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 GY/A/CV2023/001
GY Civil Appeal No 103 of 2022

BETWEEN

DR BHARRAT JAGDEO **APPLICANT**

AND

ANNETTE FERGUSON **RESPONDENT**

Before: **Mr Justice Anderson**
Mr Justice Barrow
Mr Justice Burgess

Date of Judgment: **19 January 2024**

On Written Submissions

Mr Devindra Kissoon and Ms Natasha M Vieira for the Applicant

Mr Lyndon Amsterdam for the Respondent

Practice and Procedure – Appeal – Special leave – Application for special leave to appeal refusal of leave by Court of Appeal – Whether Applicant may obtain leave to appeal a split decision of the Full Court to the Court of Appeal – Court of Appeal Act, Cap 3:01

SUMMARY

The Applicant, Dr Bharrat Jagdeo, is the Defendant in libel proceedings in the High Court of Guyana filed by the Respondent, Ms Annette Ferguson. Default judgment was entered against the Applicant, and he applied to set it aside. He was unsuccessful and appealed to

the Full Court. The appeal was heard by two Judges of the Full Court, and they were evenly divided resulting in the High Court decision being left standing. The Applicant then applied to the Full Court for a recall of the divided judgment and for the matter to be reassigned to an odd-numbered Full Court bench. The application was refused, and the Applicant was thus left without further recourse in the Full Court.

The Applicant thereafter sought permission from the Court of Appeal to appeal the effect of the divided Full Court judgment. The Court of Appeal held that it had no jurisdiction to grant leave since there was no appealable decision from the Full Court. The Applicant then sought special leave to appeal in this Court and requested that this Court determine that he is entitled to leave to appeal to the Court of Appeal. He asked this Court to remit the matter to the Court of Appeal and to stay the hearing for assessment of damages against him that is currently pending before the High Court.

This Court examined the issue of whether the Court of Appeal has jurisdiction under the Court of Appeal Act to grant leave to appeal a split decision of the Full Court. The Respondent submitted that the Court of Appeal does not have such jurisdiction per s 75(2) of the High Court Act. The fact that the section made no provision regarding the way forward for an appellant who is dissatisfied with a split decision in the Full Court from a decision of a single judge implied that there was no appeal available to the Court of Appeal.

The majority in this Court held that s 75(2) of the High Court Act should be interpreted to mean that where there is an evenly divided Full Court, the appeal to the Full Court is dismissed and that the High Court decision stands as the decision of the Full Court. Accordingly, that decision is subject to the regime of appeals as set out in the Court of Appeal Act. A contrary interpretation would forever immunise the decision of a single judge of the High Court from the reach of judicial review and would be inconsistent with the wording and objective of s 75 of the High Court Act.

This case was distinguished from this Court's previous decision in *Guyana Sugar Corp Inc v Seegobin* in which there was an attempt to appeal against the decision of one of two

judges in a divided Full Court. In that case, it was held that divided decisions are not directly appealable to the Court of Appeal.

In this Court, there was a dissenting opinion which would follow the CCJ's decision in *Guyana Sugar Corp Inc v Seegobin*. It reasoned that where the decision of a single High Court judge is affirmed because there was an evenly divided Full Court on an appeal, there is no adjudication and so, there is no decision of the Full Court which can be subject to further appeal. On the point of whether the Applicant was entitled to a rehearing, it stated that there is no common principle in common law courts that determines whether the failure of a divided court to agree should result in a rehearing or not.

The dissenting opinion concluded that the legislation provides for adjudication by two judges, but with the option to apply for good reason for a hearing by three judges. An applicant should know in advance and it was a material consideration for an applicant that if their application resulted in an even division of the Full Court, that meant they could go no further. The legislation seemed to have contemplated that if there was an even division, the applicant would have failed to persuade two out of three High Court judges and should go no further. Based on the dissenting judgment, the application for special leave to appeal would be dismissed and costs awarded to the Respondent.

Having regard to the opinions expressed this Court ordered that (i) the application for special leave be granted and treated as the substantive appeal and that the appeal be upheld, (ii) that the decision of the Court of Appeal that it has no jurisdiction to grant leave be reversed, (iii) that the case be remitted to the Court of Appeal for consideration whether to grant leave to appeal in all the circumstances of the case, and (iv) that the hearing for assessment of damages against the Applicant be stayed pending the final determination of this matter or until further order.

