

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-220 of 2019

Claim No. CV2015-03274

IN THE MATTER OF THE PROPERTY COMPRISED IN THE COLLATERAL MORTGAGE DEED OF MORTGAGE DATED 5TH DAY OF DECEMBER, 2005 AND REGISTERED AS DEED NO. DE200503226989D001 MADE BETWEEN DONALD GORDON SEECHARAN ALSO CALLED DONALD SEECHARAN AND FARIZA SHAAMA SEECHARAN OF THE ONE PART AND SCOTIABANK TRINIDAD AND TOBAGO LIMITED OF THE OTHER PART

Between

**DONALD GORDON SEECHARAN
FARIZA SHAAMA SEECHARAN**

Appellants

And

SCOTIABANK TRINIDAD AND TOBAGO LIMITED

Respondent

PANEL: A. Mendonça J.A.

J. Jones J.A.

Date of delivery: October 15, 2019

APPEARANCES:

Mr. R. Nelson SC, Mr. R. Seecharan and Mr. D Seecharan for the Appellants

Mrs. D. Peake SC, Mr. K. Garcia and Ms. A. Orie for the Respondent

REASONS

Delivered by A. Mendonça J.A.

1. On October 10, 2019 this appeal was dismissed. It was at that time indicated that the Court's reasons for so doing will be given at a later date. I now give my reasons for dismissing the appeal.
2. The issue in this appeal concerns the applicability of Rules 27.3 of the Civil Proceedings Rules (the CPR) to a claim issued as a fixed date claim.
3. It is necessary to refer to two rules of the CPR in particular, namely Rules 27.2 and 27.3 and it is convenient to set them out fully at this stage:

"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.
 - (4) The general rule is that the court must give at least 14 days' notice of any first hearing.
 - (5) However, this is subject to any rule or statutory provision, which, specifies a different period.
 - (6) The court may with or without an application direct that shorter notice be given—
 - (a) if the parties agree; or
 - (b) in urgent cases.

Case management conference

- 27.3** (1) The general rule is that the court office shall fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim form.
- (2) Where there are two or more defendants and at least one of them files a defence, the court office shall fix a case management conference—
- (a) when all the defendants have filed a defence; or
 - (b) when the period for the filing of the last defence has expired,
- whichever is sooner.
- (3) If the court does not—
- (a) dispense with a case management conference under rule 27.4(1) and give directions under rule 27.4(2); or
 - (b) give notice of a case management conference within—
 - (i) 14 days of the filing of a defence, where there is only one defendant;
 - (ii) 14 days of the filing of the last defence, where there are two or more defendants; or
 - (iii) 14 days of the expiration of the period for the filing of the last defence, where there are two or more defendants,
- the claimant shall within 28 days of the relevant period identified in subparagraph (b) apply for a date to be fixed for the case management conference.
- (4) If the claimant does not so apply, the claim shall be automatically struck out.

- (5) The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4).
- (6) In considering whether the court grants relief, the court shall have regard only to whether the defendant has suffered any prejudice and rule 26.7 shall not apply.
- (7) If the court grants relief, the case management conference shall take place within 28 days of the order.
- (8) The application under paragraph (5) shall be made with notice and shall be supported by evidence.
- (9) The case management conference shall take place not less than four weeks nor more than eight weeks after—
 - (a) the defence is filed where there is only one defendant;
 - (b) the final defence is filed where there are two or more defendants; or
 - (c) the expiration date for the filing of the last defence where there are two or more defendants,unless any rule prescribes a shorter or longer period or the case is urgent.
- (10) However, a party may apply to the court to fix a case management conference at a time earlier than that provided in paragraph (1) or (2).
- (11) The application may be made without notice but shall state the reasons for the application.
- (12) The court shall fix a case management conference on application if it is satisfied that it will enable it to deal with the case justly.
- (13) The court office shall give all parties not less than 14 days notice of the date, time and place of the case management conference.
- (14) The court may with or without an application direct that shorter notice be given—

(a) if the parties agree; or

(b) in urgent cases.

(15) Unless the court orders otherwise, time for fixing a case management conference shall not run in the long vacation.”

