JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS. 155 & 156 OF 2001

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**AMERICAN JEWELLERY COMPANY LIMITED**	**1ST APPELLANT/PLAINTIFF**
AND:	**INDRU KHEMLANI**	**2ND APPELLANT/PLAINTIFF**
AND:	**COMMERCIAL CORPORATION JAMAICA LIMITED**	**1ST RESPONDENT/DEFENDANT**
AND:	**TEWANI LIMITED**	**2ND RESPONDENT/DEFENDANT**
AND:	**GORDON TEWANI**	**3RD RESPONDENT/DEFENDANT**
BETWEEN:	**INDRU KHEMLANI**	**APPELLANT/DEFENDANT**
AND:	**TEWANI LIMITED**	**RESPONDENT/PLAINTIFF**

Hilary Phillips, Q.C. and Denise Kitson instructed by Grant Stewart, Phillips and Co., for the Appellants

John Graham and Carol Davis instructed by Jennifer Messado & Co. for the Respondents

March 19, 20, 21, 25, 26, 27, 2003; and December 2, 2004

DOWNER, J.A.

It is necessary to summarise the transactions between the Appellants, American Jewellery Company Ltd. Indru Khemlani ("Khemlani") and the Respondents Commercial Corporation Jamaica Limited, Tewani Limited and

Gordon Tewani ("Tewani"), in order to delineate the difficult points of law raised in these interlocutory proceedings. The proceedings in the Court below were a summons for an Interlocutory Injunction instituted by "Khemlani" and a summons for Summary Judgment instituted by "Tewani". Both summonses were heard before Glen Brown, J. (actg.) and he granted the summons for Summary Judgment and refused the prayer for an Interlocutory Injunction. Both appeals therefore are "Khemlani's" appeals. Equally, whatever "façade" is relied on "Tewani" is the respondent. For clarity it should be stated that the Interlocutory Injunction sought to prevent any dealings with respect to 70A King Street and the Summons For Summary Judgment was to recover possession of the said premises.

The initial transaction in this narrative was the contract between American Jewellery Company Limited, "Khemlani," and Gordon Tewani or his nominee for the sale of No. 3 Tropical Plaza for J$17m. The terms of payment are of sufficient importance to be fully stated. They are at pages 33-34 of Volume I of the Record which deals with Appeal No. 156 of 2001 against the order for summary judgment.

As the vendors' attorneys-at-law Clough Long and Co. had the carriage of sale presumably they drafted the contract. The clause adverted to reads:

> "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.
>
> There shall be no interest accruable due or payable to the Vendor or the Purchaser on any monies paid hereunder to the agent."

If the transfer was not effected because of failure to pay, the deposit would have been forfeited. So no interest would be due to "Tewani" as purchaser. On the other hand as Attorney-at-Law for "Khemlani" interest may be due to him. This is a matter for resolution at a trial.

Clough Long and Co. play an important role in this transaction. One role is that of stakeholder. In this role the stakeholder holds the sum deposited by the purchaser "Tewani" as between the two parties. The firm is the agent for the vendor. Equally the firm is the agent for the purchaser. The agent as Attorney-at-Law must be Clough Long & Co. The longer the monies are held by the Agent the greater the interest earned. Also there was a fiduciary

relationship between Mr. Clough and "Khemlani" and Mr. Clough could be asked to give an account of interest earned when the money was retained by him beyond a reasonable time.

Clough Long and Co. styled themselves as stakeholder. The description stakeholder did not permit Clough Long and Co. to take directions from Mrs. Jennifer Messado to the prejudice of "Khemlani". A stakeholder is to pay the money over once "Khemlani" becomes entitled to it. See **Hale v Burnell** [1911] 2 Ch. 551 and **Collins v Stimson** (1883) 11 QBD 142 at 144.

A stakeholder as **Harrington v Hoggart** 109 E.R.902 or (1880) 1 B & Ad 577 at 586 and 587 illustrates is not liable for interest on the deposit. But how long can he retain the interest without accounting for it? Certainly he was in duty bound to pay to the vendor when the title was transferred to "Tewani". That date will be determined at a trial.

The provision regarding completion is of importance. It reads at page 34 of Volume 1 of the Record:

> "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 a cheque payable the Register of Titles for the registration fee payable herein on or before the 30th September, 1999."

This clause suggests that, the duplicate Certificate of Title ought not to be handed over to the purchaser's Attorney-at-Law until there is payment in full as defined. The alternative to payment in full is the presentation of an undertaking by a named Bank.

Three of the special conditions to be noted are 6, 7 and 11 at page 37 of Volume 1 of the Record. They read as follows:

> "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 therefor has been received herein.
>
> 7. The stakeholder shall not be obliged to pay out any monies collected herein unless and until after the completion of the sale.
>
> ...
>
> 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 Limited for a period of three years from the date of completion hereof at the monthly rental of $25,000.00 per month such rent payable on the first day of each and every month."

Clause 7 needs some explanation. Once the deposit was paid there was a binding contract for sale, and even before transfer there is an immediate equitable interest in the property which accrues to the purchaser "Tewani". Moreover "Tewani" would be entitled to specific performance. Additionally, "Khemlani" is the trustee and "Tewani" the beneficiary. So the sale was completed when the deposit and balance of the purchase price was paid and

the equitable interest passed to the purchaser. The obligation of Clough Long & Co, arose then.

