IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2019/001
Guyana Civil Appeal No. 38 of 2017

Between

CHRISTOPHER PERSAUD, **Applicant**
in his capacity as Executor for and on behalf of
the Estate of David Persaud, Deceased

And

TOOLSIE PERSAUD
TOOLSIE PERSAUD LTD. **Respondents**

Before the Honourables: **Mr. Justice A. Saunders, PCCJ**
Mr. Justice D. Hayton, JCCJ
Mr. Justice W. Anderson, JCCJ
Mme. Justice M. Rajnauth-Lee, JCCJ
Mr. Justice A. Burgess, JCCJ

Appearances
Mr. Timothy Jonas and Ms. Sandia Ramnarine for the Applicant
Mr. Robin M. S. Stoby, S.C. and Mr. Stephen G. N. Fraser, S.C. for the Respondents

JUDGMENT
of
The Honourable Mr. Justice Saunders, President
and the Honourable Justices Hayton, Anderson,
Rajnauth-Lee and Burgess

Delivered by
The Honourable Mr. Justice Burgess
on the 12 day of July 2019

INTRODUCTION

[1] The matter before this Court was spawned in the *Companies Act Cap 89:01*(*Cap 89:01*), an Act enacted by the Guyanese Parliament as Act 29/1991and which came into force in Guyana on 25 May 1995. *Section 224* of that Act introduced into the laws of Guyana for the first time a remedy called the complainant oppression action which has as its purpose the restraining of oppressive conduct in companies. The Act contains an elaborate set of oppression remedy provisions which have been characterised as "Parliament's way of saying to the courts that the classes protected by the Act are to be fairly and justly treated".[1] One of these provisions is of especial importance in this case. It is *section 232*. That section provides for the instituting of a complainant oppression remedy action as follows:

> Where this Act states that a person may apply to the court, the application may be made in a summary manner by summons, originating notice of motion, or otherwise as the rules of court provide, but subject to any order respecting notice to interested parties or costs, or any other order the court thinks fit.

[2] On 25 November 2010, the Applicant brought a section 224 complainant oppression action in the High Court against the Respondents claiming oppression by the Respondents. The Applicant's application, which was brought pursuant to *section 232*, was made by originating summons. The action was heard by Persaud J who delivered a decision in which the judge denied the Applicant's application.

[3] The Applicant sought to challenge Persaud J's decision and so filed a notice of motion of appeal before the Court of Appeal. When it appeared that he should have filed his appeal before the Full Court, the Applicant filed a motion in the Full Court for a determination of whether his appeal against Persaud J's decision was to that court or to the Court of Appeal. The Full Court's decision on that appeal was appealed by the Applicant to the Court of Appeal. The Court of Appeal dismissed the Applicant's appeal to it on procedural grounds. The Applicant has now filed before this Court an application seeking special leave to appeal the decision of the Court of Appeal which

[1] *West Foods Ltd v Watt* (1991) 5 BLR (2d) 160 (Alta CA) per Kerrans JA.

has raised before us knotty procedural questions relating to the correct appellate court in which the Applicant's appeal against Persaud J's decision should be heard.

FACTUAL AND PROCEDURAL BACKGROUND

[4] Christopher Persaud, in his capacity as executor to the estate of David Persaud (deceased), filed an action in the Commercial Division of the High Court under the provisions of the *Cap 89:01* for certain reliefs, inter alia, that the company purchase shares of the deceased, or alternatively, that the company be wound up or an interim order restraining the sale or disposition of shares. Christopher Persaud, the executor, is also the son of the deceased and throughout this judgment we refer to him in his representative capacity as the Applicant.

[5] The Applicant's father was a minority shareholder who held 33.3% of the issued shares of the Second Respondent, Toolsie Persaud Ltd (TPL). TPL is one of the largest companies in Guyana. It has interests in hardware, quarrying and timber and its assets are allegedly worth several billion dollars. The First Named Respondent, Toolsie Persaud, who is the brother of the deceased, held the remaining 66.6% shares in TPL. We refer to the First and Second Respondents as the Respondents throughout this judgment.

Complainant Oppression Application before Persaud J

[6] In his application in the High Court, the Applicant alleged that the Respondents administered the business and affairs of TPL in an oppressive manner. The Applicant also alleged that the Respondents exercised the powers of the directors to the unfair prejudice of the deceased.

