THE REPUBIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-04245

BETWEEN

DESMOND RENNE

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. K Thompson for the Claimant

Ms. Josefina Baptiste instructed by Mr. N Smart for the Defendant

JUDGMENT

Background

1. The Claimant was convicted of various criminal offences, and sentenced to serve a term of imprisonment. He appealed to the Court of Appeal. He alleges that the Court of Appeal failed to make a decision, pursuant to section 49 (1) of the Supreme Court of Judicature Act Chap. 4:01, (s. 49), to reduce his sentence by taking into consideration his detention before the determination of his appeal.

2.The Claimant contends that had the Court of Appeal considered Section 49 (1) ,and made the decision to consider his pre conviction detention, he would not have spent a further 15 months in prison in excess of his original term of imprisonment.

The Claimant asserts that this failure breached his Constitutional rights. He seeks a declaration that his imprisonment from the 7th day of February 2007 to the 7th day of May, 2008,

(as a result of the failure of the Court of Appeal to backdate his sentence to the 10th day of February, 2003), contravened the Claimant's fundamental right to liberty except by **due process of law** as guaranteed by section 4 (a) of the Constitution of Trinidad and Tobago.

He also seeks an order for monetary compensation to be assessed for the alleged breach of his fundamental right.

3. He claims that:-

"In disposing of my appeal, the Court of Appeal did not make a direction under Section 49(1) of the Supreme Court of Judicature Act Chapter 4:01 as to whether the ***time I spent in custody awaiting the appeal****, this is, from 10th day of February 2003 to the 10th day of May 2004 (15 months), should be counted towards my sentence.***" (Para 8 of affidavit)**

"In fact, the Court of Appeal specifically ruled that my term of imprisonment should start to run from the said 10th day of May 2004. *The Court of Appeal* ***gave no reasons*** *for its decision in that regard".* **(Para 9 of affidavit)**

4. He relies on judgments by the Privy Council in the case of **Vijai Bhola v The State of Trinidad and Tobago (Privy Council Appeal No 26 of 2005),** and **Ali v The State of Trinidad and Tobago [2005] UKPC 41,** and on a successful claim in the High Court by the applicant **Bhola**, before the Honourable Justice Gobin, pursuant to the said Privy Council decision, for damages for constitutional redress, (the High Court there exercising its constitutional jurisdiction).

5. Section 49 of the Supreme Court of Judicature Act Chapter 4:01 is as follows:-

49. (1) ***The time during which an appellant, pending the determination of his appeal,*** *is released on bail, and* ***subject to any directions which the Court of Appeal may give to the contrary*** *to any appeal,* ***the time during which the appellant, if in custody, is specially treated as an appellant under this section****,* ***shall not count*** ***as part of any term of imprisonment under his sentence,*** *and, in the case of an appeal under this Act,* ***any imprisonment under the sentence of the appellant****, whether it is the sentence passed by the Court of trial or the sentence passed by*

the Court of Appeal, ***shall****,* ***subject to any directions which may be given by the Court of Appeal****,* ***be deemed to be*** *resumed or to* ***begin to run****, as the case requires,* ***if the appellant is in custody****,* ***as from the day on which the appeal is determined****, and, if he is not in custody, as from the day on which he is received into prison under the sentence.* ("s.49")

6. The default position under s. 49 is that, without a specific direction from the Court of Appeal otherwise, the time between conviction and determination of appeal is NOT to be counted, unlike the position in the UK.

7. In so far as he claims that the Court of Appeal made a specific direction that the term of his imprisonment should run from the date that his appeal was determined his evidence is that the Court of Appeal did in fact appear to apply its collective mind to s. 49.

8. In the matter of **Ali v The State of Trinidad and Tobago [2005] UKPC 41** Section 49 (1) of the Supreme Court of Judicature Act was considered. In that case the Privy Council noted (at paragraph 11):-

"The effect of the order of the Court of Appeal was that the sentence which the appellant would have to serve was increased from eleven years to fifteen years and almost three months, which exceeds the maximum sentence for the offence. He was actually in custody from the date of his conviction on 14 November 1991 until 6 June 2003, when he was granted parole. He accordingly served a term of eleven years and seven months in prison, a period exceeding the sentence originally imposed, without taking any account of remission to which he would have been entitled."

