REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal Number: CA P326/2023
High Court Action Number: CV2023-00148

Between

RUTH DELTA TURNER

Claimant/Respondent

And

EDWARD P.G. TURNER

1st Defendant

MARTINA THERESA TURNER

2nd Defendant/Appellant

REPUBLIC OF TRINIDAD AND TOBAGO

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Civil Appeal Number: CA P328/2023
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Between

EDWARD PHILLIP GEOFFREY TURNER

Appellant

And

RUTH DELTA TURNER

Respondent

Panel: M. Mohammed JA
R. Rahim JA
J. Charles JA

Appearances:

First Appellant (First Respondent to the application): N. Ramnanan

Second Appellant (Second Respondent to the application): A. Mohammed

Respondent (Applicant): F. Hove Masaisai and M. Williams instructed by H. Prescod

Date of Delivery: Thursday, October 22, 2026

I have read the judgment of Rahim J.A. I agree with it and have nothing to add.

……
M. Mohammed, Justice of Appeal

I have read the judgment of Rahim J.A. I too agree with it and have nothing to add.

……
J. Charles, Justice of Appeal

JUDGMENT

Delivered by **R. Rahim JA**

Introduction

1. The main application before the Court is that of the Respondent, Ruth Turner, filed on May 19th 2025 by which she seeks to discharge the order of the single judge of the Court of Appeal, Boodoosingh JA (as he then was) made in chambers on April 29th 2025. By that order, the judge dismissed the Respondent's applications to strike out the Appellants' Notices of Appeal in CA P326 of 2023 filed on October 31 2023 and CA P328 of 2023 filed on November 1st 2023. Boodoosingh JA found that the appeals were properly filed as procedural appeals, directed that they be listed for hearing and made no order as to costs. These findings and direction were not part of the order of Boodoosingh JA but his direction has formed the gravamen of the application before us. There is also an application to have the appeals consolidated.

2. The parties are siblings. Edward and Martina are the Appellants while Ruth is the Respondent. The principal issue for determination is whether the chamber court judge was plainly wrong in concluding that the appeals against the decision of Justice Donaldson-Honeywell (as she then was) made on October 25 2023 were procedural appeals within the meaning of Part 64.1(2) of the Civil Proceedings Rules 1998 (CPR). A related issue raised, the scope of which is disputed, is whether the trial judge's order constituted a final order made in summary proceedings within the meaning of section 38(2)(c) of the Supreme Court of Judicature Act Chap. 4:01 (SCJA) such that leave to appeal was required.

Background facts

3. The underlying proceedings arise from a dispute between the parties over their respective interests in a parcel of land situated at Lady Chancellor Road in the ward of St. Ann's ("the property"). The property comprises two houses: Beaumont House, a split-level house

containing four apartments, and Serenity House, a four-bedroom dwelling house. The parties all obtained title to the property following their mother's death on January 16th 2008 and by a Grant of Letters of Administration issued on March 20th 2009. The Respondent contends that, despite numerous attempts to resolve the dispute amicably, she has been excluded from her share of the property since 2009.

Procedural History

4. On January 5th 2021, Attorney-at-law for the Respondent served the Appellants with a Pre-action Protocol letter seeking her share in the Lady Chancellor property and mesne profits for the period of her exclusion since 2009. Although correspondence ensued the parties were unable to reach a settlement. Consequently, on January 17th 2023, the Respondent commenced proceedings by Fixed Date Claim Form. The matter first came before Justice Donaldson-Honeywell on May 3rd 2023 wherein she gave directions for the Respondent to file her Statement of Case by September 6th 2023 and for the Appellants to file their Defences by October 16th 2023, and the first CMC to be on October 25th 2023.

5. The Respondent complied with the directions but the Appellants failed to file their Defences within the prescribed time. Instead, they applied, on October 16th and 17th 2023, for an extension of time to December 16th 2023. The Respondent opposed the extension and on October 19th 2023, filed an application for the fixed date claim to proceed as undefended.

6. The matter came on for the first CMC on October 25th 2023, wherein the trial judge dismissed the Appellants applications for an extension of time and, treating the hearing as the trial of the claim pursuant to part 27.2(3) of the CPR, ordered that:

    1. *Leave is granted for the partition or sale, pursuant to Section 4 of the Partition Ordinance Chapter 27:14, of ALL AND SINGULAR that piece or parcel of land situate at*

Lady Chancellor Road, in the Ward of St. Ann, in the Island of Trinidad, comprising TWO THOUSAND TWO HUNDRED AND SIXTY POINT THREE SQUARE METERS (being portion of the said land) and bounded on the North partly by lands of Louisa Chapman, partly by a Road Reserve, partly by Lot No.24, in a circle partly by Lot 23, in a circle and partly by Lady Chancellor Road, on the South partly by a Road Reserve by Lady Chancellor Road and partly lands of Louisa Chapman, on the East partly by Lady Chancellor Road and partly by a Road Reserve and on the West partly by Lands of Louisa Chapman and partly by the said Road Reserve which said piece or parcel of land is intersected by the said Road Reserve and is delineated and shown coloured pink and numbered 25 in a circle in the said general plan as described in the Deed registered as DE200702213077D001 (hereinafter referred to as the "Subject property").

