[2011] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPPEAL NO 64/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**GEORGIA PINNOCK (as Executrix of the Estate of DOROTHY M^{C}INTOSH Deceased)**	**APPELLANT**
AND	**LLOYD'S PROPERTY DEVELOPMENT LTD.**	**1ST RESPONDENT**
AND	**LLOYD E. GIBSON**	**2ND RESPONDENT**
AND	**GEORGE ANTHONY HYLTON**	**3RD RESPONDENT**

Paul Beswick instructed by Ballantyne Beswick & Company for the appellant

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the 3rd respondent

15, 16 December 2010 and 1 April 2011

PANTON P

[1] I agree with my learned sister Philips JA as regards the disposition of this matter and have nothing to add.

HARRIS JA

[2] I too agree with my sister Phillips JA. There is nothing that I wish to add.

PHILLIPS JA

[3] This appeal (No. 64/ 2010) is against the decision made by Edwards J (Ag) on 27 April 2010 wherein she ordered that "the fixed date claim form" filed on 4 February 2010 be struck out, and ordered that costs be paid by the appellant to the 3rd respondent. This appeal is related to the consolidated appeal No. 17 and 84/2010, both of which were before the court for hearing on 15 and 16 December 2010, but as the consolidated appeal consumed all the allotted time for the oral submissions before the court, it was agreed by the parties that this appeal would be dealt with on paper. On 4 March 2011 we dismissed the consolidated appeal and promised to put our reasons in writing which we have since done. This appeal is based on substantially similar facts. I will set out some of the background in order to put the appeals in context.

Background

[4] In 1989 the 2nd respondent (the registered proprietor) entered into two agreements for sale, with Mrs Dorothy McIntosh and the 3rd respondent, in respect of the same premises situated at Lot 4 on the approved subdivision for lands in Norbrook Heights, Saint Andrew, being part of the lands originally comprising lots 39 and 40 Norbrook Heights, Saint Andrew and registered at Volume 999 Folio 4 and 5 respectively, and now registered at Volume 1244 Folio 877 of the Register Book of Titles (the said property).

[5] With regard to the sale to Mrs McIntosh, a deposit was paid on execution of the agreement, however the agreement was not completed and a caveat (10729262) was lodged on 12 October 1992 to protect the purchaser's interest in the said property.

[6] On 23 August 1993 Mrs McIntosh filed an action (CLM 270/1993) seeking a decree of specific performance against the 1st and 2nd respondents, and on 30 April 1997, the court (Panton J, as he then was) granted the order.

[7] On 25 December 1999, Mrs M^{c}Intosh died, and on 21 July 2000, a grant of probate was issued by the Supreme Court to the executors of her estate, namely Roy Alexander, and Georgia Pinnock.

[8] On 3 April 2001 the Supreme Court made an order on the summons to enforce the judgment, authorizing the Registrar of the Supreme Court to sign the instrument of transfer and all documents to give effect to the judgment of the Supreme Court made on 30 April 1997.

[9] As a consequence of the above, up to April 2001 the agreement with Mrs McIntosh (deceased) (substituted in the action by one of her executors, Georgia Pinnock) had not been completed. The appellant indicated by sworn affidavit in post judgment proceedings in suit no. CLM 270/1993 that the transaction was still not completed as "prior to the grant of Probate and the administration of the plaintiff's estate, no further steps could be taken because no funds were available in the estate,

until the property of the estate had been collected by the executors, and portions thereof liquidated to settle the costs of administration". The appellant indicated that the agreement for sale had not been stamped, and any sum to pay any penalty if required, and for the completion of the transaction, also awaited the "taking of steps to collect funds into the estate of the plaintiff".

[10] The 3rd respondent also placed before the court the challenges he faced in completing the transaction, which included another caveat registered on the certificate of title for the said property, the fact that the 2nd respondent company had been struck off the Register of Companies, and through his assistance the company had been recently restored. He had paid sums to landscape, survey and develop the said property and had made arrangements for the balance of the purchase price to be paid. He had therefore instructed his attorneys to register the instrument of transfer to conclude the agreement made with the 3rd respondent in 1989.