Cases referred to:

Ashbury Railway Carriage and Iron Co (Ltd) v Riche (1875) LR 7 HL 653*; Bata Shoe Co Guyana Ltd v Commissioner of Inland Revenue* (1976) 24 WIR 172 (GY CA); *Chung v AIC Battery and Automotive Services Co Ltd* [2013] CCJ 2 (AJ)(GY), (2013) 82 WIR 357; *Darnley v Reid* [2014] CCJ 20 (AJ) (GY), GY 2014 CCJ 11(CARILAW); *Dublin, Wicklow and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155; *Durant v Essex Co*

74 US 107 (1868), 7 Wall 107; *Guyana Sugar Corp Inc v Seegobin* (GY CA, date of delivery); *Jagdeo v Ferguson* (GY CA, 4 September 2023); *Jamaica Public Service Co Ltd v Samuels* [2010] JMCA App 23; *JJ v Child Care Board* [2017] CCJ 6 (AJ)(BB), [2017] 3 LRC 390; *Ledgister v Bank of Nova Scotia Jamaica Ltd* [2014] JMCA App 1, JM 2014 CA 1(CARILAW); *Neil v Biggers* 409 US 188 (1972), 93 SCt 375; *Persaud v Nizamudin* [2020] CCJ 4 (AJ) GY; *Prashad v Persaud* [2022] CCJ 5 (AJ) GY; *Singh v A-G of Guyana* [2012] CCJ 2 (AJ) (GY), [2012] 80 WIR 382.

Legislation referred to:

Guyana – Co-operative Societies Act, Cap 88:01, Court of Appeal Act, Cap 3:01, High Court Act, Cap 3:02, Income Tax Act, Cap 81:01.

Other Sources referred to:

J T Irvine, 'The Case of the Evenly Divided Court' (2001) 64 Sask L Rev 219.

JUDGMENT

Anderson J (Burgess J concurring)

Dissenting: Barrow J

ANDERSON J:

Introduction

[1] The Applicant seeks special leave to appeal the decision of the Court of Appeal of Guyana delivered on 4 September 2023 in two consolidated civil matters. That decision was to refuse the Applicant leave to appeal to the Court of Appeal against a Full Court judgment where the two judges comprising the court gave divergent opinions. The Court of Appeal held that it had no jurisdiction to grant leave since there was no appealable decision from the Full Court. The Applicant requests that this Court determine that he is entitled to leave to appeal to the Court of Appeal and that this Court remits the matter to the Court of Appeal for a hearing of the intended appeal, or alternatively treat this application as the hearing of the appeal itself. The

Applicant also asks this Court to stay the hearing for assessment of damages against him which is currently pending before the High Court.

Background and Court Proceedings

[2] On 9 January 2020, the Respondent filed proceedings in the High Court against the Applicant seeking damages for libel. The Applicant was served with the proceedings on 27 January 2020 and his Defence was due on 25 February 2020, less than one week prior to the scheduled 2 March 2020 national elections.

[3] Unbeknownst to the Applicant, or his Counsel, on 24 February 2021, the Respondent applied for default judgment which was entered on 15 March 2021 and damages and costs were awarded to the Respondent without an assessment hearing. The order for default judgment was served on the Applicant on 30 March 2021.

[4] The Applicant contends that the first time he knew of the default judgment was when the order was served on him on 30 March 2021. He alleges that he was informed by his Counsel that the Defence was drafted and placed on file before the deadline but was inadvertently never filed in the High Court due to Counsel's heavy commitments in the general elections campaign and because he had closed his office for several months in 2020 because of the COVID-19 pandemic. The Applicant and his Counsel believed that the Defence was filed, and that the matter was not yet fixed for case management.

[5] The Applicant contends that these exceptional circumstances constitute a reasonable explanation for failing to file a Defence and that there was no intention to disregard the court's process. The Applicant further contends that he appeared in earlier interlocutory proceedings in the matter and the trial judge should have exercised a discretion to require a hearing of the application for the default judgment and/or at the very least, order that the application for the default judgment be served on the Applicant or his Counsel.

[6] On 1 April 2021, the Applicant filed in the High Court, an urgent application to set aside the default judgment and an affidavit in support containing a draft Defence. He proffered that he had meritorious defences and if allowed to lead evidence, would establish that the statements made were not defamatory and were true. The High Court heard and refused the application on 16 April 2021 but withdrew its award of damages and ordered those damages be assessed by written submissions.

[7] On 17 June 2021, the Applicant filed a Notice of Appeal in the Full Court appealing the High Court decision and requesting that the decision and default judgment be set aside and reversed in its entirety. The Full Court was equally divided, and this automatically upheld the High Court decision pursuant to s 75 of the High Court Act[1] ('the High Court Act').