Indru Khemlani signed on behalf of the American Jewellery Company Ltd. and Gordon Tewani signed as purchaser. It ought to be noted that although Gordon Tewani signed the contract for sale of Lot 3 Tropical Plaza, he stated in his affidavit supporting his summons for Summary Judgment at page 12 of Volume I of the Record:

> "8. That I am also the principal of Commercial Corporation (Jamaica) Limited, which said company in an entirely different transaction purchased property at Tropical Plaza from American Jewellery Corporation Limited, which is a different entity from the Defendant herein. To my knowledge the two transactions are unconnected.
>
> My company requested the Defendant to leave premises at King Street orally and by letter dated 24th January, 2001 but despite this the Defendant remains in possession of same."

This paragraph raises questions. "Tewani" was a party to the contract as the opening paragraph of the Agreement for Sale and Purchase reads at page 32 of Volume I of the Record:

> "AGREEMENT FOR SALE AND PURCHASE
>
> THIS AGREEMENT is made this 16th day of August 1999 BETWEEN American Jewellery Company Limited a Company duly incorporated under the laws of Jamaica and having its registered office at 27 King Street, in the City and Parish of Kingston, holder of

> TRN No. (herein called "the Vendor") of the ONE PART AND Gordon Tewani of
>
> or Nominee (hereinafter called "the Purchaser") of the OTHER PART WHEREBY the Vendor AGREES to sell and the Purchaser to purchase ALL THAT parcel of land more particularly described in the Schedule hereto (hereinafter called "the said land") upon the terms, conditions and stipulations set out therein."

Why then was Tewani stating that his company Commercial Corporation Jamaica Limited purchased No. 3 Tropical Plaza as a different transaction? Why is "Tewani" stating that "Khemlani" is entirely different from American Jewellery Co. Ltd? Why is "Tewani" so keen to sever connection between the purchase of Lot 3 Tropical Plaza and the Summary Judgment for possession of 70A King Street? It was submitted on behalf of "Khemlani" that despite paragraph 8 above of "Tewani's" affidavit that the contract to purchase Lot 3 Tropical Plaza was bound up with the property at 70A King Street: the monies from the sale of Lot 3 Tropical Plaza was to pay off the mortgage on 70A King Street.

Earlier in paragraph 6 of his affidavit Gordon Tewani stated at page 12 of the Record:

> "6 That prior to the completion of the purchase of the property by me I was advised by the Bank of Nova Scotia (hereinafter the Bank) and verily believed that on 12th September 2000 the Defendant herein had sought and obtained an ex parte order restraining the Bank from completing the sale made pursuant to its powers of sale aforesaid. However having obtained the ex parte order the Plaintiff took no further steps with regard to same, such that

> the Order expired and the Bank proceeded to complete the sale. They did obtain a further order after the sale was completed. Copies of the ex parte orders are attached marked "GT3" for identity."

Then Gordon Tewani continues thus:

> "7. That the defendant herein has filed Defence dated 23rd March, 2001. I verily believe that the said Defence is a sham, and I am advised by my Attorney-at-Law and verily believe that there is no Defence to the action herein."

Gordon Tewani's affidavit suggests that he had some knowledge of the connection between the sale and purchase of lot 3 Tropical Plaza and his purchase of 70A King Street. In paragraph 8 cited previously of his affidavit he suggested that Commercial Corporation (Jamaica) Ltd. is a façade for Tewani and the legal consequences of such a suggestion are explained in **Jones v Lipman** [1962] 1 W.L.R. 832.

The next stage of the narrative is the account "Khemlani" gives as to the fate of the contract. Here is how he states it at page 27 of Volume 1 of the Record:

> "3. That as regards paragraph 1 of the Tewani Affidavit, I dispute the plaintiff's entitlement to be the registered proprietor and be entitled to possession of the premises known as 70a King Street, Kingston (hereinafter called "the said land") for the same was acquired by virtue of the breach by Commercial Corporation of Ja. Limited, an associated company of the Plaintiff, of an agreement for sale with American Jewellery and pursuant a conspiracy between the Plaintiff and Commercial Corporation of Ja. Limited, to injure me and my companies, which is the subject of **Suit No. C.L. A-018 of 2001 American Jewellery**

> **Company Limited et al v Commercial Corporation Ja. Limited, Tewani Limited and Gordon Tewani Limited.** That Mr. Tewani, the principal of the Plaintiff and Commercial Corporation of Ja. Limited, whom I have known for many years, was told by me that American Jewellery had entered into an agreement for sale of premises known as Shop 3 Tropical Plaza to his company, Commercial Corporation of Ja. Limited on the 16th August, 1999 in order to pay off loans owed to Bank of Nova Scotia inter alia, which loans were secured by the said premises, inter alia. That I attach hereto marked "IK-1" for identity a copy of the Agreement for sale."

A reasonable interpretation of this paragraph is that the proceeds of the sale of Lot 3 Tropical Plaza was to pay the loan owed to Bank of Nova Scotia which loan was secured on 70A King Street. It is on this basis that "Khemlani" disputes "Tewani's" entitlement to be the registered proprietor of 70A King Street. This is the central issue in these proceedings. "Khemlani" is asking this Court to look at the substance not the form. The substance reveals the connection between the transactions pertaining to Lot 3 Tropical Plaza and 70A King Street.