[11] On the filing of the instrument of transfer by the 3rd respondent, pursuant to section 140 of Registration of Titles Act (The Act), the Registrar of Titles "warned" the caveat no. 729262 lodged by Mrs McIntosh in 1992.

[12] The Registrar, on her understanding of the law and practice, and having sent to the appellant, a notice to caveator by posting a registered letter to the caveator's address for service, that is at her attorneys' offices, indicated to the attorneys for the 3rd respondent that the caveat had lapsed on 16 January 2009.

[13] On 20 January 2009, the appellant herein filed a notice of application seeking an order directing the Registrar of Titles not to register the transfer to the 3rd respondent and an order restraining the 2nd respondent from dealing with the said property. This application was filed in suit no. C.L.M. 270/1993. It was heard ex parte. Anderson J granted the order for a period of 28 days. It was directed to be served on the 1st respondent and the Registrar of Titles, and was extended several times. Later, on 10 September 2009, the 3rd respondent was added to the suit and an inter partes hearing took place on 4 March 2009.

[14] On 21 October 2009, Pusey J granted an order directing the Registrar not to register the 3rd respondent's instrument of transfer for a further period of six months. He also ordered that, "The claimant shall institute proceedings for the court to determine the party with legal and equitable ownership of the property mentioned in (1) above within 3 months of this order".

[15] On 20 January 2010, Pusey J made a further order extending the time to institute proceedings until 4 February 2010. Both orders became the subject of appeal no. 17/2010. On 27 April 2010, a further restraint for a period of three months was made by Edwards, J (Ag) (in the same suit) on the Registrar from registering any dealings with the said property, and in particular the 3rd respondent's said transfer. This order became the subject of appeal no. 84/2010. These appeals were consolidated on 23 September 2010 and as previously stated, heard on 15 and 16

December 2010. No arguments were advanced however by the 3rd respondent in respect of appeal No. 84/2010. On 4 March 2011, we delivered our decision as follows:

> "ORDER
>
> Appeal dismissed.
>
> Orders of Pusey J made on 21 October 2009 and 20 January 2010 affirmed.
>
> Costs of the consolidated appeal to the respondent Georgia Pinnock to be agreed or taxed."

[16] We found that the relevant date of service of the notice to the caveator, was the date on which the notice was served at the address for service of same given in the caveat lodged by her, namely the offices of her attorneys at law. The dates given by her attorneys-at-law in respect of service were either 6 or 9 January 2009, and the application filed in court on 20 January 2009 to direct the Registrar not to register the pending transfer had therefore been filed in time, pursuant to section 140 of the Act, which was within 14 days of service of the notice to the caveator, before the caveat lapsed. Additionally Anderson J had directed the matter to be heard inter partes and Pusey J had done so. The restraint on the Registrar, though post judgment relief, was clearly incidental and ancillary to the judgment, and was, when considering the balance of convenience, in the interests of justice and fair and equitable to the parties in all the circumstances.

[17] As indicated above, Pusey J had extended the time for instituting proceedings until 4 February 2010. In purported compliance with that order, on that day, the appellant filed a "fixed date claim form" in the same 1993 action. As a consequence, the 3rd respondent filed an application to strike it out, and on 27 April 2010 Edwards J (Ag) made the following orders in suit no. C.L.M. 270/1993:

> "(1) The 'Fixed Date Claim Form' filed 4 February 2010 is struck out.
>
> (2) The Claimant is permitted to file a claim form to institute proceedings before Thursday May 6, 2010 at 4.00 pm.
>
> (3) Costs of this application and order be paid by the claimant to the 3rd Defendant."

The order stated at no. (1) above became the subject of appeal no. 64/2010.

The order stated at no. (2) above, as well as a further restraint on the Registrar in respect of any dealings with the said property, became the subject of appeal no. 84/2010 (as indicated previously at para. 13). The latter not having been pursued, but not having been withdrawn, was later dismissed.