2. *The proceeds of the sale of the subject property are to be divided between the Parties, less the reasonable costs and expenses incurred in the conduct of the sale.*

3. *The Registrar of the Supreme Court be authorized and empowered to execute the requisite Memorandum of Transfer consequent upon the sale of the subject Property should any of the Parties fail and/or refuse to do so after the expiration of thirty (30) days from the date of the notification that payment of the purchase price has been made to the Registrar's satisfaction and in such manner as ordered by the Court.*

4. *The Parties do commission a valuation of the subject property as well as the market rental value by one of the following valuators, G. Farrell and Associates, Raymond and Pierre, Brent Augustus. The Parties to bear the costs of the said valuation equally.*

5. *The Defendants shall pay to the Claimant, Mesne Profit for the period the 20th day of March 2009 to the 25th day of October 2023 as her share of the market rental value of the subject property as determined by the valuation of the subject property.*

6. *The Defendants to pay interest on the mesne profit at two point five percent (2.5%) per annum from the 5th day of January 2021 to the 25th day of October 2023.*

7. *The Defendants' Notices of Application dated the 16th October 2023 and 17th October 2023 are hereby dismissed.*

8. *The Defendants are to pay to the Claimant the costs of the applications filed on the 16th October, 17th and 19th days of October 2023 assessed in the sum of Nine Thousand, One Hundred and Fifty Dollars ($9,150.00).*

9. *The Defendants are to pay to the Claimant the costs of the Claim on the prescribed basis in the sum of Six Thousand, Three Hundred Dollars ($6,300.00).*

10. *There shall be liberty to apply.*

Transcript of October 25th 2023 of Justice Donaldson-Honeywell

7. The transcript of the hearing shows how the trial judge arrived at these orders. Three applications were before the trial judge on October 25th 2023, the Appellants' applications of October 16th and 17th 2023 for an extension of time to file their Defences to December 16th 2023 and the Respondent's application of October 19th 2023 made under 27.2(3) for the first hearing to be treated as the trial of the claim as undefended.

8. On the extension applications, the trial judge noted that the claim was filed on January 17th 2023 and served on the Appellants in March and April 2023, so that the Appellants "would have been aware of the details of the claim for six months[1]". She also noted that

[1] ROA filed by the Respondent on January 3rd 2024, Transcript of the Decision of Donaldson-Honeywell J of October 25 2023, page 4, lines 39-41

they had known of the claim even earlier through pre-action correspondence dating back to January 2021. Counsel for the First Appellant accepted that the partition or sale aspect was a very simple matter and said the extension was only needed to answer the claim for mesne profits which required an accounting exercise spanning more than ten years.[2] Counsel for the Second Appellant similarly said there were rent issues to be ventilated through an accounting exercise and that certain contributions had been made by the Appellants to the property[3]. The trial judge found *inter alia* that no good reason had been given for the delays in filing the defence as in her view, the Appellants had known since 2021 that their defence would be one of contribution and should have been gathering documents since then[4].

9. Having determined that she would not grant the extensions sought, the trial judge then turned directly to the reliefs in the Fixed Date Claim and granted each one in turn. On mesne profits, she accepted the Respondent's submission that these are measured by market rental value and held that the valuation would determine them, so that "it was not necessary to collect all the receipts" (Transcript, page 14, lines 13-18). When Counsel for the Second Appellant objected that there was no assessment of quantum, she replied that this would be found out later on with the valuation (Page 14, lines 41-47). As a concession, she ordered interest from the date of the pre-action letter rather than from 2009, describing the decision as a 'judgment based on no defence'(Transcript, page 15, lines 37-48).

10. The trial judge treated the claim as concluded. She awarded prescribed costs on the footing that the matter had been "concluded at an early stage of the proceedings" (Transcript, page 16, lines 46-50). She summarized her decision as being that the Appellants' two applications were dismissed and the Respondent's application granted. She also refused a stay of the costs orders and closed by expressing hope that the matter

[2] Ibid. Transcript, page 7, lines 25-47.
[3] Ibid. Transcript, page 9 lines 8-24; page 10, lines 15-17
[4] Ibid. Transcript, page 10, lines 33-42

would not go further than what has been determined today (Transcript, page 18, lines 1-18).