[7] The trial of the action was heard before Persaud J. The trial was conducted in open court where the parties were cross examined on the affidavits filed by them.

[8] It is important to interject here that, during the pendency of the proceedings but before the decision was handed down, new *Civil Procedure Rules, 2016 (CPR)* were

implemented by Parliament, replacing the pre-existing *High Court Rules*. The new *CPR* provided that actions brought under the authority of an Act (of course, including the provisions of *sections 224* and *232* of the *Companies Act*) would be instituted by fixed date applications, thus rendering such decisions of the Court including such actions after trial appealable to the Court of Appeal, unlike under the *High Court Rules* which provided in differing circumstances for appeal to either the Full Court or the Court of Appeal.

[9] After the promulgation of *CPR*, on 4 April 2017, Persaud J gave his decision in which he ordered that the Applicant's action be dismissed.

Appeal to the Court of Appeal against decision of Persaud J

[10] On 18 April 2017, within 14 days after the date of Persaud J's final order and as required under the *Court of Appeal Rules*, the Applicant filed an appeal in the Court of Appeal against the decision of Persaud J. In this appeal, the Applicant contended that the decision of Persaud J was erroneous in law and that the interests of justice required that it be reviewed.

[11] On 18 July 2017, the Respondents filed a notice of motion challenging the jurisdiction of the Court of Appeal to hear the appeal. The basis of the challenge was that the decision of Persaud J was a decision of a judge in chambers and that by the operation of the provisions of *section 6 (2) (a) (i)* of the *Court of Appeal Act Cap 3:01*(*Cap 3:01*) no appeal lies to the Court of Appeal from an order made by a judge in chambers.

Application to the Full Court under section 6 (8) of Cap 3:01

[12] On 20 July 2017, after the filing of the Respondents' jurisdictional challenge in the Court of Appeal, the Applicant filed a fixed date application pursuant to *section 6 (8)* of *Cap 3:01* in the Full Court for a determination of whether the order of Persaud J was a final order of a judge of the High Court not made in chambers or in summary proceedings so as to fall within the appellate jurisdiction of the Court of Appeal under *section 6 (2) (a) (i)* of that Act. The Applicant also sought in the application an

extension of time within which to file and serve a notice of appeal to the Full Court, if it was determined that the appeal should be to the Full Court. According to the Applicant, this course of action was deemed to be appropriate and preferable since the Court of Appeal did not have jurisdiction to grant an extension of time to appeal to the Full Court in the event that it determined the Full Court to be the proper forum for an appeal.

[13] The Respondents strenuously opposed this application in a notice of application filed before the Full Court. In that application, orders were sought that the Full Court had no jurisdiction to hear the Applicant's application and therefore that it should be dismissed.

[14] On 8 December 2017, the Full Court dismissed the Applicant's application as an abuse of process of the court. The Court held that applications under *section 6 (8)* could only properly be made before, and not after, any appeal from the order of Persaud J was filed. It was further held that the Court of Appeal was for the purposes of *section 6 (8)* a higher court than the Full Court and not a concurrent court. Consequently, the Full Court could not consider the question before it as a similar question was pending before the Court of Appeal for determination. The Full Court also held that the existing appeal before the Court of Appeal and the application to strike out that appeal as improperly before that Court rendered the application before the Full Court an abuse of process under the doctrine of *lis pendis*.

[15] Having decided on the procedural issues that the Full Court had no jurisdiction to entertain the application, that court determined that there was no need to delve into the merits of the case. The orders sought by the Respondents were granted and costs were ordered for the Respondents in the sum of $150,000.

Appeal to Court of Appeal against decision of the Full Court

[16] Being dissatisfied with the decision of the Full Court, the Applicant appealed to the Court of Appeal on 11 December 2017. In his appeal, the Applicant challenged the

entirety of the Full Court's decision. In particular, however, the Applicant contended that the Full Court's decision was erroneous and unsupported by any proper construction of *section 6 (8)* and further that the Full Court was wrong in stating that, for the purposes of *section 6 (8)* applications, the Court of Appeal is a higher court than the Full Court and not a concurrent court.