4. The circumstances that give rise to this appeal may be briefly summarised.
5. This is a mortgage claim begun by the Respondent, Scotiabank Trinidad and Tobago Limited, against the Appellants, Donald Gordon Seecharan and Fariza Shaama Seecharan, for monies claimed to be due under a mortgage and for possession of the mortgaged premises.
6. The claim was issued on October 2, 2015 as a fixed date claim as required by Rule 69.2 which provides “a mortgage claim is made by issuing a fixed date claim”.
7. The claim was fixed for hearing by the court office on November 3, 2015 before Gobin J.
8. On October 9, 2015 an appearance was filed on behalf of the Appellants and they were able to file a defence and counterclaim on November 3, 2015, being the same date the fixed date claim was fixed for hearing. It seems that the defence and counterclaim was in fact filed just before the hearing on that day. It was, however, not served.
9. By their defence and counterclaim the Appellants made ancillary claims against the Respondent and three other persons not named in the fixed date claim form.
10. When the matter came before Gobin J on November 3, 2015, in accordance with our practice she transferred it to R. Mohammed J as there was a related matter that was filed earlier and docketed to him. The matter was then fixed for hearing before Mohammed J on December 16, 2015.

11. Defences to the counterclaim were filed by the Respondent and Ancillary Defendants on March 31, 2016.
12. By letter dated May 11, 2017 instructing attorneys-at-law for the Respondent brought to the attention of Mohammed J (through his Judicial Support Officer) that since the transfer of the claim to him “it had never come on for hearing”. They indicated that the matter had been listed for hearing on multiple occasions “but had never actually been heard, those hearings having been successively adjourned and/or vacated”. They further indicated that despite several enquiries a date was not fixed for the next hearing and requested that the matter be listed “for further case management and early determination”.
13. On July 6, 2017 the matter came before Mohammed J. At that hearing the Appellants raised the issue that the claim was automatically struck out pursuant to Rule 27.3(4) because of the failure of the Respondent to apply for a date to be fixed for a case management conference (hereinafter referred to as a CMC) pursuant to Rule 27.3(3). There is no dispute that the Respondent has not at any time applied to fix a date for a CMC pursuant to Rule 27.3(3). The Judge gave directions for the parties to file submissions on the issue of whether the claim stands automatically dismissed pursuant to Rule 27.3(4) of the CPR.
14. The parties filed submissions and in a written judgment the Judge stated that Rules 27.2 and 27.3 make a clear distinction between general claims and those filed by way of a fixed date claim. He stated:

“[16] It is therefore evidently clear that both Rules 27.2 and 27.3 make a clear distinction between general claims and those filed by way of fixed date claim. Rule 27.3 (1), which speaks of the Court’s duty to fix a case management conference does not apply to fixed date claims, presumably because under Rule 27.2 (1), the

Court is given separate rules prescribing when the first hearing must be fixed in a fixed date claim....”

The Judge consequently held that the Respondent’s claim was not automatically struck out by Rule 27.3(4) for failure to apply for a date to be fixed for a CMC pursuant to Rule 27.3.

15. The Appellants now appeal. Mr. Nelson SC for the Appellants stated that the issue in this appeal is whether the provisions of Rule 27.3 of the CPR apply to this claim which was initiated by way of a fixed date claim on the facts before the court. He emphasised that in this matter a defence and counterclaim had been filed by the Appellants. He argued that if the fixed date claim is defended or else cannot be tried summarily, at that point the claim is in the exact position as any other claim and is governed by Rule 27.3(3). The Court may then either dispense with a CMC or give notice of a CMC as provided for at Rule 27.3(2). But if the Court does not dispense with a CMC or fails to give notice of a CMC, the claimant must apply to fix date for a CMC, and if he does not do so within the time prescribed by Rule 27.3(3) then the claim is automatically struck out pursuant to Rule 27.3(4). He submitted that as the Court in this case neither fixed a CMC nor dispensed with it and the Respondent failed to apply to fix a date for the CMC, the matter was automatically struck out and the Judge was wrong to come to the decision that he did.

16. Mrs. Peake SC for the Respondent submitted that the Judge was plainly correct. It was clear from Rules 27.2 and 27.3, she argued, that there is a different regime when dealing with a fixed date claim than when dealing with a claim other than a fixed date claim. Rule 27.2 deals with fixed date claims and Rule 27.3 deals with other claims. To suggest that the fixed date claim regime is to be converted into the non-fixed date claim regime at any point is not supported by the language of the rules. The obligation imposed on a claimant to apply to fix a date for a CMC and the sanction if he fails to do so

is governed by Rule 27.3 which deals with general claims. There is therefore no obligation on the Respondent to apply to fix a date for the CMC in these proceedings which were issued as a fixed date claim and the sanction in Rule 27.4 does not apply.