The Appeals

11. The Second Appellant, then filed a Notice of Procedural Appeal (CA P326/2023) on October 31st 2023 and the First Appellant, filed a separate Notice of Procedural Appeal (CA P328/2023) on November 1st 2023. The Second Appellant also filed a Notice of Application on November 22nd 2023 asking, inter alia, that both appeals be consolidated and treated as one procedural appeal pursuant to Part 26.1(c).

12. On December 1st 2023, Attorney for the Respondent filed a Notice of Application seeking an order that both Notices of Appeal be stayed pending this application and that the Order of Justice Donaldson-Honeywell of October 25th 2023 was a decision made in the course of the trial or final hearing of the High Court proceedings and is therefore not a procedural appeal but a substantive one.

13. The Notices of Application filed on November 22nd 2023 and December 1st 2023 came up before Justice of Appeal Lucky on January 12th 2024. Lucky JA expressed the preliminary view that this was a substantive appeal, not procedural because the trial judge made a final order disposing of the matter. She urged the parties to settle the matter, adjourned it to March 18th 2024, vacated the upcoming procedural appeal hearing, and obtained an undertaking that the trial judge's order would not be enforced in the interim.

14. The Respondent later filed two Notices of Application to Strike out the Appellants' Notices of Procedural Appeals on October 4th 2024. Her main argument was that the trial judge's order was a final order made in summary proceedings and therefore required leave under section 38(2) of the Supreme Court of Judicature Act, to be sought within 14 days under Part 64.2(1). As the Notices of Appeal were filed without leave, the appeals were void ab

initio. The Appellants contended that leave was not required because the order was not a final order made in summary proceedings, the valuation and mesne profits being outstanding and that in any event, the Court of Appeal may grant leave and treat the appeal as filed within time.

Decision of Boodoosingh JA of April 29th 2025

15. On April 29th 2025, Boodoosingh JA (as he then was) dismissed the Respondent's Application to strike out the appeals with no order as to costs. His reasoning was that although the trial judge's orders were final in effect, "the consequence of the order of the Judge was to deal with the matters as undefended," and as such "the essential appeal arises from the refusal of the judge to grant the extension of time, and had she had a different decision in respect of that, the consequence of the other part would not have followed." Consequently, he found that the appeals were properly filed as procedural appeals as they are really interrogating that decision. Accordingly, the Respondent's application was dismissed and the appeals were listed as procedural appeals. The Respondent now asks the panel to vary or discharge this decision.

Concessions made at the October 2nd Hearing before the Full Court

16. For context Rules 27.2(1), (2) and (3) CPR read;

> ***Fixed date claims—first hearing***
>
> ***27.2*** *(1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.*
>
> *(2) On that hearing, in addition to any other powers that the court*

may have, the court shall have all the powers of a case management conference.

(3) The court may, however, treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.

17. On rule **27.2(3)** CPR, counsel for the Respondent accepted that the rule is disjunctive. He further accepted that, if the trial judge treated the first hearing as the trial on the basis that the claim was undefended, rather than on the basis that it could be dealt with summarily, leave to appeal would not be required under section 38(2)(c) of the Supreme Court of Judicature Act.

18. Counsel for the First Appellant accepted that rule 27.2(3) empowers a trial judge to determine a fixed date claim at the first hearing on the material before the court, notwithstanding that no defence has been filed. Counsel for the Second Appellant accepted that a trial judge who has refused an extension of time to file a defence remains entitled to refuse the relief claimed, or to dismiss the claim. He accepted that the grant of final relief is a judicial inquiry separate from the determination of the extension application.

19. Counsel for the Respondent, for his part, accepted that had the extension of time been granted, there would have been no determination of the claim at that hearing. He disputed only that this renders the appeal procedural. Counsel for the First Appellant accepted that, if his appeal succeeds, the judgment of the trial judge will be set aside as a consequence.

20. All parties accepted that, if leave to appeal was required, this Court has a concurrent jurisdiction to grant it. Counsel for the Second Appellant accepted that the threshold for

doing so is low. Finally, counsel for the Respondent accepted that striking out the appeals would be a draconian course. He indicated that, if the Court finds that leave was not required, the Respondent would not insist on her costs, asked that the appeals then be placed on the list of substantive appeals and if possible expedited.

