

[2010] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 114/08

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	DIV DEEP LIMITED	1 ST APPELLANT
	MAHESH MAHTANI	2 ND APPELLANT
	HARESH MAHTANI	3 RD APPELLANT
AND	TEWANI LIMITED	RESPONDENT

Winston Spaulding, Q.C., and Miss Nadine Amos, instructed by Gregory Lopez of Lopez & Lopez, for the appellants

Ms. Carol Davis for the respondent

15, 30, October 2009 & 26 March 2010

PANTON, P.

[1] This appeal challenged the decision of Marsh, J. made on 21 October 2008, directing that the hearing of a fixed date claim form filed in the Supreme Court be proceeded with on a date to be fixed by the Registrar of that court.

[2] On 30 October 2009, we dismissed the appeal and affirmed the order of Marsh, J. with a promise to give our reasons later in writing.

[3] The fixed date claim form was filed by the respondent as long ago as 6 March 2007. It asserted that the respondent was the legal proprietor, and entitled to possession of no. 81B King Street, Kingston, being part of land registered at Volume 1391 Folio 496 of the Register Book of Titles.

[4] The claim form was grounded on an affidavit of the managing director of the respondent. In that affidavit, he stated that in August 2006, he attended a public auction on behalf of the respondent. There he placed a bid in respect of the property. His bid was the highest of all bidders, and it was accepted. He paid the full purchase price and the property was duly transferred and registered in the name of the respondent on 7 December 2006.

[5] The appellants have been in possession of the property and despite requests for them to vacate, they have failed to do so. The respondent has placed a monthly rental value on the premises of about \$400,000.00 plus GCT.

[6] The appellants chose to file two applications for court orders with a view to having the fixed date claim form struck out. The appeal came as a result of Marsh J's decision on these applications which were heard

together. The first application filed on 2 May 2007, sought orders for the court to strike out the fixed date claim form and to direct “that the matter proceed by way of an ordinary claim.” The other application filed on 11 July 2007, sought the same relief – that is, to have the court strike out the claim “as being irregular, null and void”.

[7] In respect of the May application, no less than eleven grounds were listed as the basis for the orders sought. The grounds, two of which have been merged, may be summarized thus:

1. The claim, while intended to achieve possession, cannot be separated from the serious disputes in law about the ownership and/or right to possession of the property as a matter of law or equity and the validity in law of any transfer of the property to the claimant;
2. the essential issues to be litigated are not for the recovery of possession of land simpliciter within the meaning, intent and scope of the fixed date claim procedure;
3. the claim is not within the classification for the commencement of proceedings by fixed date claim form;
4. in any proceedings to resolve disputes about the legal and equitable interest in the property, there will inescapably be substantial disputes of fact within the context of many legal issues and principles;
5. non-disclosure by the respondent of a known dispute as to the appellants’ interest in the property;

6. the non-disclosure constitutes deceit and is an abuse of the process of the Court;
7. there are additional issues of deceit and fraud arising in the matter;
8. the issues are inseparable from those raised in another claim filed in 2005;
9. the issues in the 2005 claim are inseparable from those involving the respondent, its managing director and NCB in respect of the acquisition at the auction; and
10. the respondent has not stated the estimated value of the property.

[8] The July application listed three grounds:

1. The claim did not comply with the Civil Procedure Rules in respect of its issuance and service.
2. The claim did not comply with Rules 8.1 (b), 8.2, 8.8 and 8.9 of the Civil Procedure Rules.
3. The claim, by virtue of the breaches, was null and void.

[9] Marsh J having considered the various affidavits and the submissions, determined that the questions to be answered were –

1. Has the respondent used the appropriate process to pursue its claim?
2. If the fixed date claim form is the appropriate form, has there been compliance with the Civil Procedure Rules?
3. Is the fixed date claim form appropriate in view of the appellants' contention that the claim is likely to

involve a substantial dispute of fact with issues of equity and legal principles?

[10] In arriving at his decision, the learned judge noted that in none of the affidavits was there any allegation as to fraud against the managing director or any officer of the respondent. He concluded that unless fraud was raised against the purchaser, there would be no defence to the purchaser's claim for possession. He said further that section 106 of the Registration of Titles Act makes it clear that the appellants herein would have no rights against the respondent in respect of the exercise of a power of sale. The learned judge labelled as "inaccurate" the appellants' argument that the claim for possession by the respondent will involve the resolution of "substantial disputes of facts within the context of many legal issues and principles."

[11] Marsh J disagreed that there had been non-compliance with the Civil Procedure Rules, and was of the view that no prejudice had been suffered by the appellants so far as the fixed date claim form had not included a statement of the estimated value of the property. This omission, he pointed out, had been rectified by affidavits that had been filed subsequently. Part 8.1.4(b) and Part 10.2(2) of the Civil Procedure Rules had been complied with.

[12] In challenging the judgment, the appellants filed six grounds of appeal. These are summarize as follows:

1. The learned judge misdirected himself as to the issues before him.
2. The learned judge misdirected himself in considering the substantive issues which would arise on the claim, without there being any Defence to the issues having been entered.
3. The learned judge erred in finding that the claim was not a nullity.
4. The learned judge erred in finding that a claim for possession was valid.
5. The learned judge erred in failing to appreciate that the challenge to jurisdiction on the basis of the appropriateness of the fixed date claim form was based on the fact that the appellants had indicated that there were substantive issues of property rights to be resolved.
6. The learned judge misdirected himself in law in finding that 'unless fraud is raised on the part of the purchaser, there would be no defence to the purchaser's claim for possession'.

[13] The arguments of the appellants may be summarized thus:

- (a) the learned judge erred in finding that the fixed date claim form is an appropriate method by which to seek possession of the property; and
- (b) the learned judge dealt with issues that were not before him.

[14] Part 8 of the Civil Procedure Rules deals with the commencement of the proceedings in the Supreme Court. Rule 8.1(1) directs that a claimant must file a claim form and, unless rule 8.2(1)(b) or 8.2(2) applies, the particulars of claim; or where permitted or required by any rule or practice direction, an affidavit or other document giving details of the claim. The claim form must be in Form 1 except in the circumstances set out in rule 8.1(4). This latter rule makes it mandatory for Form 2 to be used in certain cases. Among those cases are claims for possession of land. Form 2 is the fixed date claim form which is the subject of this appeal. For full clarity, rule 8.1(4) so far as is relevant is hereby stated:

“8.1(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.

(For the procedure under a fixed date claim form see rule 27.2)”

[15] The fixed date claim form is set out in Appendix 1 of the Civil Procedure Rules. It is a simple form, but it has attached to it “Notice to the Defendant” as well as “Prescribed Notes For Defendants” (Form 2A) and “Acknowledgement of Service of Fixed Date Claim Form” (Form 4). These forms were served on the appellants – see page 110-112 of the record. In the acknowledgement of service, the appellants indicated that they intended to defend the claim. At the point of that indication, there is a statement that if it is intended to defend the claim, a defence must be filed within 42 days of the service of the claim – rule 10.3(1). Notwithstanding that indication, the appellants have not filed a defence. Instead, as noted earlier, they filed two separate applications for court orders.

[16] Rule 27.2 referred to earlier makes provisions as to what is to happen when a fixed date claim is issued. Firstly, the registry must fix a date, time and place for the first hearing of the claim. Rule 27.2(2) to (6) deals with time lines. Rule 27.2(7) and (8) read thus:

“(7) At the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.

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

[17] It is clear from what has been quoted above that the respondent was obliged to file his claim using Form 2 (the fixed date claim form) – Rule 8.1 (4)(b). Marsh J was therefore correct in ruling that the fixed date claim form was appropriate. A fixed date claim form having been filed, rule 27.2 then provides the procedure thereafter.

[18] It was submitted that the learned judge decided issues that were not before him. However, it should be remembered that he was being asked to strike out the fixed date claim form on the basis of it being irregular, null and void. Surely, the learned judge had to demonstrate why he did not find favour with the appellants' position. He had heard submissions that there were substantial issues to be tried. He said he did not see such issues, given the strength of a registered title and the absence of any allegation of fraud against the respondent. That does not amount to a determination of issues that were not before him. Litigants do run the risk of comments of a non-binding nature being made on issues they consider important when they choose the route of making a multiplicity of applications. In the instant case, the fixed date claim form having been filed, the proper procedure was to follow the dictates of rule 27.2. The filing of the applications for court orders was an unnecessary move that has only served to delay the resolution of the dispute between the parties.

HARRIS, J.A.

[19] In this appeal, the appellants challenged the decision of Marsh, J in which he refused the applications of the appellants to strike out the respondent's claim, brought by way of fixed date claim form, as being null and void and ordered that the claim should proceed to hearing. On 30 October 2009 we dismissed the appeal and affirmed the order of Marsh, J. and ordered costs to the respondent to be agreed or taxed. We now honour our promise to put our reasons in writing.

[20] The respondent is the registered proprietor of premises known as number 81 B King Street in the parish of Kingston recorded in the Register Book of Titles at Volume 1391 Folio 496, having secured the same by way of a transfer on 7 December 2006, pursuant to its acquisition at public auction, under a mortgagee's powers of sale.

[21] The appellants have been in occupation of the property prior to its acquisition by the respondent. They have failed to vacate the property notwithstanding discussions and negotiations between the parties for them so to do.

[22] On 6 March 2007 the respondent filed a fixed date claim form seeking the following orders:

- “1. An Order for possession of premises part of NUMBER EIGHTY-KING STREET, known as Number

EIGHTY ONE B KING STREET in the parish of Kingston, and being part of the land registered at 1391 Folio 496 of the Register Book of Titles (hereinafter the said land)

2. Mense profits for the Defendants use and occupation of the said land from 8th December, 2006 to the date of possession.
3. Interest at a commercial rate
4. Further and other relief.
5. Costs."

The fixed date claim form was duly served on the appellants who filed an acknowledgment of service but did not enter a defence.

[23] On 2 May 2007 the appellants filed an application for Court Orders seeking the following orders:

- "(1) That the Court refuse to exercise jurisdiction under the Fixed Date Claim on the Claim herein to determine the issues raised in the Fixed Date Claim Form herein.
- (2) That the matter proceed by way of an ordinary Claim.
- (3) That the Fixed Date Claim Form herein be struck out.
- (4) That costs be to the Defendants in any event.
- (5) That there be such further or other orders and relief procedurally or substantively which the Court deems just and appropriate in the circumstances."

[24] The grounds on which orders were sought are:

- "(1) The Claimant seeks possession of commercial premises registered at Volume 1391 Folio 496 of

the Register Book of Titles which the Defendants occupy, pursuant to the status and rights of the 1st Defendant as purchaser of the said property in which the Defendants were put into possession on that basis. The Claim, while intended to achieve possession, cannot be separated from the serious dispute in law about the ownership and/or right to possession of the property as a matter of law or equity and the validity in law of any transfer of the property to the Claimant.

- (2) The essential issues to be litigated in this matter are therefore not for the recovery of possession of land simpliciter within the meaning, intent and scope of the Fixed Date Claim procedure and jurisdiction pursuant to the **Civil Procedure Rules (CPR)**
- (3) Further this Claim does not come within the classification of a mortgage claim, a hire purchase claim or a claim required to be commenced by Fixed Date Claim Form by any Rule, Practice Direction or other enactment.
- (4) Further, in any proceedings to resolve the disputes about the legal and equitable interest in the property, the matter inescapably will involve resolving substantial disputes of facts within the context of many legal issues and principles. This matter is therefore not suitable or convenient to be heard on a Fixed Date Claim Form.
- (5) On the Claim herein there has not been disclosure of any fact or factors regarding the dispute known by the Claimant about the status or interest of the Defendants in the property which ought to have been disclosed by the Claimant on this application.
- (6) The concealment and non-disclosure of the clear disputes between and among various parties are relevant to what procedure or on which jurisdiction of the Honorable Court, the matter

should proceed to be heard to resolve the relevant issues involved.

- (7) The non-disclosure of the existence of the dispute concerning the proprietary and/or equitable interest of the 1st Defendant in the property constitutes deceit and is also an abuse of the process of the Court which by itself ground and justify the striking out of the Fixed Date Claim herein.
- (8) Additionally, there are issues of deceit and fraud arising in this matter. In that regard, among other things, a director of the Company Topaz Jewellers Ltd. (the company referred to above) Mr. Raju Khemlani, has been charged and is before the Half Way Tree Resident Magistrate's Court for fraud, on the complaint of the Defendants to this Claim herein, in respect of the overall conduct relevant to the overall issues relevant to the proprietary interest and rights of the Defendants in the property which entitle the Defendants to remain in possession of the said property.
- (9) Further, the real issues involved in this matter are inseparable from issues raised in Claim No. HCV 3196 of 2005 (Topaz Jewellers Ltd. and Raju Khemlani v Div Deep Investments Ltd., Haresh Mahtani and Mahesh Mahtani) and the Defence and Counterclaim therein by those Defendants concerning matters relevant to the property rights and interest of the Defendants in the said property.
- (10) Further, the issues in the Claim No. HCV 3196 of 2005 are also inseparable from the issues involving the Claimant Tewani Limited and its Managing Director Gordon Tewani and the National Commercial Bank Limited (NCB) in respect of the said purported acquisition of the property by the Claimant herein at an Auction at the instance of NCB. Among many other things, the very subdivision of the property in issue took

place with the consent of NCB, after the dimensions of the property in issue, now registered at Volume 1391 Folio 496 of the Register Book of Titles were specifically adjusted on the insistence of the 1st Defendant, specifically to include the entire area which the 1st Defendant purchaser in possession occupied. Issues relating to NCB's concealment and non-disclosure of vital information, even in the face of a ministerial order, which was not complied with for several years until after sale of the property and to its deceit, bad faith and wrongfully putting on auction and selling the 1st Defendant's property in the manner done, inevitably arise in the overall context of the matters to be resolved.

- (11) The Claimant has also not stated the estimated value of the property as is required by the **Civil Procedure Rules**, which is relevant to issues in this case."

[25] On 11 July 2007, a further application for court orders was filed by the appellants. The relief sought was couched in the following terms:

- "(1) That the Court strikes out the Claimants Claim as being irregular, null and void.
- (2) That costs be to the Defendants in any event
- (3) That there be such further or other orders and relief procedurally or substantively which the Court deems just and appropriate in the circumstances."

[26] It is also of some importance to set out the grounds upon which the application was based. They are:

- "(1) The Claim was issued and served without compliance with the **Civil Procedure Rules (CPR)**. The Rules of the CPR governing such issue and service concerning the contents of the Claim,

which Rules are a precondition for the issuance and service of the Claim

- (2) The Claim was generally in substantial non-compliance with the provision of **Rules 8.1(b), 8.2, 8.8 and 8.9.**
- (3) The breaches involve, constitute irregularities amounting to the Claim being null and void."

[27] Both applications were heard simultaneously on 21 October 2008.

The following orders were made by the learned judge:

- "1. The Defendants' applications for Court Orders dated 1st May 2007 and 11th July 2007 respectively are each refused.
2. The Fixed Date Claim Form will proceed to be heard as ordered by His Lordship Mr. Justice King on a date to be fixed by the Registrar
3. Costs of these applications to be the Claimant's to be taxed if not agreed."

[28] The following grounds of appeal were filed:

- "1. The Learned Judge did not properly direct himself as to the issues before him to be resolved on the Preliminary Applications by the Defendants and consequently misdirected himself in considering the Applications before him as to the issue of the validity of the Claim and the appropriateness of the jurisdiction on which the Claim should proceed even if the Claim had been validly issued.
2. The Learned Judge misdirected himself in considering the substantive issues which would arise on the Claim despite the Preliminary Applications by the Defence and without any Defence to the issues having been entered as permitted by the Rules.

3. The Learned Judge erred in law in finding by inherent implication that the absence of the Particulars required as a precondition for the issue and service of the Claim Form did not render the Claim a nullity despite the specific requirements of **Rule** (sic) of the **Civil Procedure Rules (CPR)** prohibiting such issue and service of the Claim without compliance with the Rules for such issue and service.
4. The Learned Judge erred in law in holding that a Claim for possession, filed at a time at which the Defendants had been in possession, with the written approval of the Claimant could constitute a valid Claim, although stating that at the relevant date of the Claim the Defendants had no right to be there.
5. The Learned Judge erred in failing to appreciate that the challenge to jurisdiction on the basis of the appropriateness of the Fixed Date Claim Form was based on the fact that the Defendants intimated in their Affidavit grounding the Application, that there were substantive issues of property rights to be resolved, making the Claim not a mere possessory claim, which could be disposed of on a Fixed Date Claim when it is necessary to raise substantive issues concerning legal and equitable issues in respect of property rights, which would require a Counterclaim by the defence and joinder of other persons to have all relevant issues litigated in the same Claim.
6. The Learned Judge misdirected himself in law in finding that "unless fraud is raised on the part of the purchaser, there would be no defence to the purchaser's claim for possession" when there was not only no Defence entered on the merits of the Claim, but further the bases of the Preliminary Objection indicated that fraud was an issue which the Defendants intended to pursue on the substantive consideration of any valid Claim by the Claimant in respect of the issues involved."

[29] Mr. Spaulding Q.C, for the appellants, submitted that the commencement of the proceedings by fixed date claim form was not only irregular but also a nullity, it having been issued and served in breach of the Civil Procedure Rules (CPR), in particular rules 8.1, 8.2, 8.8 and 8.9. He further argued that the claim was issued and served without the necessary particulars mandated by Part 8 of the rules. Even if the claim had been regularly issued and served in accordance with Part 8, he argued, the proceedings involve substantial disputes of facts and the learned judge ought not to have allowed the matter to proceed on a fixed date claim form. The learned judge, he further submitted, erroneously considered the merits of the claim, notwithstanding a defence had not been entered, ignoring the fact that the appellant had taken a jurisdictional point with respect to the claim put forward by the respondent.

[30] Miss Davis, for the respondent, submitted that the present case relates to a claim for possession of land and the use of the fixed date claim form was in full compliance with rule 8.1 of the CPR. It was further submitted by her that the fixed date claim form and affidavit in support thereof having been filed and served, were done in accordance with rule 8.2 (1). It was also her submission that remedies sought and the facts on which the respondent intends to rely have been clearly outlined in the pleading.

[31] It is clear that Mr. Spaulding couched his principal challenge in terms of the jurisdiction of the court. Miss Davis submitted that there could be no challenge as to jurisdiction as the land is in Jamaica and the parties are Jamaicans. It appears to me that Mr. Spaulding's complaint was not with respect to the court's general powers to exercise jurisdiction but that due to the nature of the claim the initiating process adopted by the respondent is in excess of the authority given to the court under the CPR.

[32] The issues arising are:

1. Whether the commencement of the claim by fixed date claim form is inappropriate and thus renders it a nullity and if the court proceeds by way of fixed date claim form, it would be acting in excess of its jurisdiction.
2. Whether the fixed date claim form, if appropriate, is in compliance with Part 8 of the CPR.
3. Whether there are substantial disputed facts to be tried between the parties and as a result, the learned judge had embarked on a trial of the substantive issues in the claim, in order to arrive at his conclusion, notwithstanding a defence had not been filed.

[33] It is first necessary to make reference to those provisions of rule 8 as are relevant to the determination of this appeal. Rule 8.1 makes provision as to the manner in which proceedings may commence. It reads:

- “8.1 (1) ...
- (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) ...
 - (b) ...
 - (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 and any enactment proceedings are required to be commenced by petition, originating summons or motion.

[34] Rule 8.8, which governs the contents of a fixed date claim form, states:

- “8.8 Where the claimant uses form 2, the claim form must state –
- (a) the question which the claimant wants the court to decide; or

- (b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
- (c) where the claim is being made under an enactment, what that enactment is;
- (d) where the claimant seeks possession from a tenant,
 - (i) whether the claim relates to premises in relation to which there is an exemption certificate pursuant to the provisions of the Rent Restriction Act; and
 - (ii) if not, the relevant ground or grounds on which the claimant relies.
- (e) Where the claimant
 - (i) is claiming in a representative capacity; or
 - (ii) sues a defendant in a representative capacity, what that capacity is.

[35] Under rule 8.9 a claimant has a duty, among other things, to set out his case. The rule provides:

“8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

(2) Such statement must be as short as practicable.

- (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.
- (4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.
- (5) The particulars of claim must include a certificate of truth in accordance with rule 3.12."

[36] Rule 8.1 (3) of the C.P.R mandates the filing of a claim form as a prerequisite to the initiation of proceedings. However, by rule 8.1 (4) certain exceptions are made. This rule specifies that certain claims must be made by way of a fixed date claim form, among which are claims for possession of land. The respondent's claim is for the recovery of possession of land. There was evidence before the learned judge by way of the affidavit of Mr. Gordon Tewani, the managing director of the respondent company, that the company, Tewani Limited, was the duly registered proprietor of the land for which the respondent seeks possession.

[37] Under rule 10.2 (2) (a) where a claim is commenced by fixed date claim form the rule permits an affidavit to be served with the claim form in lieu of particulars. As permitted by the rules, the respondent, commenced proceedings by use of the fixed date claim form containing its claim and properly filed and served affidavits in support of its claim. It is clear from the claim that the respondent was not seeking recovery of possession of

the property from the appellants as tenants although Mr. Spaulding contended that they were tenants. There is evidential material before this court which shows otherwise. The affidavit of Gordon Tewani demonstrates that the property was purchased at an auction and it was transferred to the respondent company. At paragraphs 7 and 8 he states:

-

- “7. The Premises are occupied by the Defendants Div Deep Limited, and/or Mahesh Mahatani and/or Hareh Mahatani or any of them, but to date they have failed despite my request to vacate the premises that now belongs to my company.
8. Through my Attorney-s-at-Law I wrote to their Attorney Mr. Winston Spalding Q.C. demanding that they leave my company’s premises, but they have refused to move and still remain on the premises. I attach marked “GT2” for identity copy letter from my Attorney-at-Law dated 19th February, 2007.”

[38] The fact that a landlord and tenancy relationship did not exist between the parties is also confirmed by the 2nd appellant, Mahesh Mahatani, in his affidavit in which he stated that the appellants were purchasers in possession, they having entered into a contract of sale with Topaz Jewellers Limited (“Topaz”) for the purchase of the property and had paid a deposit.

[39] Mr. Spaulding contended that the respondent in its claim for recovery of land from the tenants failed to comply with rules 8.8 (d) (i) and

(ii) and 8.9. I am constrained to disagree with his submission. The appellants were never the respondent's tenants and the respondent is not seeking to recover the property from them in their capacity as tenants. It cannot be denied however, that Mrs. Messado had sent them a notice to quit and deliver up possession of the property but this in itself did not and could not have converted their status into a tenancy.

[40] The respondent is not under a duty to comply with rule 8.8 (d) (i) and (ii) as it was not claiming against the appellants as tenants. In keeping with the dictates of rule 8.8, the respondent would only be required to adhere to rule 8.8 (b) by stating the remedy sought and the legal basis for its claim to that remedy. This it had done. None of the other factors laid down in rule 8.8 would be of relevance to the respondent's case.

[41] In obedience to rule 8.9, the respondent had set out statement of facts on which it relies as required by rule 8.9 (1). In compliance with rule 8.9 (2), the statement of case was short. A copy letter dated 19 February 2007 from the respondent's attorney-at-law to the appellant's attorney-at-law, informing the appellants that the respondent is the owner of the property and that they should vacate same within seven days of the date of the letter was exhibited to the affidavit of Gordon Tewani, as stipulated by rule 8.9 (3). However, the estimated value of the claim as required by

rule 8.9 (4) had not been stated in his affidavit nor in the fixed date claim form but Miss Davis, in an affidavit, with the authority of and from information of Mr. Tewani, stated the estimated value to be between \$13,000,000.00 and \$14,000,000.00. Rule 8.9 (5) is not applicable. It cannot be said that the respondent failed to comply with rule 8.9.

[42] A further issue to be addressed is whether the relief sought by the claimant is likely to involve substantial dispute of facts. I think not. As earlier indicated, the respondent's claim is for the recovery of possession of land owned by it. In the appellants' affidavit in support of the application of the 2 May 2007 they averred that they had entered into an agreement with Topaz through its managing director Raju Kemlani for the purchase of the property for the sum of \$15,000,000.00, consequent on which they paid a deposit of \$14,800,000.00. They subsequently became aware that Topaz had obtained a loan from National Commercial Bank on the security of the property. They lodged a caveat against the title for the property. After an exchange of communication between the appellants' attorneys at law and Topaz's attorneys at law, it was agreed that Mr. Kemlani would take steps to obtain a splinter title and have the bank release the title for the appellants' part of the property.

[43] Subsequent to that, they were advised by their attorney at law that they were "invited to negotiate the purchase of the said premises as the

monies we [they] had paid for its purchase was being converted to “advanced rental” by Topaz Jewellers.” Mr. Kemlani thereafter brought proceedings against them for the recovery of \$10,549,292.30 for monies due for mesnes profits.

[44] Following this, they saw an advertisement by National Commercial Bank in the Daily Gleaner whereby the bank had put up the property for sale by way of public auction. The appellants, in turn, placed an advertisement in the Daily Gleaner, the essence of which was to notify the public that they had an interest in the property. They attended the auction. There, they saw Mr. Tewani who admitted that he had knowledge that the property had been advertised for sale.

[45] It can also be readily observed from the grounds in support of the application, that the appellants rely on, among other things, the alleged failure on the part of the respondent to disclose certain facts, including the non disclosure of their interest in the property. Their grounds also make reference to deceit and fraud on the part of Mr. Kemlani.

[46] The learned judge in dealing with the question as to whether there were substantial issues of facts which would require the matter proceeding to trial said:

“Nowhere in this affidavit was nay (sic) fraud ascribed to the Managing Director or any officer of the Claimant company.

The sole aspersion cast on Gordon Tewani was that he was aware of the situation between the Defendants and Raju Khemlani regarding the premises prior to his successful bid.

It is instructive to note that no allegation of fraud on the part of anyone connected with the Claimant company is made by any of the Defendants.

Merer (sic) knowledge of other parties rights to assert a beneficial interest does not establish fraud against the person who purchases with such knowledge.

It was held in **Doreen Willocks v George Wilson and Doreen Wilson** (1993) 30 JLR p. 297 1 K91, that:

“.....a registered title confers on the proprietor Indefeasibility of his (sic) save for fraud and this is the very basis of the Torrens system.”

Unless fraud is raised on the part of the purchaser, there would be no defence to the purchaser's claim for possession.

Knowledge that any trust or registered interest is in existence shall not by itself be imputed as fraud. This is by virtue of Section 7 of the Registration of Titles Act. Section 106 of the same Act makes it clear that in the instant case the Defendants would have no right against the Claimant (purchasers) in respect of the exercise of a power of sale.

The Defendants' contentions against Raju Khemlani and the National Commercial Bank are issues which irrelevant to the Claimant's effort to obtain possession of the premises.”

[47] Mr. Spaulding, having contended that that the claim for possession by the respondent “will involve resolving substantial disputes of facts within the context of many legal issues and points of law and principles”,

the learned judge was bound to consider whether there were in fact substantial issues, between the parties, to be tried. In arriving at his decision, the learned judge examined the material which the appellants had placed before him by their affidavit, against the background of the respondent's claim. Undoubtedly, he was guided by and applied the relevant principles in determining whether triable issues were raised by the appellants and did not fail to take into account the law as it relates to the proprietorship of registered land, as he was obliged to do.

[48] The respondent's acquisition of the property is by way of a sale. A proper transfer has been effected, thus making it the legal owner of the property. Section 106 of the Registration of Titles Act expressly speaks to the indefeasibility of a registered title, save and except in the case of fraud. No allegations of fraud had been raised against the respondent or its duly appointed servant or agent with respect to its acquisition of the property. The learned judge correctly concluded that there were no substantial disputes of facts arising on the claim which would require resolution at trial and that the claim, as brought should proceed. It cannot be said that he was wrong in so doing.

[49] It follows therefore that Mr. Spaulding's contention that even in a case in which there is jurisdiction the court should not allow the matter to proceed on a fixed date claim form since the proceedings involve

substantial disputes of facts, is devoid of merit. As permitted by rule 8.1 (4) (d), the respondent had rightly acted in compliance with that rule and had proceeded accordingly. The appellants were not tenants and the claim against them would therefore have fallen within the purview of rule 8.8 (b) and not 8.8 (d).

[50] A further submission by Mr. Spaulding is that where there is a jurisdictional challenge, as prescribed by Part 9, a defendant does not have to file a defence and that where a defendant has not filed a defence within the prescribed time for so doing, the defendant is treated as not having accepted the court's jurisdiction to try a claim. He also argued that no order has been made for the time for the filing of a defence as mandated by rule 9.6. (7) (b) (i) nor did the court fix a date for case management conference as required by rule 9.6 (7) (b) (ii).

[51] I now outline rules 9.6 (1) and 9.6 (7). Rule 9.6 (1) states

- “9.6 (1) A defendant who –
- (a) disputes the court's jurisdiction to try the claim; or
 - (b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.
- (2) ...
- (3) ...
- (4) ...
- (5) ...

(6) ...”

[52] Rule 9.6 (7) reads :-

“9.6 (7) Where an application under this rule the court does not make a declaration, it -

(a) must make an order as to the period for filing a defence; and

(b) may –

(i) treat the hearing of the application as a case management conference; or

(ii) fix a date for a case management conference.”

[53] Mr. Spaulding's submissions are devoid of merit. The appellants, sought orders requesting that the court ought to refuse to exercise its jurisdiction under the fixed date claim form and that the fixed date claim form be struck out as being null and void. It appears to me that they were seeking declaratory orders under Part 9. The appellants, could not successfully raise an objection to the commencement of the proceedings by fixed date claim form by praying in aid Part 9 of the Rules. Firstly, the respondent, in proceeding by way of a fixed date claim form is not in breach of any of the relevant rules under Part 8 of the Rules. The nature of the claim makes it one which ought rightly to be commenced

by fixed date claim form. The claim as filed does not offend against the provisions of either Part 8 or Part 9 of the Rules.

[54] It is obvious that the respondent had adopted the correct procedure in bringing the suit. The respondent adhered faithfully to the dictates of the rule and clearly, had pursued its claim by employing the proper procedural regime. It is without doubt that the court is clothed with jurisdiction to hear and determine the respondent's claim brought by way of the fixed date claim form.

[55] Secondly, there are no allegations raised by the appellants which would amount to substantial issues of facts worthy of resolution at a trial. The challenges raised by the appellants are unsustainable.

[56] It is for the above reasons that I agreed with my learned colleagues to dismiss the appeal with costs to the respondent to be agreed or taxed.