costs until and unless the defendant proves prejudice. If that were so, then, as Bingham MR recognised in *Costellow*:

...a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice.

¹⁰⁴ The basis on which the original rules were made: ‘The Chief Justice of The West Indies and two other Judges of the Federal Supreme Court selected by him in exercise of the powers conferred upon them by Section 7 of the British Guiana (Appeals) Order in Council, 1957, and of all other powers enabling them in that behalf, hereby make the following ...’

¹⁰⁵ [1993] 1 All ER 952 at 959.

This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.¹⁰⁶

[118] Further, an interpretation of Ord 1, r 8, that routinely subjects every out-of-time application to broad considerations of the interests of justice would remove the discipline of the law of civil procedure and would have a corrosive effect on predictability in the practice of law. It would also have a negative effect on the teaching of the subject of civil procedure in the region's law academies. To the extent that it can, this Court must make the pedagogy of law intelligible for the students of the law.

[119] (3) There is no natural right to liberation from the rules of court. Reduced to the present case, there is no right to appeal and no right to freedom from complying with the rules governing the appeal process. The competence to appeal derives from statute and *prima facie* must conform to the procedural requirements of the statute. Non-compliance with procedure means that a would-be appellant is not qualified to exercise the competence to appeal and must show that justice requires that consideration of the application to appeal be allowed to proceed notwithstanding the lack of compliance. To take an obvious example, in the area of criminal law it would be demonstrably necessary to depart from any inhibiting procedural rules in order to admit discovery of DNA evidence that exonerated persons wrongfully convicted of crimes. Likewise, in civil litigation, occurrence of general *force majeure* situations such as a natural disaster or states of national emergencies, or the unexpected hospitalisation of relevant persons are examples of circumstances that, subject to other relevant considerations, could well warrant a departure from the rules or an enlargement of time.¹⁰⁷

[120] (4) Where an applicant attempts entry into the appellate process through the door of Ord 1 r 8, that person must present sound and cogent reasons for any non-compliance with the rules governing the application. The applicant must come with

¹⁰⁶ *ibid.*

¹⁰⁷ See *Bethell v Royal Bank of Canada (Barbados) Ltd* (BB CA, 16 February 2023) (Cumberbatch JA) at [25].

a very strong case to show that denial of the application would likely result in a clear miscarriage of justice. It is not the responsibility of the court to sniff and rummage through the pleadings and submissions or to conduct a Sherlock Holmes-style investigation to discover the balance of the interests of justice. The burden for demonstrating that Ord 1 r 8 is deserving of application is entirely that of the applicant who seeks relief from his non-compliance with the procedural rules.

[121] (5) In determining what is required in the interest of justice the court must balance the competing interests of the dissatisfied litigant who wishes to pursue an appeal against the interests of the successful party who wishes to have the satisfaction of his judgment without delay.¹⁰⁸ That balancing exercise is first and foremost for the determination of the original court before whom the matter first arises. As Haynes C said, that ‘court’s sense of justice must be its guide.’ The remedies and procedures that the court imposes are for it to decide and are not to be prescribed for it. Allowing an oral application, adjourning to enable a written application, penalising non-compliance in costs, are all available options from which the court may choose. Striking out is admittedly a nuclear option¹⁰⁹ but it may be appropriate in all the circumstances of a case, since dismissing an application can serve many purposes, including purposes beyond the immediate requirements of the interest of the parties, a point to which I shall shortly return. Of course, the exercise of discretion by the Court of Appeal remains reviewable by this Court but that exercise of discretion is not to be overturned except in clear cases where the determination made by the Court of Appeal was plainly wrong.

[122] (6) In considering the interest of justice, it is necessary to keep in mind the interest of the justice system. The admonition of Haynes C that ‘the court should have regard to the important administrative principle against the undue protraction of litigation’ was repeated verbatim by this Court in *Sankar*.¹¹⁰ Other common law courts in the region have similarly expressed themselves as being mindful of ‘our

¹⁰⁸ *Sankar* (n 2) at [22].

¹⁰⁹ *Cuffy v Skerrit* [2022] CCJ 12 (AJ) DM, (2022) 104 WIR 162.

¹¹⁰ *Sankar* (n 2) at [22].

duty to ensure that delay does not become a feature of our civil justice system.’¹¹¹ These are important considerations to keep in mind because they speak to the nature of the legal society to which we aspire. Prolonged concatenation of litigation in the administration of estates, sometimes abetted by extreme systemic judicial delays, is not uncommon. There are several cases of the 25-year vintage¹¹² but the record appears to be 35 years¹¹³ from initiation of litigation to administer the estate to final disposition of the litigation. This cannot be allowed to go on. Inter-generational litigation is unhealthy for the psychology of its victims particularly when (as in this appeal) the victims are members of the same family. It also has pathological effects on societal economic interests. It demoralises the legal culture. This Court must safeguard against contributing to the unnecessary prolongation of litigation.

Jurisdiction of the Court to Entertain Late Applications for Leave to Appeal

[123] I entirely agree with my colleagues that both the Court of Appeal and this Court have jurisdiction to entertain an out-of-time application for special leave to appeal. It is elegantly put in the lead judgment of the majority in relation to the Caribbean Court of Justice, that:

This Court’s jurisdiction to grant special leave to appeal is conferred by statute and cannot be extinguished because a litigant filed a special leave application outside of the time period prescribed by the Court’s rules without also filing an application for an extension of time.¹¹⁴

[124] As the majority further points out, the same reasoning applies in respect of the appeals process before the Court of Appeal in Guyana. Much of what I have said in this opinion thus far recognises and reinforces this principle. At the risk of repetition, I am of the view that the power or jurisdiction to allow departure from

¹¹¹ *CGI Consumers Guarantee Insurance Co Ltd v Trident Insurance Co Ltd* BB 2016 CA 6 (CARILAW), (16 February 2016) at [66] (Burgess JA).

