

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV1056/2007

BETWEEN	TEWANI LIMITED	CLAIMANT
AND	DIV DEEP LIMITED	1 ST DEFENDANT/ ANCILLARY CLAIMANT
AND	MAHESH MAHTANI	2 ND DEFENDANT/ ANCILLARY CLAIMANT
AND	HARESH MAHTANI	3 RD DEFENDANT/ ANCILLARY CLAIMANT
AND	TOPAZ JEWELLERS LIMITED	1 ST ANCILLARY DEFENDANT
AND	RAJU KHEMLANI	2 ND ANCILLARY DEFENDANT
AND	SURESH KHEMLANI	3 RD ANCILLARY DEFENDANT
AND	NATIONAL COMMERCIAL BANK	4 TH ANCILLARY DEFENDANT
AND	TEWANI LIMITED	5 TH ANCILLARY DEFENDANT
AND	REGISTRAR OF TITLES	6 TH ANCILLARY DEFENDANT

C. Davis and P. Bailey for the Claimant

C. Dunkley and G Lopez instructed by Lopez & Lopez for the Defendants

*First hearing of Fixed Date Claim Form -
Considered Summarily - Revocation of
Certificate of Title*

Heard: May 4, 28 and October 20, 2010

Lawrence- Beswick J

1. Tewani Limited, the claimant, is registered as the proprietor of land registered at Volume 1391 Folio 496 of the Register Book of Titles known as 81B King Street.

The defendants (hereafter referred to as the Mahtanis) are in occupation of the premises and Tewani Limited has served them with notice to vacate the premises.

2. The Mahtanis assert that they are in lawful occupation of the land because they are purchasers in possession, and that Tewani Limited has no right to the property.

3. On March 6, 2007, Tewani Limited filed a Fixed Date Claim form against the Mahtanis claiming, *inter alia*, possession of the premises and mesne profits from them for use and occupation of the land from December 8, 2006. This is the first hearing of the Fixed Date Claim form. Tewani Limited, by Notice of Application here is seeking relief against the Mahtanis including Orders:

- i. That the Fixed Date Claim be determined summarily.
- ii That there be judgment for Tewani Limited against the Mahtanis on the Fixed Date Claim.
- iii That Tewani Limited be granted possession of premises part of Number Eighty King Street known as Eighty One B King Street in the parish of Kingston, and being part of the land registered at Volume 1391 Folio 496 of the Register Book of Titles.
- iv That Tewani Limited be awarded mesne profits for the Mahtanis' use and occupation of the said land, in accordance with the rental values set out in the expert report of D.C. Tavares Finson Realty Limited.
- v. Interest on the amount awarded at the rate of 15% per annum, or such other rate as this Honourable Court thinks fit.
- vi. That the Ancillary Claim against the 5th defendant be struck out.

vii. That the Ancillary Claim be dealt with separately from the main claim.

4. Topaz Limited had owned the property before Tewani Limited purportedly bought it. Raju and Suresh Khemlani are directors of Topaz Limited, and mortgaged the property to National Commercial Bank (NCB). The mortgage loan fell into default and, at the instance of NCB, the property was put up for public auction under its power of sale as a mortgagee.

5. Mr. Tewani (representing Tewani Limited) attended the auction held on August 17, 2006 and successfully bid for the property. He paid the purchase price and Tewani Limited was registered as the proprietor of the land.

6. The Mahtanis' assertion that they are purchasers in possession is based on a series of events. It is their case that in about 1995 they had agreed to purchase the said property from Topaz Limited/Raju Khemlani. The agreed purchase price was \$15,650,000.00 and they have paid \$14,800,000.00 to Raju Khemlani, representing Topaz Limited. They state that they were put in possession of the premises in 1996 awaiting the conclusion of the Sale Agreement with Topaz Limited/Khemlanis. The transaction was never concluded despite many promises from Mr. Khemlani. However, they remained on the property, considering themselves to be purchasers in possession and entitled to remain there. They claim that Topaz Jewellers was holding their legal interest in the land in trust for them.

7. The Khemlanis mortgaged the property to NCB without notifying the Mahtanis, who are their cousins. When the Mahtanis became aware of that, the Khemlanis and themselves met with NCB's managing director and agreed to have splinter titles prepared for the property.

However, the Mahtanis allege that contrary to the agreement, they were not registered as proprietors of their portion, and the mortgage was maintained over the property. When the

mortgage loan fell into arrears, the property which they regarded as theirs, was auctioned, despite their protestations, to Tewani Limited which now requires possession of the property.

Fixed Date Claim Form – First Hearing

8. In this the first hearing of the Fixed Date Claim form, Tewani Limited seeks to have the claim determined summarily.

Rule 27.2(8) of the Civil Procedure Rules 2002 (CPR) provides that the Court may treat the first hearing of a fixed date claim as the trial of the claim if the Court considers that the claim can be dealt with summarily.

Such a summary approach to the fixed date claim form would be appropriate if there is no reasonable defence to the claim.

Revocation of Certificate of Title

9. The issue at the root of this claim is whether or not the Certificate of Title can be revoked in the circumstances of the case. The question is this: - where a person is registered as proprietor of land, can that registration be revoked?

10. Section 69 of the Registration of Titles Act provides that the registered proprietor's Certificate of Title shall be conclusive evidence that such proprietor has a good and valid title to the land described, except in the case of fraud.

11. Several authorities were submitted by Counsel Ms. Davis on behalf of Tewani Limited, all supporting the law that a registered title stands undefeated, unless fraud is proved.

In **Doris Willocks v. George Wilson and Doreen Wilson**¹ Carey P (Ag.) (as he then was) reflected on what he described as settled law:

“[R]egistration of title confers on the proprietor indefeasibility of his title, save

¹ [1993] 30JLR 297

for fraud... [and] is the very basis of the Torrens System of registration of land...”²

12. The Registration of Titles Act clearly states that basic tenet of the law:

“70. Notwithstanding the existence in any other person of any estate or interest... the proprietor of land... under the operation of this Act shall except in case of fraud, hold the same... absolutely free...”

The section further details certain qualifications or encumbrances which are not relevant here.

13. There is no direct allegation of fraud on the part of Tewani Limited here. However, the allegation is that Tewani Limited was aware that the Mahtanis had an interest in/claim to the land to the extent that the Mahtanis had filed suit in the Supreme Court, seeking to retrieve it. Defence Counsel argues that registration of Tewani Limited as being the proprietor of the land in those circumstances is improper.

The interest/claim had been published in the newspaper, and a representative of the Mahtanis at the auction told Mr. Tewani of the interest/claim. In addition, a caveat had been lodged.

Counsel for the Mahtanis, therefore argues that Mr. Tewani knew that a fraud had been perpetuated against the Mahtanis and therefore he wrongfully concurred in the sale.

14. In my view, none of the foregoing amounts to fraud at the instance of Tewani Limited and consequently the registered title must remain undefeated.

The Registration of Titles Act clearly addresses this proposition:

“s.17 Except in the case of fraud, no person... tak[ing] a transfer from the proprietor or any registered land... shall be affected by notice,... of any trust or unregistered interest,... and the

² Pg. 299

knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

15. In my view, there is no reasonable defence to this claim. The law as I understand it, is quite clear as it concerns the effect of registered proprietorship of land. It does not brook credible argument. The registered title can only be defeated by fraud. As there is no proof of fraud here, it cannot be defeated, even if the purchaser were aware of another interest being claimed. In the circumstances therefore the claim can be dealt with summarily.

16. I am fortified in my view by the fact that in an earlier decision, **DIV Deep Limited, Mahesh Mahtani, Haresh Mahtani v Tewani Limited**³, the facts considered by the Court of Appeal were substantially the same as in the instant application and Harris JA opined that, “there were no substantial disputes of facts arising on the claim which would require resolution at trial...⁴ The challenge raised by the appellants is unsustainable⁵.” In my view, there are no issues to be resolved at a trial and the Fixed Date Claim form can be dealt with summarily by this application. I therefore order that there be judgment for the claimant and that the claimant recover possession of the property from the Mahtanis.

Mesne Profits

17. It is undisputed that the Mahtanis occupy the land. The Certificate of Title shows that Tewani Limited was registered on December 7, 2006 as the proprietor of the premises. Tewani Limited would therefore be entitled to mesne profits and has claimed for mesne profits from December 8, 2006 until now.

18. Tavares & Finson Realty Limited, based on an Order of the Supreme Court, inspected the property to determine its rental value. Their report is before the Court and has been unchallenged,

³ SCCA 114/08 delivered 26/3/10

⁴ Par. 47

⁵ Par. 55

save for disagreement between the parties as to what is to be regarded as expenses borne by the Mahtanis to effect improvements to the property.

19. Miss Davis, Counsel for Tewani Limited has submitted that for “ease of resolution” the value without improvement should be awarded to Tewani Limited.

The valuation puts the sum of \$13,590,000.00 as being rental for December 2006 to February 2010.

20. In the absence of any evidence that the Mahtanis have quit the premises, I award a further amount of \$2,960,000.00 for their occupation from February 2010 to October 2010 being 8 months at \$370,000.00 per month (as per valuation report).

The total mesne profits due to Tewani Limited would therefore be \$16,550,000.00 from December 2006 to October 2010.

Commercial Interest

21. In the Fixed Date Claim form, Tewani Limited claims interest at a commercial rate. Miss Davis, Counsel for Tewani Limited, argued that commercial interest of 15% would be appropriate in this case as the premises are commercial property. She submitted documentation reflecting commercial bank weighted loan rates for the years 2006 – 2010. They average at 17% per annum.

Ancillary Claim against Tewani Limited

22. An ancillary claim was filed by the Mahtanis against Tewani Limited for the “fraudulent circumvention of Caveat... duly recorded against [the] land... thereby procuring the fraudulent transfer of the said lands to Tewani Limited.”

The ancillary claim further (a) seeks a rescission of the Transfer of the land, (b) claims against Tewani Limited for falsely representing itself to be a disinterested 3rd party bona fide purchaser for value without notice.

The ancillary claim against Tewani Limited, seeks also, *inter alia*, that Tewani Limited indemnify the Mahtanis for any mesne profits, damages or compensations which may be awarded against them.

23. The evidence is that Tewani Limited was represented at a lawful public auction and, through its representative Mr. Gordon Tewani, made the highest bid for the purchase of the premises.

There is no evidence of any fraudulent circumvention of the caveat by Tewani Limited. Mr. Tewani attended a public auction and purchased the property as permitted by law. The property was being sold under the unfettered mortgagee's powers of sale.

I therefore strike out the ancillary claim against Tewani Limited as having no merit.

Separate trial of Ancillary Claim

24. The ancillary claim in this matter seeks relief against Topaz Jewellers, Raju and Suresh Khemlani, National Commercial Bank, Tewani Limited and the Registrar of Titles.

In view of my conclusion that judgment is to be entered in the Fixed Date Claim form, it follows that the ancillary claim will be tried separately from the original claim.

Order

1. Judgment for the claimant, Tewani Limited.
2. Possession granted to Tewani Limited of premises part of Number Eighty King Street known as Eighty-One B King Street in the parish of Kingston, and being part of the land registered at Volume 1391 Folio 496 of the Register Book of Titles on or before February 28, 2011.
3. Mesne profits to be paid to the claimant, Tewani Limited by the defendants, DIV Deep Limited, Mahesh and Haresh Mahtani in the amount of \$16,550,000.00 and continuing at the

rate of \$370,000.00 per month from October 8, 2010 until the defendants vacate the premises with interest at the rate of 17% per annum.

4. Ancillary claim against the 5th ancillary defendant, Tewani Limited, struck out.
5. Ancillary claim against the other ancillary defendants is to proceed separate from the original claim.
6. Costs to the claimant, Tewani Limited, to be agreed or taxed and to be paid by the defendants, DIV Deep Limited, Mahesh and Haresh Mahtani.