Judgment of Edwards J (Ag)

[18] The learned judge found that it was not possible to bring a fixed date claim form within an existing claim. Claim no C.L.M. 270/1993 was an existing claim brought in 1993, and a fixed date claim form brought in 2009 could not bear the date 1993. The learned judge also indicated her understanding of the interpretation to be accorded rule

8 of the Civil Procedure Rules 2002 (CPR) in particular that it mandates a claimant who wishes to start proceedings to file a claim form in the registry of the Supreme Court, King Street Kingston (or at such other place as the Rules Committee may determine). She also set out the particular circumstances in which the CPR directs that a fixed date claim form must be used. The judge stated that part 11 deals with the applications for court orders made before, during or after the course of the proceedings. The learned judge did not agree that the issue related to a matter of numbering by the Registrar of the Supreme Court. In her view, "it must be more than mere numbering to file a claim made in 2009 with a 1993 date". If that were so, she stated, then the fixed date claim form would be continuing proceedings in claim no. C.L.M. 270/1993, and that would be an invalid procedure, as it cannot be used to make an application in an existing claim. There must, she ruled, be a fresh claim filed for the determination of the priority interests. She also found that bearing in mind rule 8 (1) (d) of the CPR, she was not of the view that a fixed date claim form was the most appropriate form and directed that a claim form (form 1) should be filed by the appellant. She therefore struck out the fixed date claim form filed in suit no. CLM 270/1993 and gave the appellant seven days to file the claim form, whilst restraining the Registrar for three months. What is of much significance to this appeal is that the appellant duly filed the claim form (using form 1) on 5 May 2010 pursuant to the order of Edwards J (Ag).

[19] Both the fixed date claim form filed in C.L.M. 270/1993 and the claim form HCV 02263/2010 filed on 5 May 2010, were placed before us. The wording of both

documents is **verba ipsissima**, and the reliefs sought in both claim forms are exactly the same. The question one would ask therefore is why would the appellant proceed none the less with this appeal?

The appeal

[20] The appellant filed seven grounds of appeal which read as follows:

> "(1) The Learned Judge in Chambers erred in law (sic) expressly concluding that there is such a rule which requires that a claim be issued with an original claim or suit number;
>
> (2) The Learned Judge in Chambers erred in law in holding that the effect of Civil Procedure Rules 2002 (CPR) Part 8 and Part 11 is that a party cannot file a claim form or a fixed date claim form in a case which is already before the court when in fact there is no such principle capable of abstraction from the said rules;
>
> (3) The learned Judge in Chambers erred in holding that the order of Pusey, J required that the appellant not institute proceedings by way of a Fixed Date Claim Form. The said judgment in fact placed no restriction, restraint or other fetter on the manner of instituting proceedings and the words used by the Learned Judge indicate a complete freedom for the appellant to institute proceedings in any appropriate manner.
>
> (4) The Learned Judge in Chambers erred in concluding that in bringing a new claim for the determination of the (sic) interests in equitable and legal interests in land, a new claim form must be filed in fresh proceedings indicating the date, these fresh (sic) proceeding begin, as per the filing system in the registry, as contrary to the holding of the Learned Judge in Chambers, the civil registry at the Supreme Court contains no provisions or filing system which differentiates between claims which are 'fresh' proceedings and claims which arise from requests for post-judgment relief.
>
> (5) The Learned Judge in Chambers erred in impliedly holding that it is an abuse of the process of the Court to file a Fixed Date Claim Form with the same claim number as that in which a final judgment has been delivered;

(6) The Learned Judge in Chambers erred in law in rejecting the appellant's contention that the Fixed Date Claim Form issued was issued by the Registrar of the Supreme Court who alone has authority and jurisdiction to issue process and accordingly therefore that the responsibility for the choice of the claim number was not the appellant's nor was the appellant responsible for this choice;

(7) The issue between the parties involves no dispute or substantial dispute of fact and is therefore perfectly suited to be resolved by way of a Fixed Date Claim Form pursuant to CPR r.8.1(4)(d)."