[8] On 19 May 2022, Counsel for the Applicant made an oral application to recall the divided judgment and sought reassignment of the matter to an odd-numbered Full Court bench. The application was refused thus closing all avenues by the Applicant to the Full Court.

[9] On 27 May 2022, in the Court of Appeal, the Applicant filed a Notice of Motion for leave to appeal the effect of the divided Full Court judgment.

[10] On 1 June 2022, the Applicant filed a fixed date application in the Full Court for an extension of time to file a fresh appeal of the High Court decision or, alternatively, for the Full Court judgment to be recalled and reassigned to a bench of three judges of the Full Court. This application was dismissed on 11 July 2022 and costs were awarded against the Applicant.

[11] On 22 July 2022, in the Court of Appeal, the Applicant filed a second Notice of Motion for leave to appeal to the Court of Appeal, this time for leave to appeal the Full Court's dismissal of the fixed date application. The Applicant's motions were consolidated and in the decision on 4 September 2023, alluded to at [1], the Court

[1] Cap 3:02.

of Appeal wholly rejected both motions and imposed costs upon the Applicant. The first motion failed on the ground that there was no appealable Full Court decision, and the Court of Appeal had no jurisdiction to grant an appeal, there being no egregious errors, special circumstances or prospects of success.[2] The second motion failed as there was no basis to interfere with the decision of the Full Court to deny the fixed date application.

[17] On 8 September 2023, the Applicant filed an application for special leave to appeal in this Court on the main grounds that the Court of Appeal erred (a) in finding that it had no jurisdiction to hear an appeal from a divided Full Court, and (b) in failing to overturn the Full Court's refusal to either recall its divided judgment and remit the matter to three fresh Full Court judges or grant an extension of time to file a fresh appeal if no decision had in fact been rendered by the Full Court. The Applicant seeks to reverse the Court of Appeal's decision and/or have it set aside; that leave to appeal in the Court of Appeal be granted, that the matter be remitted to the Court of Appeal for a hearing of the appeal on its merits or alternatively, that the default judgment be set aside.

[18] On 12 October 2023, this Court ordered the parties to file written submissions on issues surrounding the appealability of split decisions of the Full Court to the Court of Appeal.

[19] The Applicant submitted that an appeal from a final order in a summary proceeding is to the Full Court and that s 6(2)(a)(i) of the Court of Appeal Act[3] ('the Court of Appeal Act') contains a jurisdictional barrier which prevents an appeal of an interlocutory order to the Court of Appeal. He further submitted that there is no dispute that the High Court's order refusing to set aside the default judgment was interlocutory, that refusal being appealable to the Full Court. As such, a resulting divided Full Court does not give the Court of Appeal jurisdiction to hear an interlocutory appeal from a trial judge.

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[2] *Guyana Sugar Corporation Inc v Seegobin* GY/A/CV2021/004.
[3] Cap 3:01.

[20] The Respondent submitted that there is no provision in the Court of Appeal Act for special leave to appeal a decision of the Full Court or more particularly a split between two judges sitting in the Full Court. According to the Respondent, s 75(2) of the High Court Act shows that the legislature did contemplate circumstances where there was a split decision in the Full Court on appeal from the Magistrate's Court but in the case of a split in the Full Court from a decision of a High Court judge, the legislators merely stated that the decision of the single judge shall stand. As such, the High Court Act should be interpreted as proscribing appeals to the Court of Appeal from split decisions in interlocutory appeals.

Statutory Framework

[21] The statutory framework applicable to this case consists primarily of provisions in the High Court Act and the Court of Appeal Act. Section 75 of the High Court Act sets out the Constitution of the Full Court with a proviso governing split decisions. This section reads:

> 75. (1) There shall be a division of the High Court styled "The Full Court of the High Court" in this Act referred to as the Full Court.
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> (2) The Full Court may be composed of all, but shall consist of not less than two, of the judges of the Court:
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> Provided that when the Full Court is composed of two judges and they differ as to the judgment that should be given on an appeal from a single judge the judgment of the single judge shall stand except as to any matters in which the Full Court agrees that it shall be reversed, and on an appeal from a decision of a magistrate's court the appeal shall be re-heard as soon as conveniently may be by a full court of three judges.

[22] Section 6 of the Court of Appeal Act, as far as relevant, reads as follows:

> 6. (1) The Court of Appeal shall have jurisdiction to hear and determine any matter arising in any civil proceedings upon a case stated or upon a question

of law reserved by the Full Court or by a judge of the High Court pursuant to any power conferred in that behalf by any Act.

