THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL
(CHAMBER COURT)

Civil Appeal No. CA P246 of 2021
Claim No. CV2015-03274

BETWEEN

(1) Donald Seecharan

(2) Fariza Shaama Seecharan

Appellants/Ancillary Claimants

AND

(1) Rachel Laquis

(2) Avalon Smith

(3) Romney Thomas

Respondents/Ancillary Defendants

BEFORE THE HONOURABLE JUSTICE VASHEIST KOKARAM, J.A.

Appearances:
Mr. Riaz P. Seecharan for the Appellants.
Mrs. Deborah Peake S.C. leads Mr. Kerwyn Garcia instructed by Ms. Andrea Orie for the Respondents.

Date of Decision: Tuesday 3 May 2022

REASONS

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1. On 13th April 2022, I dismissed the Appellants' application for directions[1]. I have now reduced into writing my reasons for so doing.

[1] Filed 22nd February 2022

2. At the hearing of the Appellants' application for directions in this appeal made under rule 64.11 of the Civil Proceeding Rules 1998 ("CPR") the Respondents raised a preliminary issue that this appeal is a "procedural appeal". If this is in fact a procedural appeal the consequence for the Appellants is significant.

3. First, this appeal was not filed as a "procedural appeal". It was filed some 28 days after the decision being appealed was made by the learned judge below.[2] While it was filed within the 42 day time limit for non-procedural appeals or substantive appeals pursuant to rule 64.5(b) of the CPR, it is beyond the 7 day window for the filing of procedural appeals[3]. In those circumstances, if the appeal is in fact a procedural appeal, the Appellants must obtain an extension of time to file this appeal out of time if it wishes to pursue the appeal. The considerations set out in **Mala Ragoonanan v The Attorney General of Trinidad and Tobago** CA P044/2020 would be considered on such an application to determine if such an extension ought to be granted.

4. Secondly, it will follow that the present application made under rule 64.11 CPR would be otiose as the rules for the compiling of documents and bundles in procedural appeals are governed by rule 64.9 CPR and the Practice Direction on Procedural Appeals dated 28th June 2018. Rule 64.11 CPR which deals with directions as to the manner in which the evidence in the court below may be brought before the Court of Appeal in regular appeals is not relevant to procedural appeals.[4]

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[2] The time for filing a notice of appeal differs between a procedural and substantive appeal. A procedural appeal must be filed within 7 days of the decision being appealed against was made **[Rule 64.5 (a) CPR]** while the notice of appeal in a substantive appeal must be filed within 42 days of the date when the decision was delivered or the order made **[Rule 64.5 (b) CPR].**

[3] Rule 64.5 (a) CPR provides:

> "64.5 The notice of appeal must be filed at the court office—
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;.."

[4] The conjoint effect of rules 64.8, 64.11, 64.12 and 64.13 CPR is the such an application is not necessary for procedural appeals.

5. A procedural appeal is defined in rule 64.1(2) CPR as "an appeal from a decision of a registrar, master or judge **which does not directly decide the substantive issues in a claim"**, subject to a number of exclusions[5]. If the decision in this case did not "directly decide the substantive issues" of the claim and does not fall within the listed exclusions then an appeal from that decision will be a procedural appeal.

6. The decision which is the subject of this appeal was made in a counter claim/ancillary claim brought by the Appellants/Ancillary claimants against **Scotiabank Trinidad and Tobago Limited, Rachel Laquis, Avalon Smith and Romney Thomas** as Ancillary Defendants. The learned judge summarised the essence of the counter claim and ancillary claim in paragraph 4 of his judgment:

> "[4] The Defendants/Ancillary Claimants filed their Defence and Counterclaim on 3 November 2015. The Defendants/Ancillary Claimants subsequently filed an Amended Defence and Counterclaim on 22 November 2019. In summary, the Defendants/Ancillary Claimants alleged that Scotiabank Limited fraudulently misappropriated the monies paid to it under the loan, and that its decision to appoint a Receiver was illegal. In essence, the Defendants/Ancillary Claimants denied the claims sought and also proceeded to file a Counterclaim with their Defence for several

[5]These exclusions pursuant to rule 64.1(2) CPR are:
"**(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;
(iv) any order made before proceedings are commenced or against a non-party; and
(d) an order for committal or confiscation of assets under Part 53;
e) an order as to costs only.."

declarations and orders, which, inter alia, stated that certain decisions and actions of Scotiabank Limited were illegal and/or in contravention of various pieces of legislation along with orders for damages, an independent review of 3G's accounts and that Scotiabank Limited provide a proper statement of accounts."