[17] Of crucial importance to note here is that, simultaneously with the filing of the 11 December 2017 notice of appeal in the Court of Appeal, the Applicant filed a notice of motion in that Court seeking two orders. The first was an order that the proceedings before the Court of Appeal be heard together with the appeal filed on 11 December 2017. The second was an order that the appeal of 18 April 2017 against the order of Persaud J be referred to the Full Court for hearing on such terms as the Court of Appeal deems just, if it is determined by the Court of Appeal that the appeal of 18 April 2017 falls properly to be heard by the Full Court.

[18] The two motions, that is, the motion filed by the Respondents in the first appeal dated 18 July 2017 and the other dated 11 December 2017 filed by the Applicants, were heard by the Full Bench of the Court of Appeal on 11 January 2019. After hearing the parties on the issues alluded to above, the Court of Appeal made two orders. First, it made an order dismissing the motion filed by the Applicants dated 11 December 2017 on the basis that the appeal from the Full Court was void as being filed without leave in contravention of *section 6 (4)* of *Cap 3:01.* Second, it made an order granting the order sought in the motion of 18 July 2017 filed by the Respondents and dismissed the substantive appeal on the basis that the proceedings at first instance were proceedings before a judge in chambers, were not affected by the new *CPR* and did not change their character so as to be appealable to the Court of Appeal.

THE APPLICATION TO THIS COURT

The Notice of Application

[19] On 18 January 2019, the Applicant, being dissatisfied with the decision of the Court of Appeal, filed a notice of application in this Court pursuant to *section 8* of the

Caribbean Court of Justice Act, Cap 3:07, (Cap 3:07), seeking special leave to appeal the orders of the Court of Appeal given on 11 January 2019. The application also sought orders under the inherent jurisdiction of this Court that (i) the application for special leave be treated as the hearing of the intended appeal; (ii) the decisions and orders of the Court of Appeal be set aside; and (iii) the Court of Appeal be directed to hear the substantive appeal of 18 April 2017, or alternatively that that appeal be referred by this Court to the Full Court to be heard and determined by that court upon such terms as this Court deems just.

[20] The basis upon which the Applicant seeks the intervention of this Court to grant the reliefs sought is that the Court of Appeal's findings were erroneous in law. As a result of these errors, the Court of Appeal did not embark upon an examination of the merits of the appeal from the Full Court, including whether the circumstances warranted a grant of an extension of time to file an appeal from the decision of Persaud J given on 4 April 2017. The Applicant contends that, as a consequence of the Court of Appeal's decision, he has been precluded from prosecuting valid and meritorious grounds of appeal and that the overriding objective of justice has been defeated.

Issues in the Application before this Court

[21] Based on the notice of application to this Court and the decision of the Court of Appeal, two substantial, intertwined issues arise for determination. These are, first, whether the Court of Appeal was correct in holding that the appeal from the Full Court filed in the Court of Appeal was void as being filed without leave in contravention of *section 6 (4)* of *Cap 3:01*. The second is whether the Court of Appeal was correct in granting the order sought in the motion of 18 July 2017 filed by the Respondents dismissing the substantive appeal on the basis that the proceedings at first instance were proceedings before a judge in chambers.

[22] The first issue may be encapsulated in the question whether leave was required for the appeal from the Full Court's decision to the Court of Appeal. The second involves a question of whether the appeal of 18 April 2017 from the decision of Persaud J was

to the Full Court or to the Court of Appeal and a consequential question of whether the orders made by the Court of Appeal were appropriate in the circumstances of this case. These issues are dealt with seriatim.

[23] We pause here to note that the written and oral submissions of counsel before us involve disputes over a number of technical procedural matters which were raised in the Court of Appeal and which, to a large extent, formed the basis of the Court of Appeal's decision. In our judgment, the answer to these procedural matters are subsumed in the substantial issues we have just identified. In consequence, many of these disputes fall away or are dealt with in our determination of the substantial issues.

[24] Before turning to the substantial and the procedural issues, however, we consider it necessary to treat with a preliminary objection raised by the Respondents. That objection relates to the jurisdiction of this Court to hear the application from the Court of Appeal dated 11 January 2019.

Preliminary Issue: Whether this Court has jurisdiction to hear the application from the decision of the Court of Appeal dated 11 January 2019?

[25] As has already been pointed out, the application before this Court is an application for special leave made directly under *section 8* of *Cap 3:07* and for the hearing of the special leave application to be treated as the hearing of the intended appeal. In *Brent Griffith v Guyana Revenue Authority*,[2] this Court firmly laid down the principle that special leave to appeal to this Court is always a matter of discretion and never a matter of right.[3] In exercising that discretion in favour of the Applicant, this Court has held consistently that the Applicant must show that the appeal has a real prospect of success.[4] Accordingly, where it is clear that the appeal as presented is wholly devoid of merit and is bound to fail, special leave will not be granted.

[2] [2006] CCJ 2 (AJ)
[3] ibid at [27]
[4] *Barbados Turf club v Melnyk* [2011] CCJ 14 (AJ), *Systems Sales Ltd v Browne-Oxley* [2014] CCJ 16 (AJ), *James Ramsohoye v Linden Mining Enterprise and others* [2019] CCJ 07 (AJ)

[26] The Respondents maintain that the special leave application before this Court is bound to fail on the preliminary ground that this Court has no jurisdiction to hear the underlying appeal. In support of this contention, the Respondents claim to rely on this Court's decision in *Chung v AIC Battery and Automotive Services*[5]and dicta of this Court in *Attorney General of Guyana v NH International*.[6] In *Chung*, the Applicant filed an appeal to the Court of Appeal challenging a judgment against the Applicant in summary proceedings. The Court of Appeal dismissed that appeal. This Court in dealing with the appeal from the Court of Appeal to this Court held that the Full Court was the proper forum for appeals in summary matters. It accordingly dismissed the appeal and affirmed the decision of the Court of Appeal. This Court upheld the principle of law that neither the Court of Appeal, nor the Caribbean Court of Justice, has jurisdiction to hear an appeal from a judgment in summary proceedings.

[27] In *NH International*, Saunders JCCJ (as he then was) confirmed the principle that there was no right of appeal to the Court of Appeal from an order made in chambers. Saunders JCCJ stated:

> [6] Section 6(2)(a)(i) of the Court of Appeal Act gives a right of appeal, inter alia, to orders that are final and that are not made in Chambers. The critical question is whether the proceedings before the judge should be considered proceedings "in Chambers". If they were, then the preliminary objection made by the company must be sustained because the Attorney General would not have had the direct right of appeal to the Court of Appeal that he chose to exercise, and the preliminary objection would have been well made.

[28] In our judgment, whilst the principle adumbrated in *Chung* and in *NH International Ltd* remains unimpeachable, that principle is not applicable in this case. In this case, on 11 January 2019, the Court of Appeal gave its decision in respect of the two motions pending before that Court, the motion dated 18 July 2017 and the motion dated 11 December 2017. This decision was in respect of a judgment in a civil matter of the Full Court from which the Applicant, unlike in *Chung* and *NH International Ltd*, had the direct right of appeal to the Court of Appeal. In these premises, we are of

[5] [2013] CCJ 2 (AJ)
[6] [2015] CCJ 5 (AJ)

the view that this Court has jurisdiction under *section 8* of Cap *3:07* to hear this appeal subject to the grant of leave.

[29] Notwithstanding the foregoing conclusion, we consider it important to underline this Court's decision in *Brent Griffith*[7] on the issue of special leave. In that case, the Applicant averred that owing to his attorneys' unfamiliarity with the procedure for exercising the new right of appeal to this court, no application for leave was made to the Court of Appeal within the prescribed time as required under the *Cap 3:07*. Confronted with this procedural snafu, the Applicant moved that this Court exercise its discretion to grant special leave in his favour taking into consideration the fact that his appeal had merit and had a real prospect of success. Counsel for the Respondents opposed that motion arguing that this Court cannot entertain an application for special leave to appeal in a constitutional matter since special leave applications are restricted under *section 8* of *Cap 3:07* to criminal and civil matters.

[30] This Court rejected the respondent's arguments and confirmed that this Court had wide powers under its inherent jurisdiction to grant special leave. Nelson JCCJ described these powers as follows:

> [22] Special leave may be granted under section 8 of the CCJ Act in civil and criminal cases. This is intended to apply to cases which do not fall within either section 6 or section 7 of that Act i.e. cases where the appeal does not lie as of right and leave to bring the appeal cannot be obtained from the Court of Appeal. If the case falls within either of these sections, an application for leave should be made to the Court of Appeal.
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> [23] But this Court may also in the exercise of its inherent jurisdiction grant special leave (either in an as of right case or one where the conditions for leave under section 7 are satisfied) or has granted leave subject to conditions which it had power to impose. The same inherent jurisdiction is in our view exercisable when no application for leave has been made to the Court of Appeal…The court in the exercise of this inherent jurisdiction is not limited to cases which fall into the category of either 'civil' or 'criminal'.