(2) Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a judge of the High Court (whether made before or after the date on which this Act comes into force) where such order is—

(a) final and is not—

(i) an order of a judge of the High Court made in chambers or in a summary proceeding;

(ii) an order made with the consent of the parties;

(iii) an order as to costs;

(iv) an order referred to in paragraph (d);

(b) a decree nisi in a matrimonial cause or an order in an admiralty action determining liability;

(c) declared by rules of court to be of the nature of a final order;

(d) an order upon appeal from any other court, tribunal, body or person.

…

(4) With the leave of the Full Court or of the Court of Appeal, an appeal shall lie under this section from a decision of the Full Court upon appeal from a judge of the High Court in respect of an order referred to in subsection (2) (a) (i), (a) (ii) or (a) (iii) or in respect of an order of a judge of the High Court not referred to in the said subsection.

…

(6) No appeal shall lie under this section from any order of the Full Court or of a judge of the High Court where it is provided by any Act that the decision of such Court or judge shall be final.

Analysis

[23] The central issue to be decided is whether the Court of Appeal has jurisdiction to hear an appeal from a split decision from the Full Court in respect of the rejection of the Applicant's defence to the default judgment against him. No question arises as to an appeal as of right since s6(2)(a)(i) debars appeals in respect of orders from

the Full Court or a judge of the High Court unless the order is final and not obtained in a summary proceeding. This Court has extensively explored the meaning to be attributed to s 6(2)(a)(i): *Singh v Attorney General of Guyana*[4]; *Chung v AIC Battery and Automotive Services Co Ltd*[5]*; Persaud v Nizamudin*[6]. Suffice it to say that an order is not 'final' if it is interlocutory, and that a 'summary proceeding' is one which is 'short, speedy and without formality'[7] and does not involve a full trial preceded by the regular common law processes involving use of writs, statement of claim, defence, reply, and so on.

[24] In this case, there is no issue that the orders in the Full Court were interlocutory and granted in summary proceedings. The Applicant candidly conceded that the High Court's order refusing to set aside the default judgment was interlocutory, that refusal being appealable to the Full Court. As such, a resulting divided Full Court did not give the Court of Appeal jurisdiction to hear the interlocutory appeal from a trial judge, this being precluded by s6(2)(a)(i) of the Court of Appeal Act. This was a concession properly made since summary judgments have been regarded as interlocutory and not final: *Jamaica Public Service Co Ltd v Samuels;*[8] *Ledgister v Bank of Nova Scotia Jamaica Ltd*[9].

[25] The question that remains is whether the Court of Appeal has jurisdiction pursuant to s 6(4) of the Court of Appeal Act to grant leave to appeal the split decision of the Full Court. The Respondent submits that it does not. According to the Respondent, s 75(2) of the High Court Act shows that the legislature contemplated and provided for the re-hearing of an appeal from a magistrate's court in circumstances where there was a split decision in the Full Court. The fact that the section made no provision regarding the way forward for an appellant who is dissatisfied with a split decision in the Full Court from a decision of a single judge implied that there was no appeal available to the Court of Appeal.

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[4] [2012] CCJ 2 (AJ) (GY)), [2012] 80 WIR 382.
[5] [2013] CCJ 2 (AJ) (GY), (2013) 82 WIR 357.
[6] [2020] CCJ 4 (AJ) (GY).
[7] *Chung* (n 5).
[8] [2010] JMCA App 23.
[9] [2014] JMCA App 1, JM 2014 CA 1 (CARILAW).

[26] Respectfully, I cannot accept this submission. Admittedly, it is trite law that an aggrieved person must look to legislation to determine whether they may appeal. In *Bata Shoe Co Guyana Ltd v Commissioner of Inland Revenue*[10], it was stated:

> With respect to a right of appeal, the position at common law was that such a right did not exist. The courts had no inherent powers to hear appeals. There could be no implication of such a right. It was a matter for the legislature. Time and again the courts have declared that an appeal was a creature of statute.

[27] Based on an analysis of statutory framework in Guyana, this Court stated in *Darnley v Reid*[11] that:

> The general rule is that there must be an as of right route and a discretionary route to the Court of Appeal unless there are special instances where no appeal at all is allowed as prescribed by section 6(5) and section 6(6) of the Court of Appeal Act.[12]

[28] Section 6 controls the avenues of appeal to the Court of Appeal. Section 6(2) grants a right of appeal subject to exceptions; for the reasons traversed earlier, the exceptions in s 6(2) means that the Applicant in this case does not have a right of appeal. Section 6(4) gives the Court of Appeal jurisdiction to grant leave to hear appeals from the Full Court including in circumstances where the exceptions in s 6(2) eliminate a right of appeal.