7. The learned judge's order which is the subject of this appeal is that "The Second, Third and Fourth Ancillary Defendants be and are hereby removed as parties to the Amended Defence and Counterclaim filed on 22 November 2019". The Appellants were ordered to pay the costs of the application to be assessed in default of agreement.

8. The learned judge made that order upon hearing an application filed by the Respondents who were all ancillary defendants together with Scotiabank Trinidad and Tobago Limited[6] that they, the Respondents, cease to be parties to the action on the ground that it was not desirable for them to be parties to the proceedings. The application was made pursuant to rule 19.2(4) CPR. To determine if this appeal is a procedural appeal, the question to be determined at this stage is whether the learned judge in making that order directly decided the substantive issues in the ancillary claim as between those parties. While it can be contended on the one hand that the order substantively brings to an end the dispute between these parties or on the other hand that it was an order only determining the proper parties to the ancillary claim, neither proposition answers the question, did the decision "directly decide the substantive issues" of this ancillary claim. It is not a matter which can be determined simply by looking at the order which is the subject of the appeal.

9. In determining whether this appeal is a procedural appeal two main questions are relevant:

[6] Notice of Application filed 5th October 2017

a) Does the decision appealed directly decide the substantive issues in a claim? If it does the appeal is not a procedural appeal.

b) If it does not, the next question is whether it was subject to any of the exclusions set out in rule 64.1(2) (a) to (e) CPR. If it is subject to any of those exclusions then is not a procedural appeal.

See Alan Dick and Company Limited (improperly sued as Alan Dick and Company) v Fast Freight Forwarders Limited Civil Appeal No. 214 of 2010 per Mendonça J.A.[7]

10. Jones J.A. in **Doc's Engineering Works (1992) LTD and ors v First Caribbean International Bank (Trinidad and Tobago Ltd)** CA No. 34 of 2013 provided further guidance on this question of determining what is a procedural appeal. In that appeal the Appellants appealed against the judge's decision striking out their defence and entering judgment against the Respondent on its statement of case.

11. Jones J.A. in determining whether the appeal was a procedural appeal noted:

> "**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

[7] In **Alan Dick and Company Limited (improperly sued as Alan Dick and Company) v Fast Freight Forwarders Limited** Civil Appeal No. 214 of 2010 Mendonça J.A noted 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."

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

12. While it is tempting to view what is known as an interlocutory order as one that is procedural in nature and a final order as one that substantively determines the matter, importantly Jones J.A. observed that whether the decision can be categorised as final or interlocutory is not the correct test.

> "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**."

13. It may well be that while it may be easy in some cases to characterise the order as one not directly deciding the substantive issues such as orders extending time, granting relief from sanctions or ordering specific disclosure, there are other cases where it cannot be so easily gleaned from the order itself whether an appeal from it should be a procedural appeal. One category of such cases are where the orders bring an end to the dispute. Jones J.A. noted:

> "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."

14. Jones J.A. went on to re-state the questions posed by Mendonça J.A. in **Alan**

Dick in determining whether an appeal is a procedural appeal to the two main questions: (a) does the decision appealed from directly decide the substantive issues in the claim and (b) do any of the exclusions apply.

15. In the case before her, Jones J.A. examined whether the judge in arriving at his decision to strike out the defences and enter judgment for the Respondent directly decided the substantive issues in the claim. She did so by examining the application, the evidence adduced and the submissions as there were no reasons available by the learned judge. In this case, the learned judge's reasons are available and I indicated to the parties that those reasons will assist in the determination of this preliminary issue.

16. The learned judge in his judgment pointed out that one of the grounds that the Ancillary Defendants/Respondents relied upon in its application was that there was no ground for bringing a claim against them and no realistic prospect of success of the claim. It is relevant to note that while a decision under rule 26.2 (1) (a) or (d) CPR[8] might decide an action "in the sense of concluding it, generally such a decision will not directly decide the substantive issues in the claim. They treat more with the procedure followed rather than the substance of the claim. In those circumstances an appeal from such a decision will generally be a procedural appeal".[9]

17. However, as Jones J.A. noted, decisions under rule 26.2(1) (b) and (c) that a

[8] Rule 26.2 (1) CPR provides:

> "**26.2** (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—
> *(a)* that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;
> *(b)* that the statement of case or the part to be struck out is an abuse of the process of the court;
> *(c)* that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or
> *(d)* that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[9] **Doc's Engineering Works (1992) LTD and ors v First Caribbean International Bank (Trinidad and Tobago Ltd)** CA No. 34 of 2013 paragraph 35.

claim discloses no ground for bringing the claim or is an abuse of process "are not always so clear-cut. Decisions under those grounds can, but may not always, directly deal with the substantive issues in the case. So for example an action for damages for breach of contract or based on a tort may be determined upon an application made under either (b) or (c) on the ground that the cause of action is statute-barred. A decision in these circumstances will not have treated with the substantive issues in the case directly or at all but rather proceeds on the basis that too much time has passed for the court to examine such a claim. Or the application may be brought under (b) or (c) but in fact on further examination the application is really based on the failure of the defendant to comply with Part 10 resulting in the defence disclosing no ground for defending the claim. Again here there may be no direct determination by the judge or master of the substantive issues."[10]

18. Jones J.A. also noted that an application to strike out under rule 26.2(1)(c) CPR may very well deal with all the issues of law and fact raised in the claim and in those circumstances do deal with the substantive issues:

> "37….. **In the cases which are not clear-cut therefore, in order to determine whether an appeal from the decision of the judge is or is not a procedural appeal, there needs to be an examination of the issues in the case; the decision of the judge and, particularly in circumstances such as this where there are no reasons, the nature of the application, the grounds upon which the application is based, the evidence adduced and the submissions made. The mere fact that an appeal is from an application made pursuant to Part 26.2 of the CPR is not determinative of the procedure to be followed on appeal."**[11]

[10] Ibid paragraph 36

[11] **Doc's Engineering Works (1992) LTD and ors v First Caribbean International Bank (Trinidad and Tobago Ltd)** CA No. 34 of 2013

19. Quite apart from the helpful guidance in **Alan Dick** and **Doc's Engineering**, the very structure of the rules suggests that there is a distinction made by the framers of the rules between decisions in relation to procedural law and the determination of substantive rights[12]. The structure of rule 64.9 CPR sets out a distinct pathway for the resolution of procedural appeals. Those appeals are designed to be determined quickly and summarily with the minimum use of the court and party's resources. A procedural appeal is heard within 56 days of the appeal being filed, it is determined by a minimum of 2 judges, the decision must be given orally or in any event promptly. It can be determined without an oral hearing or on paper hearings. Parties are restricted by a 20 minute time window to make submissions.[13]

20. No doubt while some procedural appeals may involve complex questions of law, the process map for those appeals is not structured in a manner reserved for substantive appeals or appeals from decisions that do directly decide the issues in a claim. In that event, the procedural pathway set out for those appeals are more elaborate. A record of appeal comprising notes of evidence must be compiled. The record comprises a number documents which would been before the trial court importantly, including the notes of evidence at the substantive hearing. The time to schedule a full appeal is much longer than a

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[12] Glanville L. Williams, 10th Ed, 1947.

> "So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."

[13] Rule 64.9 (2), (3), (4), (13), (14):

> "(2) The general rule is that a procedural appeal is to be determined by two judges of the court.
> (3) The hearing of the appeal is to take place in chambers.
> (4) The hearing shall take place not more than 56 days after the notice of appeal was filed and, for the purposes of this paragraph, time shall not run during the vacations specified in rule 79.1(2)…
> (13) Procedural appeals may be determined without an oral hearing.
> (14) At any oral hearing of a procedural appeal each party is limited to a speaking time of not more than 20 minutes inclusive of rejoinder, unless the judges decide otherwise."

procedural appeal and it is heard by a panel of a minimum of 3 judges.

21. This differentiation in the rules as to the preparation of both types of appeals demonstrates the proportionate use of resources to resolve matters that are procedural in nature as distinct from determining the substantive rights of parties. It underscores the difference to be made between determining the substantive rights of the parties as distinct from the procedural law within which those rights are to be ventilated.

22. Further, as Jones J.A. acknowledged, the framer's use of the word "directly" in the phrase "directly decide the substantive issues" captures the focus of the inquiry as to whether the decision directly and not impliedly nor inferentially decided the substantive issues in the case. No doubt in some decisions on procedural law there may be an impact on substantive rights, however, it is a procedural appeal unless those substantive issues or rights were the focus of the court's deliberation and determination.