At paragraphs 16-17 of the Judgment the Court stated:-
The legislation governing loss of time varies between the several Caribbean jurisdictions. The majority of enactments now are in terms similar to the Criminal Appeal Act 1968 in England, but several, including Trinidad and Tobago, make provision on the same lines as the Criminal Appeal Act 1907. Their Lordships are very conscious that it is a matter for the legislature in each jurisdiction to enact its own rules, reflecting conditions in its own state. They accordingly

do not consider it appropriate to express a preference for either approach. In a jurisdiction which has a statutory provision similar to s 49(1), an appellate court must start with the statutory injunction regarding loss of time. It should consider in each case in the light of the relevant facts whether to exercise its discretion to backdate the sentence and, if so, for what length of time. Appellate courts are entitled to exercise their discretion in the manner which they think appropriate, provided it is consistently exercised and in accordance with proper principle. What their Lordships propose to do is to make clear the approach which appellate courts should adopt to provisions on lines similar to s 49(1), bearing in mind the rationale and objective of such provisions.

In the first place, their Lordships consider that the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases. Secondly, it is wrong in principle to take into account the heinousness of the offence or the prisoner's lack of remorse, for these are factors which are relevant only when the original sentence is passed. Counsel for the State cited to the Board an Australian decision, R v Wort [1927] VLR 560, also referred to by the Court of Appeal in Tiwari's case, in which the Court of Criminal Appeal of Victoria had regard to the prisoner's record and the leniency of the sentence. Their Lordships consider that this was incorrect in principle and that this decision should not be followed. Similarly, regard should not be paid to the prisoner's conduct since conviction, except in so far as it may tend to show his state of mind in applying for leave to appeal. Thirdly, any decision by which it is determined that there should be loss of time should be proportionate, that is to say, it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Their Lordships do not wish to be prescriptive about the appropriate length of ***loss of time orders****, which is* ***a matter for each appellate court in each individual case.*** *They consider, however, that they should be made with regard to the abuse which they are designed to curb and would not expect them to exceed a few weeks in the large majority of cases.*

9. In the matter of **Vijai Bhola V The State of Trinidad and Tobago Privy Council Appeal No 26 of 2005** the Privy Council at paragraphs 1-2 and 25 applied **Ali** as follows:-

"On 29 October 2001 the appellant, Vijai Bhola, was convicted before Baird J and a jury of demanding money with menaces on 20 June 1995 for which he was sentenced to six years imprisonment with hard labour. On 18 December 2002 the Court of Appeal of Trinidad and Tobago (Hamel-Smith, Lucky and Kangaloo JJA) dismissed his appeal against conviction. Because the Court of Appeal made no direction under section 49(1) of the Supreme Court of Judicature Act, the appellant's time in custody (some thirteen and a half months) between conviction and appeal did not count towards his sentence. Special leave to appeal against conviction was given by the Board on 19 July 2004.

At the close of the hearing before the Board on 31 January 2006 their Lordships announced their decisions to dismiss the appellant's appeal against conviction but to grant him special leave to appeal against the failure to make a section 49(1) direction and to allow that appeal and direct that the time between the appellant's conviction and the determination of his appeal should count as part of his term of imprisonment which should be deemed to run as from the date of his conviction on 29 October 2001. Accordingly the appellant was to be released immediately. The Board now gives its reasons for these decisions.

25. It remains to consider the appeal against sentence which the Board can deal with altogether more briefly. This appeal concerns the proper approach to section 49(1) of the Supreme Court of Judicature Act in Trinidad and Tobago and involved no more than the straightforward application of the Board's very recent decision in Ali v State of Trinidad and Tobago (Practice Note) [2006] 1 WLR 269. It is quite unnecessary to rehearse here the substance of that decision or, indeed, set out again the terms of section 49(1). Suffice it to say that this appellant's appeal to the Court of Appeal could not possibly have been characterised as frivolous or time-wasting and ***no basis whatever has been suggested for that court properly to have withheld the direction necessary under section 49 to ensure that the appellant was not penalised as to his time in custody through having exercised his right of appeal****. The appeal to the Board on this issue was in truth here irresistible and it is to the State's credit that Mr Guthrie was in the event instructed not to resist it. The Board accordingly made the order indicated at*

the outset of this judgment. In the result the appellant stands convicted ***but has now served his sentence****."*

10. The distinction between **Bhola** and the instant case is that in **Bhola** the appellant there appealed to the Privy Council. The Court of Appeal in that case delivered reasons -

a. which enabled the Privy Council to make the observation that it did that ***no basis whatever has been suggested for that court properly to have withheld the direction necessary under section 49*** and that by so doing, in the circumstances of that case, had improperly extended the length of that appellant's sentence

b. which enabled the Honourable Justice Gobin to conclude that a factual basis existed to characterise the failure in that case to exercise s.49 jurisdiction as error of a type that allowed exercise of constitutional jurisdiction and which entitled the then appellant **Bhola** to constitutional redress.