[29] In my respectful view, it would be contrary to the objective and intent of the statutory regime of appeals to hold that the Court of Appeal has no jurisdiction to give leave simply because of the happenstance that the Full Court was composed of two High Court judges who were divided in their opinions. It must be extremely doubtful that the legislature would have invested the Court of Appeal with jurisdiction to give leave to hear an appeal from a decision reached by a three-member Full Court but to divest the Court of Appeal of that jurisdiction simply

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[10] (1976) 24 WIR 172 (GY CA) at 201.
[11] [2014] CCJ 20 (AJ)(GY), GY 2014 CCJ 11 (CARILAW).
[12] ibid at [11].

because there was a two-member Full Court which had divided opinions. Such an interpretation is inconsistent with the availability of an appeal in split decisions involving magisterial decisions and would deprive the Court of Appeal of the opportunity to clarify important points of law and/or to ensure the proper exercise of judicial discretion according to law. It would forever inoculate the decision of a single High Court Judge from review and thereby, potentially, forever immunise injustices from correction and for no good forensic reason intelligible upon any fair and reasonable reading of the legislation.

[30] In my view, the proper interpretation of s 75(2) is that when the Full Court is composed of two judges, and they differ as to the judgment that should be given on an appeal from a single judge of the High Court, the judgment of the single judge of the High Court shall stand as the judgment of the Full Court, it being remembered that the Full Court is simply a division of the High Court. This interpretation receives support from the concluding words of the subsection; the judgment of the single judge stands, 'except as to any matters in which the Full Court agrees that it shall be reversed'.

[31] Further, this interpretation of s75(2) is consistent with the venerable principle in English common law that where an appellate court is evenly divided, the result is that the challenged decision stands and the appeal is dismissed. There can then be an appeal from that decision to any higher appellate court that exists. In *Ashbury Railway Carriage and Iron Co (Ltd) v Riche*[13], where the appellate court was evenly divided, the decision was appealable to the House of Lords. Also, in *Dublin, Wicklow and Wexford Railway Co v Slattery*[14], it was stated that where on appeal, there was an evenly divided decision, the decision of the court below stood affirmed, and an appeal could subsequently be brought against that decision. According to J.T. Irvine, in both the Supreme Court of Canada and the

[13] (1875) LR 7 HL 653 at 675.
[14] (1878) 3 App Cas 1155 at 1159.

Saskatchewan Court of Appeal, where the court is evenly divided, the result is that the appeal is dismissed.[15]

[32] Based on the principles in the above cited English cases and the academic commentary on Canadian courts, all that occurs where there is an evenly divided Full Court is that the appeal is dismissed. The decision which stands is then subject to the regime of appeals as set out in s 6(4) of the Court of Appeal Act. Again, this is entirely consistent with a generous interpretation of the applicable statutory provisions in Guyana.

[33] The Order of this Court in *Guyana Sugar Corp Inc v Seegobin*[16] (there was no reasoned judgment) in no way opposes this interpretation of s 6(4) of the Court of Appeal Act. In *Seegobin*, there was an attempt to appeal against the decision of one of two judges in a divided Full Court. The Preamble to the Order recited that the divided decisions are not directly appealable to the Court of Appeal. This is necessarily so by virtue of s 75(2) of the High Court Act.

Conclusion

[34] In the circumstances, I respectfully take the view that the division of opinion in the Full Court meant, by virtue of s 75(2) of the High Court Act, that the previous decision of the High Court judge was affirmed by the Full Court. The Applicant has no right to appeal this decision, nor is he 'entitled' to leave to appeal. But s 6(4) of the Court of Appeal Act does give the Court of Appeal jurisdiction to decide whether to grant him leave to appeal the decision in relation to his arguments for setting aside the default judgment. It goes without saying that this discretion to grant leave must be exercised according to the applicable settled principles. I would therefore remit the matter to the Court of Appeal for that court to consider whether it is appropriate to grant the Applicant leave to appeal in all the circumstances of this case.

[15] J T Irvine, 'The Case of the Evenly Divided Court' (2001) 64 Sask L Rev 219, 229.
[16] CCJ Appeal No GY/A/CV2021/004.

BARROW J (dissenting):

[35] By this application for special leave to appeal, the Applicant (the Defendant) seeks to appeal to this Court to reverse the decision of the Court of Appeal[17] ('the Decision') made against him that there was no decision by or of the Full Court against which to appeal to it (the Court of Appeal) and, therefore, that that court does not have the jurisdiction to hear an appeal to it.