¹¹² See for example, *Knox v Deane* [2020] CCJ 5 (AJ) (BB), BB 2020 CCJ 5 (CARILAW).

¹¹³ *Singh v A-G* [2018] CCJ 3 (AJ) (GY).

¹¹⁴ At [37].

procedural rules in the interest of justice, now codified in convention and statute, also inheres in the exercise of the judicial power.

[125] I also agree that upon one reading of the cases of *Blackman v Gittens-Blackman*,¹¹⁵ *Mitchell v Wilson*,¹¹⁶ *Attorney General of Guyana v Dipcon Engineering*,¹¹⁷ and *Pound v Dueck*,¹¹⁸ it could be said this Court expressed itself as being powerless to entertain a late application to seek leave to appeal. However, respectfully, this would be an incomplete reading of the opinions rendered by judges of this Court. It was clearly the case in each of those cases, and this was often expressly stated, that it was *not* in the interest of justice for an extension of time to be granted. In other words, the existence of the possibility of a miscarriage of justice was the only basis on which it would be legitimate to depart from the conventionally and statutorily authorised rules adopted to regulate, ‘the practice and procedure of the Court in exercise of the appellate jurisdiction.’ In the absence of the risk of an injustice, the Court had no jurisdiction to allow a departure from those rules so as to overlook the lateness of the application for leave to appeal.

[126] In the lead judgment of the majority it is said, in respect of the four CCJ cases cited, that:

... the Court’s recognition that it has the power to grant an extension of time to avert a clear miscarriage of justice and consideration of whether there would be any resulting miscarriage of justice *are at odds* with its position that it has no jurisdiction (or is powerless to act) in the absence of an application for an extension of time (emphasis added).

[127] With respect, if the language used by this Court in the referenced cases appears to be inelegant or to be a judicial sleight of hand then the appearance is only an optical illusion. The technique under examination is a method familiar to many areas of

¹¹⁵ *Blackman* (n 27) at [7].

¹¹⁶ *Mitchell* (n 28).

¹¹⁷ *Dipcon Engineering* (n 30).

¹¹⁸ *Pound* (n 31).

the law. Most obviously, it is a well-established and fundamental principle of judicial procedure that a court has inherent jurisdiction to decide upon its jurisdiction. Courts have jurisdiction to decide that they do not have jurisdiction: competence-competence (also called *Kompetenz-Kompetenz*). This seeming paradox is sometimes stated in the constitution, statute or rules of court.¹¹⁹ As it was expressly put by the US Supreme Court in case of *Ruhrgas AG v Marathon Oil Co*,¹²⁰ ‘the question of whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question.’ This proposition is codified in the UNCITRAL Model Law¹²¹ Article 16(1) which explicitly states that an arbitral tribunal ‘may rule on its own jurisdiction’. Many national arbitration acts adopt this language.

[128] Less obvious examples of this seeming forensic conundrum abound. For instance, a decision on whether an applicant has standing to bring an action for judicial review is not, under modern conditions, made at the start of the litigation purely on proprietary interest. It is made after the court has had the opportunity to consider the interest and expertise of the applicant, the importance of the issues for the society, and the totality of all of the circumstances of the case.¹²² Hence it is entirely possible that after a lengthy and involved trial on the substance of the issues, the court may decide that the applicant had no standing to bring the litigation. Whether an applicant can properly bring a constitutional action or is relegated to pursuing alternative remedies in private law is not made solely on the initial determination on whether there exists an adequate remedy in private law but only after considering the substance of the claim brought.¹²³ These illustrations could be multiplied several times over.

¹¹⁹ See for example, Court of Appeal Act, Cap 3:01, s 6(8); Supreme Court (Civil Procedure) Rules 2016 r 9.01(2) (GY).

¹²⁰ 526 US 574 (1999).

¹²¹ United Nations, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006* (Vienna 2008).

¹²² *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

¹²³ *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100 at [133] (Saunders J).

[129] My colleagues and I agree on and reaffirm the dictum in *Watson v Fernandes*,¹²⁴ that the *raison d'être* for the existence of the courts is to do justice between the litigants. However, justice must be according to law. It is sometimes overlooked that this Court's refusal in *Watson* to recognise '... a time limit on the court's ability to excuse non-compliance with the rules' was conditioned on '*if the interests of justice so require*' (emphasis added). It is only where the ends of justice require the exercise of discretion that, to return to the quotation in *Watson*, 'The Court retains that jurisdiction.'

[130] I am not as sanguine as my colleagues that in the absence of a risk of miscarriage of justice, the pronouncement that the Court has no jurisdiction to hear a late application for leave to appeal, or for special leave to appeal, where no application for an extension of time has been filed, is necessarily wrong.

Conclusion

[131] I would dismiss this appeal and award costs to the respondents.

Disposition

[132] Having regard to all the opinions expressed, the Court orders that:

- (i) The appeal is allowed;
- (ii) The order of the Court of Appeal dated 7 October 2024 is set aside and the matter is remitted to the Court of Appeal for fuller consideration in accordance with this Court's judgment;
- (iii) The parties bear their own costs before this Court.

¹²⁴ *Watson* (n 22) at [39].

/s/ W Anderson

Mr Justice Anderson (President)

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ P Jamadar

Mr Justice Jamadar

/s/ C Ononaiwu

Mme Justice Ononaiwu

/s/ C Eboe-Osuji

Mr Justice Eboe-Osuji