23. From these authorities, whether an appeal from a striking out application is a procedural or substantive appeal depends on whether:

    a) The decision appealed from directly decide the substantive issues in the claim.

    b) The exclusions in rule 64.1(2) (a) to (e) CPR apply.

    c) If the answer is not "clear cut" then the following must be examined: the issues in the case and the decision of the judge. Where there are no reasons available, the nature of the application; the grounds upon which the application is based; the evidence adduced and the submissions made.

24. In my view this appeal is a procedural appeal as, while the exclusions in rule 64.1(2) (a) to (e) CPR do not apply, the decision which is the subject of the

appeal did not directly decide the substantive issues in this claim. I say so for the following reasons.

25. First, it was a decision made prior to the hearing of the trial which is fixed for September 2022 and the exclusions of rule 64.1(2) (a) CPR does not apply.

26. Second while the decision finally determines the claim as between the Appellants/Ancillary Claimants and the Respondents/Ancillary Defendants in the sense of disposing of it, it did not directly determine the substantive issues that arose in that claim. In short, the issues that arose for determination on the application were procedural in nature. They were "pleading issues" and did not determine substantively the rights and liabilities of the parties on the issues of fact or law that arose in the claim.

27. The nub of the learned judge's decision is found in paragraphs 21 to 23 of the judgment:

> "[21] Having examined the contents of the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019, the Court is of the view that the Defendants/Ancillary Claimants have not pleaded any relevant material facts to establish that there is reasonable cause of action against the Second, Third and Fourth Ancillary Defendants. The Defendants/Ancillary Claimants, in the case at bar, have not pleaded nor given particulars of fraud, deceit, fraudulent misrepresentation or dishonesty, nor have they pleaded any other material facts specific to ascribing personal liability to the Second, Third and Fourth Ancillary Defendants.
>
> [22] Furthermore, the Second, Third and Fourth Ancillary Defendants are protected from personal liability unless it can be shown that the acts and/or conduct complained of are tortious or exhibit a separate identity or interest from that of Scotiabank Limited so as to make the actions and/or

conduct their own. Again, the Defendants/Ancillary Claimants have not pleaded, nor given particulars of, these material facts in their Amended Defence and Counterclaim.

[23] Consequently, in the absence of such pleaded material facts against these officers and/or employees of Scotiabank Limited, the Court is of the opinion that it is not desirable for the Second, Third and Fourth Ancillary Defendants to be parties to the Counterclaim. In that regard, the Court agrees with Counsel for the Second, Third and Fourth Ancillary Defendants that they are not proper parties to the Defendants/Ancillary Claimants' Amended Defence and Counterclaim filed on 22 November 2019."

28. Those findings of the learned judge determined the procedural pleading issues in which the Appellants' claim should have been framed as distinct from determining the substantive issues that arose in that claim.

29. Third the nature of the application was one inviting the court to exercise a wide discretion under rule 19.2 (4) CPR to remove a party if it is "desirable" to do so. The claim against the Respondents/Ancillary Defendants as identified by learned judge[14]can be summarised as:

    (i) there was failure by Scotiabank, Rachel Laquis, Avalon C. Smith and Romney Thomas to account for a performance bond;

    (ii) Scotiabank, Rachel Laquis, Avalon C. Smith and Romney Thomas fraudulently purported to not know of the performance bond in order to deprive 3G and the Appellants from the benefit of the proceeds of the performance bond;

    (iii) the appointment of the Receiver was illegal and fraudulent;

[14] See paragraph 20 of the learned judge's decision

(iv) there was breach of the Financial Institutions Act and the Central Bank's directions and Mr. Thomas, Scotiabank and its officers have acted maliciously against 3G and the Appellants.

(v) the claim of the sum of $19, 594,898.07 was fraudulently claimed by Scotiabank, Rachel Laquis, Avalon C. Smith and Romney Thomas.

30. As can be gleaned from the judgment at paragraph 9 the main grounds of the application before the learned judge suggests that those claims against the parties disclosed no grounds for bringing the claim or have no realistic prospect of success. While investigating whether a claim has no realistic prospect of success may involve a greater examination of the facts and evidence in a claim short of conducting a mini trial, a determination that there is no ground for making a claim frequently does not. In fact, the approach taken by the learned judge suggests that he took the classical approach of examining whether the pleadings themselves, assuming them to be true, establish a reasonable cause of action against the Respondents. There was no substantive determination whether those facts were proven to be true or not.

