

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

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

**CCJ Application No BBCV2013/005  
BB Civil Appeal No. 4 of 2009**

**BETWEEN**

**FREDDY OYSTEIN WEEL**

**APPLICANT**

**AND**

**THE ATTORNEY GENERAL OF BARBADOS  
THE DENTAL COUNCIL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

**Before The Honourables**

**Mr Justice R Nelson  
Mr Justice J Wit  
Mr Justice D Hayton**

**Appearances**

**Mr Bryan L Weekes for the Applicant**

**Mrs Donna K Brathwaite QC and Mrs Marcia Thompson-Cumberbatch for the 1<sup>st</sup>  
Respondent**

**Mr Gregory Nicholls and Ms Alicia J Dowell for the 2<sup>nd</sup> Respondent**

**JUDGMENT**

**of**

**Justices Nelson, Wit and Hayton**

**Delivered by**

**The Honourable Mr Justice Nelson  
on the 22<sup>nd</sup> day of January, 2014**

- [1] The Applicant, Dr. Freddy Oystein Weel, obtained conditional leave to appeal to the Caribbean Court of Justice (“the Court”) from the Court of Appeal. The Applicant did not comply with the conditions imposed by the Court of Appeal, and thereafter applied

directly to this Court for the grant of special leave to appeal. The central issue is whether the Applicant in making an application for special leave in such circumstances merely puts the abortive application to the Court of Appeal behind him and is entitled to special leave from this Court by showing that he has an arguable case having a realistic chance of success on appeal.

### **The application**

- [2] The Applicant, Dr. Weel, filed an application dated November 12, 2013, supplemented by two separate appendices filed on November 14, 2013 and December 5, 2013 respectively. The Applicant seeks an order that he be granted special leave pursuant to section 8 of the Caribbean Court of Justice Act (“the Act”) and Rule 10.12 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2005 as amended (“the Rules”) to appeal against an order of the Court of Appeal made on July 8, 2011.
- [3] On March 22, 2006 the Applicant filed a constitutional motion seeking certain declarations and an order striking down rule 14(2)(b) of the Dental Registration Rules 1973 on the ground that it was overbroad in that it had the effect of unreasonably restricting the Applicant’s right to freedom of expression guaranteed under the Constitution of Barbados.
- [4] On February 20, 2009 the High Court dismissed the action and the Applicant appealed to the Court of Appeal. The Appeal was heard on December 7, 2009 and judgment dismissing it was delivered on July 8, 2011.
- [5] On August 10, 2011 the Applicant filed an application seeking leave to appeal as of right to the Court. On October 28, 2011 leave to appeal to this Court was granted by the Court of Appeal subject to certain conditions. The material terms of the order were as follows:
- “That the Appellant is granted leave to file his Notice of Appeal in this matter upon the following conditions:
- 1.1 That he pays the sum of \$10,000.00 into Court as security for costs in this matter within 90 days of the date of this Order; and

1.2 That he files the required List of Documents with the proper officer within 90 days of the date of this Order

in accordance with Rule 10.6 2(a) and (b) of the Caribbean Court of Justice (Appellate Jurisdiction Amendment) Rules, 2008.”

[6] The Applicant did not pay the sum of \$10,000 into Court as ordered or at all but did file the required list of documents on the last day of the 90-day time limit, i.e. January 27, 2012.

[7] By letter dated September 18, 2013 Counsel for the Second Respondent, Mr. Nicholls, reminded counsel for the Applicant of the Applicant’s non-compliance with the Court of Appeal’s order and gave notice that unless the Applicant rectified his non-compliance with the order within 28 days, he would apply “to have the Appeal (sic) struck out and ... for the costs in the proceedings.”

[8] Counsel for the Applicant by letter dated October 11, 2013 to the Registrar of the Supreme Court, acknowledged that his client had failed to pay the sum of \$10,000 “within 60 (sic) days of the date of the Order”, and invited the Registrar to issue a certificate of non-compliance “so that the Appellant may apply for special leave to appeal to the Caribbean Court of Justice in accordance with Part 10.12....”

[9] The Registrar of the Supreme Court belatedly issued on October 23, 2013 a certificate of non-compliance, which was served on the Applicant on October 24, 2013. Thereafter on November 14, 2013 the Applicant filed this application for special leave to appeal pursuant to Rule 10.12 as narrated above.

[10] The certificate of non-compliance recited the relevant condition of the Court of Appeal’s order for payment of \$10,000 as security for costs “within 60 days (sic)” and certified that the Applicant had failed to comply with that condition within the time prescribed.

[11] The dates critical to the instant application filed on November 14, 2013 are:  
(i) the date of the Court of Appeal’s order of October 28, 2011;  
(ii) the date of the expiry of the time for compliance, January 27, 2012; and

(iii) the date of administrative rescission under Rule 10.10(4) of the Court of Appeal's conditional leave, October 31, 2013, being seven days after the issue of the certificate of non-compliance which the Registrar should under Rule 10.10(1) have "promptly" issued in February 2012 after the Applicant's non-compliance.