Law

21. The application before the court is brought under Rule 64.18(2) CPR which permits a party to apply to the Court of Appeal to vary or discharge an order made by a single judge of the court. The rule prescribes no particular threshold for the exercise of that power. In ***Wayne Lum Young v Scotiabank Trinidad and Tobago Limited***[5], on an application to set aside the decision of a chamber court judge, the Court held that the appellant must demonstrate that the decision of the Chamber Court judge was plainly wrong applying ***The Attorney General of Trinidad and Tobago v Miguel Regis***[6]. At paragraph 21, Kokaram JA stated:

> *"On this appeal the Appellant purchaser must demonstrate that the decision of the Chamber Court judge was plainly wrong. Unless for instance it can be demonstrated, that the Chamber Court judge "disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong" the Court of Appeal will not generally interfere with the exercise of a court's discretion. See The Attorney General of Trinidad and Tobago v Miguel Regis Civil Appeal No.79 of 2011 paragraph 11."*

[5] Civil Appeal No. P178 of 2019
[6] Civil Appeal No. 79 of 2011

Procedural or Substantive appeal?

22. The central question on this application is whether the appeals are procedural or substantive. Rule **64.1(2)** CPR defines a procedural appeal as follows:

> *"'procedural appeal' means an appeal from a decision of a registrar, master or judge which does not directly decide the substantive issues in a claim but excludes—*
>
> *(a) any such decision made during the course of the trial or final hearing of the proceedings;*
>
> *(aa) any decision with respect to the admissibility of evidence in the trial or hearing;*
>
> *(b) an order granting any relief made at an application for judicial review (including an application for leave to make the application) or under section 14(1) of the Constitution under Part 56;*
>
> *(c) the following orders under Part 17:*
>
> *(i) an interim injunction or declaration;*
>
> *(ii) a freezing injunction;*
>
> *(iii) an order to deliver up goods; and*
>
> *(iv) any order made before proceedings are commenced or against a non-party;*
>
> *(d) an order for committal or confiscation of assets under Part 53; and*

(e) an order as to costs only."

23. The approach to the definition was considered by Mendonca JA in [7]***Alan Dick and Company Limited v Fast Freight Forwarders Limited***. The appeal in that case was from the refusal of the judge to set aside an order, made without notice, joining the appellant as a second defendant. The Respondent contended that the appeal was not a procedural appeal because the order was made in the course of the trial of the claim. Mendonca held at paragraph 23:

> "23. To determine whether this is a procedural appeal two questions therefore are relevant. Does the decision appealed directly decide the substantive issues in a claim? If it does the appeal is then not a procedural appeal. If it does not, the next question is whether it was made during the course of a trial or final hearing."

24. In ***Doc's Engineering Works (1992) Ltd and others v First Caribbean International Bank (Trinidad and Tobago) Ltd***[8], the appeal was from the decision of a judge striking out the appellants' defences under rule 26.2 CPR and entering judgment for the respondent. Jones J.A. noted the distinction between regular appeals and procedural appeals. Specifically at paragraphs 24 and 25 she stated:

> *"24. The general rule therefore is that an appeal from a decision that does not directly decide the substantive issues in the case is a procedural appeal but if that decision is made in any of the proceedings identified at (a) to (d) above then it cannot be the subject of a procedural appeal. So that, for example, an order granting relief in an application for judicial review or a decision made during the course of a trial even though it does not directly decide the substantive issues of the case cannot be the subject of a procedural appeal. The cases under the old*

[7] Civil Appeal No. 214 of 2010
[8] Civil Appeal No. 34 of 2013

rules that address the difference between interlocutory and final orders therefore do not assist in the determination of what is a procedural appeal.

25. Under the CPR the determinate factor is not that the decision may have finally decided the dispute between the parties but rather whether the decision directly deals with the substantive issues in the claim. Of note here are the use of the words 'directly' and 'substantive' in the rule. Such a determination requires an examination of the issues in the claim and the decision of the judge or master.

26. Of course in the majority of cases it is relatively easy to determine whether an appeal is procedural or not. The difficulty arises with those decisions that finally determine the action and in particular those decisions that arise out of applications to strike out statements of case, as in the instant case, and from applications for summary judgment. In those cases, if the appeal is properly a procedural appeal an incorrect categorization may be fatal to the appeal."

Submissions

Respondent

25. The Respondent accepts that the decisive question is not whether the order finally determined the dispute but whether it directly dealt with the substantive issues in the claim. The Respondent argued that the chamber court judge failed to consider the transcript of the trial judge which showed that she dealt with the substantive issues of the claim, specifically, i) the judge identified the nature of the claim as one for partition or sale among siblings, ii) the judge considered the Second Defendant's proposed defence of contribution and how such contributions might be dealt with, iii) the judge went through the reliefs in the Fixed Date Claim one by one and granted partition for sale, valuation, distribution of the proceeds and the execution of the transfer by the Registrar, and iv) the judge determined the claim for mesne profits by reference to the market rental

value and fixed the date from which interest would run at the date of the pre-action protocol letter. As such the Respondent contends that the substantive issues were the direct focus of the court's deliberation and determination. The decision was therefore not procedural.