(Whether or not this court agrees with that decision is not relevant as the factual scenario here is entirely different).

11. In the instant case the claimant did not appeal his conviction or sentence to the Privy Council. He therefore does not have the benefit of a finding of that court similar to Bhola. He does not therefore have any basis before this court to substantiate his necessary assertion that his situation, in not being afforded a back dating of his sentence, was similar to that of Bhola.

12. The Honourable Justice Gobin found in **Bhola**, based on the judgment of the Court of Appeal that the Court of Appeal had not **adverted to section 49** and they had given no reason for not applying their discretion in favour of the applicant Bhola. (See paragraph 16 of that judgement). In fact however, the claimant here himself suggests that the Court of Appeal **specifically** ordered that his sentence run, not from the date of conviction, but from the date of appeal. This suggests that, rightly or wrongly, the Court of Appeal did advert to, and did specifically exercise its jurisdiction and discretion under s 49, though not in the claimant's favour.

13. If that is so it cannot be contended that there was a procedural error of the type in **Bhola**, where it was the finding that ***no basis whatever had been suggested for that court properly to have withheld the direction necessary under section 49***. It was the **finding** that this deprived **Bhola** of the opportunity to have the time between conviction and determination of appeal taken into account, unnecessarily extending his sentence **with no basis having been provided** for so doing, which established the foundation for his application for constitutional redress.

14. In this case this court is asked to exercise a similar constitutional jurisdiction to that exercised by the Honourable Justice Gobin in **Bhola**. .However this court would first have to have a similar foundation for concluding that the Court of Appeal, similar to the situation in Bhola, did not advert to its section 49 jurisdiction, or withheld the direction under section 49 backdating the applicant's sentence without any basis, resulting in the excessive imprisonment of the claimant.

15. The Honourable Justice Gobin had such a basis in the judgment of the Court of Appeal and in the decision and written judgment of the Privy Council. In fact the Privy Council in **Bhola** made its findings on the failure to exercise its s. 49 jurisdiction by the Court of Appeal **on a substantive criminal appeal** against conviction.
In the instant case the claimant does not have reasons from the Court of Appeal before this court, presumably because he did not appeal the decision of the Court of Appeal, delivered since 10th May, 2004.

16. The High Court here is being asked in effect to make such a finding of fact and law in this constitutional motion based on nothing more that the applicant's affidavit, which itself suggests that, unlike in **Bhola**, the Court of Appeal considered and applied s. 49, though not in the claimant's favour. However, even if the Court of Appeal applied s. 49 wrongly, and erred in law in so applying it, that error would be one of substantive law, and cannot entitle the claimant to constitutional relief. Without such a finding there would be no basis for the High Court to invoke its original constitutional jurisdiction.

17. Even ignoring for the moment the applicant's affidavit evidence, in the absence of reasons from the Court of Appeal, or a finding by the Privy Council, the High Court would be required to embark on the same analysis that the Privy Council did in Bhola, on a substantive criminal appeal, in order to conclude that the Court of Appeal – an appellate court – failed to properly exercise its s. 49 jurisdiction on that appeal. Without such a finding the necessary basis does not exist for even considering whether Constitutional breach has occurred thereby, (so as to entitle the claimant to consideration as to the availability of constitutional redress)

18. It is obvious that the High Court, even exercising its original Constitutional jurisdiction, cannot sit in **appeal** of a **substantive** Court of Appeal decision. To ask it in effect to do so amounts to a clear abuse of process.

19. Further, if the key to the exercise of any constitutional jurisdiction by the High Court is a failure in the process of appeal, there is no basis in fact to substantiate any such failure. In so far as the claimant seeks to rely on his own affidavit in this regard, it does not establish that the Court of Appeal failed to properly exercise section 49 jurisdiction, only that it consciously exercised such discretion against him.