**The Applicant's contentions**

[12] Counsel at first contended that the present application was an ordinary application under the enabling power of section 8 of the Act and Rule 10.12 of the Rules which permits special leave to be sought from the CCJ within twenty-one days of rescission of leave granted by the Court of Appeal. Although the grant of special leave was discretionary, the Court would normally grant leave where the Applicant had demonstrated a good arguable case that had a realistic chance of success. The affidavit of the Applicant, Dr. Weel, indicated that he had been advised and verily believed that the Court of Appeal did not properly analyze Rule 14(2)(b) of the Dental Registration Rules 1973 and that it was overbroad and unconstitutional in that it prevented members of the dental profession, including himself, from advertising in a manner which would not offend the ethics of the profession.

[13] It was further contended that the default of the Registrar in issuing the certificate of compliance "promptly" after the expiry of the deadline for compliance was a contributing factor to the delay in making this application. The error of the Registrar also prejudiced the second Respondent, which was concerned at the Registrar's failure to issue a certificate of non-compliance.

[14] Counsel for the Applicant cited the trilogy of cases of *Scantlebury v A.G.*<sup>1</sup>, *Hawkesworth v A.G.*<sup>2</sup>, and *Gaskin v A.G.*<sup>3</sup> decided by this Court. The judgment in *Gaskin v A.G.* is expressly applied in *Scantlebury v A.G.* and *Hawkesworth v A.G.* These cases were relied on to show that in a similar case, conditional leave was rescinded in January 2010 after the misstep of filing a notice of appeal on December 30, 2009. A further breach of the Rules took place with the filing of a poor person application in the Court of Appeal (instead of the CCJ) in June 2010 after conditional leave had been rescinded. In addition

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<sup>1</sup> [2011] CCJ 3 (AJ); (2011) 77 WIR 57

<sup>2</sup> [2011] CCJ 2 (AJ); (2011) 77 WIR 57

<sup>3</sup> [2011] CCJ 1 (AJ); (2011) 77 WIR 57

to these breaches of the Rules, the special leave application itself was filed in December 2010 more than 21 days after the rescission of leave in January 2010. The suggestion (later shown to be erroneous) was that leave to appeal had in fact been granted in that case despite the breaches of the Rules and late filing of the application. By contrast, in the instant case, the special leave application was filed without any breach of the Rules and *a fortiori* leave to appeal should be granted.

- [15] Counsel for the Applicant urged the Court to take notice of the trend in the cases (not cited to the Court) not to shut out an Applicant if he had a good arguable case despite breach of the Rules.

**The contention of the Respondents**

- [16] Counsel for the second Respondent, the Dental Council, had no objection to the Applicant's application provided he paid into court security for costs in the sum of \$10,000 within a specified time.
- [17] Counsel for the Attorney General resisted the application. She pointed out that no application for an extension of time had been made to this Court between October 28, 2011, the date of the Court of Appeal's order and October 11, 2013, the date of the Applicant's letter to the Registrar. Such an application could have been made pursuant to Rule 5.3(1) of the Rules. In response, counsel for the Applicant contended that this route was closed to him because he could not show that the expiry of the prescribed time limit was due to "unforeseeable circumstances".
- [18] Counsel for the Attorney-General referred to Rule 10.10(4) entitling the Respondents to their costs without further order consequent upon the failure of the Applicant to challenge the certificate of non-compliance within 7 days of it being served on the Applicant.
- [19] In rebuttal of the argument based on the *Scantlebury/Hawkesworth/Gaskin* cases (supra), counsel for the Attorney-General submitted that in those cases the application for an extension of time to make the special leave application was dismissed. We agree. Indeed, it was forcefully dismissed.

### **The issue**

[20] Based on the foregoing, the issue which falls for resolution is whether the Applicant on a post-rescission application for special leave to appeal under Rule 10.12, is enabled by section 8 of the Act to start with a clean slate, especially where a lengthy period of time has elapsed before issue and service of a certificate of non-compliance. Before delving further into the matter, it would be useful to make some observations about special leave applications.

### **The law on special leave applications**

[21] Special leave to appeal may be sought from this Court under its inherent jurisdiction (see *Brent Griffith v Guyana Revenue Authority*)<sup>4</sup> at [23] or pursuant to section 8 of the Caribbean Court of Justice Act (“the Act”). All other applications for access to this Court are channelled through the Court of Appeal pursuant to sections 6 or 7 of the Act.

[22] The post-rescission application for special leave pursuant to Rule 10.12 shares all the characteristics of the ordinary special leave application. Leave is a matter of discretion, not of right; a good arguable case having a realistic chance of success must be shown. However a special leave application after rescission of conditional leave granted by the Court of Appeal must in addition present good and substantial reasons (a) for non-compliance with the order of the Court of Appeal and (b) for the delay in approaching this Court after the expiry of the deadline for compliance with the order of the Court of Appeal. In this respect, the post-rescission application for special leave is *sui generis*.

### **Compliance with conditions of the Court of Appeal**

[23] The structure of the Rules is that in order to accelerate the progress of appeals through the Court, Rule 10.9 (issue of certificate of compliance) was introduced in 2008 to enable the Registrar, independently of the litigants, to issue a certificate of compliance “forthwith” upon compliance with the conditions imposed by the Court of Appeal and to serve copies thereof within 7 days after the issue of that certificate.