It should be recognized that the sale was binding when the deposit was paid, the date of this payment was not stated in the evidence. "Khemlani" explains the reason for the delay in the performance of the contract thus:

> "4. That there were delays in completing the Agreement for Sale within the time specified on the Agreement. That one of the main causes of the delay was the refusal of the Purchaser to execute a Lease in accordance with Clause 11 of the Agreement for sale. That instead the Purchaser sought to impose terms requiring, first a progressively increasing United States Dollar rental, and later a rental of

> J$125,000.00 per month in the first year, J$140,000.00 per month in the second year and J$170,000.00 per month in the third year of the Lease. Additionally for some months, despite requests from my then Attorneys-at-Law, Messrs. Clough Long & Co., no undertaking was given by the Purchaser's Attorneys-at-Law, Mesdames, Jennifer Messado & Company for the payment of the balance purchase price. That I attach hereto marked "IK-2 a,b,c,d,e" copy letters dated 20th January, 2000, 7th February, 2000, 10th and `12th April, 2000 and 28th September, 2000 between my Attorneys and Mrs Jennifer Messado on the matter."

Of the letters exhibited it is sufficient to cite three of them. The initial letter of 20th January reads at page 45 of Volume I of the Record:

> "20th January, 2000
>
> Mrs. Jennifer Messado
> Attorney-at-Law
> Dominica Drive
> Kingston 5
>
> Dear Madam.
>
> **Re: Purchase of Shop at Tropical Plaza, Kingston 10 American Jewellery Co. Ltd. To Gordon Tewani**
>
> We refer to meeting yesterday and to our letter to you dated the 12th January, 2000 a copy of which is attached.
>
> We cannot send you the Agreement for Sale unless and until we are satisfied as to the payment of the balance of purchase money and costs herein.
>
> If we did this, you will then have in hand Certificate of Title, Transfer and the Agreement of sale, i.e. all documents of perfect title, and we will have nothing to protect our client herein.

> We again ask that you let us have a suitable undertaking for the balance of purchase money and costs herein.
>
> We stand ready, willing and able to complete.
>
> Yours faithfully,
> **CLOUGH LONG & CO."**

Clough Long and Co., gave a reminder on 7th February 2000 at page 47 of Volume 1 of the Record and reminded his opposite number of the obligation to provide an undertaking pursuant to the contract. Here is the letter:

> "7th February, 2000
>
> Mrs. Jennifer Messado
> Attorney-at-Law
> 6 Dominica Drive
> Kingston 5
> Dear Madam,
>
> **Re: Sale of Lot 3 Tropical Plaza**
> **American Jewellery Co. Ltd. to Gordon Tewani**
>
> We have your letter dated the 3rd February, 2000. Your client cannot maintain that he is in a position to complete unless and until he can show the Courts he can pay the balance purchase money and costs.
>
> To date despite our several requests we have not received payment of outstanding costs [already due under the Agreements of Sale] or a suitable undertaking therefor.
>
> If we do not receive the above we shall take steps to terminate, forfeit the deposits herein.
>
> Yours faithfully
> **CLOUGH LONG & CO."**

It must be emphasized that these are interlocutory proceedings and so the full correspondence was not exhibited. If there is a trial with the proper parties, then an Agreed list of documents, Discovery of documents and Interrogatories will give a full picture of what happened.

Did Clough Long comply with the following letter and deliver a transfer and title to Jennifer Messado?

The third respondent's reply exhibited at page 49 of Volume 1 of the Record reads:

> "April 10,2000
>
> Clough Long & Co
> Attorney-at-Law
> 51 Harbour Street
> Kingston
>
> Attention: Mr. Raymond Clough
>
> Dear Sir,
>
> Re Sale of Lot 3, Tropical Plaza- American Jewellery Company Limited to Gordon Tewani and/or Nominee
>
> We refer to our many discussions.
>
> Now that we have solved the problem regarding the undertaking out of the way, we place on record that our Clients' instructions are that No DRAFT LEASE is to be delivered until the duplicate certificate is duly transferred into their name.
>
> Yours faithfully
> JENNIFER MESSADO"

This is a remarkable letter. Did the Appellant "Khemlani" agree to this? What was the solution of the undertaking that was now out of the way? Certainly

both Attorneys-at-Law ought to give an explanation of this. Could "Tewani" have instructed Mrs. Jennifer Messado to breach the Agreement For Sale and Purchase? Perhaps it should be noted that the payment terms stipulated that the entire balance should be paid by 30th September 1999 or secured by an undertaking from one of three named Banks.

Clough Long and Co. wrote again on April at page 1 of Volume I of the Record and on September 28, 2000 at page 54 of Volume I of the Record and on December 29, 2000. They wrote as follows at page 56 of the Record:

"29th December

Jennifer Messado & Co
Attorneys-at-Law
6 Dominica Drive
Kingston 5

Dear Mesdames:

Re: Sale of lot 3, Tropical Plaza – American Jewellery Company Limited to Gordon Tewani

We refer to our previous correspondence, discussions, and meetings between the writer and your good selves herein.

The monies paid to us on account balance purchase monies were sent on the express condition that our client executes a lease on the terms and conditions, including rental, demanded by you and which terms and conditions were not in keeping with the express terms and conditions of the Agreement for Sale particularly in respect to the Rental.

Our client has very pressing needs and wishes that we pay him the monies received from you. Having regard however to the conditions imposed on us we find it necessary to now request that you consent to his being paid out these sums without condition.

Kindly be good enough as to let us have your early confirmation of your withdrawal of all conditions.

Yours faithfully
Clough, Long & Co.

Raymond Clough."

This is an extraordinary letter. It refers to the "condition imposed on us." This must refer to Clough Long & Co. position as stakeholder. There was a condition presumably drafted by Clough Long & Co. To reiterate, it states that monies collected should not be paid out until after the completion of the sale. But the sale was binding after the deposit was paid and the entire sum should have been paid on execution of the contract of the 16th August 1999 or an undertaking given pursuant to the agreement. It was then December 2000, when this letter was written yet Clough Long and Co. sought permission from Jennifer Messado & Co. to pay out funds. Was there collusion between these Attorneys-at-Law? Was Clough Long and Co. now beholden to Jennifer Messado? Mr. Clough had a fiduciary relationship with "Khemlani". Mr. Clough speaks of "pressing needs" on December 29, 2000. 70A King Street was transferred to "Tewani" on 5th January 2001.

