IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 8 of 2009

BETWEEN:

BELIZE ELECTRICITY LIMITED	**Appellant**
AND	
PUBLIC UTILITIES COMMISSION	**Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Vincent Nelson QC and Mr. Anthony Sylvester for the appellant.
Mr. Derek Courtenay SC and Ms. Vanessa Retreage for the respondent.

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5 March, 8 October 2010.

PRELIMINARY OBJECTION TO HEARING OF MOTION TO RE-HEAR APPEAL

MOTTLEY P

[1] Following the dismissal of an appeal heard by this Court by a panel comprising Mottley P, Morrison and Barrow J, Belize Electricity filed an application for a rehearing of the appeal. The Notice of Motion for leave to rehear the appeal before a new panel of the Court which did not involve Barrow

JA was filed on 17th November. The application was made pursuant to sections 12 and 13 of the Court of Appeal Act Cap 90 and the Common Law. The grounds upon which leave was sought are set out in the Notice. It is stated that Kimano Barrow, the son of Justice Barrow was, at all material times during the appeal process, a Commissioner of the Public Utilities Commission, the respondent in the appeal. BEL states that it was not aware until after the conclusion of the hearing of the appeal that Commissioner Kimano Barrow was the son of Justice Barrow. BEL asserts that, had it been aware of the familial relationship between Kimano Barrow and Justice Barrow, it would have instructed its legal representative to request Justice Barrow to recuse himself from the panel which heard the appeal.

[2] BEL contends that the familial link between Justice Barrow and Kimano Barrow, would lead a fair-minded and informed observer who considered the facts to conclude that there was a real possibility that Barrow JA lacked impartiality and was biased.

[3] The relationship of father and son, BEL alleges, is wholly of an exceptional character and therefore merits this Court exercising its jurisdiction pursuant to section (13)(1) of the Court of Appeal Act and common law principles to set aside the oral decision announced on 27 October 2009 and order a rehearing of the appeal before a different constituted panel of the Court.

[4] BEL relies on the provisions of sections 12 and 13 of the Court of Appeal Act Cap. 90. These sections provide:

> "12. Where in any case no special provision is contained in this or any other Act, or in rules of court, with reference to any jurisdiction of the court in relation to appeals in criminal and civil matters such jurisdiction shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being in force in England in the Court of Appeal.

13.- (1) Subject to this Part and to rules of court, the Court shall have jurisdiction to hear and determine appeals from judgments and orders of the Supreme Court given or made in civil proceedings and for all purposes of and incidental to the hearing and determination of any such appeal.

(2) The Court 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 Supreme Court or a judge thereof pursuant to any power conferred in that behalf by any law."

PRELIMINARY OBJECTION

[5] On 26 February 2010, counsel for the PUC filed a Notice that the PUC intended to rely upon a preliminary objection. This Notice was filed pursuant to Order 11 Rule 7(1) of the Court of Appeal Rules which provides:

> "7(1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing setting out the grounds of the objection and shall file such notice together with four copies thereof with the Registrar within the same time."

[6] In the Notice of Preliminary Objection, the PUC set out two grounds on which it intended to rely. These grounds are:-

1) The Court of Appeal is now *functus officio* by reason that:
   (a) at the conclusion of the hearing of the appeal on 27 October 2009, the Court ordered that the appeal be dismissed with costs by to PUC;
   (b) the terms of the Order were approved by counsel for BEL on 30 October 2009;

(c) the terms of the Order were approved by the PUC on 2 November 2009;

(d) the Order was signed and entered on 25 November 2009.

2) The jurisdiction of this Court to further hear and determine this appeal ceased when on 16 November 2009 BEL gave notice of its application for leave to appeal to Her Majesty in Council against the Order of the Court upon grounds which did include the grounds which are set out in its Notice of Motion.

[7] Paragraph 3 of the Skeleton Argument on the Preliminary Objection filed by Mr. Courtenay, counsel for the PUC, contains a time line. Mr. Nelson QC for BEL took no issue with this time line which is now set out:

27th October 2009 - hearing of Civil Appeal NO. 8 of 2009 concluded an oral decision to dismiss the Appellant's appeal pronounced by the Court of Appeal;

- "Notice to Authorities of Result of Appeal" issued by the Assistant Registrar of the Court of Appeal addressed to the attorneys for the Appellant, Messrs. Youngs Law Firm and the attorneys for the Respondent, Messrs. E. H. Courtenay & Co. of the result of the appeal i.e., that the appeal was dismissed with costs to the Respondent to be taxed if not agreed; and, reasons in writing for the dismissal to follow at a later date;

29th October 2009	-	draft Order by attorneys for the Respondent sent to attorneys for the Appellant, Messrs. Youngs Law Firm for approval;
30th October 2009	-	draft Order returned by Messrs. Youngs Law Firm to attorneys for the Respondent endorsed with signature of approval of the terms therein by Mr. Michael Young, S.C. of Messrs. Youngs Law Firm;
2 November 2009	-	draft Order endorsed with signature of approval by attorneys for the Respondent and sent to the Registrar of the Court of Appeal for approval by the Justices of Appeal;
16th November 2009	-	Notice of Motion for leave to appeal to the Privy Council filed by Messrs. Youngs Law Firm on behalf of the Appellants;
18th November 2009	-	Notice of Motion for leave to rehear the appeal filed by Messrs. Musa and Balderamos, purporting to act as attorneys for the Appellant;
25th November 2009	-	Order of the Court of Appeal entered and perfected;
26th February 2010	-	Notice of Preliminary Objection to motion for leave to rehear the Appeal filed and served by attorneys for the Respondent, Messrs. W. H. Courtenay & Co.

GROUND 1

[8] It is not disputed by BEL that the order of this Court was perfected on 25 November 2009. Mr. Courtenay submitted that, once the order is perfected, it follows that the Court of Appeal is functus officio and therefore lacks jurisdiction to grant leave to rehear. Counsel submitted that it is a tenet of the common law that the outcome of litigation should be final. For this proposition counsel relied on **Taylor v Lawrence [2002] 3 WLR 640**.

[9] In **Taylor v Lawrence**, a case heard en banc by the Court of Appeal in England, the Court assumed jurisdiction to give guidance as to the jurisdiction of the Court of Appeal to reopen an appeal after the Court had determined the appeal. The Court identified the issues at para.

> "This application raises two important issues. The first relates to the jurisdiction of this court. It is whether the Court of Appeal has power to reopen an appeal after it has given a final judgment and that judgment has been drawn up ("the jurisdiction issue"). The second issue is as to the circumstances that are capable of giving rise to the possibility of bias on the part of a judge ("the bias issue")

[10] Lord Woolf CJ who delivered the judgment of the Court said at para 6:

> "The rule in ***Ladd v Marshall*** is an example of a fundamental principle of our common law—that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry: ***Henderson v Henderson (1843) 3 Hare 100***. The reasons for the general approach is vigorously proclaimed by Lord Wilberforce and

Lord Simon of Glaisdale in ***The Ampthill Peerage [1977] AC 457***. Both statements deserve the most careful attention. However, for reasons of economy we will cite only Lord Wilberforce, who presided, but we give reference to Lord Simon's speech, at pp 575e-576h. Lord Wilberforce said, at p 569:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the [Legitimacy Declaration Act 1858 (21 & 22 Vict c 93)] is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance,

> and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

[11] Having accepted that it was possible in certain circumstances to depart from the rule of finality, the Chief Justice later indicated that, in **Taylor v Lawrence**, the question which required determination was whether the Court of Appeal had jurisdiction to reopen an appeal if an appearance of bias can be demonstrated on the part of the court below. (In this case on the part of the Court of Appeal). He stated at p. 646:

> "It is not uncommon for fresh evidence to come to light after a judgment has been perfected which puts that judgment in doubt. In such circumstances the unsuccessful litigant may be able to invoke that evidence in order to challenge the judgment by an appeal. Once the judgment is perfected, however, the court that has delivered the judgment, be it a court of first instance or the Court of Appeal, would not entertain an application to reopen the judgment in order to consider the effect of the fresh evidence. This is not because of any express statutory prohibition. In considering the extent of their jurisdiction the courts have ruled that a perfected judgment exhausts their jurisdiction because this accords with the fundamental principle that the outcome of litigation should be final. This can be demonstrated by reference to the judgment of Russell LJ in ***In re Barrell Enterprises [1973] I WLR 19*** (see the passages of the judgment at pp 23h-24a and 24e-f.)"

Both the House of Lords and the Court of Appeal recognized that fundamental rule in litigation was a matter of policy and in certain recognized situation such as fraud the Courts may in the interest of justice depart from the rule.

[12] Lord Woolf accepted that the Court of Appeal had jurisdiction to rehear a matter where bias is being alleged against a judge. However, the Chief Justice went on to point out that this jurisdiction will not be exercised where the order of the court has been perfected.

While I accept this statement of the law as being of general application, in my view it is necessary to look at the facts of this particular case and to see to what extent the fundamental provision of the Constitution impact on the rule. I shall return to this aspect later in my judgment.

[13] Mr. Courtenay also relied on **Vishnu Narine Sarja v Walker (No. 2) (1974) 21 WLR 193**. The Court of Appeal in Guyana, then the final Appellate Court, had to determine whether, by virtue of it status as a final Court of Appeal, the Court had power to hear further argument, it being alleged that some error of law had occurred before the orders of the Court have been drawn up and entered. In his judgment, Crane JA identified the issue for the Court:

> "The point for decision in this motion, however, is of much greater significance. It is whether we have, by virtue of our status as Guyana's Court of last resort, not only the power to vary and/or set aside our previous decisions, but whether we are possessed, like the High Court, of the power to hear further arguments on them on an allegation of some error of law, before orders of court have been drawn up and entered. Its original jurisdiction notwithstanding, the power to review and reconsider ought never to be harmfully exercised by the High Court so long as there is a right of appeal from that court to this court; but there being no further right of appeal from the Guyana Court of Appeal to any other tribunal, ought we, in view of the principles of certainty and finality of judgments that are to be expected from a final appellate court, to permit this motion alleging that we were in error on a point of law? The error alleged is one that would ordinarily form the subject-

> matter of an appeal to an intermediate court of appeal, namely, that there has been employed one method of computing pecuniary compensation rather than another. Let me express the matter in another way: Before our orders are drawn up and entered, ought we as a final court of appeal, to establish the practice of allowing rehearings on points of law we have already decided?"

[14] Crane JA determined the issue this way:

> "While I will readily concede we have generally no power to rehear an appeal after our order has been drawn up, passed and entered, yet I am of opinion we are quite competent to entertain not only applications under the slip rule, but to rehear and reconsider out own decisions, either on our own motion, or on the motion of any of the parties at any time before the orders of court pertaining to them have been entered."

Crane JA was speaking of the jurisdiction of the Court of Appeal of Guyana which at that time was the final appellate Court. This led the Court to assume jurisdiction. This case is not particularly helpful because it relates to the final jurisdiction and may be equally distinguished because the Court of Belize is not a final Court of Appeal. BEL has the right to appeal to the CCJ even if leave were required.

[15] Counsel for the PUC also relied on **Flower v Lloyd [1867] 6 Ch 297**. In that case, after the order of the Court of Appeal had been entered, application was made to have the appeal reheard with fresh evidence on the basis that the judgment of the Court of Appeal had been obtained by fraud. In dismissing the application, Lord Jessel M.R. said at p. 299:

> "The question which we have to decide is whether, final judgment having been pronounced by the Court of Appeal dismissing an action with costs, the Plaintiff in that action is entitled by motion to

apply for leave for a rehearing of the appeal before the Court of Appeal on the ground of subsequent discovery of facts which shew or tend to shew that the order of the Court of Appeal was obtained by a fraud practised on the Court below.

If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy. In the first place it must be remembered that the old practice remains where not interfered with by the new rules, and secondly, it must be remembered that all the jurisdiction of the old Court of Chancery is transferred to the High Court of Justice. Now, had the Court of Chancery any jurisdiction to give relief in such a case? It plainly had. I will read from the well-known treatise of Lord *Redesdale*: "If a decree has been obtained by fraud, it may be impeached by original bill," and he goes on to say, "without the leave of the Court"—but there are very few such cases, in most cases you must obtain leave—"the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. and where a decree has been so obtained the Court will restore the parties to their former situation, whatever their rights may be."

[16] In **Stewart v Engel & Another [2000] 3 ALL E.R. 518**, the issue for the Court of Appeal, Sir Christopher Slade in giving his judgment stated:

"The final version of the judge's judgment received by the parties' solicitors on 29 September 1999 contained a newly added, last sentence to this effect.

Following receipt of the final version of the judgment, the plaintiff, who, as already stated, had obtained legal aid for consulting leading counsel before the hearing of 9 July 1999, availed herself of that legal aid. On 22 October 1999, having received his advice, she

> applied for permission to amend her statement of claim to plead a claim for conversion of the copies in substitution for the claims in negligence and breach of contract. It is common ground that by that date any new claim in conversion would have been statute-barred.
>
> Also on 22 October 1999, the order made by the judge on 24 September was sent to the court by the defendant's solicitors for stamping and issue. There was then correspondence as to whether it should be issued."

[17] Roch LJ opined to the same effect at p. 540 when he said:

> "I agree with Sir Christopher Slade and Clarke L.J. that a court has power to reopen its judgment or order in the period between delivery of judgment either by the judgment being spoken or handed down, and the date on which the judgment or order is sealed or otherwise perfected, when the time for appealing begins to run under RSC Ord. 59, r 4(1). This will be so although the effect of the judgment or order may be immediate on the judgment or order being spoken, where the court does not specify that the judgment or order should take effect at a later date: see CPR 40.7(1).
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> The court has power at any given time to correct an accidental slip or omission in a judgment or order: see CPR 40.12(1). With that exception the court has no power to vary or amend in respect of a judgment or order that it has made once the judgment or order has been sealed and time for appealing has commenced to run. If that judgment is a final judgment then it can only be altered by a court hearing an appeal from it."

[18] This case shows that, once judgment has been delivered and the order is perfected, the court that delivered the judgment will not entertain an application to reopen the case to consider fresh evidence. As pointed out in **Taylor's** case,

the perfected judgment puts an end to the jurisdiction of the court whether at first instance or on appeal. And this rule of practice is not based on a rule of statute but upon the "fundamental principle that the outcome of litigations should be final" (Lord Woolf). It is however open to the litigant to appeal against the perfected judgment.

[19] Counsel for the PUC submitted that the perfecting of the order had the effect in these circumstances of terminating the application of BEL. He relied on the statement of Sir Christopher Slade in **Stewart's** case where he said that, had it not been for the intervention of the judge who stopped the order from being issued, the judge would not have had any further jurisdiction in the matter.

[20] Mr. Nelson for BEL informed the Court that he could find no authority dealing with the situation where the application for leave to rehear had in fact been filed and served before the order was perfected. Counsel however relied on the observations of Watkins J in **Marsden v Marsden [1972] 3 W.L.R 136**, dealing with consent orders as opposed to the order of the Court.

[21] In **Marsden's** case, the husband's petition for a divorce was opposed by the wife. During the course of the proceedings counsel for the wife, acting contrary to the expressed authority of his client, came to an agreement with counsel for the husband. An order was made by Watkins J in the terms of the agreement. The wife applied to have the order set aside on the grounds that it was made without her consent. The order was perfected on the same day the application to set aside was heard by Watkins J.

[22] Watkins J in delivering the judgment posed the question whether, having regard to his finding that counsel had acted contrary to the authority, the agreement could stand. The judge answered the question by saying at p. 141:

> "The facts relevant to the question of whether this application can be entertained at all are as follows. I pronounced a decree nisi on February 24, 1972, but the other orders of which complaint is made

> in this application were not perfected until March 14, 1972. I have not been able to ascertain the precise time of day on March 14, 1972, when this happened. It is not necessary for me to inquire into, nor do I think it relevant to inquire into, the reason why the orders were not perfected sooner. On the previous day, or the day before that, the solicitor for the wife informed the court that the application which is before me would be made. In the afternoon of March 14, 1972, the application was made before Lane J. The matter was then referred to me since I had originally been seized of it. Having regard to those facts, I have come to the conclusion that the high probability is that the application was made, if not contemporaneously with the order being perfected, then at some time before it. In any event, where circumstances are to the effect that action was taken of informing the court of the intention to make an application before the perfection of the order and the application is actually made upon the day of the perfection of the order, it seems to me to be a manifest injustice to an applicant to exclude her application from consideration upon the basis that she may not have made it before the order was perfected. These are special facts in a rather special case, and I do not wish to say anything which can have greater implication than is necessary for the decision in this case. Having regard to these special facts, I feel entitled to entertain this application."

[23] It must be remembered that the order of the Court of Appeal although, approved by counsel for BEL and PUC, was not perfected until 25 November 2009. The application for leave to rehear the appeal was however filed on 18 November 2009 and served before the order was perfected.

[24] To hold that the perfecting of the order some seven days after the filing of its Application automatically put an end to BEL's application and prevents this Court from considering that application, to my mind, would cause a manifest

injustice to BEL. BEL is suggesting that the decision of the Court of Appeal was invalid because the presence of Barrow JA on the panel which heard the appeal give the appearance of bias. Such bias if established could it may be said that the decision was invalid. It was conceded during the course of the hearing of the application that the Order was not submitted to the Registrar for signature by BEL but by PUC. To permit BEL, in the circumstances of this case to apply to the ourt would not in my view offend the common law principle of finality of litigation. To hold otherwise, would result in shutting out of court a litigant who, at the time when it filed its application, could invoke the undoubted jurisdiction of the court which existed at the time of the filing of the application.

[25] If I am wrong and it is said that at common law BEL is shut out by the operation of the principles enunciated in **Taylor v Lawrence**, in my view, that is not the end of the matter. It is necessary to consider whether the application to the court for a rehearing is in any way protected by the provisions of the Constitution. Under section 3 of the Constitution, BEL is entitled to the protection of the law which is more particularly set out in section 6(7) of the Constitution. Section 6 of the Constitution gives protection to litigants who appear before the courts. Section 6(7) provides inter alia that:

> "… where proceedings for such determination are instituted by any person before such court or authority, the case shall be given a fair hearing within a reasonable time."

Section 2 of the Constitution provided that the Constitution is the supreme law of Belize and if any law is inconsistent with the Constitution, that law shall be void to the extent of the inconsistency. .

The common law principles set out in **Taylor v Lawrence** are in my opinion a law "as defined by section 131(1) of the Constitution. This section provides that a law means any law in force in Belize or any part thereof, including any instrument having the force of law and any unwritten rule of law…."

[26] It is my view BEL ought not to be deprived of its right to apply for a rehearing of the appeal. Consequently, I hold, in the circumstances of this case, that having regard to the provisions of the Constitution, BEL's application is in order and that this Court ought to entertain the application for a rehearing of the appeal.

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MOTTLEY P

SOSA JA

[27] On 5 March 2010 I was in agreement with the other members of the Court that the preliminary objection of the Public Utilities Commission to the hearing of the application of Belize Electricity Limited should be overruled. Having now read, in draft the judgments of Mottley P and Carey JA on that objection, I concur in the reasons for ruling given by Carey JA in his judgment and, to the extent that they are consistent with Carey JA's judgment, in the reasons for ruling set out by Mottley P in his judgment.

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SOSA JA

CAREY JA

[28] The appellant invokes the provisions of sections 12 and 13 of the Court of Appeal Act, for an order setting aside this court's (Mottley P, Morrison and Barrow JJA) decision made on 27 October 2009 and directing a re-hearing of the appeal before a re-constituted panel. The single ground being urged, is an allegation by the appellant of the appearance of bias on the part of a member of the court, namely, the Hon. Mr. Justice Barrow JA. An objection to that re-hearing has been taken by the respondent. After hearing submissions from counsel, we over-ruled the objection and promised reasons. Mine are set out hereunder.

[29] There is, it has been accepted on all hands, that no express provision which confers a power in the court to rehear matters upon which it has pronounced. The applicant invokes section 12 of the Court of Appeal Act, Cap. 90, as providing some provenance. Section 12 reads:

> "Where in any case no special provision is contained in this or any other Act, or rules of court, with reference to any jurisdiction of the court in relation to appeals in criminal and civil matters such jurisdiction shall be exercised by the Court as nearly as may be in conformity with the law and practice for the time being in force in England in the Court of Appeal."

We do not, I suggest, need that crutch. Some four years ago, the Court of Appeal in England considered its powers to re-open an appeal after it had given a final judgment in **Taylor v Lawrence [2002] 3 WLR 640**. It held "that the Court of Appeal had an implicit jurisdiction to do what was necessary to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice, that therefore it could take the exceptional course

of reopening proceedings which it had already heard and determined if it was clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy; that before exercising such a power, the court would consider the effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune; and that where the alternative remedy would be an appeal to the House of Lords the Court of Appeal would only give permission to re-open an appeal if it was satisfied that leave to appeal to the House of Lords would not be given …"

As a court of appeal we equally have an implicit jurisdiction to do what is necessary to correct wrong decisions and ensure public confidence in the administration of justice. For this reason, I would say that we have the jurisdiction to re-open an appeal which has been decided.

An important point to note is that this restricted power to re-open an appeal, is exercisable only before the order of the court is drawn up or perfected. Lord Woolf CJ had no doubt that this was the legal position when in the case just cited, he stated in categorical terms (para. 9)

> "Once the judgment is perfected, however, the Court that has delivered judgment, be it a court of first instance or the Court of Appeal, would not entertain an application to re-open the judgment in order to consider the effect of the fresh evidence. This is not because of any express statutory prohibition. In considering the extent of their jurisdiction the courts have ruled that a perfected judgment exhausts their jurisdiction because this accords with the fundamental principle that the outcome of litigation should be final."

This principle was articulated as long ago as 1887 in **Flower v Lloyd 6 Ch. D. 297** in which Jessell MR stated that if the Court of Appeal "had once determined an appeal, it has no further jurisdiction." On this firm foundation, I would rest the

jurisdiction of the court to re-open an appeal on which it has pronounced provided the application is made before and not after the order is perfected.

[30] Mr. Courtenay SC although noting in his skeleton arguments the following sequence of litigation events (as far as is material):

27 October 2009 -	hearing of Civil Appeal No. 8 of 2009 concluded and oral decision to dismiss the Appellant's appeal pronounced by the Court of Appeal;
16 November 2009 -	Notice of Motion for leave to appeal to the Privy Council filed by Messrs Youngs Law Firm on behalf of the Appellant;
18 November 2009 -	Notice of Motion for leave to rehear the appeal filed by Messrs Musa and Balderamos, purporting to act as attorneys for the Appellant;
25 November 2009 -	Order of the Court of Appeal entered and perfected,

nonetheless went on to say that the court was *functus officio* as at the 16 November 2009 when the appellant applied for leave to appeal to the Privy Council. He supported the proposition by advancing an argument that the appellant, in seeking leave to appeal to Her Majesty in Council, "had ipso facto exhausted the jurisdiction of the Court of Appeal and rendered the court *functus officio.* With respect, the Court, in my opinion, is not so frail as to tire under this burden. The case cited – **Latiff v Persaud [1968] 14 WIR 50** does not support

the proposition but is authority for saying that a judgment may be recalled before it has been perfected.

[31] It is however quite unnecessary to further analyze the arguments relating to this question of the Court being *functus officio*. The fact of the matter is that the application to rehear the appeal was filed well in advance of the date on which the order was perfected. Mr. Courtenay SC, experienced counsel that he is, shifted his emphasis somewhat. The action of the appellant in making its application for leave to appeal to Her Majesty in Council can only be regarded as one of prudence. It was not an abuse of process and Mr. Courtenay disavowed any such suggestion. That shift, even if considered adroit, lacking any substance or support as it did, could not help the respondent's cause. The conclusion is inevitable that this challenge must fail and that the court should proceed to hear the application for rehearing.

CAREY J