[36] What gives rise to this fundamental dispute as to whether there exists a decision of the Full Court against which to appeal is s 75 of the High Court Act[18] which states what is the situation when, as here, a panel of two judges of the Full Court heard an appeal against a decision made by a judge in chambers refusing to set aside a judgment entered against the applicant on his default in filing a defence. The two judges differed as to what should be the judgment. Section 75, after establishing a division of the High Court styled 'The Full Court of the High Court', goes on to state:

> 75. (1) There shall be a division of the High Court styled "The Full Court of the High Court" in this Act referred to as the Full Court.
>
> (2) The Full Court may be composed of all, but shall consist of not less than two, of the judges of the Court:
>
> Provided that when the Full Court is composed of two judges and they differ as to the judgment that should be given on an appeal from a single judge *the judgment of the single judge shall stand* except as to any matters in which the Full Court agrees that it shall be reversed, and on an appeal from a decision of a magistrate's court the appeal shall be re-heard as soon as conveniently may be by a full court of three judges. (emphasis added).

The Case for the Applicant

[37] In an impressive submission on behalf of the Applicant, Mr Kissoon demonstrated a full appreciation of the general rule that the Court of Appeal cannot grant leave

[17] *Jagdeo v Ferguson* (GY CA, 4 September 2023).
[18] Cap 3:02.

to bring an appeal against the decision of a single judge of the High Court because s 79 of the High Court Act specifies that the relevant High Court decision may be appealed only to the Full Court of the High Court; it may not be appealed to the Court of Appeal; see *Prashad v Persaud*.[19] As Counsel noted, the CCJ went on to state that s 6(2)(a)(i) of the Court of Appeal Act contained a complete jurisdictional barrier which prevented an appeal of an interlocutory order to the Court of Appeal. However, because of the circumstance that a deadlock in the two-member panel of the Full Court that heard an appeal against the High Court decision left the High Court decision *to stand*, in a well-crafted argument the applicant sought to show why he should be granted leave by the Court of Appeal where, otherwise, that court has no jurisdiction to grant leave because it has no jurisdiction to hear such an appeal. The Applicant can point to no statutory basis for this contention that he has a right of appeal, even though he accepts that a right of appeal only exists where it is granted by statute. His attempts to get past that difficulty attract the present consideration.

Whose Decision?

[38] The thesis of the Applicant is that what he now proposes to appeal is the decision of the Court of Appeal, 'the Decision'. The Applicant relies on a clear line of court decisions and observations that have consistently stated that the single judge decision that shall stand is left to stand by a judicial act of 'affirmance'. The Applicant begins this submission by stating:

> Clearly, by operation of Section 75(2) of the HCA, a divided Full Court results in the affirmation of the trial court's decision, this being appealable to the Court of Appeal. In other words, the effect of a divided Full Court is that the appeal stands dismissed and the trial judge's decision upheld, nothing more. See J.T. Irvine "The Case of the Evenly Divided Court" (2001) 64 Sask L Rev 219, which concludes that "In summary, when a court divides evenly in England, the appeal is dismissed."

[19] [2022] CCJ 5 (AJ) GY.

[39] Treating an even division of the intermediate appellate court as 'an automatic affirmation of the decision of a lower court,' the Applicant submitted that it was this affirmation that was now appealable. To be clear, the Applicant was submitting that it was the decision of affirmation by the Full Court that was appealable and not the decision of the single judge that was left to stand. The submission was buttressed by reference to *Ashbury Railway Carriage and Iron Co (Ltd) v Riche*[20] where it was stated that the judges of the lower intermediate court being equally divided, the decision at first instance '… stood affirmed' and an appeal ('Error') was then brought to the House of Lords. Similarly, it was recognised that the original decision was affirmed and that such affirmance was subject to appeal in *Dublin, Wicklow and Wexford Railway Co v Slattery*.[21] The extract from that case cited by the Applicant, referring to the even decision of the intermediate court, states 'The Court being equally divided, the order was affirmed, and the appeal to your Lordships is *from that affirmance*.' (emphasis added).

[40] The Applicant went on to submit that the result or effect of an even division in the intermediate appellate court was the automatic dismissal of the appeal against the first instance decision, citing the article by Irvine[22] (see [37], above) and cases relied on. In England, submitted the Applicant, this gave rise to a right to appeal to a superior appellate court.

Appeal not Proscribed

[41] The Applicant's submission that there is an appeal to the Court of Appeal from a decision of affirmance by the Full Court was introduced with the argument that the legislation governing the right to appeal, the High Court Act does not proscribe such an appeal and that for such a right to be proscribed there would be required specific language. The submissions begin with reference to the case of *Darnley v*

[20] (1875) LR 7 HL 653.
[21] (1878) 3 App Cas 1155.
[22] Irvine (n 15).