The closing letter exhibited reads at page 58 of Volume I of the Record:

January 2, 2001

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

KINGSTON

Attention: Mr. Raymond Clough

Re: Sale of Lot 3, Tropical Plaza – American Jewellery Company Limited to Commercial Corporation Ja. Ltd

We have your letter dated the 29th December, 2000.

> We are not prepared to release you from the condition, and expect the Vendor to execute the Lease in the form as agreed, failing which we shall take the necessary steps to have your client's use and occupation TERMINATED FORTHWITH.
>
> We look forward to the immediate return of the executed Lease to enable the completion of this long outstanding matter.
>
> Yours faithfully
> JENNIFER MESSADO & CO."

It is interesting to note that in his letter of 29th December, Mr. Clough makes no mention of the undertaking by a Bank pursuant to the contract. Again in Mr. Clough's letter of 28th September to Mrs. Messado, he mentions his client's letter which speaks for itself. That letter is not in the Record. The letters at pages 51, 54 and 56 speak to the lease and it seems that the Respondent "Tewani" through his Attorney-at-Law has refused to comply with the express terms of the Agreement For Sale and Purchase regarding the lease.

Paragraph 5 of "Khemlani's" affidavit is of importance as his contention is that "Tewani" deliberately breached the terms of the contract he made with "Khemlani" and that he was aware of the consequences of his breach. Further, he accuses Mrs. Jennifer Messado of registering the Transfer although $1.7M was still owing. The issue as to how she got the Transfer and how she registered it and secured the Title is one of the questions which ought to be answered at a trial. On the evidence so far in these interlocutory proceedings it may be that Mr. Clough can provide an answer at a trial. After all he was in a fiduciary relationship with "Khemlani". If he delivered the transfer to Mrs.

Messado he might be in breach of fiduciary duty or he might have delivered it fraudulently in pursuance of a conspiracy. All these questions can only be determined at a trial.

Further Mr. Clough stated in his letter of December 29, 2000, that as the stakeholder he could not release the funds entrusted to him until there were variations in the lease agreement embodied in the Agreement For Sale and Purchase. Be it noted again that the Agreement For Sale And Purchase stated that the stakeholder shall not be obliged to pay out any monies collected herein unless and until after the completion of the sale. However, we note that there has been a transfer to "Tewani" of Lot 3 at Constant Spring although "Khemlani" states that monies are still owed to his company. These are serious allegations and if they were proved at a trial a Court could find that its officers were liable for serious breaches, especially if they were sued for conspiracy with "Tewani". For the power to amend the pleadings see 1967 **White Book** paragraphs 15/6 and 21.1.3 and section 100, 101, and 102 of the Civil Procedure Code Law now repealed.

What role did "Khemlani's Attorneys-at-Law play?

Here is the relevant paragraph of "Kemlani's" affidavit at page 28 of Volume 1 of the Record:

> "5. That unknown to me in or about August 2000, Mrs. Jennifer Messado registered the Transfer from American Jewellery to Commercial Corporation Ja. Limited, although approximately $1.7 million dollars of the purchase money then remained outstanding (and still remains due) and she continued to insist, on her client's behalf that the moneys paid to Mr. Clough, totaling Ten million dollars, could not

> be disbursed until American Jewellery had agreed to the variations of the Lease terms in the Agreement for Sale. That we did not agree. Further that as a result of the refusal to permit the release of the funds I was unable to pay out the debt owed to the Bank of Nova Scotia and the Bank of Nova Scotia listed the property the subject hereof for auction in August 2000. The Bank was then owed approximately Thirteen Million Dollars but was prepared to accept Ten Million Dollars on account to cancel the auction. That as Mr. Tewani indicated in paragraph 4 of his Affidavit, he attended the auction and purchased the premises the subject thereof."

In **Phang Sang v Sudeall** (1988) 25 J.L.R. 226 at 230 Carberry, J.A. speaks of the "unwisdom" of a vendor's solicitor transferring land into the name of the purchaser without having got the purchase money or an irrevocable undertaking. Later on page 231 the learned judge reiterated this stance.

Then paragraph 6 refers to letters which have been cited previously. It reads:

> "6. That even as late as 2nd January, 2001 whilst I was pursuing an appeal process to prevent the Transfer of the premises by Bank of Nova Scotia to Mr. Tewani's company the Plaintiff hereof in answer to a letter from my attorneys dated 29th December, 2000 requesting the release of the funds the response from Mr. Tewani's attorney, dated the 2nd January 2001, was that they would not release the conditions. That I attach hereto marked "IK-3 & IK"-4 for identity letters dated 29th December, 2000 and 2nd January, 2001."

It is arguable that Clough Long and Co. as experienced conveyancers could have taken steps pursuant to sections 153 and 154 of the Registration of Titles Act (the "Act") to protect their client. What did Mr. Clough do apart from

withholding payment of the funds he held as stakeholder? These matters can only be cleared up at a properly constituted trial.