It is also of some significance, in my view, for the disposal of this appeal, what particular reliefs the appellant is seeking. These are set out below:

"(1) The orders numbered (1) and (3) in the Order dated the 27th day of April, 2010, be set aside;

(2) A declaration that the Fixed Date Claim Form filed on 4th February, 2010 was filed in compliance with the orders of Pusey J, made on the 21st day of October, 2009 and the 20th day of January, 2010;

(3) The appellant be granted leave to withdraw the Fixed Date Claim Form filed on the 4th day of February, 2010;

(4) Costs of the application in Chambers, the withdrawal of the Fixed Date Claim Form and of this appeal be paid to the appellant by the 3rd respondent to be agreed or taxed."

The appellant therefore though having appealed, and asked the court to declare that the fixed date claim form filed on 4 February 2010 in claim C.L.M. 270/1993, was filed in compliance with the orders of Pusey J, nonetheless requested that she be granted leave to withdraw the same, and by so doing, permit the claim form filed on 5 May 2010 to remain. She also did not ask that the order permitting the appellant to file a claim form to institute proceedings before Thursday, 6 May 2010 at 4:00pm be set aside.

Issues on appeal

(21) The issues in the appeal, in my view, therefore are:

(1) Would the appellant have complied with the order of Pusey J, " to institute proceedings for the court to determine..." by filing the fixed date claim form in suit no. C.L.M. 270/1993?

(2) Is it appropriate to file a fixed date claim form in an existing claim when judgment has already been entered?

(3) Is the fixed date claim form the appropriate procedure to be adopted in the circumstances of this case.

Issues (i) and (ii)

The appellant's contentions

[22] Counsel for the appellant argued that the filing of the fixed date claim form in the same suit no. C.L.M. 270/1993, in which a judgment had already been entered, was not an abuse of process. There was no rule, counsel submitted, which required that a claim must be issued with an original claim or suit number. He relied on the fact that post judgment relief was a remedy accepted in the common law procedure, and should, he said, be adopted in this case. Pusey J had already granted the same in keeping with the provisions of section 140 of the Act. Additionally, the facts and matters which are the subject of the fixed date claim form, are all arising out of suit no. C.L.M. 270/1993, and therefore no prejudice could be suffered if the matters in controversy between the parties, namely the determination of the competing equitable rights, are finally

concluded as directed by the court, in the same action. The application to strike out the fixed date claim form was, therefore, he submitted, "misconceived and groundless".

[23] Counsel then referred to the powers of the Registrar of the Supreme Court pursuant to section 12 of the Judicature (Supreme Court) Act and argued that regardless of who prepares, types and writes a document in the Supreme Court, "it is the Registrar of the Court who had carriage of the document, once filed". It is, he stated, the Registrar or his/her office which issues the suit or claim number, and neither the appellant nor any other litigant, "had any right or persuasive ability to direct the course of filing or indexing of documents in the Civil Registry of the Supreme Court". According to the appellant, section 12 (supra), confers on the Registrar and on her alone, the authority to determine how proceedings are filed and indexed in the Supreme Court. Thus, if a document is filed with the incorrect claim number, it is the responsibility of the Registrar to correct the same, and if that is not done, it can be presumed to have been found to have been acceptable to the Registrar. It was the appellant's further contention that in the circumstances of this case, since there was no contumelious conduct on her part, and bearing in mind the new regime focusing on the overriding objective, there were other alternatives which could be adopted by the court, rather than utilising the draconian measure of striking out the appellant's claim such as:

(a) an order that the existing filed copy of the fixed date claim form be amended to bear a different and new claim number, and the parties be directed to amend their copies accordingly;

(b) an order that the fixed date claim form be re-filed as is, but then be amended with a newly issued claim number;

(c) an order that the action continue with the existing claim number.

[24] It was submitted that if the court were to direct any of the above alternatives, the result would be that the matter could proceed with some dispatch as opposed to protracted litigation and unnecessary increased costs. It was therefore the contention of the appellant that she had complied with the orders of Pusey J, as there was no rule preventing her from proceeding as she did, but if there was any irregularity (which was not accepted by her) there were other ways to cure the same and so the order of Edwards J (Ag) was wrong in law.