20. The claimant does not indicate whether he was represented by counsel at the Court of Appeal, and does not contend that he was not afforded a hearing on the exercise of section 49 in relation to him, or that natural justice was thereby breached, or that the opportunity to argue the point was not afforded the appellant. If the appellant was afforded the opportunity on appeal to argue the point but did not avail himself of such opportunity then he cannot then later say that the failure to backdate was procedurally wrong, and in breach of natural justice.

21. The claimant is surprisingly reticent on what transpired in the Court of Appeal save to contend that the exercise of s 49 discretion was not in his favour. He has not produced a transcript of the proceedings or sought to raise any specific allegations as what transpired at the hearing of his appeal. Even to do so however would have identified the similarity between an appeal, and the exercise that this court would necessarily have to have embarked upon in order to put this action and the case of **Bhola** on the same factual footing

22. The instant claim is an abuse of process. It requires this court in effect to sit as **a** Court of appeal in relation to the exercise by **the** Court of Appeal of its appellate criminal jurisdiction, so as to make the finding, necessary to the granting of constitutional relief, that the Court of Appeal erred in relation to the exercise or non exercise of its s. 49 jurisdiction. This it cannot do.

23. The claimant failed to avail himself of the opportunity to obtain such a finding by appeal to the Privy Council, the body capable of sitting in appeal of the decision in question. It is an abuse of process to seek such a determination from the High Court.

24. It is a further abuse of process in that the affidavit of the claimant establishes no factual basis for his contention that the actions or omissions of the Court of Appeal in relation to the exercise / failure to exercise a section 49 jurisdiction, were of such a nature as to give rise to or afford constitutional redress.

LAW

25. Alternative remedy

The Defendant's submits that once there is an alternative remedy the Constitutional Court should not invoke its jurisdiction to grant relief.

In **Maharaj v The Attorney General of Trinidad and Tobago (No. 2) (1978) 30 WIR 310** at page 321 (a) the Court stated:

"In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or ***substantive*** *law, even where the error has resulted in a person's serving a sentence of imprisonment.* ***The remedy for errors of these kinds is to appeal to a higher court****. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1 (*a*), and no mere irregularity in procedure is enough, even though it goes to jurisdiction;* ***the***

error must amount to a failure to observe one of the fundamental rules of natural justice. *Their Lordships do not believe that this can be anything but* ***a very rare event****."*

Further at *at 321e -"In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court.* ***It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under s 6(1), with a further right of appeal to the Court of Appeal under s 6(4). The High Court, however, has ample powers, both inherent and under s 6(2), to prevent its process being misused in this way****; for example, it could stay the proceedings under s 6(1) until an appeal against the judgment or order complained of had been disposed of."*

26. In **Thakur Jarooo v The Attorney General of Trinidad and Tobago [2002] UKPC 5** at paragraph 14 of its decision the Privy Council noted:-

[14] The Court of Appeal also rejected the appellant's argument under s 4(a). But Hosein JA, in a judgment with which de la Bastide CJ and Ibrahim JA agreed, raised the question for the first time whether the constitutional route which the appellant had chosen for his application was appropriate. The question which he posed was whether proceedings under the Constitution ought really to be invoked in matters where there is ***an obvious available recourse under the common law****. He referred to Lord Diplock's observation in* Harrikissoon v A-G *(1979) 31 WIR 348 at 349 that the mere allegation of constitutional breach was insufficient to entitle the applicant to invoke the jurisdiction of the court under what is now s 14(1) of the Constitution if it was apparent that the allegation was frivolous or vexatious or an abuse of the process of the court as being made* ***solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy****. He said that in his opinion the appellant's motion was inescapably doomed to failure on the merits. But he also said that it* ***connoted a resort to***

proceedings under the Constitution which lacked bona fides and was so clearly inappropriate as to constitute an abuse of process.

At Paragraph 39 of the Jaroo decision the Court stated:

"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. ***He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it…."***

27 .In **Forbes v Attorney General of Trinidad and Tobago [2002] UKPC 21** the Appellant sought to appeal the decision of the Court of Appeal affirming his sentence and conviction in the absence of the Magistrate's reasons. The Privy Council at Paragraph 13 of its judgment stated:-

"*The appellant has spent two periods in custody, one of nineteen months as a prisoner on remand and one of eleven months as a convicted prisoner serving a term of imprisonment with hard labour. The first was the result of a conviction which cannot be shown to be safe; the second was the result of an* ***error of law*** *on the part of the Court of Appeal in upholding the conviction. The conviction has now been quashed.* ***The question, therefore, is whether a person who has served a term of imprisonment before his conviction is quashed on appeal has been deprived of his constitutional rights to due process and the protection of the law****."* (Emphasis added)