[7] ibid fn. 2

[31] The case of *Singh v Moosai*[8] is similarly relevant to this broad power under its inherent jurisdiction. In that case, this Court considered that a litigant who has an appeal as of right under *section 6 (a)* of *Cap 3:07* but failed to file such appeal within the requisite timeframe, had recourse to seek special leave of the Court under *section 8*. In that case also, a procedural issue regarding the Court of Appeal's error in granting an extension of time for the filing of an application to the Court of Appeal for leave to appeal to this Court as of right pursuant to *section 6(a)* of *Cap 3:07*, when it had no power to do so as specified in *Rule 10.3* of the *CCJ Appellate Jurisdiction Rules*. This Court reminded itself of its duty to do justice in each case and so permitted the appeal and proceeded to consider the substantive issues in the case.[9] Rajnauth-Lee JCCJ explained the application of this principle to the case before her as follows:

> [21] It is logical to assume that had the objection been taken earlier and had this Court found that the Court of Appeal had erred in granting the extension, Singh would have proceeded to seek an extension of time within which to file an application for special leave to appeal to this Court. It is likely that he would have obtained such leave given the important substantive issues raised before us. We are also reminded of the duty to do justice in the case before us. Considering all the circumstances of this case, and bearing in mind that (a) Singh proceeded upon the basis that he was validly before the Court, (b) the late stage at which the objection was brought to the attention of both Singh and the Court, and (c) the substantive issues raised in the appeal, we are of the view that this is indeed an exceptional case and that we should hear it.

[32] These cases demonstrate that this Court has an inherent jurisdiction to exercise its discretion to grant special leave in cases where procedural rules have not been strictly followed and where such leave is required in the interest of justice. The instant case raises important issues as to the right of the Applicant to appeal in an application for a complainant oppression remedy under *section 232* of *Cap 89:01*. Important issues relating to the promulgation of the new CPR in Guyana are also raised in this case. In a word, this case is a case in which this Court would consider that the interest of justice required the exercise of its discretion to waive any procedural irregularity and grant special leave to appeal.

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[8] [2019] CCJ 1 (AJ)
[9] ibid at [21]

[33] For the two foregoing reasons, the preliminary objection must fail. Accordingly, we turn to considering the application for special leave as the appeal.

Issue No 1-Whether leave was required for the appeal from the Full Court's decision to the Court of Appeal?

[34] The Applicant has also asked this Court to set aside the order of the Court of Appeal dismissing the motion filed by the Applicants dated 11 December 2017. The basis of that order was that the appeal from the Full Court was filed without leave in contravention of *section 6 (4)* of the Cap 3:01 and so was void.

[35] *Section 6 (4)* provides as follows:

> With the leave of the Full Court or the Court of Appeal, an appeal shall lie under this section from a decision of the Full Court upon an appeal from a judge of the High Court in respect an order referred to in subsection (2) (a) (i) …

[36] The Court of Appeal noted that the matter before Persaud J was made in chambers and as such the appeal was "in respect an order referred to in subsection (2) (a) (i)" for which leave was required. The Court also noted that it had not been shown that leave was granted by the Full Court to appeal its decision, neither had leave been sought of, or granted by, the Court of Appeal. In those circumstances, the Court of Appeal held as follows:

> Therefore, the question of the appeal against the Full Court's decision being heard, together with the extant appeal filed to this Court or both being consolidated, cannot be entertained. Therefore, there can be no question of this Court directing the Full Court or to give directions to that Court when technically, the appeal is not in being in any event the appeal against the order of Justice Persaud must be to the Full Court and therefore the appeal to this Court in the circumstances must be struck out.

[37] In the circumstances, the appeal was struck out and costs were agreed between the parties in the sum of $300,000.

[38] We do not agree with this decision of the Court of Appeal for two reasons. The first reason for our disagreement is because, as we have explained below, the decision of Persaud J was appealable to the Court of Appeal and not the Full Court. Consequently, *section 6 (4)* was not applicable and accordingly no leave to appeal to the Court of Appeal by the Applicant was required.