Issue (iii)

[25] Counsel for the appellant argued that the use of the fixed date claim form was appropriate in all the circumstances.

The respondent's contentions

[26] Counsel referred to rule 8 of the CPR with regard to the "start" of proceedings, as against rule 11, which referred to applications for court orders during the course of proceedings, and concluded that if one sought to initiate proceedings, one must use the claim form or the fixed date claim form, and if one sought interim relief in proceedings already begun, then one must proceed by way of application.

[27] Counsel argued that since the appellant had filed a fixed date claim form (with the claim number already typed in), in a suit which had not only been initiated but had been concluded, it was an abuse of the process of the court, a plain breach of the rules, and was "an attempt to seek additional relief in suit No CLM 270/1993 (the 1993 claim) under the guise of bringing a new claim".

[28] Counsel submitted that Pusey J had directed the appellant "to institute proceedings" not "make an application". The 3rd respondent's complaint was therefore that "it was not simply a matter of a claim being filed using the same number as an old claim; the appellant filed a new claim, claiming different substantive relief, but she filed it in an existing claim". The 3rd respondent, counsel argued, would not be able to utilize the procedures of a new claim, namely discovery, filing of witness statements and so on, as the matter would proceed as an application in an existing claim which would be prejudicial to him. Counsel referred to the fact that the appellant had already utilized the very procedures and obtained relief in the existing claim. He had already objected to the post judgment relief that the appellant had obtained, which he submitted, ought not to have been granted. These were issues however, that were canvassed in the consolidated appeal, which have been dealt with by the court in the disposal of that appeal.

[29] Counsel pointed out that counsel for the appellant had not sought to persuade the court that utilising the 1993 claim number was in error. To the contrary, it was the appellant's position that the CPR does not require that a claim be issued with an original

claim number; that the fixed date claim form can be used to obtain post judgment relief; and that in the circumstances there could be no prejudice. But, counsel said, if this were correct, the appellant would be able to obtain, by filing a fixed date claim form in an old suit, additional and substantial relief representing a new claim. That, he said, could not have been the intent of the rules. Further, by adopting that approach, the appellant did not and would not have complied with the order of Pusey J which was therefore an abuse of the court's process. Counsel also drew to the court's attention, the fact that in compliance with Edwards J's order a new claim, to wit, HCV 02263/2010 had been instituted by the appellant, which he submitted, made the pursuit of this appeal a complete waste of the court's time and pointless.

Analysis

Issues (i) and (ii)

[30] Rule 8.1 (1), (2), (3) and (4) of the CPR read as follows:

> "8.1 (1) A claimant who wishes to start proceedings must file in the registry of the court at The Supreme Court, King Street, Kingston (or at such other as the Rules Committee may determine) the original and not less than one copy for each defendant (for sealing) of
>
> (a) the claim form; and
>
> (b) unless either rule 8.2(1)(b) or 8.2(2) applies-
>
> (i) the particulars of claim; or
>
> (ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part.

(2) Proceedings are started when the claim form is filed.

(3) A claim form must be in Form 1 except in the circumstances set out in paragraph (4).

(4) Form 2 (fixed date claim form) must be used-

(a) in mortgage claims;

(b in claims for possession of land;

(c) in hire purchase claims;

(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;

(e) whenever its use is required by a rule or practice direction; and

(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion."

I agree with learned Queen's Counsel that to start proceedings, one files a claim form which includes a fixed date claim form. The order of Pusey J directed the appellant "to institute proceedings". The word 'institute' is defined in the Concise Oxford Dictionary, fifth edition, as "to begin, set going, originate". It therefore cannot be doubted that in order to comply with the order of Pusey J, a claim would have had to have been filed or instituted, in such a manner so that a new action was begun, started or originated.

[31] In any event, as is stated in Halsbury's Laws of England 4th edition, Volume 26, at para. 551:

"When judgment has been given in an action, the cause of action in respect of which it was given is merged in the

> judgment and its place is taken by the rights created by the judgment; so that a second action may not be brought on that cause of action."