At paragraph 15 (citing **Chokolingo v A.G** [1981] 1 WLR 106) Lord Diplock stated:

'Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under s 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also

cumulative since the right to apply for redress under s 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, ***he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld****, by making an application for redress under section 6(1****) to a court of co-ordinate jurisdiction, the High Court.*** *To give to Chapter I of the Constitution an interpretation which would lead to* ***this result*** *would, in their Lordships' view, be* ***quite irrational and subversive of the rule of law*** *which it is a declared purpose of the Constitution to enshrine."*

[16] *In Nankissoon Boodram v Attorney-General (1995) 47 WIR 459, the appellant, who was on trial for murder, complained that his constitutional rights had been infringed by continuing press reports which were calculated to prejudice his trial and by the failure of the Director of Public Prosecutions to take measures to forestall or prevent their publication. His constitutional motion was dismissed by the Court of Appeal and its decision was affirmed by the Board. Lord Mustill said (at pp 494, 495):*

'The "due process of law" guaranteed by this section has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. These mechanisms form part of the "protection of the law" which is guaranteed by s 4(b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. ***It is only <u>if it can be shown</u> that the mechanisms themselves (<u>as distinct from the way in which, in the individual case, they are put into practice</u>) have been, are being or will be subverted that the complaint moves <u>from the ordinary process of appeal</u> into the realm of constitutional law*** *...*

…*The Board held that, since the appellant had been* ***represented by counsel on his appeal against conviction*** *and this had* ***enabled him to argue any matters reasonably open to him****, the* ***ordinary appellate processes had given him adequate opportunity to vindicate his right to a***

fair hearing, so that his constitutional motion had properly been dismissed*. Lord Bingham of Cornhill said (at para [24], p 114):*

'It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: ***a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction*** *or a judicial decision ...* ***The appellant's complaint was one to be pursued by way of appeal against conviction****, as it was ...'*

The Court in **Forbes** (at paragraph 18 of its judgment), stated, "*Their lordships do not think that it would be helpful or desirable to add their own observations to the foregoing citations. They establish that it is only in rare cases where there has been* ***a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated, it is clear that the constitutional rights to due process and the protection of the law*** ***do not guarantee that the judicial process will be free from error.*** *This is the reason for* ***the appellate process****. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction,* ***by way of further appeal to the Board****. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed, and the courts of Trinidad and Tobago were right to dismiss his constitutional motions."* (Emphasis added)

28. Delay

The Defendant contends, inter alia, that failure of the Court of Appeal, (if any), to give a direction under section 49 (1) would not have been capable of constituting a procedural error but rather a substantive **error of law** which was rectifiable by way of appeal. The Claimant did have the alternative remedy of applying for special leave to appeal to the Privy Council in relation to

the determination and judgment of the Court of Appeal in his criminal trial. The fact that he did not do so, and has delayed long past the time when he could have done so, to now seek constitutional relief, is itself an abuse of process, as recognized by the Privy Council in **Durity v Attorney General of Trinidad and Tobago [2002] UKPC 20** .

It stated, (at Paragraph 35), "*In this context the Board consider it may be helpful if they make certain general observations. When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been* ***delay such as would render the proceedings an abuse or would disentitle the claimant to relief,*** *it will usually be important to* ***consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction.*** *This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikissoon v A-G of Trinidad and Tobago [1980] AC 265, [1979] 3 WLR 62, 268 of the former report. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.* (Emphasis added)

Conclusion

29. The claimant's application is dismissed on the grounds that it is an abuse of process for the aforementioned reasons including:-

i. The claimant's evidence in support of the instant application does not support his contention that the Court of Appeal failed to consider s. 49 and make an appropriate loss of time order.

ii. The application amounts to a collateral attack on the decision of the Court of Appeal with no good reason or cogent explanation having been provided for the claimant's failure to avail himself of the necessary alternative remedy of a timely appeal of the decision of the Court of Appeal.

Orders

30. i. The claimant's claim is dismissed.

ii. The claimant is to pay to the Defendant costs in the sum of $14,000.00.

Dated this 28th day of January 2013.

Peter A. Rajkumar
Judge.