[39] The second reason rests on the express language of *section 6 (4)*. That sub-section applies to "a decision of the Full Court upon appeal from a judge of the High Court". The decision of the Full Court against which the appeal was made, was a decision of the Full Court on an application before them made *de novo* by the Applicant. There was no appeal to the Full Court from a decision of a judge of the High Court. It was a fixed date application that originated in the Full Court. For this reason, also, the Applicant did not need leave to appeal the decision of the Full Court to the Court of Appeal in this case.

Issue No 2-Whether the appeal from the decision of Persaud J was to the Full Court or to the Court of Appeal?

[40] In our judgment, in approaching this question, it is crucially important to remember that the matter before Persaud J was an application brought pursuant to *section 232* of *Cap 89:01*. That application was headed: "In the matter of the Companies Act No. 29/1991 and more particularly sections 224 and 232 thereof and Order 41 rule 5 (3) of the Rules of the High Court".

[41] As has been seen, *section 224* of *Cap 89:01* makes provision for the oppression remedy and *section 232* of that Act provides that such an application "may be made in a summary manner by summons, originating notice of motion, or otherwise as the rules of court provide". In our judgment, the ways by which an application may be made, which are expressly laid out in this section, is a recognition by Parliament that the oppression remedy is "a broad and flexible tool, designed to protect the interests of corporate stakeholders in a variety of corporate circumstances".[10] Because of the

[10] Patterson, *Shareholders Remedies in Canada* (Toronto:1989) at para 18:21.

breadth of the oppression remedy, some cases of oppression may be uncomplicated and capable of being tried in a summary manner whilst other cases may be more complex and be required to proceed by notice of motion in open court. *Section 232* caters for these various circumstances.

[42] There is one other observation which it is necessary to make here in respect of *section 232*. It is that the expression "or otherwise as the rules of court provide" in that section makes it imperative to have regard to *Order 41 Rule 5 (3)*. That rule provides as follows:

> Where by any Act or rule it is provided that an application to the Court shall be made by an "originating motion" such application shall be made by originating summons or by petition.

[43] It is evident that *Cap 89:01*, an Act, provides in *section 232* that an application for the oppression remedy may be made by "originating motion". Therefore, an oppression remedy Applicant, not bringing his application in a summary manner or by petition, can only be in full compliance with *Order 41 Rule 5 (3)* in bringing an application for relief from oppression by making an application by "originating summons".

[44] The upshot of the foregoing is that, in determining whether the Applicant's application by originating summons was an application to a judge in chambers or an application to a judge in open court, the Court of Appeal had to consider whether that originating summons was indeed an originating motion made in compliance with *section 232* and *Order 41 Rule 5 (3)*. This was especially so as the evidence is that the trial of the application proceeded before Persaud J in open court and there was no factual evidence that the case was ever treated as a trial before a judge in chambers. So, for example, all the witnesses were cross-examined on their affidavits.

[45] This approach to the treatment of the originating summons was not raised before the Court of Appeal and the Court of Appeal did not consider it. Instead, the Court of Appeal held that, as the matter before Persaud J was commenced by way of originating summons, it was *ipso jure* a trial by a judge in chambers and so appealable to the Full

Court and not the Court of Appeal. Furthermore, the Court of Appeal held that the trial did not change its character of being a trial before a judge in chambers because evidence was taken in open court. In this regard, the Court of Appeal claimed to derive support for its view from the *Rules of the High Court*, and specifically *Orders 42* and *43*, which deal with matters heard in chambers and by originating summonses. The Court of Appeal pointed in particular to *Order 42 Rule 18* which provides that a judge in chambers, if he thinks it desirable that any summons or application owing to its importance or the length of time likely to be occupied for any other reason should be so heard in open court, may direct the same to be so heard and may adjourn the hearing for this purpose. The Court of Appeal noted that the *Rules of Court* provide that the decision given in that regard is a decision made in chambers.

[46] The reasoning and the conclusion of the Court of Appeal are doubtlessly predicated on the erroneous premise that the Applicant's complainant oppression application was commenced inherently in chambers by originating summons before Persaud J. It was not. As has already been pointed out, it was made pursuant to *section 232* of Cap *89:01* which expressly provide for an application by "originating motion" which, by *Order 41 Rule 5 (3)* "shall be made by originating summons". It follows therefore that an application by originating summons made under *section 232* cannot be *ipso jure* an application to a judge in chambers as the Court of Appeal held. Indeed, *Order 40*, which is headed "Motions and Other Applications", and which in effect stipulates that an originating motion is the method by which an application to a "Judge in Court" must be made, supports the conclusion that such an application is generally to be regarded as being made to a judge in open court.

[47] The written and oral submissions by counsel before this Court were similarly based on the erroneous assumption that the applicable rules were either the old *Rules of the High Court* or the new *CPR*. We note here that when counsel was asked at the oral hearing before this Court about the relevance of the provisions of *Cap 89:01,* counsel did not pursue this matter.

[48] In our judgment, the fact that the Applicant's application before the High Court was expressly made under *section 232* of *Cap 89:01* is determinative of the question whether the appeal from the decision of Persaud J was to the Full Court or to the Court of Appeal. Such an application is by originating motion to a judge in open court notwithstanding that as a matter of form it is constrained to be made by originating summons. Indeed, this case was conducted in open court. Accordingly, the proceedings before Persaud J were not in chambers but in court. It follows therefore the Court of Appeal erred in holding that the Applicant's appeal from the decision of Persaud J in those proceedings was to the Full Court and not the Court of Appeal.

Issue No 3-What are the powers of the Court of Appeal to make orders in a case involving unnecessary disputes over procedural matters?

[49] As has been noted above in this judgment, the Parliament of Guyana introduced into Guyana the complainant oppression remedy in *section 224* of *Cap 89:01*. This remedy is generally regarded as a broad and flexible equitable tool given to the courts to deal with complainant oppression in companies that is not to be defeated by technicalities. It is this remedy which the Applicant sought in his application to the High Court.

[50] Having lost his oppression action in the High Court, the Applicant did all that a diligent litigant could have done to secure his appeal. He lodged an appeal before the Court of Appeal within the time stipulated in the *Rules of the High Court*. When it was contended that the appeal should have been to the Full Court and not the Court of Appeal, he promptly applied under *Rule 6 (8)* of *Cap 3:01* for a determination of that issue by the Full Court. The Applicant appealed the decision of the Full Court to the Court of Appeal and the decision of the Court of Appeal to this Court.

[51] Every attempt by the Applicant to pursue his appeal was met by technical procedural manoeuvres and arguments by the Respondents. It is noteworthy that the Respondents have never once asserted that they have suffered any prejudice whatsoever as a result of the Applicant's actions.

[52] Given the foregoing, we feel bound to recall that *Rule 1.3 (1)* of the *CCJ Appellate Jurisdiction Rules* enjoins this Court to ensure "that unnecessary disputes over procedural matters are discouraged". To borrow the language of Saunders JCCJ (as he then was) in *NH International*, "the ethic conveyed by [*Rule 1.3 (1)*] is that litigation is not a game where parties should be permitted, wily-nilly, to frustrate the hearing of a case on its merits because of some technical procedural flaw". Saunders JCCJ also pointed to the power of the Court of Appeal to deal with disputes over procedural matters. He said:

> …A court would take advantage of the provisions of Order 54 to treat the non-compliance or irregularity as having been waived. The ethic conveyed by Order 54 is that litigation is not a game where parties should be permitted, willy-nilly, to frustrate the hearing of a case on its merits because of some technical procedural flaw. In a deserving case (we do not suggest that this was one) Order 54 rule (1), which states that non-compliance with any of these rules shall be dealt with "in such manner and upon such terms as the Court or Judge shall think fit", could conceivably serve as a legal basis for the Court of Appeal, in a case where the appeal should have gone to the Full Court, to refer the appeal to the Full court. That approach is of course not at all appropriate in this case in light of the huge delay.[11]

[53] Sir Dennis Byron PCCJ in *Mitchell v Wilson*[12] expressed a similar view. He said there: "The overriding objective of the Rules set out in part 1.3 requires us to discourage unnecessary disputes over procedural matters". On the court's power in this regard, Sir Dennis said:

> [5] The overriding objective of the Rules set out in part 1.3 requires us to discourage unnecessary disputes over procedural matters. This is a procedural dispute and in considering the requirements of a just result we should also consider that the resources to be allocated to the case should be proportionate to its complexity…
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> [6] The systemic delays in this case show a long history of counsel errors, which have led the Applicants to change lawyers more than once. 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

[11] [2015] CCJ 5 (AJ) at [9]
[12] [2017] CCJ 5 (AJ)

> amount to professional misconduct. We acknowledge that minor infractions which do not prejudice the other parties, the timeliness of the resolution of the dispute and the administration of justice need not always result in turning away litigants from the seat of justice...