[32] In suit no CLM 270/1993, as can be seen by the order made on 30 April 1997. Mrs McIntosh obtained an order for specific performance of the agreement entered into between herself and the 2nd respondent. The court further declared that as against the 2nd respondent, the appellant was the beneficial owner of the said property. On 3 April 2001, Anderson J directed the Registrar of the Supreme Court to sign the instrument of transfer and all documents to give effect to the judgment of specific performance granted by Panton J. The cause of action had merged with the judgment and the rights created by the judgment had taken its place. A second action could not therefore be brought on that cause of action. In my view, the fixed date claim form filed on 4 February 2010, in C.L.M 270/1993 could not therefore proceed in the same suit in respect of the same transaction/cause of action.

[33] In my opinion, the Registrar ought not to have accepted the fixed date claim form, which is an originating document, and assigned to it the same number, viz CLM 270/1993, and placed it on the file, particularly since judgment had already been entered in that suit.

[34] Section 12(1) of the Judicature (Supreme Court) Act defines the duties of the Registrar of the Supreme Court, and so far as relevant to the instant case, states:

> " (12) the Registrar…shall perform the following duties, that is to say…

> examine, copy, enter, arrange, index and keep, proceedings and records of proceedings in the Supreme Court, and shall permit the public to search and take copies of the same in the office of the Supreme Court at reasonable hours;.."

[35] The question which arises is what is the import and the meaning of "enter" "arrange" and "index" within the meaning of section 12 of the Judicature (Supreme Court) Act? Is there an onus on the Registrar to undertake the responsibility of entering numbers on and arranging documents submitted by litigants for filing? In ***Christopher Olubode Ogunsalu v Dental Council of Jamaica*** SCCA No 53/2008, delivered 3 April 2009, Harris JA, in delivering the decision of the court confirmed that "the entry, arrangement and indexing of documents presented to the Registry, of the Supreme Court is clearly of an administrative character". She also went on to say that:

> "27..As ordained by the Act, it is a function which must be performed by the Registrar and certainly not by a litigant. The proper execution of the requisite functions commanded by the Act could only be achieved by the Registrar putting in place a procedure by which documents could be properly identified and accounted for. As a consequence, in the interest of good administration, the Registrar, the custodian of the court's records, is bound to employ some order in the registration and recording of proceedings. It must be that Parliament had intended that in order to effect the efficient management of the court's business, the Registrar must adopt appropriate means to record proceedings and may do so by the assignment of numbers to documents submitted for filing. It would and could not have been the intention of the legislators that litigants should assign file numbers to documents. This would run contrary to the spirit and intent of the statute.

28. In keeping with the requirements of the Act, the responsibility of the Registrar demands the designation of a specific number in respect of each suit filed, which number would characterize such suit in all subsequent proceedings. The Registrar is therefore bound to ensure that any number assigned to a suit at the commencement of proceedings subsists throughout the life of the action."

[36] In ***Ogunsalu*** the facts were that the appellant had obtained leave to apply within 14 days of the grant of such leave, for an administrative order and for judicial review. He was granted leave to apply for a declaration that he was a dentist in good standing, he having paid the relevant practising fee, and having had a practising certificate issued to him; for orders of certiorari quashing the decision of the respondent not to issue a letter of good standing to him; for prohibition preventing the respondent from representing that he was not in good standing; and for mandamus commanding the respondent to issue such a letter of good standing. The appellant did not file the fixed date claim form in the suit in which leave was granted, but on the last day filed the claim form without any claim number, and a different suit number was assigned to the document by the Registry. The document was much later amended to bear the correct suit number and even later served on the respondent. At the hearing of the claim on a preliminary point, the fixed date claim form was struck out. On appeal however, the court held that, "The error in assigning the wrong suit number to the pleading is merely a mechanical exercise, which must be remedied by the Registrar affixing the correct suit number thereto".