Reid[23] where this Court in considering appeals from the full court of the Court of Appeals stated at [11]:

> The general rule is that there must be an as of right route and a discretionary route to the Court of Appeal unless there are special instances where no appeal at all is allowed as prescribed by section 6(5) and section 6(6) of the Court of Appeal Act.

[42] The submission continued that there is nothing in the High Court Act which suggests that there can be no appeal from a divided Full Court to the Court of Appeal. Rather s 75(2) of the High Court Act simply asserts that the trial judge's decision stands where there is a divided full court; it does not specify that the decision is final in accordance with s 6(6) of the Court of Appeal Act nor does it contain any language which proscribes an appeal. Thus, the Applicant submitted, if Parliament intended that draconian effect to be the case, that is to deprive a litigant of the ability to appeal, it would have expressly said so by stating that the decision of a divided full court was final. The example was given of s 86(10) of the Income Tax Act, Cap 81:01 which states 'The decision of the judge on any question other than a question of law shall be final'. The other example given was s 5(4) of the Co-operative Societies Act, Cap 88:01 which provides that the Commissioner's decision shall be final. Accordingly, it was respectfully submitted, the general rule established in *Darnley* ought to be applied and there was no room to interpret the High Court Act in such a manner as to proscribe appeals without express language to that effect.

Not an Adjudication or Order

[43] The trove of information contained in the article by Irvine includes an analysis of the nature of the affirmance of the original decision that is left standing[24], which comes from the 1868 decision in the United States of *Durant v Essex Co*.[25]

[23] *Darnley* (n 11).
[24] See Irvine (n 15) 241, 242.
[25] 74 US107 (1868), 7 Wall 107.

Speaking for the court, Field J observed that in the event of an even division in the appellate court, the judgment of the court below stood in full force. He continued:

> It is, indeed, the settled practice in such cases to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the case is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal or writ of error, were dismissed.

[44] The author cites Powell J in *Neil v Biggers*[26] where he '… reaffirmed that an even division of the Court does not decide any principles of law, and it is not a binding precedent. The Court has not "actually adjudicated" the claim.'

[45] It is to be gathered from these observations that the course of the appellate court making the statement that the result of an even division is the affirmance of the first instance decision is a matter of judicial practice, in those jurisdictions where that statement is made. As Field J stated in *Durant* (see [42] above) that statement of affirmance is to be regarded simply as the most convenient way of conveying the result of the unsuccessful appeal. It is not an adjudication. In contrast, in Guyana the affirmation is a legislative statement of the legal result, as per s 75 of the High Court Act. There is no informational statement by a judicial organ of the legal result, which can be confused with a judicial determination or order. That legal result is ordained, stated by, and gets its force directly from the legislation.

The Judgment Shall Stand

[46] The conclusion that flows from the foregoing discussion that there was no decision of the Full Court to appeal disposes of the reliance on *Darnley* for the proposition that 'the general rule is that there must be …' a right of appeal to the Court of Appeal from a decision of the Full Court. To repeat: there was no decision of the Full Court. The discussion in *Darnley*, however, underscores the significance of the fact that there is no right of appeal. It confirms that a right of appeal is given by

[26] 409 US 188 (1972), 93 SCt 375 quoted in Irvine (n 15) 242

legislation in stated instances, either as a matter of entitlement or upon obtaining leave to appeal and it makes the point that there are instances where particular statutes expressly provide that there shall be no appeal.

[47] Relying on the fact that the High Court Act does not expressly provide that there is no right of appeal against the result of an even division, the ultimate argument of the Applicant comes down to the proposition that there must be a right to appeal the result of the even division because, were it otherwise, there would be a denial of justice. This argument engages with the judicial policy contained in the High Court Act and the Court of Appeal Act.

No Right to a Rehearing

[48] The first part of the policy appears from the provisions of s 75(2) of the High Court Act. This section makes the clear statement that where there is an evenly divided Full Court on an appeal from the decision of a single judge *the judgment of the single judge shall stand*. In the very same sentence that states the single judge's decision shall stand, in stark contrast, the section states that where the appeal is from a decision of a magistrate's court the appeal *shall be re-heard* as soon as may be convenient by a Full Court of three judges. The difference in result merits repetition for emphasis. In the case of an appeal from a single judge their decision shall stand. In the case of an appeal from a magistrate their decision does not stand, it is mandated by the section that there shall be a rehearing of the appeal against it.