17. I agree with the decision of the Judge and the submissions of Mrs. Peake SC. Rules 27.2 and 27.3 of the CPR are very clearly worded. Rule 27.2 applies to fixed date claims and 27.3 to other claims. This is patent from the language of the rules. Rule 27.2 speaks to the Court's obligations in relation to fixed date claims and Rule 27.3 speaks to obligations of the court office in relation to other claims, which I may refer to as general 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.
18. So far as the obligation to fix a CMC is concerned, Rule 27.3(1) requires the court office as a general rule to fix a CMC upon the filing of a defence to a claim other than a fixed date claim. An exception to that rule is at Rule 27.3(3)(a) where the court decides to dispense with a CMC. There may be other exceptions to the general rule but it is clear that the requirement for the court office under Rule 27.3(1) to fix a CMC upon the filing of a defence does not apply to fixed date claims but to general claims.
19. When a CMC is not dispensed with, the court office must fix it and, it is its responsibility to give notice of it. Where the court office does not give notice of the CMC, the onus falls on the claimant by virtue of Rule 27.3(3) to apply to fix a date for the CMC. Rule 27.4 provides a sanction where the claimant does not comply with his obligation to apply to fix a date for the CMC. Where the claimant does not so apply, the claim is automatically struck out. The claimant may apply for relief from that sanction, but there is no ambiguity that the obligation on the part of the claimant that gives rise to the sanction

is the requirement on the part of the claimant to apply to fix a date for a CMC in default of the Court doing so in claims other than fixed date claims.

20. If authority is required for what is very clear from the language of the rules, I need do no more than refer to the Privy Council's decision in **Super Industrial Services Ltd and another v. National Gas Company of Trinidad and Tobago Ltd [2018] UKPC 17**. In that case, the question arose whether a claim begun as a regular claim (or in other words not as a fixed date claim) was automatically struck out under Rule 27.3(4). Lord Briggs who gave the judgment of the Board considered Part 27 and stated:

“23. The CMC is, as the Chief Justice describes, at the heart of the new procedural code, and of the system whereby the court takes over from the parties (under the pre-CPR culture) the active management of cases for the furtherance of the overriding objective. The CMC is an event which must take place early in the progression of every claim except (i) for fixed date claims and (ii) where the judge otherwise orders, for example by dispensing with a CMC under rule 27.4.”

21. According to Mr. Nelson SC, where a fixed date claim is defended or else cannot be tried summarily, the claim is in the exact position of an ordinary claim and requires the Judge at that point to fix a CMC, or in default for the claimant to do so. The Appellants' submission seem to me to invite the Court to read into Rule 27.2 in respect of claims that are defended or cannot be dealt with summarily, the obligation in Rule 27.3 on the part of the Court in relation to general claims to fix a CMC and give notice of it or in default to require the claimant to apply for a date for a CMC on the penalty of the claim being automatically struck out. But that is fraught with difficulty and will not achieve any useful purpose.

22. As a general rule, a claim begun by an ordinary claim does not engage the Judge's attention until a defence has been filed and the matter comes before

him in accordance with the procedure outlined at Rule 27.3 for the convening of a CMC. As the Privy Council noted in **Super Industrial Services Ltd (supra)** the CMC lies at the heart of the system whereby the court engages in active management of the case. If the CMC is not convened there is a fair chance that many cases may simply lapse into oblivion or judicial limbo as the Privy Council referred to it. It is in that context that Rule 27.3 provides a procedure for the convening of the CMC and a sanction if there is ultimately default by the claimant. As Lord Briggs stated in **Super Industrial Services Ltd (supra)**:

“33. ...it is not surprising to see, in rule 27.3, a structure in place which ensures that a claim cannot just fall into an old-fashioned limbo after exchange of pleadings, with no trial date or timetable in place. On that view, rule 27.3(4) does no more and no less than ensure that no such limbo, in which thousands of sleeping cases used to accumulate in the pre-CPR procedural culture, can occur.”