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<sup>4</sup> (2006) 69 WIR 320 at [23]

- [24] The issuance of the certificate of compliance is intended to hasten the filing of a Notice of Appeal within 21 days of being served with the certificate of compliance: Rule 11.1.
- [25] On the other hand, where there is non-compliance with the conditions of a conditional leave order, the Registrar is to issue “promptly” a certificate of non-compliance and serve it on the parties within 7 days: Rule 10(1) and (2).
- [26] The Applicant may or may not then seek to challenge the certificate of non-compliance. If the Court on application confirms the certificate of non-compliance, leave is rescinded by order. If there is no challenge to the certificate, leave is rescinded automatically 7 days after the service of the certificate of non-compliance.

**The special leave application after rescission**

- [27] The application for special leave after rescission of conditional leave is still an application as-of-right pursuant to section 6(c) of the Act. Special leave invokes both Rule 10.12 and the inherent jurisdiction of the Court. The application pursuant to Rule 10.12 does not receive its vires from section 8 of the Act. The application remains as-of-right but, as the Court held in *Brent Griffith v Guyana Revenue Authority* (supra), once brought before this Court, the Court is entitled to examine the viability of the appeal.
- [28] In the present case, the Court was prepared to assume in favour of the Applicant that he has a good arguable case. However, since the Applicant took no forensic steps for 22 months since January 27, 2012 when the time limit for compliance expired, the Court must have good and substantial grounds for (a) the breach of the Court of Appeal’s orders and (b) the inaction during the period of 22 months up to the date of filing this application. These grounds need to be considered even though the Applicant has subsequently complied with the Rules by making a special leave application to this Court within 21 days after the rescission of the originally granted leave.
- [29] The real purpose of the certificate of non-compliance is to enable the Respondents to bring closure to the proposed appeal and to have the parties’ costs assessed and paid by the defaulting intended Appellant.

- [30] At the same time, Rule 10.12 reserves the right of the Applicant even at the eleventh hour to be granted leave to appeal where the justice of the case dictates such a course. That right is subject to two fundamental principles of civil litigation:
- (1) that there should be an end to litigation, and
  - (2) that the orders of a court must be obeyed.
- [31] The situation in the present case is graver than a breach of the Rules: it involves breach of a Court order. A litigant who has disobeyed an order of the Court of Appeal is only entitled to this Court's indulgence by putting forward a contrite but coherent explanation of the reasons for his failure to comply with the order. It is not enough to make a bald assertion that the litigant was "not in a financial position to pay the sum of \$10,000 ... within the time prescribed as a condition of prosecuting this appeal ..." More to the point is what efforts were made to comply with the order. At the end of the day, counsel for the Applicant was frank enough to admit that the Applicant's assertion was not enough. Further, at no time did the Applicant, who felt he could not meet the deadline fixed by the Court of Appeal, apply to this Court for an extension of the time limit fixed by the Order, not the Rules.
- [32] Further, for 22 months after the expiry of the 90 day period for compliance the Applicant did nothing. It is clear that he had the option of approaching this Court for special leave: see *Hendy v Commissioner of Police*.<sup>5</sup>
- [33] The Appellant sought to lay the blame for the delay at the door of the Registrar. Indeed, the Registrar was in dereliction of the duty in Rule 10.10(1) to issue a certificate of non-compliance "promptly." However, the continuance of the Applicant's leave to appeal did not turn on any act or omission of the Registrar in bringing the litigation to finality, but on the Applicant's ability to obtain an order of this Court granting him special leave at the earliest possible moment. The Respondents had been deprived of the fruits of the Court of Appeal's order since October 28, 2011. Expedition in resolving disputes is not an antonym of justice, but is an integral part of substantive justice.
- [34] Delay must also be considered in a broader context. Disciplinary charges were laid in 2006 but have been stayed pending the outcome of these proceedings, which began in

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<sup>5</sup> [2008] 72 WIR 251 at [11]

2006. The order of the Court of Appeal was made on July 8, 2011. More than two years later no notice of appeal has been filed initiating an appeal.

[35] The procedure in rule 10.10 was designed to speed up the filing of a Notice of Appeal or to bring litigation to finality with or without a court order. The special leave procedure after administrative rescission of leave to appeal was intended to remedy any vestige of injustice that might have occurred in bringing leave to appeal to an informal end. The application for special leave in such circumstances is *sui generis*. The application is premised on a default in complying with a court order and on the fact that despite squandering an opportunity to appeal, the Applicant seeks a second chance. On an application of this kind, the Applicant must satisfy the Court on these matters as well as the merits of the proposed appeal. In this case, the Applicant has failed to account satisfactorily for the delay in coming to this Court or to explain his breach of the Court of Appeal's order.

**Disposal**

[36] The application for special leave filed on November 12, 2013 is dismissed with costs to be assessed, if not agreed, and paid to the First and Second Respondents.

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**The Hon Mr Justice Nelson**

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**The Hon Mr Justice Hayton**

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**The Hon Mr Justice Wit**