[49] The article by Irvine shows that, in the various common law jurisdictions he discusses, it is purely a matter of legislative policy (with one policy consideration being the level of the court involved) whether on an even division on an appeal against a lower court decision the appealed decision shall be left standing or subject to further challenge.[27] There is no common principle that determines whether the failure of a divided court to agree should result in a rehearing or not. Interestingly,

[27] See Irvine (n 15) 243, 244.

one of the alternative remedies that the Applicant sought on his application to the Court of Appeal was a rehearing by the Full Court. This recognises that a rehearing and not an appeal is a good enough recourse for dealing with an even decision of the intermediate appeal court.

No Right of Appeal

[50] As indicated, the Applicant showed a lucid understanding that the proceedings are interlocutory in nature. This expression means, in short, that the order made by the single judge dismissing the application to set aside the default judgment entered against him did not finally dispose of the rights of the parties, which arose on a claim for defamation. It disposed only of a procedural point, which was whether to set aside the default judgment. In *JJ v Child Care Board*[28] this Court emphasised the policy that appeals against interlocutory decisions are to be discouraged and this policy may be considered of general application, even though in that case the Court was speaking of appeals to its level. This is not simply a matter of judicial policy but a matter of the legislated order. That order is as expressed in s 6(4) of the Court of Appeal Act - appeals against interlocutory orders can only be brought with leave or permission of a court.

[51] It would have been seen from the outset that an even division in a two-member panel of the court was fully anticipated as a possible result and provided for in the legislation. Section 75 of the High Court Act which states that on an even division, the single judge decision shall stand must now be accepted without qualification for what it states. In so providing the legislation provided for a trade-off or balance between the value of obtaining a quicker hearing by a more quickly constituted two-member panel, with the risk that if there is an even division of that panel that ends the applicant's prospect of appealing and requiring a three-member panel to be constituted, with the risk that there could be a long delay before this could be done.

[28] [2017] CCJ 6 (AJ) (BB), [2017] 3 LRC 390.

[52] Section 77 of the High Court Act gives the option to an applicant, which he must exercise before there is a hearing by a two-member panel, to apply for the hearing to be before a three-member panel. As a practical matter, it would be expected that if an applicant opts for a three-member panel this will delay the hearing because it is likely to be far more difficult for the Chief Justice to find three judges who would be available at the same time to constitute a three-member panel. It is, therefore, an important choice an applicant must make between the two alternatives.

[53] There can be no decrying a decision by an applicant to accept adjudication by a two-member panel with the prospect that if there is an even division it marks the end of his ability to appeal. Hindsight must not diminish the reasonableness of an applicant's choice after he has assessed the strength of his proposed appeal. If the Applicant thought, as may have been reasonable to do, that there was a good likelihood of either a clear win or a clear loss before a two-member panel it would have been natural and, indeed, sensible to decide to proceed with that constitution. The risk of an even division was certainly to be considered. But it was truly a matter of the applicant assessing the likely outcome of such a hearing – at that point in the life of the litigation.

[54] In this regard, it is to be given proper weight that it was a material consideration for him that if his application resulted in an even division, (which he may have assessed as highly unlikely), he would have failed to persuade two out of three High Court judges that the default judgment should be set aside. On that – to him unlikely - scenario of an even division, he may have concluded that his chances of obtaining permission to appeal to the Court of Appeal and persuading that court to set aside the default judgment were slim. Thus, it may have been a reasonable forensic decision for the Applicant to have opted to accept adjudication by a two-member panel.

Conclusion

[55] Having so accepted, the Applicant must live with the result. This is what was decided recently by the Court of Appeal in *Guyana Sugar Corp Inc v Seegobin*[29] and confirmed by this Court.[30] The result is laid down by statute. That decision clarifies that the rule applies to mean that there is no appeal from the opinion of one of two evenly divided judges. The rule must necessarily mean that neither can there be an appeal from the opinion of the other. By the same principle there can there be no appeal from the fact or result of the failure to arrive at a judgment.

[56] For the reasons given, I would dismiss the application for special leave to appeal and award costs to the Respondent.

Disposition

[57] Having regard to the opinions expressed, the Court orders:

i. The application for special leave to appeal is hereby granted.
ii. The application is treated as the substantive appeal.
iii. The appeal is upheld.
iv. The decision of Court of Appeal that it has no jurisdiction to grant leave is reversed.
v. The case is remitted to the Court of Appeal for consideration whether to grant leave to appeal.
vi. The hearing for assessment of damages against the Appellant is stayed pending the final determination of this matter or until further order.
vii. Costs in the cause.

[29] (GY CA, date delivered).
[30] CCJ Appeal No GY/A/CV2021/004.

/s/ W Anderson

Mr Justice Anderson

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess