[2010] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 6/2007

BEFORE: THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	**AMERICAN JEWELLERY COMPANY LIMITED**	**1st APPELLANT**
AND	**INDRU KHEMLANI**	**2ND APPELLANT**
AND	**ROSHAN KHEMLANI**	**3RD APPELLANT**
AND	**SHAM KHEMLANI**	**4TH APPELLANT**
AND	**RAJ KHEMLANI**	**5TH APPELLANT**
AND	**COMMERCIAL CORPORATION JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**TEWANI LIMITED**	**2ND RESPONDENT**
AND	**GORDON TEWANI**	**3RD RESPONDENT**
AND	**JENNIFER MESSADO**	**4TH RESPONDENT**

Miss Hilary Phillips, Q.C., Mrs. Denise Kitson and Miss Lauren Sadler instructed by Grant, Stewart, Phillips and Company for the appellants

Mrs. Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the 1st respondent

Miss Carol Davis for the 2nd and 3rd respondents.

Garth McBean instructed by Garth McBean and Company for the 4th respondent

30 & 31 March, 1, 2 & 3 April 2009 and 1 October 2010

COOKE, J.A.

[1] This appeal challenges the correctness of the decisions made by Beswick J in five consolidated claims. These claims and the defences thereto were usefully summarized by the learned trial judge and I accept that effort as adequate for the purposes of the debate which was conducted before us. I now reproduce this summary, but before I do this, I must indicate that "Mr Khem" is the 2nd appellant, "Mr T" is 3rd respondent; "American" is the 1st appellant "T Ltd" is the 2nd respondent and "Commercial" is the 1st respondent.

[2] The summary is as follows: -

"The claims

> "10. American and Mr. Khem filed **Suit CL A018/2001** seeking to recover damages from Commercial and Mr. T for breach of the contract for the sale of the Tropical Plaza property alleging that the full purchase price was not paid and that Commercial's name was wrongfully registered as owner.
>
> 11. American therefore also claims damages against Ms. Messado for breach of her professional undertaking not to deal with the Tropical Plaza premises until the purchase price was paid.

12. American also seeks to recover the monies described as the balance of the purchase price for the premises. The amounts claimed differ. The Further Amended Writ of Summons and Endorsement claims the amount to be $1,709,738.50. The Further Amended Statement of Claim claims the amount to be $1,657,488.91and in the written submissions the amount outstanding is said to be $1,656,825.57.

13. American also asks for a declaration that the lease of the premises would commence when that sum was paid.

14. American and Mr. Khem, in this suit, also claim damages from Commercial, T Ltd, and Mr. T for conspiracy to injure and/or to defraud and/or damages for fraud.

15. Mr. Khem, as against T Ltd., asks for an Order that the transfer of the King Street property be set aside and that an injunction be granted restraining it from dealing in or parting with that property.

16. Commercial and Mr. T in their defence say that all monies due to American were paid and American remained in occupation of a portion of the premises and were thus liable to pay for that occupation.

17. Mr. T and Commercial contend that they were entitled to set off certain amounts from the purchase money for American's use and occupation of part of the Tropical Plaza property, i.e. the American shop. Their counterclaim therefore is for American's use and occupation of one half of the Tropical Plaza property (the American shop) with General Consumption Tax (GCT) between February 8 and December 31, 2000. The Special Damages are particularized as being use and occupation of shop 3 Tropical Plaza from March 1, 2001 to present and continuing with GCT. They deny any conspiracy to defraud, or any fraud and or any wrong-doing and plead that the purchase of the King Street property was a separate transaction from the purchase of the Tropical Plaza property.

18. In Suit **CL C149/2001** Commercial claims rental monies from Roshan, Sham and Raj Khemlani for Shop 3 Tropical Plaza and in **CL C255/2001** claims for possession of that shop. The defence to both claims is that the property still belongs to American and therefore the lease has not commenced.

19. In Suit **CL T024/2001**, T Ltd, claims possession of 70A King Street. Mr. Khem denies that T Ltd., is entitled to that relief because, he alleges, the transfer to T Ltd., was wrong and was part of a conspiracy to defraud and a fraud. He counterclaims for damages for fraud and/or conspiracy to injure and/or defraud against T Ltd., and the ancillary defendants, Commercial, Mr. T and Ms. Messado whom he had joined to the suit and asks for the transfer to be set aside and an injunction be granted restraining T Ltd from dealing in or parting with the premises. T Ltd., and the ancillary defendants deny any wrongdoing.

20. In Suit **CL T151/2001,** T Ltd., claims from Mr. Khem mesne profits for occupying the King Street property from January 5, 2001 to the present and continuing.

21. Mr. Khem's defence is that the transfer to T Ltd., was fraudulent and he denies that his continued possession of the premises is wrongful, so that T Ltd., is not entitled to the monies claimed.

22. Mr. Khem counterclaims in this suit against T Ltd., and against Commercial. Mr. T and Ms Messado whom he had also joined as ancillary defendants to the counterclaim for damages for fraud and against T Ltd., for an order that the transfer of January 5, 2001 of this King Street property to T Ltd be set aside and that T Ltd. be restrained from dealing in or parting with the premises.

23. Mr. Khem contends that there was a conspiracy involving Mr. T, Mr T's companies and Ms Messado, T's lawyer, focused on defrauding Mr. Khem by deliberately delaying payment to him of the balance of the purchase price of Tropical Plaza. Mr. T, so it was alleged, knew that without that money, Mr. Khem

> would be unable to pay his debts on the King Street property, and an auction of the premises would be inevitable. Mr. Khem asserts that in furtherance of the conspiracy, Mr. T then stood ready to purchase that King Street property and did in fact make that purchase at an undervalue, thereby fraudulently depriving Mr. Khem of the property."

[3] The central issue in this contest is whether or not parties who had conduct of the purchaser's side of the bargain in respect of the contract for the sale of the Tropical Plaza property carried out their obligation in a manner which was calculated to injure the 2nd appellant. The contention of the 1st appellant was that there was a conspiracy whereby, by the use of fraudulent delaying tactics, the purchase monies in respect of the contract of sale were deliberately withheld so that the 2nd appellant was without funds to discharge a mortgage on his property at 70A King Street in the parish of Kingston. This inability to discharge this mortgage resulted in the mortgagee exercising its power of sale. This sale was through the medium of a public auction. The 3rd respondent at the auction bought the property for "an undervalue", it is said. The injury which the 2nd appellant suffered was the loss of his property at 70A King Street. The alleged conspiracy had achieved its objective as the 2nd respondent acquired 70A King Street by fraudulent means.

[4] Counsel for the appellants, Ms Phillips Q.C., subjected the judgment of the learned trial judge to microscopic scrutiny and in the written submissions listed some twenty six instances where there were errors in law and in fact. These

instances include criticism of the learned trial judge's treatment of a lease agreement which I do not regard as being relevant to what I regard as the central issue and will be dealt with subsequently in this opinion. As regards the learned trial judge's findings of fact, I will be cognizant of the guidance given by their Lordships' Board in a case from our jurisdiction – **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1982) 35 WIR 303 where at page 305 e - f, it was said :

> "The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar, but ii is worth stressing yet again what has been said both by the House of the Lords and by this Board. The matter is summed up in the well-known passage from the speech of Lord Thankerton in ***Watt (or Thomas) v Thomas*** [1947] AC 484 at pages 487 and 488:
>
> > "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (ii) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[5] I now turn to the agreement for sale in respect of the Tropical Plaza property. It is to be noted that this agreement is between the 1st appellant and the 3rd respondent. The 2nd appellant was the majority shareholder in the 1st appellant. This agreement was made on 16 August 1999. The subject matter was land known as No 3 Tropical Plaza, Kingston and comprised two shops, one of which was apparently used by the 1st appellant to carry on a jewellery business. The property was to be conveyed to the 3rd respondent or his nominee. In fact, it was conveyed to the latter who is the 1st respondent. This agreement for sale contained the following relevant clauses and special conditions:

> **"Sale Price:** SEVENTEEN MILLION JAMAICAN DOLLARS ($17,000,000.00)
>
> **How Payable:** A deposit/earnest money of TEN PERCENT (10%) of the sale price shall be payable to the vendor's Attorneys-at-Law as stakeholder thereof, on the execution of this Agreement.
>
> A further payment of TEN PERCENT (10%) of the sale price shall also be payable to the vendor's Attorneys-at-Law as stakeholder thereof, on the execution of this Agreement.
>
> The entire balance of the Sale Price shall be payable on or before the 30th September 1999 or secured and payable by an undertaking from the National Commercial Bank Jamaica Limited, Bank of Nova Scotia Jamaica Limited or CIBC Jamaica Limited in a form acceptable to the vendor's Attorneys-at-Law."

> **"Completion:** On payment in full of the Sale Price and cash fees and costs of transfer and such other amounts payable by the purchaser hereunder as hereinbefore provided and in exchange for the delivery of the duplicate Certificate of Title for the said land with a transfer executed by the Vendor, along with discharges of mortgages for all or every mortgage duly impressed with Government Stamp Duty and Transfer Tax along with a cheque payable (sic) the Register of Titles for the registration fee payable herein on or before the 30th September, 1999.**"**

Special condition 2 stated inter alia:

> "2. It is hereby understood and agreed that the Vendor's Attorneys-at-Law shall be entitled to pay the stamp duty and transfer tax payable in respect of this Agreement from the deposit and or payments paid hereunder… "

There is also special condition 11 which stated:

> "The Vendor HEREBY FURTHER AGREES to lease the one half section of the said premises being the shop now known as American Jewellery Company Limited for a period of three years from the date of completion hereof at the monthly rental of $125,000.00 per month such rent payable on the first day of each and every month."

[6] There was also another agreement for sale of chattels in the Tropical Plaza property between the same parties. The sale price was $3,000,000.00. Thus, under both contracts made on the same day, the 3rd respondent had an obligation to pay $20,000,000.00. The contending parties have treated both contracts as if they were one and so will I. In respect of both agreements for

sale, the date for completion was to be 30 September 1999, some six weeks after the execution of the agreement for sale. By that date the vendor should have fulfilled its obligation under the completion clause (supra). At the time of the execution of the agreement for sale there was a mortgage on the subject property. The vendor's attorneys-at-law had to satisfy special condition 2 (supra). In respect of the purchaser's obligation, the "How payable" and the "Completion" clauses do not appear to be easily reconcilable. Whereas the "How payable" clause speaks to the balance of the purchase price being payable by 30 September 1999, or "secured and payable by an undertaking … to the vendor's Attorneys-at-Law", the "Completion" clause demands payment in full of the sale price. Perhaps the requisite undertaking is to be regarded as "payment in full".

[7] I will now examine the evidence to discern to what extent the parties to the contract honoured their respective obligations:

(i) On or about 11 August 1999, that is, before the executed sales agreement, the 3rd respondent paid to Raymond Clough, attorney-at-law who was acting for the 1st appellant, $4,000,000.00.

(ii) The minor shareholders of the 1st appellant (members of the family of the 2nd appellant) had obtained an injunction against the sale of the subject property. This injunction was discharged in December 1999.

(iii) On 29 October 1999, the purchaser was sent a new transfer and two copies with transferee as Commercial Corporation Limited, 20 Constant Spring Road.

iv) On or about 30 December 1999, the mortgage to which the Tropical Plaza property was subject was discharged by the purchaser. This amounted to $6,397,312.82. The learned trial judge accepted this figure at the then prevailing exchange conversion rate of J$41:00 to US$1:00, as regards the loan then standing at US$156,032.00.

v) Raymond Clough, on or about 15 March, 2000 accepted the undertaking of Jennifer Messado and Company to pay $6,120,892.18, that sum representing, in Mrs. Jennifer Messado's view, the then balance of the purchase price.

vi) Jennifer Messado, the attorney-at-law acting for the purchaser made by letter, repeated requests for a stamped agreement of sale (special condition 2 supra). This request went unheeded and eventually she undertook that exercise and paid the requisite sum of $2,209,990.00.

vii) On 16 June 2000 a registered title to the subject property was obtained in the name of the nominee, the 1st respondent herein. This would appear to be all due to the efforts of Mrs. Jennifer Messado. On 18 July 2000 the purchaser paid $2,000,000.00.

viii) On or about 30 August 2000, the purchaser paid $388,402.18 which Jennifer Messado considered was the final amount payable by the purchaser.

[8] In a statement of account sent by Mrs. Messado, there were two items which formed the alleged basis for the deduction of monies from the purchase price which was payable. The first pertained to "rental due (inclusive of G.C.T) for 4 months for use and occupation of the premises" from March to June 2000 at $125,000.00 per month. The total was $575,000.00. The second sum was for $862,500.00 being, "Further amount agreed to be deducted for rental July, August, September, October, November and December – six (6) months at $125,000.00 + G.C.T". The final amount payable was stated to be thus $388,402.18.

[9] The appellants complain that the "purchaser sought to vary the terms of the contract so that the method of registration of the purchaser on the title was changed; so that the purchaser could get early possession of the shop not occupied by A.J.C. (1st appellant); so that special condition 11 would be discharged; and so that rental could be charged before the completion of the contract". There are three questions to be asked: -

(a) what were the significant variations?

(b) were these variations consensual?

(c) if they were not consensual, what impact did these variations have on the completion of the contract and in particular, did these variations constitute fraud on the part of the purchaser?

[10] There was a plethora of correspondence between the lawyers representing both parties. I am compelled to say that the tenor of the various letters which passed between them displayed unacceptable discourtesy unbecoming of our profession. On 17 January 2000, Mrs. Messado wrote to Mr. Raymond Clough and the relevant part of the letter is reproduced below:

"January 17, 2000

Clough, Long & Co.
Attorneys-at-Law
81 Harbour Street
KINGSTON

Attention: Mr. Raymond Clough

Dear Sirs:

Re: Purchase of Shop at Tropical Plaza, Kingston 10
Gordon Tewani from American Jewellery Co. Ltd.

We refer to our discussions and to our client's instructions regarding the release by the Vendor of Special Condition number 11 of the Agreement of (sic) Sale regarding the Lease of the subject premises.

We now enclose in the name of American Jewellery Company Limited for the sum of ***FOUR MILLION DOLLARS*** ($4,000,000.00) as an immediate payment to the Vendor,

hereby varying the contract of sale **IN *EXCHANGE*** for the following variations to the Agreement:-

a) the delivery of vacant possession by the Vendor on or before the 28th February 2000 in exchange for payment of the final difference in purchase money by the purchaser;

b) the failure by the Vendor to adhere to paragraph (a) above will result in the Vendor being liable to the Purchaser for interest on all amounts previously paid by the Purchaser, this would be approximately the sum of $14,000,000.00 at 40% interest calculated to the date of the delivery of vacant possession herein, which will have to be deducted from the final balance payable;

c) TIME IS OF THE ESSENCE of the provisions herein."

Mr. Clough inscribed on this letter "Jennifer, I feel I will be able to deal with this matter with client but cheque has to be made to me". On the 27th January, Mr. Clough wrote to Mrs. Messado saying, "We met with our client this morning. Our client will make a decision in relationship to your offer early next week". Then on the 8th February, Mr. Clough sent a letter enclosing:

(i) Keys for shop in accordance with Agreement for sale (sic)

(ii) letter of possession.

The 2nd appellant admits that he agreed to the early handing over of the keys to the shop not occupied by the 1st appellant. There is no evidence of any agreement in respect of the charging of interest as contained in paragraph (b) of the Messado letter of 17 January 2000 (supra). There is also the letter of 13 July 2000 from Mrs. Messado to Mr. Clough. This letter was in these terms:

"July 13, 2000

Clough Long & Co
Attorneys-at-Law
81 Harbour Street
KINGSTON

Attention: Mr. Raymond Clough

Dear Sirs:

Re: Sale of Lot 3 Tropical Plaza – American Jewellery Company Limited to Gordon Tewani/Nominee

We refer to our discussions regarding the proposed Lease for the above premises and confirm that our client has agreed to finalise the Lease in Jamaican Dollars, on the following terms and conditions:-

1. J$125,000.00 per month, plus G.C.T. - Year 1
2. J$140,000.00 per month, plus G.C.T. - Year 2
3. J$170,000.00 per month, plus G.C.T. - Year 3

They will further agree to execute the Lease, provided that the rental as agreed at J$125,000.00 per month, plus G.C.T. for the first four (4) months and the remainder of the year, is deducted from the balance purchase money payable herein.

In consideration we will pay you Two Million Dollars ($2,000,000.00) on account and will fulfill our undertaking in accordance with the Statement of Account already submitted, minus the funds stated herein.

The cheque for the said sum of $2,000,000.00 is sent on the condition that your client will have no OBJECTION to the proposals stated herein."

It is to be observed that this letter was subsequent to the conveyance of the Tropical Plaza property in the name of the 1st respondent. No lease on the terms

suggested in this letter was ever executed. The $2,000,000.00, as earlier stated, was paid on 18 July 2000. It seems more than a little odd that Mrs. Messado could have written this letter at a time when her client was in possession of a registered title. Be that as it may, this attempt at a variation was never realized. This payment may be of significance in another aspect of this appeal and will be considered in due course.

[11] The only meaningful variation pertained to early possession of the shop not occupied by the 1st appellant. As to this, as already said, that had the approval of the 2nd appellant. Therefore, the debate as to whether or not Mr. Clough was clothed with the ostensible authority to bind the appellants would not seem to arise in respect of this variation. In any event the learned trial judge found that:

> "In my view the negotiation of the cheques marked an acceptance of the terms and conditions under which they were paid. The money was not returned. The changes were not unilateral, but were instead proposed by Mr. T through Ms Messado and were accepted by Mr. Clough on behalf of Mr. Khem, in exchange for money paid before the documents of Title were ready to be exchanged. The new terms and conditions now governed the agreement. They were the result of negotiations. I do not regard them as the source of delay."

The learned trial judge further found:

> "That Mrs. Messado had every basis for proceeding with the understanding that the new conditions had been accepted by Mr. Khemlani as Mr. Clough had negotiated the cheques."

I am accordingly of the view that the complaint made about the error of the learned trial judge that the variation was not consensual is unfounded. It is unnecessary for me to consider the position if there was no consensus ad idem.

[12] The learned trial judge ruled that the 1st appellant must pay interest at a commercial rate on the amount paid in excess of the agreed initial quarter million deposit from the original completion date of 30 September 1999 until the actual completion date of 16 June 2000. No basis was proffered for this award and I cannot discern any. I am dealing with this issue at this stage as paragraph (b) in the Messado letter of 17 January 2000 (supra), spoke to the charging of interest and this may have influenced the judge. If so, it should not have so done. There was no consensus as to the charging of any interest. Further, paragraph (b) was contingent on the request in paragraph (a) which was realized. I cannot appreciate why a party should, without more, be awarded interest on monies paid, which monies that party was obliged to pay. I would set aside this award.

[13] The appellants criticize the learned trial judge for not finding that the purchaser had breached the terms of the contract and that the delay in completion after December 1999 was entirely the fault of the purchaser and his attorney-at-law. Previously, in paragraph 7 (supra), I outlined what I regarded as significant aspects of the transactions relevant to the contract of sale. That overview demonstrated that major obligations to be undertaken by the vendor

had to be done by the purchaser so that the contract could be completed. Accordingly, this criticism does not appear to be well-founded. This is how the learned trial judge dealt with this aspect of the case:

> "Further, there is much evidence that Mr. Clough played the major role in causing delay in the completion of the sale as follows:
>
> 1. The Agreement for Sale was not stamped with Stamp Duty or Transfer Tax although Mr. T had paid a deposit of $4 million and that could have covered the amount for the duty and tax.
>
> 2. Mr. Clough in a letter dated April 14, 2000 stated, "The writer will attend with a copy of the stamped agreement and/or fax you the front page thereof". This gave the impression that these amounts had been paid. That was a false impression.
>
> 3. Mr. Khem was informed by Mr. Clough that he was stamping the document but that was untrue.
>
> 4. Mr. Khem's evidence is that American did not have the money to discharge the mortgage on the Tropical Plaza property.
>
> 5. Ms. Messado did not receive information that Union Bank had received US$156,032.02 and had closed the loan to American until January 3, 2000 when she received a letter from Union Bank. It was Mr. T who had supplied that money.
>
> 6. Union Bank refused to accept Mr. Clough's undertaking according to the unchallenged evidence of Ms. Messado.
>
> 7. Mr. Clough was requesting an account from Union Bank in a letter exhibited dated January 6, 2000, months after the original date set for completion. This, he wrote to them, was delaying

> the completion of the sale of the Tropical Plaza premises.
>
> It follows that I find that it was not Mr. T who failed to pay the balance of the purchase price promptly. On December 31, 1999, Mr. Khem was still not in a position to complete the sale.
>
> In any event, evidence is absent as to the proceeds from the Tropical Plaza property being sufficient to discharge the debt on the King Street property. Indeed, there is an absence of proof that Mr. T even knew that that particular property belonged to Mr. Khem. Mr. T's evidence, which I accept as being true, is that the day before the auction he saw the advertisement, checked the address and that is when he found that it belonged to Mr. Khem. Nor is there credible evidence of any link between Tropical Plaza property sale and the King Street property sale, except for the fact that some of the parties are involved in both sales.
>
> It is my finding therefore that no fraud has been proved to have been committed by Mr. T, T, Ltd, Commercial or Ms. Messado. They were not dishonest in this transaction."

There was evidentiary material which entitled the learned trial judge to make those findings.

[14] The appellants submitted that the sum of $862,500.00 which was deducted from the purchase price (paragraph 8 supra) was wrongly done as there was never any agreement to deduct rental from the purchase price. The learned trial judge ruled that the sum of $575,000.00 was wrongly deducted as that sum pertained to a period when the vendor was still lawfully in possession, the registered title having been obtained on 16 June 2000, prior to Mrs Messado

sending the final statement dated 18 July 2000. She wrote to Mr. Clough on 29 August 2000, stating inter alia:

> "We refer to previous correspondence in this matter and now enclose herewith cheque for Three Hundred and Eighty-eight Thousand Four Hundred and Two Dollars and Eighteen Cents ($388,402.18) in full and final settlement of our client's obligations herein."

In that same letter, Mr. Clough was asked to sign a copy letter in acknowledgement of receipt and in discharge of "our client's obligations herein". The learned trial judge found that the statement of account was agreed and the final balance was acknowledged on 30 August 2000. The acknowledgment was the signature of Mr. Clough. This conclusion is without fault. Therefore, the question arises as to whether the 1st appellant was bound by Mr. Clough's agreement that the sum of $862,500.00 should have been deducted from the purchase price. Mr. Clough had conduct of bringing the contract to closure. In the final statement the deduction from June to December 2000 was stated to be "agreed". This was not contested by Mr. Clough. By special condition 11 (supra) a lease should have been executed contemporaneously with the completion of the contract. However, the 1st appellant remained in occupation of the shop in which it conducted its business and apparently intended to so remain, hence special condition 11. Both the 1st appellant and its attorney-at-law must be presumed to have been aware of this. The amount charged for rental/occupation and use was the same to be paid as was stipulated, that is, $125,000.00 per month, a sum which attracted G.C.T.

This background cannot be ignored in considering the instant issue. It does not seem perplexing to me that there was an agreement to have made this deduction. Admittedly, it was, as counsel said – a deduction in futuro, but it was a deduction that accorded with the reality of the circumstances. In **Thompson v Cartwright** [1863] 33 Beav 178 at 185, Sir John Romilly M.R. said:

> "I take the rule to be generally that the client must be treated as having had notice of all the facts which in the same transaction, have come to the knowledge of the Solicitor and that the burden of proof lies on him (the client) to show that there is a probability, amounting to a moral certainty, that the solicitor would not have communicated that fact to his client."

This dicta was cited with approval by the House of Lords in **A.S. Rendel v Arcos Ltd.** [1973] 3 All E.R. 577 at 588, per Lord Wright. I accept the correctness of this statement. In this case, the statement of account was dated 18 July 2000. The letter signed by Mr. Clough agreeing to that statement was dated 29 August 2000. It is to be assumed that the fact of the submission of the statement and its contents was communicated to the appellants. There is also the Jamaican authority of **Thompson v Alexander** [1946] 6 W.I.R. 538 where Lewis J.A. at page 541 opined that:

> "In my opinion the instructions given him (as a retained solicitor) to accept the offer and complete the sale included an implied authority to do whatever was reasonably necessary to bring the sale to a successful conclusion."

I would not regard Mr. Clough's agreement to the deduction of the $862,500.00 as being unreasonably unnecessary, in bringing the sale to its conclusion.

Therefore, my view is that either the appellants agreed to this deduction as there was communication of the statement of account to which Mrs. Messado received no objection or, that Mr. Clough had an implied authority to accept, which he did. I would say that this deduction was not incorrectly made.

[15] At this juncture, perhaps it is convenient to deal with the undertaking given by Messado and Company on 15 March, 2000. This undertaking is not in accordance with the requisite undertaking prescribed on the sales agreement, as set out in the 'How Payable' clause. However, no issue seems to have been made of this variance and the undertaking was essentially the undertaking of Messado and Company (Mrs. Messado in effect) to pay the balance of the purchase monies at the time of the registration in her client's name. Thus the balance of the purchase monies should have been paid on or about 16 June 2000. The learned trial judge ruled that there was a breach of the undertaking in respect of the payment of $388,402.18, and that interest should be paid thereon at a commercial rate to be determined either by agreement within 30 days of her judgment or by the Registrar of the Supreme Court. The period for which the interest was to be calculated was from 23 June 2000 to 29 August, 2000. The learned trial judge had allowed 7 days from the date of registration for the balance of the purchase monies to be paid. The appellants are aggrieved that there was not a similar approach to the payment of $2,000,000.00, which was paid on 18 July, 2000. There is, as the appellants submitted, a want of consistency. There was a breach of the undertaking in not

paying this sum in a reasonable time which was within 7 days, as was the time frame as determined by the judge, during which that sum should have been delivered. It is my view that the 4th respondent is to pay interest on this sum from 23 June 2000 to 18 July 2000. The rate of interest is on similar terms as ordered in respect of the sum of $388,402.18. It is to be paid within 30 days of the delivery of this judgment at a commercial rate to be agreed and if not, fixed by the Registrar of the Supreme Court. Finally, on this aspect, there is the sum of $575,000.00 which was also outstanding, the learned judge having determined that that was a wrongful deduction. There is a breach of undertaking in respect of the payment of this amount. I do not know if this sum has yet been paid. There is no documentary evidence which I have seen to so indicate. If it has been paid, then interest is to be calculated on similar terms as to the sums above from 25 June 2000 to the date of payment. These late payments and nonpayment lead to the breach of an undertaking rather than to a breach of contract by the purchaser.

[16] It was submitted that the four respondents "acted in concert to engineer a series of events calculated to prevent AJC (1st appellant) from paying its debts to BNS and thus save King Street from auction". This submission was grounded principally on the delay in the payment of the entire purchase monies. It is impossible to understand how there could be any conspiracy between the first three respondents as the first two were companies of the 3rd respondent – see **American Jewellery et al v Commercial Corporation Ja. Ltd.** SCCA Nos. 155 and

156/2001 delivered 2 December 2004. So if there was a conspiracy, that would be according to the evidentiary material and it would be one that involved the 3rd and 4th respondents.

[17] To succeed in what I will call the "conspiracy claim", a plaintiff(s) must establish to the requisite standard that (a) there was a combination and (b) that the predominant intention of that combination was to injure and (c) that there was resulting harm. These principles I have distilled from the authorities – see in particular **Total Networks v. Revenue and Customs Commissioners** [2008] UK HL 19.

[18] The learned trial judge made a number of findings pertaining to this issue, which were challenged before us. A significant finding was that –

> "There was no evidence that what was available of the proceeds from the sale of Tropical Plaza would have been sufficient to pay off the indebtedness of the King Street Property."

The appellants pointed to the evidence of Mr. Clough to the effect that the amount required to pay the mortgage on the King Street property was $7,000,000.00 - $8,000,000.00, and therefore the above finding "is contrary to the evidence". This criticism must be viewed in the context of the overall reasoning of the learned trial judge which is now set out below:-

> "The Tropical Plaza property belonged to American and American had no interest in the King Street property. It belonged to Mr. Khem. The evidence is that there were other shareholders of American besides Mr. Khem, including his brother. There were, at the time

> of the signing of the Agreement for Sale, serious disputes among them. Witness Barbara McNamee testified that Mr. Khem had told her that he wished to use some of the proceeds of the sale to settle disputes with these shareholders. I believe her.
>
> Further, I accept as true, the evidence that Mr. Khem requested some of the purchase money to be paid quickly to allow him to use it to clear some of his goods at the wharf.
>
> There is thus credible evidence as to other important uses to which the Tropical Plaza proceeds were to be put. There is no evidence that what was available of the proceeds from the sale of Tropical Plaza would have been sufficient to pay off the indebtedness of the King Street property."

An appellate court has no basis for disturbing these findings.

[19] A conspiracy calculated to cause the loss of the King Street property presupposes that the conspirators were aware of the circumstances which could trigger that loss and behaved in such a way to bring it about. The learned trial judge correctly directed her mind to an important question, which was whether or not the 3rd and 4th respondents knew that the monies were required for an urgent purpose? This is how she answered:

> "… Meanwhile Mr. Khem himself, not American, owned property at 70A King Street, Kingston. He owed monies on its mortgage to the Bank of Nova Scotia. Whilst negotiations continued about the Tropical Plaza property, the Bank of Nova Scotia put the King Street property up for sale by public auction, to recover the monies due on it.
>
> Mr. Clough in cross-examination said that he had told Ms. Messado that the money was to be used to pay off the King Street debt but he also testified that nowhere

in the correspondence between himself and Ms. Messado, spanning over 11/2 years is there any mention of Ms. Messado having been told of the purpose for the funds.

Indeed, Mr. McBean, Counsel for Ms. Messado, asked Mr. Clough if he thought it would be very important to tell Ms. Messado why his client needed funds. Mr. Clough's response was, 'Absolutely not. Why would you tell other Counsel on the other side why your client needed money. You can say it verbally but you can't wash your client's dirty linen.'

He further testified that he told Ms. Messado he needed the money for the Bank of Nova Scotia, but did not mention the King Street property.

The contradictions in Mr. Clough's testimony cause me to regard his evidence of having informed Ms. Messado about the urgent need for the money as unreliable.

Interestingly, the urgency of the need is not reflected in any documentation that is exhibited. The Agreement for Sale does not have a condition making reference to any urgent need for the money. Mr. Herbert Grant, attorney-at-law, gave evidence on behalf of American/Mr. Khem. He testified that it would have been prudent to insert such a condition in the Agreement to reflect that situation. In fact the clause making Time of the Essence was struck out of the Agreement. The unchallenged evidence is that Mr. Khem did not serve any Notice making Time of the Essence. It was Ms. Messado who served one on Mr. Clough.

There is no evidence that Mr. Khem made any request for monies to pay off all, or even a portion of, the mortgage debt owed on the King Street property. The evidence is that the requests were to pay mortgage monies on the Tropical Plaza property and to pay to clear goods on the wharf.

> I believe Mr. T when he says that he was unaware of any urgent need for the money to pay off the Bank of Nova Scotia,
>
> In my view the evidence shows that neither Mr. T, T Ltd, Commercial nor Ms Messado was informed that Mr. Khem required the Tropical Plaza sale proceeds urgently to pay off the debt of the King Street property."

I cannot fault these findings. However, in the interest of accuracy, I need to make some comments which will not affect the soundness of her conclusion. The clause making time of the essence was struck from the chattel contract. Also, the notice making time of the essence was limited to the acceptance of the proposed variation pertaining to early possession.

[20] The learned trial judge also found that:-

> "Indeed, there is an absence of proof that Mr. T even knew that that particular property belonged to Mr. Khem. Mr. T's evidence, which I accept as being true, is that the day before the auction he saw the advertisement, checked the address and that is when he found that it belonged to Mr. Khem. Nor is there credible evidence of any link between Tropical Plaza property sale and the King Street property sale, except for the fact that some of the parties are involved in both sales."

This finding ought not to be disturbed and in my view completely underminds the "conspiracy claim". At the auction held on 31 August 2000, the 3rd respondent's bid of $12,000,000.00, which was accepted, was the fourth bid.

[21] There is no evidence to establish any combination having the predominant intention of causing injury to any of the appellants and thereby causing loss. This conspiracy claim is confounded by aspects of the evidence such as –

(i) The purchaser discharging the mortgage on the Tropical Plaza property.

(ii) The purchaser performing the statutory and contractual obligations which ought to have been fulfilled by the vendor.

These are factors indicating a desire to complete the contract rather than to frustrate its completion. It would appear that the 4th respondent endeavoured to extract as much as she could on behalf of her client. At times, some of her requests could be regarded as unreasonable but to regard her conduct as fraudulent would not be appropriate. In this case, as the learned trial judge properly found, there is no nexus between the Tropical Plaza property sale and the King Street property auction.

[22] A lease was executed by the 1st respondent and the 3rd, 4th and 5th appellants in respect of the shop at Tropical Plaza in which the 1st appellant conducted its business. This lease came into effect on 1January 2001 and was for a period of three years and the monthly payment was $125,000.00. The 3rd, 4th and 5th appellants are the sons of the 2nd appellant. The duration of the lease and the monthly payment are similar to the terms envisioned by special

condition 11 of the Tropical Plaza property contract. There were two payments (and apparently not three, as the learned trial judge found) but the lessees remained in occupation thereafter. The learned trial judge ruled that the 3rd, 4th and 5th respondents were jointly and severally liable for the entire lease period. She also ruled that the 1st respondent was entitled to recover possession of the shop and that for the period during which the lessees remained in occupation after the expiry of the lease, they were to pay "the market value" rental and she dictated the method of computation to arrive at that sum. These orders are challenged on the basis that the lease was in fact between the 1st appellant and the 1st respondent and the sons in executing the formal document were agents or nominees of the 1st appellant. Accordingly, since by special condition 11 a lease was contemplated only after the date of completion, and since all the purchase monies had not been paid, the lease was ineffective. The payments by the named lessees, it was said, were made in error on the erroneous instructions of Miss Levers, who at the time had replaced Mr Clough. The conclusion was that the 1st appellant was entitled to remain in possession of the shop without any impediment. The evidential bases for submitting that the sons were agents/nominees of the 1st appellant were twofold. Firstly, in evidence Mrs. Messado said:-

> "The whole (lease) transaction was with AJC and the lease was AJC. The lease is in accordance with the agreement. There is nothing to say it was not."

Secondly Mrs. Messado wrote a letter to the 2nd appellant enquiring about payment under the lease. If the appellants are correct that the sons were indeed agents/nominees of the 1st appellant that would create some difficulty for it. It would seem to me that if the sons acted in a representative capacity, it would be in respect of all the prevailing circumstances, one of which was the existence of special condition 11. By executing the lease agreement they must be taken to have waived any operative import of special condition 11. They would have capacity (unless specifically stated otherwise) to deal with the creation of the lease in its totality. The learned trial judge found that the sons were not agents/nominees of the 1st appellant. She, in a somewhat peremptory manner said:

> "The lease document is clear. The parties are clear. There is no reference to American. There is neither documentary nor … evidence to indicate that the sons are empowered to represent American."

I would not disturb this finding.

[23] I would uphold the order made by the learned trial judge except for the following:

(1) There should be an award to the 1st appellant for $575,000.00, as stated in paragraph (2) of the listing of the orders made. This sum it will be recalled, related to a deduction from the purchase monies. This sum which I agree was wrongly deducted ought properly to be considered in the claim in respect of the breach of professional undertaking.

(2) Accordingly, paragraph (5) of the listed orders has to be amended to take into account the sums of not only

$388,402.18, but also the sum of $575,000.00 and $2,000,000.00 as stated in paragraph 15 of this judgment. So, therefore, the rate of interest on $388,402.18 is as the learned trial judge prescribed and in respect of the two other sums, is to be similarly determined and the period for which interest is due is set out in paragraph 15 (supra).

(3) The order in paragraph (6) of the listed orders whereby it was ordered that there should be judgment for the 3rd respondent for interest on the amount paid on account of the sale agreement in excess of the agreed initial $4 million deposit to or on behalf of the 1st appellant from the original completion date of the 30th September 1999 until the actual date of completion of the 16th June, 2000 at a commercial rate…is, for reasons previously given, set aside.

[24] A synopsis of the learned trial judge's orders which I would uphold are:

(a) There are to be no damages for breach of contract in respect of the Tropical Plaza contract.

(b) There was no fraud and or conspiracy to injure and/or to defraud.

(c) The purchase of the King Street property at the auction was without taint and would not be set aside.

(d) The 2nd appellant was to vacate the King Street property within 12 weeks of the judgment and was liable for payment of mesne profits to the 2nd respondent. This payment was to be in terms of her postulated formula.

(e) The Khemlani sons were to vacate the Tropical Plaza shop and to pay to the 1st respondent sums as stated in judgment.

[25] I would not disturb the learned trial judge's rulings as to the payment of interest as to costs. These are set out in her judgment.

[26] In respect of the appeal pertaining to

(i) CL 018/2001, I have suggested variations as set out above in paragraph 23. The contending parties will in the circumstances have 50% of the costs of the appeal pertaining to the issues raised in that claim.

(ii) CLT 149 and 255/2001 (consolidated) the appeal is to be dismissed and the respondents should have their costs in the appeal.

(iii) CLT 151 and 024/2001 (consolidated) the appeal is dismissed and the respondents should have their costs in the appeal.

[27] In coming to a resolution, I have not dealt seriatim with each complaint challenging the findings of facts and/or law. I endeavoured to concentrate on those issues which in my view were relevant to the determination of the appeal.

My proferred approach is not to be regarded as showing any disrespect for the commendable assiduity of counsel who appeared for the appellants. Finally, I would like to express my appreciation to the learned trial judge who in her judgment demonstrated a comprehensive grasp of what appears to be a mountainous mass of material.

HARRISON, J.A.

Introduction

[28] This appeal challenges decisions of Beswick, J. in consolidated claims heard by her in the Supreme Court. I have read the judgment in draft of Cooke, J.A. and agree with the orders which he has proposed in the disposition of the appeal. However, I will make a few comments on three issues which arise in the appeal. They are: (a) was there breach of the agreement for sale? (b) were there valid variations to the contract? and; (c) did Mrs. Messado and Mr. Gordon Tewani conspire to injure Mr. Indru Khemlani?

The Background to the Appeal

[29] The issues in this appeal concern a written agreement dated 16 August 1999, for the sale of property known as "No 3 in Tropical Plaza, Kingston" and was made between the 1st appellant, American Jewellery Company (AJC) through its managing director, Mr. Indru Khemlani, the 2nd appellant, and the 3rd respondent, Mr. Gordon Tewani. The property consisted of two shops, one of which was being occupied by the 1st appellant at the time the agreement was

made. The agreement discloses that the completion date was to be on or before 30 September 1999. However, as a result of protracted dealings between the parties, the agreement was far from complete when the agreed completion date arrived. In fact, the purported completion and transfer of the property in the name of the purchaser's nominee, Commercial Corporation of Jamaica, (CCJ), the 1st respondent, did not occur until June 2000, almost a year after the agreed completion date.

[30] The sale of property located at 70A King Street, Kingston is also of significance in the appeal. This property was owned by Mr. Indru Khemlani and was acquired by Mr. Tewani at an auction on 31 August 2000; two days after the latter purported to complete the agreement of 16 August 1999. The property was transferred into the name of the 2nd respondent Tewani Limited, a company of which Mr. Tewani is the managing director.

[31] For the purposes of this appeal, the pertinent clauses of the agreement for sale of 16 August 1999 are:

> "Completion: On payment in full of the sale price and cash fees and costs of transfer and such other amounts payable by the Purchaser hereunder as herein before provided and in exchange for the delivery of the duplicate Certificate of Title for the said land with a transfer executed by the vendor along with discharges of mortgages for all or every mortgages (sic) duly impressed with Government Stamp Duty and Transfer Tax along with a cheque payable (sic) the Registrar of Titles for the registration fees payable herein on or before the 30th September 1999.

Special Condition

1 …

2. It is hereby understood and agreed that the Vendor's Attorneys -at- Law shall be entitled to pay the stamp duty and transfer tax payable in respect of this Agreement from the deposit and or payments made hereunder...

3...

4...

5. The Vendor shall be entitled to all rental due and payable by the Lessee of the above described property to the date of the actual date of the payment of the entire Sale Price hereunder.

6. The Vendor shall not be obliged to register the Transfer to the Purchaser until all moneys payable by the Purchaser herein have been paid or an undertaking suitable therefore has been received herein.

7...

8....

11. The Vendor HEREBY FURTHER AGREES to lease the one-half section of the said premises being the shop now known as American Jewellery Company for a period of three years from the date of completion hereof at the monthly rental of $150,000.00 per month such rent payable on the first day of each month."

[32] Subsequent to the execution of the agreement, a plethora of correspondence passed between Mr. Clough, the attorney-at-law acting for the 1st and 2nd appellants, and Mrs. Messado, the attorney-at-law acting for the 2nd

respondent. A perusal of these documents discloses the following germane facts:

(i) Minority shareholders (who were also family members) of AJC initiated court proceedings to prevent the sale of the property.

(ii) A consent judgment was entered in respect of the court action to the effect that the shares and the real estate in AJC would be valued and that the majority shareholders Indru Khemlani and Jean Khemlani would purchase the shares from the minority shareholders (page 70c Vol. 3.)

(iii) The attorneys-at-law for the minority shareholders later requested on 6 July 2000, that the proceeds of the sale of the Tropical Plaza property be placed into an interest bearing account in the name of the attorneys-at-law representing the minority shareholders (page 190a Vol.3).

(iv) There was a mortgage on the Tropical Plaza property. This mortgage was eventually discharged by Mrs. Messado sometime around 30 December 1999. (page 98a Vol.3)

(v) On 10 January 2000, Mrs. Messado wrote a letter to Mr. Clough enclosing a cheque for $4m. In that letter, she

indicated that the cheque was being offered "AS AN IMMEDIATE PAYMENT TO THE VENDOR hereby varying the contract of sale IN EXCHANGE for the following variations to the Agreement.

> "(a) delivery of vacant possession on or before 28 February 2000, in exchange for payment of the final difference in purchase money."

The letter further stated that failure to adhere to this condition would result in 40% interest being charged on the sum of $14m that had already been advanced towards the total purchase price (page 103 Vol. 3)

(vi) The letter of 10 January 2000 was never signed by Mr. Khemlani. However, the key, accompanied by a letter of possession for the unoccupied shop was sent to Mrs. Messado on February 8, 2000 (page 119 Vol. 3)

(vii) On 27 March 2000 Mrs. Messado served a formal notice making time the essence of the agreement, (page 147 Vol. 3).

(viii) From as early as 26 October 1999, Mr. Clough wrote to Mrs. Messado asking for the balance of the purchase price and subsequently for a suitable undertaking with respect to such balance. The first undertaking given on 8 November 1999 was

to the effect that she would not deal with the duplicate certificate of title until the full purchase price and costs had been paid. Subsequently on 15 March 2000, Mrs. Messado gave another undertaking that the balance purchase price would be paid in exchange for the duplicate certificate of title endorsed in the name of CCJ. The letter containing this undertaking was signed by Mr. Clough which seemed to indicate that the undertaking was acceptable to him. Thereafter, dealings between the attorneys continued with a view to completing the agreement. It was not until 7 April 2000, that Mr. Clough informed Mrs. Messado that the undertaking was not acceptable. Mrs. Messado gave the required undertaking on the 10th April.

(ix) The agreement was eventually stamped by Mrs. Messado on 5 May 2000 (page 141a Vol.3)

(x) On 23 June 2000, Mrs. Messado wrote to Mr. Clough informing him that she had stamped the agreement for sale and transferred the title to Mr. Tewani's nominee, CCJ.

(xi) On 13 July 2000, Mrs. Messado wrote to Mr. Clough proposing to vary the rental stated in special condition 11 (supra) as follows: $125,000 in year 1; $140,000 in year 2; $170,000 in year

3 and that the purchasers would agree to execute the lease if rental for the first four months would be deducted from the balance of the purchase price. A cheque for $2m was enclosed on the condition that Mr. Khemlani would not object to these proposed changes (page 194 Vol.3)

(xii) In July 2000, Mrs. Messado sent a statement of account to Mr Clough which reflected that the balance owing to AJC was $388,402.18 after deductions of $862,000,000 and $575,000.00 were made for four months of future occupation under the lease and for the period from which possession had been given to the date of the transfer, respectively (page 197 Vol.3).

(xiii) The final payment made in purported completion of the agreement was on 29 August 2000, in the form of a cheque accompanied by a letter from Mrs. Messado. Mrs. Messado requested that Mr. Clough sign the letter in acknowledgment of the receipt of the cheque and full discharge of Mr. Tewani's obligations. This letter was signed by Mr. Clough (page 200a Vol.3).

(xiv) The cheques that accompanied the letters in which the conditions were sought to be varied were all encashed by Mr. Clough.

(xv) In December, Mr. Khemlani's sons, Roshan, Sham, Raj, the 3rd, 4th and 5th appellants respectively, had entered into an agreement with CCJ for the lease of the shop occupied by AJC. They paid rental until March and thereafter no further sum was paid to CCJ.

Mrs. Messado acting on behalf of CCJ served a Notice to Quit on 27 July 2001.

[33] These events culminated in a multiplicity of actions/claims filed by the different parties. The actions were all consolidated and heard by Beswick, J.

Judgments in the respective Claims

[34] On 4 December 2006, the learned judge gave judgment as follows in respect of the several claims:

> "1. In the claim by American Jewellery Company against the defendants Commercial Corporation of Jamaica Limited and Mr. Tewani for damages for breach of contract and a declaration concerning the lease:
>
> **Judgment for the defendants Commercial Corporation Jamaica Limited and Mr Tewani.**

2. In the claim by American Jewellery Co. against the defendants Commercial Corporation Jamaica Limited and Mr. Tewani for payment of $1,657,488.91:

> **Judgment for the 1st plaintiff American Jewellery Co. against Mr Tewani in the amount of five hundred and seventy-five thousand dollars ($575,000.00). In the circumstances of this case I make no order as to costs in this claim.**

3. In the claim by American Jewellery Co. and Mr. Khemlani against the defendants Commercial Corporation Jamaica Limited, Tewani Limited, Mr. Tewani and Mrs. Messado for fraud and or conspiracy to injure and/or defraud:

> **Judgment for the defendants, Commercial Corporation Jamaica Limited, Tewani Limited, Mr. Tewani and Mrs. Messado.**

4. In the claim by Mr Khemlani against Tewani Limited to set aside the transfer of premises (the King Street Property) and to restrain Tewani Limited from dealing with it:

> **Judgment for the defendant Tewani Ltd.**

5. In the claim by American Jewellery Company Limited against Mrs. Messado for breach of professional undertaking:

> **Judgment for the plaintiff American Jewellery Company Limited for interest on the sum of $388,402.18 from 23rd June 2000 to 29th August, 2000. This interest is at commercial rate to be determined in accordance with paragraph 170 of this judgment. No order as to costs in this claim.**

6. In the counterclaim by Commercial Corporation Jamaica Limited and Mr. Tewani against American Jewellery Company Limited for payment for occupation of a shop at Tropical Plaza, which was conditional on the Court finding that Commercial Corporation Jamaica Limited and Mr. Tewani were not entitled to deduct sums for occupation for 8th February to 31st December 2000.

> **Judgment for Mr. Tewani for interest on the amount paid on account of the Sale Agreement**

in excess of the agreed initial $4 million deposit, to or on behalf of American Jewellery Company Limited from the original completion date of 30th September, 1999 until the actual date of completion of 16th June 2000. This interest is at a commercial rate to be determined in accordance with paragraph 153 of this judgment.

7. In the claim by Commercial Corporation Jamaica Limited against Roshan, Sham and Raj Khemlani for rental for the Tropical Plaza property:

Judgment for Commercial Corporation Jamaica Limited.

8. In the claim by Commercial Corporation Jamaica Limited against Roshan, Sham and Raj Khemlani for possession of the Tropical Plaza premises:

Judgment for Commercial Corporation Jamaica Limited.

9. In the claim by Tewani Limited against Mr. Khemlani for the use of 70A King Street:

Judgment for Tewani Limited for mesne profits.

10. In the claim by Tewani Limited against Mr. Khemlani for possession of King Street:

Judgment for Tewani Limited.

11. In the counterclaims in both suits by Mr Khemlani against Tewani Limited and ancillary defendants Commercial Corporation Jamaica Limited, Mr. Tewani and Mrs. Messado for fraud and/or conspiracy to injure and or defraud:

Judgment for Tewani Limited and ancillary defendants Commercial Corporation Jamaica Limited, Mr Tewani and Mrs. Messado against Mr. Khemlani.

12. In the counterclaims in both suits by Mr. Khemlani against Tewani Limited to set aside the transfer of King Street and to restrain dealing with the premises:

Judgment for Tewani Limited."

The Grounds of Appeal

[35] The appellant filed the following six (6) grounds of appeal:

"1. That the learned trial judge erred in law and in fact in making her findings.

2. That the findings are against the weight of the evidence.

3. The learned trial judge erred in refusing to allow Mr. Raymond Clough to comment on certain allegations made by Mrs. Jennifer Messado in her Witness Statement and then made findings adverse to Mr. Khemlani and American Jewellery Company Limited in respect of those allegations.

4. The learned trial judge refused to allow Mr. Indru Khemlani to be recalled in order to admit relevant documentary evidence which had been discovered during the currency of the hearing.

5. That certain of the orders of the learned trial judge are unreasonable and without any basis in law or in fact.

6. That several of the findings are irreconcilably conflicting, inconsistent and contradictory one with the other..."

Grounds 3 and 4 were not pursued by counsel for the appellant in her oral submissions.

[36] It is quite obvious from the grounds of appeal that the thrust of the appeal is against findings of fact made by the learned trial judge. It is of course well-established that in an appeal such as this, where findings of fact are being challenged, this Court will disturb the decision only where the trial judge's findings were "obviously and palpably wrong" (**Watt v Thomas** [1947] A.C. 484).

The Issues Warranting Comments

[37] I will now turn my attention to three (3) issues which in my view warrant some comment. I propose to deal with (a) and (b) (supra) together.

Issues (a) and (b)

[38] Miss Hilary Philips Q.C., (as she then was) counsel for the appellants, contended that the agreement for sale had been breached by Mr. Tewani because the terms of the agreement had not been complied with. She argued that the total purchase price had not been paid, as demonstrated by the learned judge's finding that Mrs. Messado, on behalf of Mr. Tewani, had wrongfully subtracted $575,000.00. She further submitted that an additional sum of $862,000.00 for future rental under the lease agreement mentioned in condition 11 of the agreement had been deducted without Mr. Khemlani's consent.

[39] These deductions, she contended, were not in accordance with the agreement nor could they properly be regarded as variations to the agreement

because Mr. Khemlani had not agreed to these variations. She argued that in accordance with the principle that any agreement that is required to be in writing should also be varied in writing, the variations should have been in writing and there was no documentary evidence showing any agreement by Mr. Khemlani to those terms. Counsel for the appellants contended that it was precisely by virtue of this principle that Mrs. Messado had included in the letter concerning early possession to Mr. Clough instructions that he should ensure that his client sign the letter in acknowledgment. She further argued that Mrs. Messado's letter suggesting the deductions for future rents and occupation subsequent to possession had been a mere proposal. Neither Mr. Khemlani nor Mr. Clough signed this letter that was accompanied by a statement of account showing the balance after the sums in question were deducted. She further submitted that any purported agreement to these variations by Mr. Clough as Mr. Khemlani's attorney-at-law could not bind Mr. Khemlani because Mr. Clough did not have any authority to act in a manner not required by the contract. On this latter point, she relied on several authorities such as **Eccles v Bryant** [1947] 2 All ER 865, **Evans v James** 1999 EWCA 1759; **Pianta v National Finance and Trustees** [1964] 180 CLR 146; **IVI Pty Ltd v Baycrown Pty Ltd** [2005] QCA 205, CA (10 June 2005).

[40] Counsel for the 3rd respondent, Miss Davis submitted that there had been no breach because the attorneys-at-law for both vendor and purchaser had agreed to these terms. Mr. Clough had signed his agreement to the letter

accompanying the final statement of account that Mrs. Messado had sent to him; this statement of account indicated that the sums had been subtracted. Further, Mr. Clough had also accepted the cheque that had been sent "in full and final settlement of" the purchaser's obligation under the agreement. In her written submissions, counsel relied on the case of **Thompson v Alexander** (1946) 6 WIR 538 to support her contention that Mr. Clough had the ostensible authority to agree to the variations.

[41] Section 4 of the Statute of Frauds, makes it abundantly clear that agreements concerning the disposition of land must be evidenced in writing in order to be enforced.

> "No action may be brought upon any contract for the disposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person."

[42] It is clear then that the agreement itself need not be in writing. A note or memorandum thereof is sufficient, provided of course, that the note or memorandum contains all the material terms. Further, the authorities do seem to suggest that the agreement must also be varied in writing (See Chitty on Contracts 26th ed. Pgh I600; **Goss v Lord Nugent** (1833) 5 B. & Ad.58; **United Dominions Trust (Jamaica) Ltd v Shoucair** [1969] 1 A.C. 340). However, there is nothing in the wording of the Statute of Frauds to indicate that the agreement or the variation must be contained in one document. What seems to be

important is that the variation be signed by or on behalf of the party to be charged thereby indicating that party's willingness to be bound. Thus, in order for the variation to be effected, it was not necessary for Mr. Khemlani or Mr. Clough acting on his behalf to sign the letter of July where Mrs. Messado had first introduced those terms. The subsequent correspondence and circumstances must be taken into consideration. It is therefore significant that Mr. Clough signed the later letter by Mrs. Messado in which she included a cheque for the $388,402.18. This sum was the figure that was arrived at after the deductions had been made. In that letter Mrs. Messado indicated to Mr. Clough that he should "sign and return to us the attached copy letter... and in discharge of our client's obligations herein".

[43] It seems to me that in signing this letter, Mr. Clough was agreeing to the deductions proposed in the earlier letter. Mr. Tewani acting through Mrs. Messado was entitled to assume that Mr. Clough had the authority to agree to these variations on his client's behalf. Such an assumption is not unreasonable when it is considered that the variation as to possession had been effected without the signature of Mr. Khemlani even though Mrs. Messado had indicated that Mr. Khemlani should have indicated his agreement by signing. It follows that the authorities relied on by Miss Phillips cannot assist because they concern the attorney's authority to conclude a contract for the sale of land where the attorney was given express/implied authority to negotiate the contract but none concerns the attorney's authority to vary a concluded contract.

Thompson v Alexander (supra) is, however, a case where the terms of a contract for sale had been varied although the contract for sale had been concluded. The Court held that the variation of a term in respect of title was within the solicitor's general authority.

[44] Miss Phillips sought to distinguish that case on the basis that the attorney in that case had acted for the benefit of his client. She therefore submitted that the principle in that case only applies to circumstances where the attorney acts to the benefit of his client and that in this case, the attorney had acted to the detriment of his client. This submission is not, I think, consistent with the principle of ostensible authority for ostensible authority is not restricted to situations where the agent acts for the benefit of the principal. I am of the view that in the circumstances of the instant case, the ostensible authority of Mr. Clough did not oblige Mrs. Messado to enquire beyond the acceptance of Mr. Clough. If it is later discovered that Mr. Clough was in fact not authorized, as it was suggested by Mr. Khemlani's letter of 20th September, Mr. Khemlani's remedy would be against Mr. Clough. The learned judge found that there was no documentary evidence of Mr. Clough's authority being limited. I agree with the learned judge that "Mrs. Messado had every basis for proceeding with the understanding that the new conditions had been accepted by Mr. Khemlani as Mr. Clough had negotiated the cheques. And that the agreement for sale was spent upon the payment of the final sum". I would add also that the cheques aside, as I have indicated earlier, there was evidence in writing of the variation.

[45] It cannot be ignored that the variation was first proposed after the duplicate certificate of title to Tropical Plaza was transferred into the name of the purchaser's nominee, CCJ. Miss Philips submitted that the purchaser, through his nominee, having obtained the benefit of the contract could not seek to vary the contract. Any variation would have had to occur prior to registration because on registration all the monies are due. Indeed, the basis of the agreement is the sale of land, therefore once the price is paid and the transfer of the land effected, the agreement is complete. Therefore, if the property is transferred, there ought to be no variation in the price to be paid. However, if the obligation to pay the price is not fully discharged, I think the parties are at liberty to vary a condition in the agreement that is only subsidiary to the agreement, that is, the lease of the property. In this case, the variations did not affect the price that was originally agreed to be the purchase price. The variations affected how much of the balance would actually be paid. I therefore do not think that the variations were impermissible in law. I agree with the learned judge that there was no breach of contract.

Issue (c)

[46] In support of her contention that the learned judge had erred in finding that there was no fraud or conspiracy to injure or commit fraud, Miss Philips, in her oral submissions, identified the following as being unlawful acts committed by Mrs. Messado on behalf of Mr. Tewani which amounted to fraud:

(i) failure to pay the balance purchase price by December 1999 or at all;

(ii) paying $6,388,402.18 on stated onerous conditions which were in breach of the agreement for sale;

(iii) wilfully and wrongfully withholding monies due under the contract;

(iv) failing to release the stated onerous conditions;

(iv) wrongfully procuring the registration of the premises at Tropical Plaza in breach of the undertaking

(vi) retaining the sum of $1,600,000.00 (the total of sums charged/withheld for rent) and depositing $,800,000.00 for the purchase of the King Street property on the following day. She argued that the learned judge had erred in finding that there was nothing unlawful about breaching a contract.

[47] Mrs. Gibson Henlin for CCJ contended that CCJ could not be held liable for fraud or conspiracy to commit fraud because CCJ was not a party to the agreement for sale that had been breached. Furthermore, she submitted, in order to successfully establish the tort, it must be proven that the person who was injured was the person at whom the injurious acts were aimed. Miss Davis, on behalf of Tewani Limited and Mr. Tewani, submitted that knowledge was an essential ingredient of fraud and the learned judge had found in this case that Mr. Tewani did not know that the King Street property had been used to secure a mortgage on the Tropical Plaza property.

[48] The burden of Miss Philips' submission, as I understand it, is that the principal unlawful act was breach of contract and although not by itself sufficient to ground fraud, when combined with the other acts of delay was sufficient to amount to fraud or injury to the claimant. Indeed, in her written submissions, she contended that the learned judge ought to have found that the actions were deliberate, intentional and calculated to injure. In **Assets Co. Ltd v Mere Rolhi** [1905] AC 176, a judgment of their Lordships Board, Lord Lindley stated at page 210 of the judgment that fraud means "dishonesty of some sort, not what is called constructive or equitable fraud" and that in order for the registered title of a proprietor to be impeached, fraud must be brought home to him/her. Also of significance are the following words of Lord Scott of Foscote in the House of Lords in **Total Network SL v Revenue and Customs Commissioners** [2008] All ER (D) 160 at page 18 of the judgment:

> "unlawful means are employed by the conspirators to achieve their object and their object involves causing harm to the victim, the intent to cause harm does not have to be the predominant purpose of the conspiracy... The circumstances must be such as to make the conduct sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages."

[49] It is clear that there must be found an intent to defraud or injure. This intent can only come into existence where there is knowledge of the circumstances which could be exploited to defraud or injure. In this case, a finding of conspiracy to injure or defraud Mr. Khemlani could be made against CCJ, Mr.

Tewani and Mrs. Messado only where the learned judge was satisfied that Mr. Tewani and/or Mrs. Messado knew that Mr. Khemlani was in default of his mortgage payments on Tropical Plaza and that he had used the King Street property to secure this mortgage. Miss Philips in her written submissions argued that Mr. Tewani must have known of Mr. Khemlani's financial circumstances because the real estate agent who had introduced Mr. Khemlani to Mr. Tewani in respect of the sale of Tropical Plaza had known about Mr. Khemlani's indebtedness. She sought to persuade this Court, by way of inference, that the real estate agent had knowledge of Mr. Khemlani's indebtedness and at the meeting with Mr. Tewani and Mr. Khemlani, the real estate agent had disclosed this to Mr. Tewani. However, in my view, this is mere conjecture. Nowhere in the evidence of these three individuals is there any indication that this was discussed at the meeting. It is true that Mr. Khemlani in his witness statement did say that he had told Mr. Tewani of his indebtedness. However, in cross-examination he admitted that in none of the correspondences did he or Mr. Clough indicate that the money was needed to pay off the mortgage. Further, although Mr. Clough in his oral evidence at one point said that he had told Mrs. Messado about Mr. Khemlani's indebtedness, he later resiled from this. In fact, the learned judge did not find him to be a witness of truth. I can find no reason to disturb the learned judge's finding that none of the alleged conspirators knew about Mr. Khemlani's indebtedness to Scotia Bank. At paragraphs 122-1 24 she said:

"122. Interestingly, the urgency of the need is not reflected in any documentation that is exhibited. The Agreement for Sale does not have a condition making reference to any urgent need for money. The unchallenged evidence is that Mr. Khemlani did not serve any Notice making Time of the Essence. It was Mrs. Messado who served one on Mr. Clough.

123. There is no evidence that Mr. Khemlani made any request for monies to pay off all or even a portion of the mortgage debt owed on the King Street property. The evidence is that his requests were made to pay off the Bank of Nova Scotia."

[50] The result of this is that knowledge being absent, there can be no intention to injure or defraud.

Conclusion

[51] In my judgment, the following orders should be made disposing of the appeal:

A. In respect of the appeal concerning Suit CL AOI8/2001:

1. The appeal is allowed in part.

2. The orders of the learned judge are varied as follows:

(i) There shall be no award to the 1st appellant for the sum of $575,000.00.

(ii) The 4th respondent shall pay to the 1st appellant as damages for breach of undertaking, interest on the sum of $388,402.18 from 23 June to 29 August 2000, on the sum of $2,000,000.00 from 23

June 2000 to 18 July 2000 and on the sum of $575,000.00 from 25 June 2000 to the date of payment. Interest is to be paid at a commercial rate to be determined either by agreement within 30 days of the date of delivery of this judgment or by the Registrar of the Supreme Court/Court of Appeal.

(iii) The 3rd respondent is not entitled to any sums for interest on sums paid in excess of the agreed initial deposit of $4,000,000.00.

(iv) Each party is entitled to 50% of the costs of the appeal.

B. In respect of the appeal concerning Suits CL CI49/2001 and CL C255/2001:

Appeal dismissed with costs to the respondents to be taxed if not agreed.

C. In respect of the appeal concerning Suits CL TO24/200l and CL TI51/2001:

Appeal dismissed with costs to the respondents to be taxed if not agreed.

DUKHARAN, J.A.

I agree with the proposed orders made by my learned brothers Cooke and Harrison, JJA.

COOKE, J.A.

ORDER

1. The appeal is allowed in part.

2. The orders of the learned judge are varied as follows:

(i) There shall be no award to the 1st appellant for the sum of $575,000.00.

(ii) The 4th respondent shall pay to the 1st appellant as damages for breach of undertaking, interest on the sum of $388,402.18 from 23 June to 29 August 2000, on the sum of $2,000,000.00 from 23 June 2000 to 18 July 2000 and on the sum of $575,000.00 from 25 June 2000 to the date of payment. Interest is to be paid at a commercial rate to be determined either by agreement within 30 days of the date of delivery of this judgment or by the Registrar of the Supreme Court/Court of Appeal.

(iii) The 3rd respondent is not entitled to any sums for interest on sums paid in excess of the agreed initial deposit of $4,000,000.00.

(iv) Each party is entitled to 50% of the costs of the appeal.

D. In respect of the appeal concerning Suits CL CI49/2001 and CL C255/2001:

Appeal dismissed with costs to the respondents to be taxed if not agreed.

E. In respect of the appeal concerning Suits CL TO24/200l and CL TI51/2001:

Appeal dismissed with costs to the respondents to be taxed if not agreed.