23. In the case of a fixed date claim, the position is quite different. When the fixed date claim is filed a date is fixed for its hearing. In accordance with our system, it is then docketed to a Judge who can case manage the matter and who will see it through to its determination. So that practically from the moment a fixed date claim is filed it will without more and from that point on engage the Judge’s attention and the chance that it will go into judicial limbo is remote.

24. When the fixed date claim comes before the Judge at the first hearing, in addition to any other power that the Court has, he has all the powers available at a case management conference. Those are the powers that Rule 27.2 recognises the Judge has at the first hearing of a fixed date claim. Those powers are not limited to claims that are not defended or cannot be dealt with summarily but relate to all matters. As the Court has such powers there

would be no need to require the convening of a CMC in relation to claims that are defended or cannot be dealt with summarily at the first hearing.

25. Rule 27.2 focuses on the first hearing of the fixed date claim. It would, however, be absurd to suggest that after that first hearing the Judge would no longer be able to exercise case management powers. He would be able to do so. What then would be the purpose of requiring the court to convene a CMC at any stage after the issue of a fixed date claim? In my view, there clearly would be none or at least no useful purpose as the Judge has all the case management powers available to a Judge at a CMC. The Judge of course may convene a CMC but that is a matter for him if in his discretion he sees it fit to do so, and is not an obligation. To impose a requirement in the case of a fixed date claim that a CMC must be convened at any stage is to add an additional procedural layer that in the circumstances would serve no useful purpose. It seems to me that the only real purpose a requirement that there be such an additional procedural layer would serve would be to incur costs and delay which cannot be the intention of the CPR.

26. The only support for Mr. Nelson's submission seems to me to come from the dicta of Jones J.A. in her judgment in the **Super Industrial Services Limited and another v. The National Gas Company of Trinidad and Tobago Limited Civil Appeals P186 of 2016 and P190 of 2016** case where she says at paragraph 49:

"49. With respect to the case management conference therefore part 27.3 is clear and detailed. It purports to provide a comprehensive procedure for the fixing of the event called a case management conference, the sanction that is to be applied upon a failure to comply with the rule and the manner of obtaining relief from that sanction. It requires the staging of this event in all cases where the claim is not dealt with summarily except where a judge determines that it is not necessary in accordance with part 27.3(3). So that, for example, where

in a fixed date claim a judge determines that a defence is to be filed part 27.3(3) applies.”

Jones J.A. was there of the view that where in a fixed date claim the Judge determines that a defence is to be filed, Rule 27.3 applies.

27. However, as I mentioned, the issue in **Super Industrial Services Limited** case was whether Rule 27.3(4) applied so as to automatically strike out a claim issued as an ordinary claim and not a fixed date claim. That statement of Jones J.A. is, therefore, not binding on me and for the reasons given above I do not agree with it. In any event, I have read the reasons of Jones J.A. and note that she now accepts that Rule 27.3 does not apply to fixed date claims and, like me, agrees that the issue in this matter was correctly determined by Mohammed J.

28. For the above reasons and those of Jones J.A. the appeal was dismissed.

29. In relation to costs, we directed that the Appellants file and serve submissions on costs within 14 days of the reasons of the Court becoming available and that the Respondent file and serve submissions in reply within 14 days thereafter.

A. Mendonça J.A.

Delivered by J. Jones J.A.

30. I have read the reasons of my brother Mendonca J.A. and I too am of the opinion that Part 27.3(4) of the Civil Proceedings Rules 1998 as amended (the CPR) does not apply in this case. Since I have arrived at this conclusion by a slightly different route than that of my brother Mendonca J.A. I wish to say a few words on this appeal. In addition it is incumbent on me to clarify a statement made by me, by way of obiter dicta, in the appeals of **Rainforest Ltd and Super Industrial Services Ltd v the National Gas Company of Trinidad and Tobago Ltd Civ. Appeals P 186 and 190 of 2016.**

31. In those appeals the issue for our determination was whether Part 27.4 applied to ordinary claims in circumstances where the judge to whom the matter was docketed was already seized of the case and, in accordance with part 17.7 of the CPR, could have exercised any of the case management powers given to a judge by parts 26 and 27 of the CPR. The Rainforest appeal, upheld by the Privy Council, determined that, despite the power given to a judge to exercise its case management powers, the staging of a case management conference was an event made necessary and mandatory by part 27.3 of the CPR. In those circumstances part 27.3(4) required that where no notice of a case management conference was given by expiration of the relevant period, or where the judge had not dispensed with the case management conference, then a claimant was required within 28 days to apply for a case management conference to be fixed. A failure to do so attracted the sanction of striking out.