Second Appellant

26. In response, Attorney at Law for the Second Appellant acknowledged that the CPR draws a distinction between procedural and substantive appeals under Part 64 but averred that this is a hybrid situation that is not as straightforward. It was accepted that the order of October 25th 2023 did, on its face, determine the claim. It was contended however that the true gravamen of the appeal is procedural rather than substantive in that the Appellants are not truly appealing the substantive finding on partition or the precise award of mesne profits but rather 'the procedural injustice that led to those outcomes'. Her complaint is that the process was flawed, the judge refused to grant a reasonable extension of time for the defence, ignored that there were live issues to be tried (how much mesne profits should be paid) and thereby short-circuited the normal trial process. That her grounds of appeal focus on the judge's failure to permit a defence and hold a trial which are procedural errors, making it similar to an appeal from a default judgment or a refusal to grant relief from sanctions which are classically procedural appeals.

27. The Second Appellant relied on ***Trincan Oil Ltd v Keith Schnake***[9] for the proposition that an appeal from a case management ruling, even one that is, in effect, case-ending, is a procedural appeal. It was submitted that, properly characterised, the decision under appeal is the decision to exclude her defence. That decision did not directly decide the substantive issues, since no defence was heard and no adjudication on contested facts ever took place, including the Appellants' contributions and the proper measure of mesne

[9] Civil Appeal No. 91 of 2009

profits. The substantive issues were decided only in a most peremptory way, essentially by default. The Second Appellant therefore averred that Boodoosingh JA was correct in concluding that the manner in which the judge dealt with the extension of time application makes the present appeal procedural. The fact that the judge's refusal to grant an extension occurred at the same moment she granted final relief does not change the essential nature of the Appellant's grievance, namely that the judge should never have proceeded to make final orders without allowing the Appellants to file a defence and without a proper trial.

First Appellant

28. Attorney for the First Appellant submitted that the question under 64.1(2) CPR is whether the decision actually under appeal directly decides the substantive issues in the claim. He accepted that the trial judge eventually considered the evidence and the pleadings and gave judgment. He submitted, however, that a judge cannot at any stage simply enter judgment. In a fixed date claim, the power to do so arises under rule 27.2(3) CPR only when certain conditions are satisfied. The appeal, he said, is directed at whether those conditions were met, not at the judgment itself.

29. Counsel submitted that the First Appellant's notice of appeal raises two procedural questions. The first is whether the trial judge erred in refusing the application for an extension of time to file a defence; had the extension been granted, she could not have proceeded to treat the claim as undefended. The second is whether, the claim being undefended, the trial judge in fact conducted the trial that rule 27.2(3) requires. Neither question, he submitted, directly decides the substantive issues in the claim.

30. Counsel accepted that some grounds of appeal touch on the merits of the trial judge's decision, but submitted that they were included for a limited purpose. Counsel submitted that the transcript suggests the trial judge refused the extension because she considered that a defence would be futile: in a partition claim between acknowledged co-owners, mesne profits appeared to her to be a natural consequence of occupying and letting the property. Had the extension been granted, the First Appellant would have contended that a co-owner is entitled to occupy, and that where the property is let to a third party, what falls to be divided is the actual profit, net of expenditure, and not mesne profits. The grounds touching the merits therefore go only to show that the trial judge was plainly wrong in the exercise of her discretion to extend time. The appeal is not an appeal against the substantive judgment, although if it succeeds it will indirectly have the effect of setting that judgment aside. Counsel failed however to articulate the position in relation to the other grounds raised by the notice of appeal should his appeal on the issue of the extension fail.

31. The First Appellant relied on ***Alan Dick*** (supra) in which an order for the filing of a defence was not itself appealed, but Mendonça J.A. recognised that if the order adding the appellant as a party were set aside, the order for a defence would of necessity fall away.

32. The First Appellant further submitted that the CPR provides other instances in which a judgment made on the merits may be set aside on procedural grounds, and in which an appeal is nonetheless a procedural appeal:

    a. where a default judgment is entered after the court has considered the claimant's evidence on the merits, an application to set it aside raises a procedural issue, and an appeal from the decision on that application is a procedural appeal;

b. where judgment is entered under Part 40 at a trial at which one party fails to attend, the judge considers the evidence on the merits, but an application under that Part to set the judgment aside is procedural; and

c. where a defendant fails to file witness statements, is refused relief from sanctions and the claim then proceeds as undefended, the defendant's appeal against the refusal of relief is a procedural appeal, and if it succeeds the ensuing judgment falls away.

