JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 32 OF 2007

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

BETWEEN:	**YVETTE REID**	**APPELLANT**
AND	**CITY OF KINGSTON CO-OPERATIVE CREDIT UNION LTD.**	**RESPONDENT**

Mrs. Marvalyn Taylor-Wright instructed by **Taylor-Wright & Company** for the Appellant.

Mr. Jermaine Spence instructed by **Dunn Cox** for the Respondent.

19th, 20th, 22nd November, 2007 and 31st July 2008

SMITH, J.A.:

This is an appeal from the Order of Anderson, J. that a Writ of Certiorari be issued to quash an award made by the Registrar of Co-operative Societies in favour of the appellant and her now deceased mother. The respondent, City of Kingston Co-operative Credit Union Limited (COK), is a body corporate duly registered under the Laws of Jamaica with registered office at 66 Slipe Road, Kingston 5. The appellant, Ms. Yvette Reid and her mother, Mrs. Mavis Henry (now deceased) were members of the respondent.

Sometime in 1990 or 1991 the appellant obtained two (2) loans from the respondent. The loans were secured by a Certificate of Title in the names of her parents Matthew Henry and Mavis Henry and the shares held by the appellant in City of Kingston Credit Union. It would appear that on the payment of a fee the respondent undertook to have the death of Mr. Matthew Henry noted on the Registered Title.

The first loan was repaid but the appellant defaulted in the repayment of the second loan. The shares the appellant held were used to liquidate the loan. However, the Title was not returned to the appellant on the liquidation of the loan but remained with the respondent for sometime thereafter.

By a contract dated 24th of October, 2003 between the Ministry of Education and Education Matters (a business apparently owned by the appellant's mother) the latter agreed to supply goods to the former at an agreed price. The contract period was for ninety (90) days ending on January 21, 2004.

On the 15th December, 2003 Mavis Henry wrote the President of the respondent in the following terms:

> "I wish to use the Title now in the possession of the Credit Union as collateral for a loan at the Self Start Fund. To allow for this I will clear all indebtedness for which it is being used, so that the process of replacement and submission to them can be effected.
>
> I hereby ask that you submit the Title to the Self Start Fund as soon as the replacement is in place".

On the 31st December, 2003 the respondent wrote the Self Start Fund stating that "... as soon as we have been able to track down and receive same we will forward the Title to you as instructed."

In response to an application by the appellant for a US$52,000.00 loan, the National Export-Import Bank of Jamaica Limited (Exim Bank) on February 1, 2004 wrote her stating that the Bank had given her application favourable consideration. The letter indicated the pre-conditions to the establishment of the credit and enclosed were the requisite promissory note and indemnity.

On February 8, 2004, Certweld Engineers Limited wrote the appellant's mother stating:

> "I have instructed my secretary to prepare the cheque for 2.5 Million Dollars for the purchase of school equipment for Basic School on contract with the Ministry of Education, Youth and Culture, and based upon the following agreed conditions.
>
> - A loan of 2.5 million dollars has been agreed upon by both parties at an interest rate of 14% for sixty (60) months.
>
> - Collateral in the form of a Title registered at Volume 1031 Folio 572 shall secure the loan and shall be submitted upon the receipt of the cheque.
>
> - All attendant cost and charges associated with registration of the mortgage will be bourne by you.
>
> I am mindful of the Time frame set out on the contract and will comply accordingly."

Other important correspondence which preceded the cancellation of the contract will be referred to later.

On the 16th March, 2004 the Ministry of Education cancelled the contract between Education Matters and itself. The letter cancelling the contract which was addressed to Mrs. Mavis Henry, reads:

> "The Ministry of Education, Youth and Culture and Education Matters entered into an Agreement on the 24th of October, 2003 whereby Education Matters agreed to supply equipment for Early Childhood institutions as per schedule provided by the Ministry.
>
> The original contract period of ninety (90) days ended on January 21, 2004. However upon several requests from you for additional time to complete the contract, the Ministry, by letter dated February 5, 2004 granted an extension to March 12, 2004. Despite this your company failed to deliver any of the items in the schedule within the extended contract period.
>
> The Ministry hereby advises that the contract has been terminated as of today's date, March 16, 2004 and the contract is deemed to be in default as set out in Clause 11 – Cancellation of the Contract, of the Conditions of Contract and Schedule of goods.
>
> You are further advised that the Ministry reserves the right to seek redress for any additional expenditure that may be incurred as a result of your failure to provide the goods under the terms of the contract".

The letter was signed by the Director of Project, Management and Technical Services (Acting) on behalf of the Permanent Secretary.

The following day, March 17, the Title was delivered to Mrs. Henry under cover of a letter which reads:

"Dear Mrs. Henry

Re: Duplicate Certificate of Title registered at Volume 1031 Folio 572

Upon the instructions of your lawyer, Bert S. Samuels, we forward to you herewith the captioned duplicate Certificate of Title.

Please acknowledge safe receipt of the enclosure by signing and returning the attached copy letter.

Yours co-operatively.

City of Kingston Co-operative Credit Union LIMITED."

ARBITRATION

Subsequently, the appellant applied to the Registrar of Co-operative Societies for the settlement of a dispute which arose between the respondent and herself. The application for the settlement of the dispute was in accordance with section 50 of the Co-operative Societies Act. By virtue of section 50 (2) of the Act, the dispute was referred to an Arbitrator, Mr. Roy A. Stewart, a retired Resident Magistrate and practising Attorney-at-law.

The complaints before the Arbitrator were:

"1. The inability of City of Kingston Co-operative Credit Union to:

(a) Note the death of Mr. M. Henry on registered Title used as collateral for a loan obtained by Yvette Reid in 1991 although the legal fees had been paid and the documents signed.

(b) Return the said registered title in a timely manner after the obligations to this Credit Union had been discharged and this

had resulted in the Claimant's incurring additional expense to recover the title.

2. The tardiness of City of Kingston in finding and returning the Title to them had resulted in one of the Claimants losing a lucrative contract with the Ministry of Education as the title was needed to obtain funding elsewhere.

3. Yvette Reid took out a second loan with the Credit Union in 1993. After the loan was liquidated, 6 years later it was discovered

   "(a) That interest late charges had been taken from her account after the loan was paid.

   (b) An amount of $3,000.00 was withdrawn from her share account in 1997 replaced in 1999 and no explanation given."

After three (3) days of hearing the Arbitrator on the 9th of September, 2005 in a twelve (12) page document, gave his findings and reasons for making the following awards:

"1. City of Kingston Co-operative Credit Union Limited to pay the sum of $150,000.00 to Claimants being fees to note the death of Matthew Henry on the Title.

2. City of Kingston Co-operative Credit Union Limited to pay to the Claimant Mavis Henry the sum of $4,043,001.80 as loss of profit on the contract.

3. Claim for loss of profits on posters, foam and felt products disallowed.

4. City of Kingston Co-operative Credit Union Limited to pay Claimants $150,000.00 being costs of representing Claimants in this matter.

5. Claim for refund of late charges $9,126.60 and claim for refund of interest $9,590.90 disallowed.

6. Claim for difference between interest on $600,000.00 at City of Kingston Co-operative Credit Union Limited's rate of 30% and Certweld at 14% disallowed.

Interest at 12% on award from 15th of December, 2003 to date of payment."

APPEAL TO THE REGISTRAR

By letter dated the 21st of September, 2005 the respondent's Attorneys-at-law gave the Registrar of Co-operatives and Friendly Societies Notice of Appeal against the award of the Arbitrator. This was pursuant to s. 50 (3) of the Act.

The grounds of appeal were:

"1. That the Arbitrator erred in law and in fact in his finding "that Wood Parchment & Company applied on behalf of City of Kingston Co-operative Credit Union Limited to note the death of the deceased joint owner (page 9 of the Award)

2. That the Arbitrator erred as a matter of fact in finding that a connection had been established by the Claimant between her not having received her Certificate of Title from the Credit Union in a timely manner and her losing the contract she had with the Ministry of Education.

3. That the Arbitrator erred in law in finding "that the Claimant Mrs. Mavis Henry is entitled to an award for loss of profits on the contract with the Ministry of Education "(page 11 of the Award)".

4. That the Arbitrator's findings were contrary to the weight of the evidence and as a consequence unreasonable."

At the hearing of the Appeal before the Registrar on the 6th of February, 2006 Counsel for the respondent withdrew ground 1. Counsel also stated that the other three (3) grounds were interwoven and that the real issue was whether or not there was an evidential nexus between the claimants' loss of the contract and the failure of the respondent to return the Certificate of Title in a timely manner.

The respondent's Counsel further stated that the respondent's challenge was specifically directed at the award of $4,043,001.80 representing loss of profit from the contract. He referred to the number of finance houses that the claimants approached and the absence of reference to the unavailability of the Title being the reason given for not obtaining financing. Counsel also referred to the evidence of the willingness of a number of finance houses to finance the contract. He submitted that the claimants did not show a connection between the return of the Title by the respondent and the loss of profit from the contract. Therefore the Arbitrator's Award was unreasonable and should be set aside and the sum awarded to the claimant reduced.

Mrs. Taylor-Wright for the claimants pointed out what she described as the "disingenuous, inconsistent and contradictory" evidence of the City of Kingston Co-operative Union. She referred to the loan agreement between the claimants and Certweld Engineers and submitted that if the claimants had been able to collect the cheque of $2.5 M from Certweld in exchange for the Title, they would have been in a position to meet their contractual obligations.

After reviewing the Arbitrator's Award and considering the evidence as well as the submissions made on behalf of the parties, the Registrar, on March 31, 2006 gave his decision in writing. He concluded that:

> "A nexus was established by the Claimants between the failure of the Appellant to return the Claimants' Certificate of Title in a timely manner and the loss of the contract with the Ministry of Education, Youth and Culture. Adequate evidence was produced to validate Claimants' repeated

> requests for the return of the Certificate of Title and Appellant's tardiness in honouring its obligation, in ensuring the safe return of the Certificate of Title ... I concur with the Arbitrator's finding that the Appellant's failure to return the Certificate of Title to the Claimants in a timely manner denied the Claimants full use and benefits of the Title for Claimants own benefits inclusive of the business venture in question".

Accordingly the Arbitrator's Award was upheld with costs to be paid to the claimants. The interest rate of 12% per annum as awarded by the Arbitrator, was varied to be effective from March 1, 2004 until settlement is made in full.

JUDICIAL REVIEW

On May 16, 2006 City of Kingston Co-operative Credit Union filed and served a re-issued Notice of Application for Court Orders in the Supreme Court seeking leave to apply for judicial review. The Registrar of Co-operative Societies was the only respondent. On May 18, 2000, Mrs. Yvette Reid filed a Notice of Application for Court Orders that she be added as a respondent. In her affidavit in support of the application she testified that she was one of the claimants to the Arbitration and Appeal proceedings relating to the dispute between City of Kingston Co-operative Credit Union and her late mother Mavis Henry and herself. She further testified that she was the executrix of the estate of her late mother and that her mother's estate and she herself as recipients of the award, had acquired interest therein.

On May 25, 2006 by consent, Mrs. Reid was added as a respondent to the application for leave. The only ground on which leave to apply for judicial review was sought was stated thus:

> "That there is an error of law on the face of the Respondent's award dated this 31st day of March, 2006."

Leave to apply was granted on the 31st day of July, 2006.

On the 15th of August, 2006 the then applicant's (COK Cooperative Credit Union) Attorneys-at-law filed a Fixed Date Claim Form (Application for Judicial Review) in the Supreme Court. The applicant sought the following orders:

> "1. A Writ of Certiorari to quash the Award of the First Respondent dated the 31st day of March, 2006.
>
> 2. An Order that the matter be remitted to the First Respondent for a proper determination."

The only ground pleaded was the same as stated before.

The application for judicial review was heard by Anderson J. who, in a written judgment delivered on February 16, 2007, found that the "failure to understand and apply the legal principle of causation to the stated facts led the Tribunal into error." Accordingly, the learned judge made the following orders:

> 1. A Writ of Certiorari to issue to quash the decision of the Registrar of Co-operatives and Friendly Societies;
>
> 2. The matter is to be remitted to the First Respondent for re-hearing and a proper determination.
>
> 3. Costs of this application to be the Applicant's, to be taxed if not agreed."

It is from this decision that Mrs. Yvette Reid has appealed to this Court."

GROUNDS OF APPEAL

Some eight (8) grounds of appeal were filed on behalf of the appellant, Mrs. Reid.

"1. The learned trial Judge erred in law when he ordered:

(a) The issuance of a Writ of Certiorari to quash the decision of the tribunal.

(b) The rehearing and proper determination of the matter by the tribunal.

In circumstances where the applicant in applying for Judicial Review on the basis that there was error of law on the face of the Award of the Registrar of Co-operatives and Friendly Societies had raised no challenge to the assumption of Jurisdiction of the Tribunal nor claimed that the Tribunal had exceeded its Jurisdiction.

2. The learned trial Judge erred in law when in considering the effect of the finality or privative clause he allowed himself to be influenced by New Zealand Authorities and cases from the Samoan jurisdiction which enhances (sic) the scope of Judicial Review to include errors of law in and of themselves whether or not such errors affect the Jurisdiction of the Administrative Tribunal instead of the Privy Council decision of **South East Asia Fire Bricks SDN, BHD v Non- Metallic Mineral Products Manufacturing Employees Union (1981) AC 363** and the House of Lords decision of **Anisminic**

Ltd. v. Foreign Compensation Commission and Anor (1962) 2 AC 147 inter alia which retain the distinction between errors of law which affect Jurisdiction and those which do not.

3. The learned trial Judge failed to appreciate the substance of the 2nd respondent arguments concerning the effect of Finality Clauses when he expressed the view and held that section 50 (4) of the Act does not give a blanket exclusion as argued by the Respondent, since this was never the position of the 2nd respondent.

4. In arriving at his decision the learned trial Judge failed to recognize that the Applicant had not in its Affidavits or arguments clarified:

   a) what legal principle of causation was not understood or applied by the Tribunal and fell into error when he himself agreed with the arguments of the Applicant without making the said clarification; with the result that the finding that the tribunal failed to understand or apply the legal principle of causation or had misapplied the legal test is devoid of any legal or factual substratum or justification.

5. The learned trial Judge erred in law when he quashed the decision of the tribunal even though the applicant had:

   (a) failed to show how the error of law was apparent on the face of the record.

   (b) had not presented details of this error by affidavit evidence.

   (c) had not presented on oath a full and candid disclosure of the material facts.

(d) had not on appeal challenged the Arbitrator's finding as a matter of law or placed any issue of law for the consideration of the Appellate Tribunal.

6. The learned trial Judge erred in law in coming to the conclusion to issue a Writ of Certiorari when there was evidence available to the tribunal from which it could have arrived at its decision.

7. The learned trial Judge erred in law when he treated the award under review for an error of law as the Arbitrator's award thereby allowing the Applicant for Judicial review to make a fresh challenge to the Arbitrator's award which was never made to the Registrar on appeal; namely the Applicant for review had not placed causation before the Registrar on Appeal as an issue of law for his consideration nor raised any complaint before the registrar that the Arbitrator had made an error of law in applying any principle of law relating to causation.

8. The Learned Trial Judge erred when in ordering Certiorari and a rehearing of the matter he failed to recognize that the Applicant for Judicial review had raised no challenge before the Appellate Tribunal of items 1,3,4,5 and 6 on page 12 of the award. As a consequence the order to rehear the matter ought to have excluded those items; which items the applicant should have been ordered to pay forthwith."

Both parties seem to agree that these grounds raise two (2) main issues:

1. Whether or not the learned trial Judge was correct in finding that there was an error of law on the face of the award.
2. If so, whether or not the 'finality clause' in section 50 (4) of the Co-operative Societies Act ousts the jurisdiction of the court to quash the decision of the Registrar on the basis of the error of law on the face of the record.

THE ERROR OF LAW ISSUE

As stated before, the only ground on which judicial review was sought is that there was an error of law on the face of the respondent's award. What was the error of law complained of? The applicant for judicial review in the court below did not identify the point of law in its Fixed Date Claim Form. However, Ms. Indera Persaud, the Legal Advisor of the applicant/respondent (COK) stated in her affidavit sworn to on the 4th of May, 2006 (para. 25):

> "The Applicant seeks judicial review on the ground that the registrar erred in law when he failed to apply the legal principles governing the award of damages, in particular the Registrar applied the incorrect test with respect to causation".

At page 10 of the written award the Arbitrator said:

> "At paragraph 14 the Amended Defence states that 'there is no connection between the claimant getting the title and loosing (sic) the contract.' It seems to me that the connection is that the claimants could not go from one institution to another. It is common knowledge that borrowers sometimes have to approach more than one institution before success is attained. Absence of the title

> prevented the Claimants from doing so. It is correct that City of Kingston Co-operative Credit Union Limited approved a loan of $925,000 to the Claimants in February, 2004. This appears to be a last effort by the Claimant to try and save the contract. The original date for performance had passed i.e. January 2004 and an extension to 16/3/04 granted City of Kingston Co-operative Credit Union Limited had still not given them the title, which it knew they needed to transact business. I find that the Claimant Mrs. Mavis Henry is entitled to an award for loss of profits on the contract with the Ministry of Education..."

On appeal, the Registrar of Co-operatives stated that he was satisfied that the claimants had established a nexus between the failure of COK to return the Certificate of Title in a timely manner and the loss of the contract. He concurred with the Arbitrator's finding that COK's failure to return the Certificate of Title timeously denied the claimants "full use and benefits of this Title for the Claimant's own benefits inclusive of the business venture in question".

On judicial review, Anderson J held that there had been "an application or perhaps more correctly a mis-application of the legal test". The learned judge founded his decision on the following passage from "Judicial Review of Administrative Action" (1995) 5th Edition by de Smith, Woolf and Jowell at p. 286:

> "The concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Error of law also includes decisions which are

> unreasonably burdensome or oppressive. Thus whether or not the drawing of an inference from the primary facts, or the application of a statutory term to the facts and inferences drawn therefrom, is held or assumed to be a matter of fact (or fact and degree) or a matter of law, the court may still hold the decision erroneous in point of law if any of the above defects is present".

The learned Judge concluded that the Tribunal's failure to understand and apply the legal principle of causation led it into error.

Mrs. Marvalyn Taylor-Wright for the appellant, Mrs. Yvette Reid, submitted that the learned trial Judge erred in that he confused "an error of law on the face of the award" with a decision which is erroneous because of insufficient evidence. She referred to their Lordship's Board's decision in **Champsey Bharat and Company v Jivraj Balloo Spinning and Weaving Co. Limited** (1923) A.C. 480 for a definition of "an error on the face of the award". At p. 487 their Lordships said:

> "An error of law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous."

Counsel for the appellant contends that where, as in the instant case, an error of law is not apparent on the face of the award of the Registrar, certiorari cannot properly be issued.

It is Mrs. Taylor-Wright's contention that a decision based on insufficient evidence does not qualify as an error of law on this face of the award. She relies on

the following statement of Denning L.J. (as he then was) in **Rex v. Northumberland Compensation Appeal Tribunal** (C.A.) (1952) 1 K.B. 338 at 352:

> "I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision".

The learned Judge, she submits, erred in ordering that certiorari should go, based on the insufficiency of evidence to establish a causal connection between the loss of the contract and the failure to return the Title. Counsel for the appellant further argues that even if there was an error of law on the face of the award that by itself would not be sufficient to make the award amenable to Judicial Review. The applicant for judicial review would also have to show how that error affected the jurisdiction of the tribunal.

She relies on the Privy Council decision in **South East Asia Fire Bricks SDN.BHD v. Non-Metallic Mineral Products Manufacturing Employees Union and others** (1981) AC 363.

It is also the submission of Mrs. Taylor-Wright that the so-called failure of the registrar to apply the legal principle of causation and the legal principles governing the award of damages was not an identifiable error of law on the face of the award.

Finally, counsel contends that not only must the error of law be identifiable on the face of the award but it must also be shown to have affected the decision itself of the Arbitrator.

Mr. Jermaine Spence for the respondent contends that there was no or no sufficient evidential basis for a finding that the failure by the respondent to deliver the Certificate of Title to the claimant in a timely manner caused the loss of the contract with the Ministry of Education. In particular, there was no evidence as to how the lack of the Title affected the Certweld offer. This case, he says, is about indirect consequential loss. With regard to consequential loss suffered in an action for conversion of chattels, he referred to **McGregor on Damages**, 17th Ed. Para 33-065 at p. 1109 which reads in part:

> "On the other hand, the claimant's loss of profits on contracts made with third parties has tended to form too remote an item of damage. That such loss may be recoverable is recognized (Re Simms 1934 Ch. 1. C.A. at 29), but it has been allowed only where it could have been anticipated by the defendant. Thus in **Bodley v. Reynolds** (1846) 8 QB 779 the claimant recovered for his loss of custom by reason of the defendant's conversion of the tools of his trade, but of this decision it was said in **France v. Gaudet** (1871) L.R. 6 Q.B 199 at 205 that the defendant must be shown to have known that in the nature of things inconvenience beyond the loss of the tools would be caused to the claimant."

Counsel for the respondent submits that where the claim involves an indirect consequential loss the law stipulates certain criteria such as the remoteness test, before someone may be held responsible for that loss. The law, he contends, requires foreseeability for recovery of damages.

As regards the question of whether or not the error of law is apparent on the face of the award, the contention of Mr. Spence is that such a question is not relevant to this case. Counsel referred to the affidavit of the Registrar of the Co-operative

Societies which was put before the Review Court. This affidavit was in response to the affidavit filed by the respondent's attorneys in support of the application for judicial review. In this affidavit the Registrar indicated the factual basis on which he made his decision and explained the reason for the award.

In my judgment, the learned trial Judge was correct in holding that there was an error of law on the face of the award. The "Award" in this case includes not only the Registrar's Award but also the Arbitrator's Award since the former confirmed the latter on appeal. The Arbitrator in his written Award, incorporated the evidence that was put before him and gave the reasons for his decision. The affidavit of the Registrar which stated the reason for his decision is, on clear authority, part of the "face" of the Award. Attached to this affidavit was a bundle of documents containing all the documentary evidence which was presented to the Registrar for the hearing of the appeal – see para. 4 of the affidavit.

At para. 4 (ibid.) the Registrar stated inter alia:

> "...I must state that my finding that there was a nexus between the failure to return the certificate of title and the loss of contract was based not on the failure of the applicant to obtain a loan from the Self Start Fund, but from her failure to obtain a loan from Certweld Engineers Limited".

At para. 6 the Registrar indicated that he knew that "causation" was an issue. At paragraph 9 he said:

> "The circumstances before me, I believe were sufficient to establish that the Applicant (City of Kingston) knew of the contract between the 2nd Respondent (the appellant in this appeal) and the Ministry of Education; the Applicant knew

> that the purpose for which the 2nd Respondent needed the certificate of title was to obtain financing to carry out her obligations under the contract; the Applicant failed to return the certificate of title to the 2nd Respondent in a timely manner and as a result the 2nd Respondent was not able to carry out her obligations under the contract with the Ministry of Education thereby leading to the cancellation of the contract with the Ministry. The 2nd Respondent therefore lost any gains that would have accrued to her under the contract with the Ministry as a result of the certificate of the title being withheld".

The letter from the Ministry of Education dated the 16th of March, 2004 indicates that the contract was terminated because of Mrs. Mavis Henry's failure to deliver any of the items in the schedule within the extended contract period.

The Arbitrator and the Registrar were clearly of the view that the reason for the appellant's failure to deliver "any of the items" was that she and Mrs. Henry did not have the Title so they could not get financing to enable them to perform the contract.

In this regard mention should be made of a letter dated August 15, 2005 from Self Start Fund to the respondent . It reads in part:

> "Mrs. Mavis Henry's failure to obtain financing from the Self Start Fund for her project presented in December, 2003, had nothing to do with security. The Fund was making preparations, to facilitate the project and was relying on the strength of the commitment given by the City of Kingston Co-operative Credit Union to forward to us the abovementioned certificate of title as soon as it was in hand.
>
> The facility however was not successful as other conditions regarding the loan was not favourable."

On the evidence the only institution which required the Title as a condition of the loan was Certweld Engineers Limited. There is no evidence that the respondent knew of the loan agreement between the appellant and Certweld. There is no evidence that an undertaking from the respondent to Certweld would not be good enough to secure the loan. No evidence was placed before the Arbitrator or the Registrar that Certweld refused to provide the funding because of the respondent's inability to deliver the Title at the material time.

Further, the letter terminating the contract stated that the appellant had failed to supply any of the items in the schedule. The appellant's contract with the Ministry of Education commenced on October 24, 2003. The appellant's first approach to the respondent in respect of the use of the Title to secure funds for the purposes of the contract was by way of the letter of December 15, 2003 – two (2) months after the contract was entered into. It is important to note that in this letter Mrs. Henry identified Self Start Fund as the source of the funding. Apparently, on the same day Mrs. Henry wrote to the Ministry of Education requesting the Ministry to pay over a certain sum to Self Start Fund. This is gleaned from the Ministry's letter of December 18, 2003 to Mrs. Henry. It reads, in part:

> "Dear Ms. Henry
>
> Re: Contract to supply educational material
>
> Reference is made to your December 15, 2003 correspondence in which you requested the Ministry to pay over the sum of One Million and Fifty Thousand Dollars ($1,050,000.00) to the Self Start Fund as at the date of completion of the Contract.

> This is to advise that the Ministry has no objection to making the payment. However as you are aware, clause 14 of your Contract states that: "The Contractor shall be entitled to present requests for interim payments..." You therefore should instruct the Ministry when to make the payment to Self Start Fund, ensuring that sufficient funds are payable to accommodate this..."

It is also apparent that, on the same day that the Ministry wrote Mrs. Henry, Self Start Fund wrote the respondent. This may be inferred from the respondent's letter of December 31, 2003 to Self Start Fund. This letter, addressed to Self Start Fund, reads:

> "Re: COK Loan Account ...
> Duplicate Certificate of Title Registered Volume 1031 Folio 572 i.n.o. Matthew and Mavis Reid (sic)
>
> We are in receipt of your letter dated 2003 December 18th regarding the captioned matter and have bee (sic) instructed by Mrs. Yvette Reid to forward the duplicate Certificate of Title to you.
>
> Kindly be advised that out records indicate that the said Title was in the possession of Wood Parchment & Co., attorneys-at-law to note the death of Mr. Matthew Henry. This partnership is no longer in existence; however the attorneys can be located and as soon as we have been able to track down and receive same we will forward the Title to you as instructed".

This letter was signed by the respondent's Legal Advisor.

From the foregoing correspondence it is reasonable to conclude that as at December 18, 2003 arrangements were in place for the appellant to receive funding from the Self Start Fund even though the Certificate of Title was not located.

On February 5, 2004 the Ministry wrote Mrs. Henry referring to her letter of February 4, 2004 by which she requested the Ministry to pay over $925,000.00 to the

respondent. The 3rd and 4th paragraphs of this letter from the Ministry are identical to those of its letter of December 18, to Mrs. Henry. I have not seen the letter of February 4 in the Record of Appeal. However a letter dated February 6, 2004 from the respondent to the Ministry puts Mrs. Henry's letter of February 4, in context. This letter states:

> "Dear Sirs
>
> Re: Education Matters – Mavis Henry and Yvette Reid
>
> Please be advised that we have approved a loan to our captioned member, which is to be secured by the contract from your Ministry 2003 October 13 for $6,537,372.00.
>
> We also refer to your letter dated 2004 February 5 confirming payment to City of Kingston Co-operative Credit Union of $925,000.00 and letter dated 2004 February 6 from Education Matters to your Ministry irrevocable (sic) instructing you to do so."

Kindly therefore confirm that you are in receipt of the said letter and that you will undertake to comply with its terms providing that Education Matters fulfill their obligations".

Inspite of these arrangements for funding the appellant's contract with the Ministry was terminated because the appellant had failed to deliver any of the items in the schedule to the contract. The appellant's contract was cancelled because of the appellant's failure to deliver. Was there a connection between the appellant's failure to deliver and a lack of funding? If so, was there a connection between the lack of funding and the failure of the respondent to return the certificate of title?

Only if the answers are in the affirmative would it be reasonable to conclude that there was a connection between the cancellation of the contract and the Title. If there was such a connection the next question, in my opinion, would be, could the respondent have reasonably foreseen that in the special circumstances known to the respondent, its failure to return the Title in a timely manner would cause the cancellation of the contract. Only if the respondent could have reasonably foreseen the alleged consequence would the respondent be liable. Once liability is established the next issue would be the measure of damages.

The Arbitrator's finding that the connection between the claimant (the appellant) getting the Title and losing the contract is that "the claimants could not go from one institution to another" demonstrates that his decision was not informed by the correct legal principles of causation. The Registrar in concurring with the Arbitrator's finding fell into error. I agree with Mr. Spence that both the Arbitrator and the Registrar in not applying the legal principles of causation and remoteness of damages erred in law. They asked themselves the wrong questions and came to a finding without sufficient evidence to support that finding.

The Finality Clause Issue

Section 50 (3) of the Act states;

"(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Registrar within such period and in such manner as may be prescribed.

(4) A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called in question in any civil court. "

Mrs. Taylor-Wright for the appellant contends that this provision ousts the jurisdiction of the court from reviewing the decision made by the Registrar sitting as an appellate tribunal except in circumstances where the Registrar has acted in excess of jurisdiction or contrary to the rules of natural justice.

She submits that the mere allegation of an error of law is not sufficient, by itself, to grant the issuance of the Writ of Certiorari. She relies on the **South East Asia Fire Bricks** case,(supra). Counsel for the appellant, however, concedes that in **R v Lord President of the Privy Council Exparte Page** [on appeal from **Regina v Hull University Visitor ex parte Page**] (1993) A.C. 682, the House of Lords expressed the view that there is no practical distinction between non-jurisdictional and jurisdictional errors of law. However, she insists that the respondent has neither "demonstrated the error of law" nor shown how it affected the decision of the Registrar. She asks this court to hold that the Privy Council's decision in the **South East Asia Fire Brick** (supra) case ought to be followed in this jurisdiction. In that case the Privy Council held that there was no power to grant certiorari for an error of law on the face of the award which did not affect the jurisdiction of the Industrial Court and therefore since the only allegation was that there were errors of law on the face of the award, the High Court had no jurisdiction to grant an order of certiorari.

Although the Judicial Committee of the Privy Council is indeed the highest Court for this jurisdiction, the decision of the House of Lords in relation to the common law is our law. Dicta in **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.** (1986)

A.C. 80 at 108 support the view that a decision of the House of Lords in respect of common law is our law and is binding on us. See also dicta in **Clinton Bernard v Attorney General of Jamaica** Privy Council Appeal No: 30/2003 delivered October 7, 2004. These cases were referred to in the judgment of the Court in **Loretta Brissett v R.** SCCA 69/2002 delivered December 20, 2004.

Mr. Spence for the respondent submits that Anderson, J. had the power to review the decision of the Registrar of Co-operatives notwithstanding the ouster clause contained in section 50 (4) of the Act, on the basis of an error of law. He relied on the **Anisminic** case, **O'Reilly & Others v Mackman & Others** (1983) 2 A.C. 237 at 278, **In Re Racal Communications Ltd.** (1981) A.C. 374 at 382-3 and **R v Hull University Visitor Ex parte Page** (supra) among others. I accept most of Mr. Spence's submissions.

In Re **Racal Communications Ltd.** (supra) (sub nom In **Re A Company**. at p 383 Lord Diplock said:

> "The breakthrough made by Anisminic (1969) 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished".

In **O'Reilly v Mackman** supra, at p. 278 Lord Diplock said that the decision in **Anisminic:**

> "...has liberated the English public law from the fetters that the courts had theretofore imposed upon themselves so far as "determinations of inferior courts and statutory tribunals

> were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction and errors of law committed by them within their jurisdiction. The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a 'determination' within the meaning of the empowering legislation was accordingly a nullity".

In **R v Hull University Visitor ex parte. Page** (supra) at p 701F, Lord Browne-Wilkinson said:

> "In my judgment the decision in Anisminic Ltd. v Foreign Compensation Commission (1969) 2 AC 147 rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires".

Lord Slynn at p 705 H (ibid) said:

> "For my part and despite the advice of the Privy Council in **South East Asia Fire Bricks Sdn. Bld. v. Non-Metallic Mineral Products Manufacturing Employees Union** (1981) A.C. 363, I would now follow the opinion of Lord Diplock **In re A Company** ... (with which Lord Keith of Kinkel agreed) and in **O'Reilly v Mackman** ... (with which the other members of the Appellate Committee agreed".

It is now reasonably clear that, generally, any decision affected by an error of law made by an administrative tribunal or an inferior court can be quashed for error of law.

I must now turn to the question of whether or not s.50 (4) of the Act ousts the jurisdiction of the Supreme Court to review the decision of the Registrar of Co-operatives by certiorari.

It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly. The cases show that an ouster clause does not protect a nullity.

It is the constitutional role of the courts to interpret the written law and expound the common law and rules of equity. The courts will jealously guard this role. As Anderson, J. in the court below puts it, the court must not "resile from its seminal role as the arbiter of the rights of the citizens of any society and the protector of the Rule of Law". Lord Denning in **Pearlman v Keepers and Governors of Harrow School** (1979) QB 56 at pp69-70 said that no inferior court or administrative tribunal has jurisdiction to make an error of law "on which the decision of the case depends".

In **Re Racal Communications Ltd.** (supra) (sub. nom. In **Re A Company**) Lord Diplock at p. 383 A-B said:

> "If the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity".

Lord Reid in the **Anisminic** case had this to say about 'nullity' (p.171 **B-D**):

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in

> such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the Inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the Inquiry it has done or failed to do something in the course of the Inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend the list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".

The above passage indicates that the courts will be inclined to interpret a provision making the decision of an administrative tribunal or authority "final and conclusive" as intending to protect a decision of the tribunal which is not a nullity in the Anisminic sense.

In the light of the foregoing the question is – Did Anderson, J. err in holding that section 50 (4) of the Act did not oust the jurisdiction of the court to review the Award of the Registrar on the basis of an error of law? I think not. Where the decision-making power is conferred on an administrative tribunal or authority that is not a court of law, the presumption is that Parliament did not intend the administrative body to be the final arbiter of questions of law.

Section 51 of the Co-operative Societies Act suggests that the legislature did not intend that the Registrar or Arbitrator should himself determine difficult or intricate questions of law but should seek the opinion of the court. This section provides s.51.

(1) Notwithstanding anything contained in section 50, the Registrar at any time when proceeding to a decision under this Act, or the tribunal at anytime when an appeal has been referred to it against any decision of the Registrar under this Act, may refer any question of law arising out of such decision for the opinion of the Supreme Court.

(2) Any Judge or Judges, of the Supreme Court as the Chief Justice may direct, may consider and determine any question of law so referred and the opinion given on such question shall be final and conclusive.

In commenting on similar provisions in s 50 of the Co-operative Societies Ordinance the Guyana Court of Appeal in **Sowatilall v Kalika Persaud et al** (1971) 18 WIR 186 at 193 (p.8):

> "The Commissioner is, however, not expected to adjudicate on intricate points of law. His limitations in this respect are fully appreciated and recognized in s.50, where it is provided as a safeguard in the interests of justice that notwithstanding what has been said in s. 49, he may, when proceeding to his decision from the arbitrator's award refer any question of law ... for the opinion of the High Court ... [Tw] words "may refer" are interpreted to mean that it is imperative on the Commissioner to state a case on the point of law on the request of one or both of the parties in the appeal before him. I think it is obligatory on him to do so, he being a public officer, the depository of a power that is

> coupled with a duty which it is incumbent on him to exercise in the interests of persons having rights in the matter so as to prevent a failure of justice. That is why I conclude that "may refer" in s.50 means "must refer".

It seems to me that the Registrar should have referred the questions of causation and remoteness of damages in respect of indirect loss for the opinion of the Supreme Court pursuant to section 51.

In my view the Registrar must have asked himself the wrong questions in arriving at his decision that the evidence before him was sufficient to establish a nexus between the appellant's loss of the contract with the Ministry of Education and the failure of the respondent to return the Certificate of Title. This error renders his decision a nullity in the **Anisminic** sense. Such a decision is not protected by the 'finality clause' in s. 50 (4) and certiorari may go to quash his decision.

Accordingly, I would dismiss the appeal with costs to the respondent.

HARRIS, J.A.

I agree.

SMITH, J.A. (Ag.

I agree.

SMITH, J.A.

ORDER:

The appeal is dismissed with costs to the respondent.