[37] In the instant case, the appellant typed in and therefore affixed its own number to the fixed date claim form which number was already that of the existing claim, namely C.L.M. 270/1993. As indicated, in my view, the Registrar erroneously permitted the originating document to bear that number and to be placed on that file. A new number ought to have been entered on the document which would have been indexed accordingly, and copied and kept as directed by the Registrar. The appellant obviously contributed to this administrative irregularity, as the number was affixed to the document prior to it having been filed, but the obligation and duty of ascribing the number to the suit remains with the Registrar. As a consequence, the fixed date claim form filed on 4 February 2010 and which bore claim no C.L.M. 270/1993 was incorrectly filed.

[38] However, in the instant case, as opposed to the factual scenario of the **Ogunsalu** case, the breach cannot as easily be corrected. The error in assigning the wrong claim number to a statement of case was in that case merely a mechanical exercise and the error could have been remedied by the Registrar affixing the correct suit number thereto. In the instant case, the fixed date claim form must be impressed by stamp with the relevant fees, (see Judicature (Rules of Court) Act, Rules of the Supreme Court (Fees) 2002), and must also be sealed pursuant to rule 3.9 of the CPR. There was no evidence before us indicating whether the document had been stamped, which I would seriously doubt, as it was filed in an existing suit. If the requisite fee is not paid, then the document is not treated as filed until the fee is paid or an undertaking is received to satisfy the same (3.7(3) (a) and (b) of the CPR). In this

case, the court could however still have ordered that the fixed date claim form either be amended or re-filed as long as the required stamps and or fees had been settled, the seal of the court impressed, and the new number assigned thereto. I agree with counsel for the appellant, that the draconian approach of striking out the fixed date claim form was not necessary in all the circumstances, as it has only spawned further litigation, and increased costs as a result thereof.

[39] That would dispose of issues (i) and (ii) on the appeal. The appellant did not comply with the orders of Pusey J when she filed the fixed date claim form in suit no. C.L.M. 270/1993 because it was not appropriate to file a fixed date claim form in an existing claim and/or one in which judgment had already been entered.

Issue (iii)

[40] I cannot help stating that I am at a complete loss to understand the insistence of the appellant in pursuing this appeal. It does seem to be a complete waste of the court's time. The appellant has already re-filed the claim form as directed by Edwards J (Ag) and within the time specified by the learned judge. A claim form (form 1) has therefore been filed in lieu of the fixed date claim form (form 2) previously filed. There is no doubt, in the circumstances of this case, and pursuant to rule 8(1)(d) of the CPR (supra) that the claim form, and not the fixed date claim form was the appropriate procedure to be adopted. As already indicated on para. 28, the fixed date claim form must be used when the question(s) before the court for its decision are unlikely to involve a substantial dispute as to fact.

[41] There is no doubt that there will be substantial dispute as to fact in this case, with regard to, inter alia, which agreement for sale was first in time, and whether either or both of the parties have come to the court with clean hands, and in whose favour in spite of the laches in respect of the completion of both transactions, the court should exercise its discretion . However, on the basis of the Privy Council case, ***Eldemire v Eldemire*** (1990) 38 WIR 234 the fixed date claim form could have been ordered to proceed as if it had begun by claim form, so that the relevant procedures relating to discovery and the filing of witness statements, referred to by learned Queen's counsel, could still take place and no-one would suffer any prejudice as a result.

In conclusion I find as follows:

[42] The fixed date claim form was incorrectly filed in claim no. C.L.M. 270/1993, the judgment for specific performance having already been entered in that claim.

(i) The learned trial judge was correct that the fixed date claim form was not the appropriate form to be used for the matter, but ought not to have struck it out.

(ii) I would therefore permit the fixed date claim form filed on 4 February 2010 in suit CLM 270/1993 to be withdrawn.

(iii) The case should proceed by way of claim form, bearing claim no. HCV 02263/2010, and filed on 5 May 2010 in the Supreme Court.

In the light of the foregoing, I would therefore allow the appeal in part, with each party bearing their own costs.

PANTON P

ORDER:

1. Appeal allowed in part.
2. The fixed date claim form filed on 4 February 2010 in suit no. C.L.M. 270/1993 to be taken as withdrawn.
3. Matter to proceed by way of claim form bearing no. HCV 0223/2010 filed on 5 May 2010 in the Supreme Court.
4. Each party to bear own costs.