33. In each case, the challenge is to whether the right to enter judgment had arisen, not to the merits of the judgment itself.

34. In answer to questions from the Court, the First Appellant submitted that even if the order was made at an undefended trial, the appeal would remain procedural, because the claim came to be undefended only through the refusal of the extension. Asked whether the refusal of the extension could be challenged within a substantive appeal from an undefended trial, counsel said that he would think not.

DISCUSSION

First Question

Did the decision appealed directly decide the substantive issues in the claim?

35. The claim was one for partition brought by the Respondent. She also sought as final relief in her Fixed date claim form, an order that the property be valued and sold by way of public auction after valuation with permission to the Appellants to bid at the sale. The law is that should partition be impractical a sale and distribution of the proceedings may be

ordered by the court. The Respondent also sought an order in the alternative that a valuation be done of the freehold property and its rental value and that the Appellants be ordered to purchase her share and/or interest in the freehold. Finally she sought mesne profits from March 20, 2009 based on the rental value determined by the valuation.

36. In her sworn evidence the Respondent explained that the property comprises two houses: Beaumont House, a split-level house containing four apartments, and Serenity House, a four-bedroom dwelling house. The parties all obtained title to the property following their mother's death on January 16th 2008 and by a Grant of Letters of Administration issued on March 20th 2009. She has tried since 2009 to communicate with the Appellants to obtain her share in the property but to no avail. She retained an Attorney who on January 5, 2021, wrote to the Appellants on her instructions. A sharing arrangement of the houses on the property was proposed.

37. The Second Appellant responded that she would need time to consult a lawyer. There being no response by January 24, 2022, Attorney at Law for the Respondent wrote once more to both Appellants that legal action would be taken if no response was forthcoming by January 31, 2022. By response letter of July 21, 2022 a counter proposal was made for sharing of the property. This being unacceptable on the part of the Respondent, another proposal was made by the Respondent. There was no resolution and the claim was subsequently filed. The Respondent attached her deed, the Grant of Representation and all of the communication that passed between the parties to her evidence. She also set out in her evidence that the property was not the subject of a mortgage or being held as collateral for a loan.

38. The order made by the Judge therefore dealt directly with the substantive issues in the claim as to partition or sale in lieu thereof. The specific challenge by the Appellants to the ruling of the judge on the method used to calculate the measure of damages for mesne

profits and/or the award of mesne profits being wrong is a direct challenge to a substantive issue in the case.

39. The answer to the question posed must therefore be an affirmative one.

Second Question

Did the judge treat the first hearing as the trial of an undefended claim or did the judge treat with the claim summarily?

40. Although, having regard to the answer to the first question, it is unnecessary to proceed to the second question, I have nonetheless considered it, as the answer to the second question ultimately addresses the Respondent's submission that leave to appeal pursuant to 38(2) of the Supreme Court of Judicature Act Chap. 4:01 was required.

41. Part 27.2 CPR was considered in ***Donald Gordon Seecharan and another v Scotiabank Trinidad and Tobago Limited***[10], in which the question was whether rule 27.3, which governs case management conferences in ordinary claims, applied to a fixed date claim. Mendonça J.A. held that it did not. He observed that "Rule 27.2 applies to fixed date claims and 27.3 to other claims… Rule 27.2 does not require the Court to fix a CMC. What it mandates the Court to do is to fix a date for the first hearing of the claim when it is issued and to give notice of the first hearing[11]". At the first hearing the judge "has all the powers available at a case management conference", and those powers "are not limited to claims that are not defended or cannot be dealt with summarily but **relate to all matters**[12]"(emphasis mine).

[10] Civil Appeal No. P220 of 2019
[11] Paragraph 17 of the Judgment
[12] Paragraph 24 of the judgment

42. In the same case, Jones J.A. explained the purpose of the first hearing, she said:

> *"35. When a fixed date claim is filed therefore the rule requires (i) the fixing of a date for the first hearing and (ii) a determination by the judge at the first hearing in accordance with part 27.2(3). At that hearing the judge may treat the first hearing as the trial of the matter if the matter is not defended or if he considers that the claim can be dealt with summarily. Unlike the ordinary claim where, unless specifically dispensed with, it is the hearing of the case management conference that is made mandatory by the rules with a fixed date claim it is the first hearing that is mandatory...*
>
> *36. The simple point is that it is the first hearing of the fixed date claim that maps out the procedure to be followed for the determination of the claim. At that first hearing the judge is seized of the whole action. If it is determined by the judge that the case is to go further, of necessity, the judge will give directions as to the manner of its determination thereby obviating the need for the application of part 27.3."*

43. It is clear to me that the judge at the High Court determined the case at the first hearing by treating it as a trial of the undefended claim. The judge's methodology is clear from the transcript of the proceedings. She first dealt with the applications to extend time to file the defences, which she refused, and then dealt with the claim in accordance with the Respondent's application to try the claim as undefended at the first hearing. The record demonstrates that the judge considered the nature and extent of the claim and the relief sought. In addition to the Statement of Case, she had before her the sworn evidence of the Respondent. It is this evidence that appears to have assisted her in her findings on the appropriate relief to be ordered.

44. Part 15 CPR (while not the subject of this appeal) provides assistance on the issue of treating with a claim summarily in so far as meaning is concerned. Part 15 is headed

"Summary Judgment" and 15.1 states that the rule sets out the procedure by which the court may decide a claim or part of a claim without a trial. 15.2 then sets the criteria for summary judgment, namely that of a party on the application of the other party having no realistic prospect of success on the claim or defence or part thereof.

Summary disposal of a claim

45. ***Jowitt's Dictionary of English Law*** (3rd Ed, Vol 2), pp 2193-2194, 'Summary Proceedings' reads as follows:

> *"(3) In procedure summary proceedings are swift and relatively simple proceedings which dispose of a claim without full trial, that is without disclosure, witness statements and a full trial involving cross examination of witnesses. The most common instance of this is upon an application under Pt 24 CPR by a claimant or defendant, where the party applying asserts that the claim or defence as the case may be has no realistic prospect of success. Such applications are determined by a Master or district judge on the basis of the statements of case or its defence has no reasonable prospect of success if it carried on to trial he will give judgment summarily. Part 8 proceedings are also usually disposed of summarily since they are intended to deal with claims where no substantial dispute as to fact arises: CPR Pt 8.1*."

46. ***Black's Law Dictionary*** (Rec 4th ed, 1968) p1369, defines 'Summary Proceeding' as:

> *"Any proceeding by which a controversy is settled, case disposed of, or trial conducted, in a prompt and simple manner, without the aid of a jury, without presentment or indictment, or in other respects out of the regular course of the common law. In procedure, proceedings are said to be summary when they are short and simple in comparison with regular proceedings; i.e., in comparison with*

the proceedings which alone would have been applicable, either in the same or analogous cases, if summary proceedings had not been available."

47. In ***Rajkumar v Lalla***[13], the Board in deciding whether judicial review is a summary proceeding under section 38(2)(c) of the Supreme Court of Judicature Act, discussed the definition of 'summary proceeding' at paragraph 7:

> "…*In the absence of any applicable statutory definition of "summary proceeding" their Lordships take the view that in essence a summary proceeding is one which can be distinguished from a more formal proceeding such as occurs in the distinction between trials on indictment in the criminal law and summary proceedings where no jury trial with its attendant procedure is required but the judgment is committed to another tribunal with the expectation that the proceedings will take less time and that they will not require the same elaboration of procedure which is attendant on a jury trial. In the civil law a summary judgment under Ord 14 of the Rules of the Supreme Court is an illustration of summary proceedings*."

48. While ***Rajkumar*** establishes that the essence of a summary proceeding is its abbreviated and less formal procedure, it does not follow that a claim dealt with summarily is determined without proof. The Eastern Caribbean Court of Appeal, construing a rule in identical terms to Rule 27.2(3), drew this distinction in ***Richard Frederick et al v Comptroller of Customs et al (HCVAP2008/037)***, at paragraph 46 where George-Creque JA said:

> *"It does not appear that anyone directed their minds to CPR Part 15 (Judgment on admissions) or indeed to CPR 56.11 which specifically governs the first hearing of a fixed date claim in respect of an administrative action. No doubt this is where*

[13] [2001] UKPC 53

the confusion crept in with regard to the question whether the appellants had sought summary judgment as distinct from the request that the judge deal with the claim summarily as contemplated under CPR 27.2 where the claim is not defended. Dealing with a claim summarily under Part 27.2 and giving summary judgment under CPR 15 entails very different considerations and engages distinctly different procedures. Quite apart from the fact that summary judgment may not be obtained on a fixed date claim form, it is similarly not obtainable in respect of proceedings for constitutional redress nor, I might add for proceedings or claims against the Crown. Dealing with a claim summarily does not mean entering summary judgment. The claimant must still prove that he is entitled to the relief sought. Therefore a trial must be conducted albeit in a summary way."