31. The learned judge's reference to **Kay Aviation b.v. v Rofe** PESCAD 7 (P.E.I C.A., **Anil Maharaj (Trading as A. Maharaj Tyre Service) v. Rudy Roopnarine, Paula Kim Roopnarine and Refinery Industrial Fabricators Limited** CV2012-04524 and **Montreal Trust Company of Canada v ScotiaMcLeod Inc**. (1995) 4 (1995) 129 D.L.R. (4th) 711 at 720 all bear the similar theme of examining whether the facts as pleaded can constitute a valid claim, not inviting the Court to embark upon an investigation as to the truth or substantive merits of the facts of those claims.

32. The learned judge did not enquire into the merits of the factual issues. For the purposes of the application, the learned judge in his decision considered whether the Appellants pleaded material facts to establish any cause of action

against the Respondents, who are employed by Scotiabank, recognising that a company is a legal entity that is separate and distinct from the individual members of the company. At paragraph 19 he stated that in the absence of that pleading, there was no link for the learned judge to make any investigation of and ultimately any basis to determine whether those defendants/Respondents could be held liable to the ancillary claimants/Appellants for the alleged default. The learned judge stated "in order to impose personal liability on the 2nd, 3rd and 4th Ancillary Defendants, the Appellants were required to plead the relevant material facts to establish that there is a reasonable cause of action against them separate and distinct from any liability of Scotiabank Limited."

33. It was in those circumstances that the learned judge was of the opinion that it was not desirable for these Respondents to be parties to the counterclaim. The Appellants, however, were not precluded from filing "witness summonses along with witness summaries requesting that these persons attend trial to give evidence."[15]

34. Fourth, the learned judge recognised that these substantive issues are still live issues as against Scotiabank which would need to be determined at the trial which is currently fixed for September 2022 in which these Respondents may be participants.

35. Finally, a closer examination of the grounds of appeal in the Notice of Appeal reveal that the main contest do not deal with the substantive rights of the parties in the ancillary claim but errors of law made by the learned judge in the procedure adopted in arriving at this decision. See for example grounds a, d, e, f, h and j.[16]

[15] Paragraph 25 of the learned judge's decision.
[16] Grounds a, d, e, f, h of the Notice of Appeal states:

36. This decision therefore did not directly decide the substantive issues which arise on the counterclaim as against these Respondents. The appeal therefore is not from an order that decided the substantive issues in the case and so is a procedural appeal.

37. As indicated above as a consequence of this finding, there is no basis to file an application for directions under rule 64.11 CPR and that application is struck out.

38. There will be no order as to costs.

Vasheist Kokaram
Justice of Appeal

"a. The learned Judge was plainly wrong that the Defendants/Ancillary Claimants have not pleaded nor given particulars of relevant material facts to establish that there is a reasonable cause of action against the Second, Third and Fourth Ancillary Defendants.
d. The learned Judge was plainly wrong that the Defendants/Ancillary Claimants, in the case at bar, have not pleaded nor given particulars of fraud, deceit, fraudulent misrepresentation or dishonesty, nor have they pleaded any other material facts specific to ascribing personal liability to the Second, Third and Fourth Ancillary Defendants.
e. The learned Judge was plainly wrong in applying the incorrect test coming to the opinion that it is not desirable for the Second, Third and Fourth Ancillary Defendants to be parties to the Ancillary Claim and not having to defend the specific Ancillary Claims made against them personally for their statutory breaches of the Financial Institutions Act Chapter 79:09, the Companies Act Chapter 81:01, the Conveyancing and law of Property Act Chapter 56:01 and the Bankruptcy and Insolvency Act Chapter 9:70
f. The learned Judge was plainly wrong to remove the Second, Third and Fourth Ancillary Defendants as parties to the Counterclaim having regard to the Court's decision/analysis/conclusion that, "Nevertheless, if the Defendants/Ancillary Claimants wish to question the Second, Third and Fourth Ancillary Defendants on their actions and/or conduct concerning the loan agreement between Scotiabank Limited, 3G and the Defendants/Ancillary Claimants, they are permitted to file witness summonses along with witness summaries requesting that these persons attend trial to give evidence…".
h. The learned Judge was plainly wrong in his failure to consider the relevant test of what had been pleaded which required disclosure from the Second, Third and Fourth Ancillary Defendants and of evidence that can come at the trial after discovery which evidence will or will not establish dishonesty, deceit, fraud or a conspiracy or breaches of statutes by the Second, Third and Fourth Ancillary Defendants
j. The learned Judge was plainly wrong in law as he did not apply the test of whether on the basis of the primary facts pleaded an inference of dishonesty, deceit or fraud or a conspiracy is more likely than one of innocence or negligence."