[54] The jurisprudential implications of *Rule 1.3 (1)* for the Court of Appeal was enunciated in this Court in the case of *Andrews v Moore*.[13] In that case, Nelson JCCJ stated that this Court:

> …approaches its own Appellate Jurisdiction Rules, the Court of Appeal Rules and the High Court 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.[14]

The implication of that statement of law in *Andrews v Moore* is that the Court of Appeal and lower courts must adhere to the principle of discouraging disputes over procedural matters and should seek to promote the interest of justice.

[55] In addition to the foregoing, *Part 27.01* of the *CPR* (similar in effect to *Order 54*) also deals with non-Compliance with the Rules or a Practice Direction. The relevant provisions provide as follows:

> … (3) A failure to comply with these Rules or a Practice Direction is an irregularity and does not render a proceeding or a step in a proceeding, a document or an order in a proceeding a nullity.
> (4) Where there has been non-compliance with these Rules or a Practice Direction, the Court may:
> (a) dispense with compliance with any Rule or Practice Direction;
> (b) grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
> (c) set aside the proceeding or a step in the proceeding in whole or in part.

[56] In addition to powers under Rule 1.3, CPR empowers a Court to rectify matters where there has been a procedural error and to enable the Court to deal with cases justly. Unfortunately, the Court of Appeal and the Full Court did not avail themselves of

[13] [2013] CCJ 7 (AJ)
[14] ibid at [8]

these powers in this case. Those Courts did not explore the relevant rules of court to rectify procedural errors so as to enable those Courts to deal with the case justly. For instance, the Court of Appeal of its own motion in the circumstances of this case ought to have exercised its power in the interest of justice to properly hear and determine the appeal despite what it considered to be a failure to comply with the leave provisions. Furthermore, having formed the opinion that the correct forum for the appeal was the Full Court, the Court of Appeal was entitled to and could have remitted the matter back to the Full Court. In light of all the circumstances of this case, the Court was not precluded from determining the issue on its own volition to serve the interests of justice.

[57] In *Zarida v Misir*,[15] Hayton JCCJ noted that this Court has the inherent power (recognised in Rule 1.4(2) of the Appellate Jurisdiction Rules) to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court in order to achieve its Rule 1(3) overriding objective "to ensure that the Court is accessible, fair and efficient and that unnecessary disputes over procedural matters are discouraged."

[58] In exercising its Rule 1.4 (2) powers, however, this Court recalls that it ought only to exercise those powers pursuant to section 11(6) of Cap 3:07 to make the orders which the Court of Appeal could have made on the Applicant's application to the Court of Appeal in exceptional circumstances. Here we have determined that the appeal was one which fell under the ambit of the new rules and as such was properly filed in the Court of Appeal. We have also determined that, even if the Court of Appeal was of the opinion that the proceedings remained proceedings under the purview of the old rules and should have been appealed to the Full Court, the Court of Appeal had the power to either consider the issue or simply remit it to the Full Court for consideration. This determination means that the issue of applicability of the new rules and proper forum for appeal is settled and as such all that is left to be determined are the substantive issues which the Applicant was seeking to have addressed on appeal prior

[15] [2016] CCJ 19 (AJ)

to his being caught in a procedural web regarding where his appeal should lie. In light of the fact that the submissions made before this Court were premised on procedural and jurisdictional issues, it may be more prudent for the Court of Appeal to determine the substantive issues in the case in relation to the appeal of Persaud J's decision.

DISPOSITION

[59] It is ordered that:

(1) The Applicant is granted special leave to appeal and this hearing is treated as the hearing of the appeal;

(2) The appeal is allowed;

(3) The decisions and orders of the Court of Appeal made on 11 January 2019 are hereby set aside;

(4) The Court of Appeal is hereby directed to hear the appeal of 18 April 2017;

(5) The Applicant's costs of this application be paid by the Respondents, to be taxed if not agreed.

/s/ A. Saunders

The Hon. Mr Justice A Saunders, President

/s/ D. Hayton

The Hon. Mr Justice D Hayton

/s/ W. Anderson

The Hon. Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon. Mme Justice M Rajnauth-Lee

/s/ A. Burgess

The Hon. Mr Justice A Burgess