Then paragraph 7 of "Khemlani's" affidavit reads as follows at page 29 of Volume I of the Record:

> "7. That as regards paragraph 6 of the Tewani Affidavit I state that as I had been in negotiation with Bank of Nova Scotia as to the repayment of its loan whilst I was seeking the release of the funds from the Purchasers of Tropical Plaza, I legitimately brought an action against Bank of Nova Scotia in an attempt to stop the transfer to the Plaintiff herein. That the allegation in paragraph 6 is incorrect in that, after obtaining the ex parte injunction I applied for the interlocutory order, but the same was refused by Mr. Justice Reckord on the 4th December 2000 on the basis that damages were an adequate remedy. That I appealed the same and obtained from Mr. Justice Smith on the 19th January, 2001 an ex parte injunction exhibited as GT –3 but it was discovered after service of the Order on the Office of Titles, that the Transfer of the property to the Plaintiff had already been registered dating back to the 5th January, 2001 when the same had apparently been lodged. That the fact that I also have a valid claim against the Bank of Nova Scotia does not affect my valid claim against the Plaintiff inter alia, which is also the basis of my Defence herein."

The proceedings relating to the Injunctions, the dates and the instructing Attorneys-at-Law for Khemlani are of importance and it is essential to set them out as they have an important bearing on setting aside the summary judgment sought by "Khemlani" and the issuance of an Interlocutory Injunction also sought by "Khemlani" in those proceedings.

Here is the order of Reckord J. at page 24 of Volume I of the Record dated 12 September 2000:

> "UPON THE EX-PARTE SUMMONS FOR INTERIM INJUNCTION coming on for hearing AND UPON hearing Mr. A.J. DABDOUB and MR. RAYMOND CLOUGH instructed by Messrs CLOUGH, LONG & Co, attorneys-at-Law for the Plaintiffs; AND UPON referring to the Affidavit of the 1st Plaintiff sworn to on the 7th day of September, 2000 and filed herein IT IS HEREBY ORDERED THAT:-
>
> The Defendant be restrained by their servants and/or agents or otherwise from completing any sale agreed in the purported exercise of the power of sale under the mortgages No. 992364 and 1002016 endorsed on the Certificate of title registered at Volume 1191 Folio 789 of the Register Book of Titles for a period of 10 days from the date hereof.
>
> Counsel gives the usual undertaking as to damages on behalf of the plaintiffs.
>
> Liberty to Apply."

So Reckord J. did grant an ex parte injunction. There is no trace of a refusal of an interlocutory injunction. The Plaintiffs were Indru Khemlani, American Jewellery Company Limited and respondent being the Bank of Nova Scotia. The same parties were before Smith JA (actg.) on 19th January 2001 exhibited at page 26 of Volume I of the Record:

> "1. That the Defendant/Respondent be restrained by itself its servants and/or agents howsoever from taking steps to enforce its Mortgage numbers 992363 992364 and 1002016 endorsed on the certificate of Title registered at Volume 1191 Folio 789 of the Register Book of Titles and known as 70A King Street in the Parish of Kingston until the 30th January, 2001.

2. The Appellants/Plaintiffs give the usual undertaking as to damages."

A pertinent question to ask is - why was "Tewani" and Clough Long and Co. not joined in these proceedings? Was the stakeholder in funds at that time? What is clear from page 16 of Volume 1 of the Record is that the other property in issue at 70A King Street was on January 5, 2001 transferred to "Tewani". Prior to that page 19 of Volume I of the Record demonstrates that Gordon Tewani at Public Auction made a bid for $12,000.000 and secured 70A King Street on 31st August, 2000. A question that must be decided at a trial is the amount the stakeholder held when the auction took place. Did he know or ought he to have known of the auction? Did Mrs. Messado know of the auction? She was "Tewani's" lawyer and presumably acted on his behalf for the transfer.

It is helpful to cite paragraphs 1-6 of "Tewani's" affidavit at page 11 of Volume I of the Record to demonstrate how "Tewani" used Tewani Ltd. and earlier Commercial Corporation Jamaica Ltd. as masks for the activities of "Tewani".

They read at page 11 of Volume I of the Record:

"1. I reside and have my true place of abode in the parish of St. Andrew, and my postal address is c/o Mall Jewellers, Mall Plaza, Kingston 10 in the parish of St. Andrew, and I am Managing Director of the Plaintiff company (hereinafter my company) and authorized to make this affidavit on its behalf.

2. The Plaintiff is the registered proprietor entitled to possession of land known as 70A King Street in the City and Parish of Kingston and being all that parcel of land situate at King Street in the city and Parish of Kingston and now known as SEVENTY KING STREET and being the land comprised in Certificate of Title registered at Volume 1191 Folio 789 of the Register Book of Titles (hereinafter the said land). A copy of the title to the said land is attached marked "GTI" for identity.

3. The said land was subject to mortgage no. 992364 to the Bank of Nova Scotia Jamaica Limited. The said mortgage was registered on 29th April, 1998 and endorsed on the title.

4. The said land was publically (sic) advertised for sale by auction variously in August, 2000, and on behalf of the Plaintiff herein I attended the said auction, and successfully bid for and duly purchased the said land. Copies of the advertisements and the bidding sheet with regard to the said sale are attached marked "GT2" for identity.

5. That pursuant to the said purchase the said land was duly transferred to my company, and the transfer registered on 5th January, 2001.

6. That prior to the completion of the purchase of the property by me I was advised by the Bank of Nova Scotia (hereinafter the Bank) and verily believed that on 12th September 2000 the Defendant herein had sought and obtained an ex parte order restraining the Bank from completing the sale made pursuant to its powers of sale aforesaid. However having obtained the ex parte order the Plaintiff took no further steps with regard to same, such that the Order expired and the Bank proceeded to complete the sale. They did obtain a further order after the sale was completed. Copies of

> the ex parte orders are attached marked "GT3" for identity."

It seems paragraph 8 of "Khemlani's" affidavit at page 29 of Volume I of the Record raises an arguable case for conspiracy to injure involving "Tewani" and officers of the Court, Here is how paragraph 8 reads:

> "8. That as regards paragraphs 7 & 8 of the Tewani Affidavit I state that my Defence is not a sham, that I have a valid claim against the Plaintiff, Mr. Tewani and Commercial Corporation Ja. Limited for loss and damage caused by conspiracy to injure and breach of contract. That indeed my home is also in jeopardy as it too secured the loan to the Bank of Nova Scotia and is also at risk of auction. That Mr. Tewani has mocked me saying that he will also go to such auction of the same and purchase my home. That it was only a little over two weeks ago that Commercial Corporation Ja. Limited finally executed the lease in the terms of the Agreement for sale, but the conditions imposed on Mr. Clough as to the disbursement of the proceeds of sale have not been expressly released. That my requests to Mr. Clough to obtain the proceeds of sale have been unsuccessful, and I am now concerned about the likelihood of my recovering the same."

Who imposed conditions on Mr. Clough regarding the disbursement of funds he received as stakeholder? The correspondence between the two Attorneys-at-Law suggests that Mrs. Messado did.

It seems as though Mr. Clough also may, in the alternative, be liable in negligence or breach of fiduciary duty. Paragraphs 9 and 10 explain the basis of "Khemlani's" case in insisting in remaining on the property in issue and the reasons for seeking an interlocutory injunction. They also explain the basis for his arguable defence with respect to the contention by "Tewani" that his

defence was a sham. They read as follows at page 30 of Volume I of the Record:

> "9. That as regards paragraph 9 of the Tewani Affidavit the Plaintiff herein has sought to recover possession of the premises from me which I stoutly defended. Further the Plaintiff has since listed the premises for sale. That I attach hereto marked "IK-5" for identity a copy of an advertisement sent to my attorneys by the Plaintiffs attorney which lists the premises the subject hereof for sale. The Plaintiff therefore threatens and intends to dispose of the property the subject hereof, before a determination of the issues which form the basis of this suit and the action filed by me inter alia against the Plaintiff inter alia. That I have owned these premises for approximately 20 years having spent substantial funds reconstructing it for my jewellery business and I have built up a substantial goodwill in this location over the years. That this property was intended for my son, Sham Khemlani who has a learning disability resulting from bypass surgery on his heart when he was an infant and is therefore unable to fend for himself and make his way in the world as other person would. Damages cannot compensate for the loss of the premises in the circumstances.
>
> 10. That in the premises I humbly pray that this Honourable Court will refuse the application for Summary Judgment herein and grant the order as prayed in the Summons for Interlocutory injunction filed in **Suit No. C.L.A-018 of 3001 American Jewellery Company Limited et al v Commercial Corporation of Jamaica Limited et al."**

On the basis of paragraph 9 above, the offer price in the exhibit IK-5 at page 60 of Volume I of the Record is $17.5M. Why was the advertisement sent to "Khemlani"? The inference is that "Tewani" is offering "Khemlani" or others 70A King Street for $5.5m. more than $12m, he "Tewani" paid for it at

the Auction. If purchased "Tewani" would be unjustly enriched to the extent of $5.5m.

The defence of "Khemlani" at page 7 of Volume I of the Record contains averments based on the affidavit evidence rehearsed previously. Paragraph 7 of the Defence at page 8 of Volume I of the Record is of special importance. It reads:

> "7. The Defendant further says that the matters herein complained of form the basis of Suit No. C.L.A. 018 of 2001, American Jewellery Company Limited and Indru Khemlani v-Commercial Corporation (Ja) Limited: Tewani Limited and Gordon Tewani filed in the Supreme Court on the 2nd day of March, 2001 by which the Plaintiffs in that suit, seek damages for breach of contract and for conspiracy to injure; for an order setting aside the Transfer to the Plaintiff herein and an injunction. The Plaintiffs in that suit intend to seek an order to consolidate the trial of that suit with the action herein."

How did Glen Brown J. (ag.) find for "Tewani" in the Court below?

The learned judge summarized the cases before him as follows at pages 3 and 4 of Volume III of the Record thus:

> "The plaintiffs claims inter alia
>
> (i) damages for conspiracy to injure
>
> (ii) an order that the transfer registered to Tewani Limited on the 5th day of January, 2001 be set aside and an injunction restraining the second defendant from dealing in or parting with the said premises
>
> On the 7th March 2001 Tewani instituted suit CL T024 of 2001 against Indru Khemlani seeking possession of 70A King Street that he had purchased at the auction.

> The latter has remained in possession notwithstanding that the mortgagee had transferred his interest."

In substance he decided both issues in favour of "Tewani" by granting the Summary Judgment for possession and refusing the Interlocutory Injunction. His orders in so far as is material were as follows at page 130 of Volume I of the Record:

> "1. That there be judgment for the Plaintiff herein.
>
> 2. That the Plaintiff be given possession of land known as 70A King Street in the City and Parish of Kingston now known as SEVENTY KING STREET and being the land comprised in Certificate of Title registered at Volume 1191 Folio 789 of the Register Book of Titles.
>
> 3. Stay of Execution of the Order of possession for a period of six (6) weeks from the date hereof.
>
> 4. Certificate for Counsel."

It is clear that in these Orders on the issue of the summary judgment for possession, the learned judge ruled in favour of "Tewani".