49. A court may therefore dispose of a case summarily where the party who is to answer the case has not presented evidence or a defence, or has in fact done so. In the present case, the judge did not represent that she had been treating the case summarily. To the contrary, at the time of her judgment the judge was seized of the application to treat the first hearing of the fixed date claim as an undefended trial. In all the circumstances, therefore, it must have been the case that the judge acceded to the application to treat the first hearing as the trial of the undefended claim. The record shows that Attorney for the Appellants did not seek leave to cross-examine. Had they done so, they would no doubt have been entitled to do so, at the least, in relation to all the issues upon which proof was required and certainly on the narrow issue of mesne profits which they now raise.

Leave to appeal

50. Section **38(2)** of the Supreme Court of Judicature Act Chap. 4:01 provides:

"(*2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from—*

(a) an order made with the consent of the parties;
(b) an order as to costs;
(c) a final order of a Judge of the High Court made in a summary proceeding."

51. In light of my ruling it is therefore clear that leave to appeal under section 38(2)(c) was not a requirement. As stated above, this much was conceded by Attorney at Law for the Respondent.

52. I am therefore of the view that the single Judge of the Court of Appeal fell into error when he determined that the appeals should be listed as procedural appeals. The essential purpose of the appeals was not only to interrogate the decision not to extend time for filing the defence (although that was one of them), but, as can be surmised from the grounds of appeal, also to challenge the judge's finding that mesne profits were to be assessed by reference to the value of the property rather than the actual rental income obtained by the occupying sibling. This was primarily a matter of law and a frontal challenge to a final order disposing of one of the main issues in the case.

53. It is clear to me that the challenge to the basis of the award of mesne profits, brought by way of appeal, is independent of the appeal against the decision not to extend time. In other words, should the Appellants succeed on this ground, the court may then order an account to be taken of the rent actually received by the First Appellant over the years. Put another way, the Appellants can succeed on this ground without succeeding on the issue of the extension of time.

54. There is no legal impediment to the full Court of Appeal determining both the issue of the challenge to the refusal of the extension application and the challenge to the

methodology to be used in assessing the measure of mesne profits. This is one of those cases in which no time would have been afforded to the Appellants to pursue a procedural appeal, because the trial proceeded immediately after the decision on the extension application. The particular circumstances of this case must therefore be considered. Those circumstances include the fact that, having regard to the grounds of appeal, the Appellants do not, in substance, challenge the order of Partition itself as a final resolution of the claim (although they have set out the entire order as being appealed in their Notices of Appeal). Accordingly, there are two frontal challenges, one to the dismissal of the application to extend time and the other to part only of the substantive final order made by the judge.

55. Additionally, should the appeal on the extension of time issue be determined by the two judges[14] on the procedural court panel, against the appellants, the two-judge panel will not have the jurisdiction to hear and determine the substantive issues raised in the notices of appeal in relation to the final order. This may result in a duplication of the resources of the court in having to convene a full panel for the hearing and determination of that part of the appeal.

56. No doubt Boodoosingh JA may have recognised that these matters were of some vintage, and that it was in the interests of the administration of justice to have the appeals heard sooner rather than later. Listing them before the procedural court may have achieved this objective, but only partially, having regard to the grounds contained in the notices of appeal. In that regard, the court considers the Appellants' arguments to be based on the premise that they will succeed on the extension point, but they sidestep the consequences of failure on that point before the procedural court.

[14] Part 64.9(2) provides that the general rule is that a procedural appeal is to be determined by two judges of the court.

57. On its face, the order of Boodoosingh JA dismissed the applications to strike out the appeals. Save for costs, there was no other order. Both appeals were filed well within the time limit for filing substantive appeals. Although couched as procedural appeals, they were nonetheless brought within the requisite period for filing substantive appeals, which, in this case, we find them to be.

58. In light of our ruling above, it is also clear that Boodoosingh JA was not plainly wrong in dismissing the applications to strike, and we agree with his decision in this regard.

59. There is therefore no basis for varying the order of Boodoosingh JA. The appeals shall, however, be listed on the list of substantive appeals, and the parties shall be heard on the costs of the application. We also find no basis for expediting the hearing of the appeals.

60. The order is as follows:

    i. The application to vary and/or discharge the order of Boodoosingh JA is dismissed.
    ii. Appeals Nos. CA P326/2023 and CA P328/2023 are consolidated and shall be heard as substantive appeals on a date to be set before a three-judge panel of the Court of Appeal.

Ricky N. Rahim
Justice of Appeal