32. In **the Rainforest case** at paragraph 49 of the judgment I stated:

“With respect to the case management conference therefore part 27.3 is clear and detailed. It purports to provide a comprehensive procedure for the fixing of the event called a case management conference, the sanction that is to be

applied upon a failure to comply with the rule and the manner of obtaining relief from that sanction. It requires the staging of this event in all cases where the claim is not dealt with summarily except where a judge determines that it is not necessary in accordance with part 27.3(3).”

33. Thereafter as an example I, somewhat exuberantly, added the following sentence:

“So that, for example, where in a fixed date claim a judge determines that a defence is to be filed part 27.3(3) applies.”

Insofar as the example given states that Part 27.3 will apply in the case of a fixed date claim where a judge determines that a defence is necessary I was wrong. This was not an example of the operation of part 27.3. Part 27.3 specifically deals with claims commenced by an ordinary claim form. The procedure for fixed date claims is governed by part 27.2. In giving this as an example of the effect of part 27.3 not only was I wrong but I did not properly consider part 27.2 of the CPR.

34. **Part 27.2** states:

“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.
- (4) The general rule is that the court must give at least 14 days’ notice of any first hearing.
- (5) However, this is subject to any rule or statutory provision, which, specifies a different period.

- (6) The court may with or without an application direct that shorter notice be given—
 - (a) if the parties agree; or
 - (b) in urgent cases.”

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. This accords with the procedure set out by the rules for the hearing of a mortgage action or summary proceedings for possession of land both of which are required to be commenced by fixed date claim. **Part 69** deals with mortgage actions and specifies what the claimant is required to put before the judge at the first hearing if final judgment is to be obtained at that hearing.

37. **Part 68.7** deals with summary proceedings for the possession of land. **Part 68.7** states:

“Powers of court at first hearing

- 68.7 (1)** At the first hearing the general rule is that the court must give judgment unless there is a defendant who attends and satisfies the court that he has a defence with a realistic prospect of success.
- (2) Nothing in this Part prevents the court from ordering possession to be given on a specified date.

(3) If judgment is not given the court must give directions as if the hearing were a case management conference.

(Parts 25 to 27 deal with case management conferences)”

38. 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.

39. The fact that a defence has been filed does not remove the requirement of a first hearing or the need for the judge to determine the manner by which the case is to proceed. The notes for the defendant that are to be served with the fixed date claim form make this clear. In order to dispute a fixed date claim the notes advise the defendant that, if accompanied by a statement of case, it is required to file and serve a defence to the claim form, or, if accompanied by an affidavit, an affidavit in answer. It is clear therefore that the CPR contemplates that by the time of the first hearing of a fixed date claim a defence may have already been filed. In such a case, in accordance with part 27.2(3) the judge must determine whether or not the matter is to proceed summarily.

40. In the instant case there has not as yet been a determination by the Judge as to the manner in which the case is to proceed. Nor strictly speaking has there been the first hearing as contemplated by part 27.2. The factual basis for this appeal is not in dispute. The matter came up for hearing first before another judge. In its speaking note the Appellants accept that on that date that judge

“did not deal with the claim but acknowledged there was a related matter CV 2014-0872 before [the Judge] and transferred the matter to him.” There was therefore no hearing in accordance with part 27.2 on that date.

41. The case was reassigned to the Judge and listed for hearing. The Judge, without a hearing, made an order extending the time for the filing of the defence and counterclaim of the ancillary defendant. The case was listed for hearing on two occasions but on each occasion rescheduled without a hearing. At the request of the Respondents, the claimants in the case, the Judge scheduled a case management conference for July 6 2017. It was at this hearing that the Appellants raised the question of whether the claim had been automatically struck out pursuant to Part 27.3(4) of the CPR. The Judge then heard submissions on the point and determined that Part 27.3 did not apply to fixed date claims.

42. Having determined the preliminary point, and given that the claim is defended, in accordance with Part 27.2 the Judge is now required to determine whether this is a claim that can be dealt summarily and, in accordance with his powers under part 26.1, give directions for the hearing of the case. In accordance with part 26.1(5) this may include the fixing of a case management conference.

43. For these reasons I agreed with Mendonca J.A. that the appeal should be dismissed.

J. Jones J.A.