The order on the summons for Interlocutory Injunction reads as follows at pages 13-14 of Volume 2 of the Record:

> **"IT IS HEREBY ORDERED:**
>
> 1. The Application for Interlocutory Injunction, sought by Summons dated 7th day of June is refused.
>
> 2. Costs to the Defendants
>
> **3.** Certificate for Counsel granted."

The grounds of appeal at pp.15 and 12 of the supplemental record Volume 111 of the Record relating to the summary judgment and the interlocutory injunction read as follows:

> "(1) The Learned Trial Judge erred in law in:-
>
> (a) Granting an Order for Summary Judgment."

> "(1) The Learned Trial Judge erred in law in:-
>
> (a) refusing the Application for Interlocutory Injunction."

The proceedings on appeal: (1) The Interlocutory Injunction

To appreciate the learned judge's reasons for refusing the application for the Interlocutory Injunction it is appropriate to cite certain passages from his judgment at page 14 of Volume 111 of the Record where he summarized the Appellant's submission thus:

> "It was the plaintiff's contention that wrongful conduct on the part of the defendant, which would fall short of fraud, would have the same effect as fraud under the Registration of Titles Act. She cited the Privy Council decision in the Jamaica case of ***Thomas v Johnson*** (1997) 52 WIR 409 and relied on a passage from the judgment of Gault J.
>
> **'There is also the issue as to whether the registration of their proprietorship could be said to have been wrongfully obtained by the Johnsons. The meaning of the word wrongfully "obtained" in the corresponding section in the New Zealand Act was left open by the Privy Council in Frazer v Walker. More recent decisions at first instance in New Zealand**

and New South Wales have considered the matter. In Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd. 1984 2 NZLR 704 at page 715 Barker J, expressed the view that wrongful conduct in its New Zealand context involved more than that the instrument pursuant to which it was procured was void and that it involved acting other than honestly and in good faith. In Scallan v Registrar-General (1988) 12 NS WLR 514 Young J., with reference to the cases corresponding New South Wales provision, followed the New Zealand cases accepting that a registration would be wrongfully obtained by an intentional act which was not rightful but which might fall short of "fraud" within the meaning of the statute.

Their Lordships have not been persuaded that the law is developing on any erroneous line nor would be inclined to accept on the material placed before them merely employing the wrong procedure without any intentional objective of defeating the rights of others would amount to wrongful conduct in this context'."

Regrettably the learned judge made no analysis of this important statement of principle nor did he make any attempt to relate the principle to the affidavit evidence in the case. Had the learned judge attempted to analyse the opinion of the Privy Council he may have found that when juxtaposed with section 153 and section 154 of the Registration of Titles Act that these two sections when taken together provided for restitution of property which was wrongfully obtained and retained. If this analysis is sound then once "Tewani"

obtained 70A King Street in bad faith, by breach of contract and conspiracy to injure "Khemlani"s business, then section 153 and 154 of the Registration of Titles Act provides the remedy of restitution.

The learned judge accepted the submission on behalf of "Tewani" thus at page 6 and 7 of Volume III of the Record:

> "In opposing the plaintiff's application, counsel for the defendants submitted that the plaintiff's claim was founded on breach of contract and conspiracy to injure. The defendant was the registered proprietor and his title was indefeasible save for fraud. She maintained that the fulcrum of the plaintiff's case was based on an intentional, deliberate and wrongful act committed by the defendants. If he was successful his only remedy would be in damages.
>
> She urged that the plaintiff's application be dismissed and summary judgment entered for the defendant in respect of their application."

Then the learned judge continued thus on page 7 of Volume III of the Record:

> "In the present case the plaintiff did not allege fraud in either the statement of claim or the defence. Under the Civil Procedure Code fraud must be specifically pleaded.
>
> The Bank of Nova Scotia had exercised their power of sale as mortgagee and transferred the premises to Tewani Ltd. The Plaintiff would have no right against the purchaser and therefore could not satisfy the court that there was a good defence to the action on the merits. Tewani Ltd was therefore entitled to possession."

The deception

The first point to note is that the learned judge failed to unravel the activities of "Tewani" from which it could have been inferred that "Tewani"

deliberately used his two companies, Commercial Corporation of Jamaica Ltd. and Tewani Ltd. as masks. His delay in payment to Clough Long & Co. and his instructions to his attorney-at-Law to breach the terms of the agreement for sale and to insist on new terms in the lease outside the Agreement For Sale and Purchase raises serious issues to be tried. Also the affidavit evidence suggests complicity between "Tewani", Jennifer Messado and Raymond Clough. These actions are closely connected with the purchase of 70A King Street by "Tewani". The refusal to pay over the funds by Jennifer Messado and Co. and the refusal to hand over the funds to "Khemlani" when the funds were disbursed, suggests a combination to deprive "Khemlani" of 70A King Street by wrongful means. So the first issue of law to address is the authority on the use of a private company as a mask and whether in these circumstances there can be inferred a combination with intent to injure. Once a mask was used in the circumstances of this case, there is a suggestion that "Tewani" was not a purchaser "in good faith" when he acquired 70A King Street at the Auction Sale. This is the basis of the arguable case on the affidavit evidence and the pleadings ought to reflect it.

In **Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.** [1914-1915] All E.R. Rep. 280, helpfully cited by Mr. John Graham, Viscount Haldane L.C. said at p. 283:

> "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be

> called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. Whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard, therefore, was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502."

"Tewani" has not concealed the fact that he is the life and soul of Tewani Ltd. and Commercial Corporation Jamaica Ltd.

Then in **R v McDonnell** [1966] 1 All E.R. 193 at 198 Nield, J. made the following observations on the status of a company:

> "DENNING, L.J., however, in the course of his judgment animadverted on the status of a company when he said:
>
> "A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the

> company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."

Then Nield J. poses this question at page 199:

> "The point which must be decided, as this is a conspiracy charge, is whether, when one man alone is responsible and solely has any sort of authority for doing any act of any kind for the company, there are two persons and two minds; ..."

The answer was given on page 201 thus:

> ". . . and I have reached the conclusion that I should express the opinion or anticipatory ruling that these charges of conspiracy cannot be sustained, on the footing that in the particular circumstances here, where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds. If it were otherwise, I feel that it would offend against the basic concept of a conspiracy, namely an agreement of two or more to do an unlawful act, and I think that it would be artificial to take the view that each of these companies can be regarded as a separate person or a separate mind, in view of the admitted fact that this defendant acts alone so far as these companies are concerned."

As for a specific authority on using a company as a mask, **Jones v Lipman** [1962] 1 W.L.R. 865 is a good example. In explaining the principle Russell, J. said at p. 835:

> "For the plaintiffs the argument was twofold. First, that specific performance would be ordered against a party to a contract who has it in his power to compel another person to convey the property in question; and that admittedly the first defendant had this power over the defendant company. Second, that specific performance would also, in circumstances such as the present, be ordered against the defendant company. For the first proposition reference was made to **Elliott and H. Elliott (Builders) Ltd. v. Pierson** [1948] Ch. 452; [1948] 1 All E.R. 939. In that case resistance to specific performance at the suit of a vendor was grounded on the fact that the property was vested in a limited company and not in the vendor. The company, however, was wholly owned and controlled by the vendor, who could compel it to transfer the property, and on this ground the defence to the claim for specific performance failed. It seems to me, not only from dicta of the judge but also on principle, that it necessarily follows that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed."

Then the learned judge continued thus at page 836:

> "For the second proposition reference was made to **Gilford Motor Co. Ltd. v. Horne** [1933] Ch. 935. In that case the individual defendant had entered into covenants restricting his trading activities. It caused the defendant company in that case to be formed. This company was under his control and did things which, if they had been done by him, would have been a breach of the covenants. An injunction was granted not only against him but also against the company. In that case Lord Hanworth M.R., after referring to **Smith v Hancock** [1894] 2 Ch. 377; 10 T.L.R. 433, C.A. said [1933] Ch. 935, 961: 'Lindley L.J. [1894] 2 Ch. 377, 385 indicated the rule which ought to be followed by the court: 'If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the

> business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly.' I do draw that conclusion; I do hold that the company was 'a mere cloak or sham'; I do hold that it was a mere device for enabling Mr. E. B. Horne to continue to commit breaches of [the covenant], and under those circumstances the injunction must go against both defendants' . . ."
>
> "Lawrence L.J., in his judgment, said[1933] Ch. 935, 965: . . . 'I agree with the finding by the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne'."
>
> "Similarly, Romer L.J. said (Ibid. 969): 'In my opinion Farwell J. was right in the conclusion to which he came. . . that this defendant company was formed and was carrying on business merely as cloak or sham for the purpose of enabling the defendant Horne to commit the breach of the covenant that he entered into deliberately with the plaintiffs on the occasion of and as consideration for his employment as managing director. For this reason, in addition to the reasons given by my Lords, I agree that the appeal must be allowed, with the consequences which have been indicated by the Master of the Rolls'."

Then in summarising the principle Russell J. at 836-837 said:

> "Those comments on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The case cited **[Gilford Motor Co. Ltd. v Horne** [1935] Ch. 935] illustrates that an equitable remedy is rightly to

> be granted directly against the creature in such circumstances."

It follows that "Tewani" could not conspire with Tewani Ltd. and Commercial Corporation Jamaica Ltd. but that he could conspire with Mr. Clough and Mrs. Messado. This inference of a combination and common intention can be drawn from "Khemlani's" evidence and the correspondence between the two officers of the Court and the actions of Mr. Clough. It is on this basis that a conspiracy can be sustained against "Tewani" and others. Buckley L.J. said in **Belmont Finance Corporation v. Williams Furniture Ltd and others No. 2** [1980] 1 All E.R. 393 at 404:

> "To obtain in civil proceedings a remedy for conspiracy, the plaintiff must establish (a) a combination of the defendants, (b) to effect an unlawful purpose, (c) resulting in damage to the plaintiff **(Crofter Hand Woven Harris Tweed Co Ltd v Veitch** [1942] 1 All ER 142 at 147, [1942] AC 435 at 440 per Lord Simon LC). The classic definition of conspiracy is that in **Mulcahy v R** (1868) LR 3 HL 306 at 317:
>
> > 'A conspiracy consists not merely of the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.'
>
> I have used the word 'combination' rather than the word 'agreement' used in that definition and by Lord Simon L.C., because the word 'agreement' in this context does not mean an agreement in any contractual sense but a combination and common intention to do the act which is the object of the alleged conspiracy. That Lord Simon LC was so using the word is, in my opinion, clear from later passages in his speech: see also the other speeches in the **Crofter Hand Woven** case."

A further illustration of a conspiracy to injure is **Lonrho plc v Fayed** [1991] 3 All ER 303. Lord Bridge after reviewing previous authorities on the subject including **Sorrell v Smith** [1925] AC 700 at 712, and **Crofter Hand Woven Harris Tweed Co Ltd v Veitch** [1942] AC 435 at 445 said at 309-310:

> "The reasoning in these passages is both clear and cogent. Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortuous. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortuous that the means used were unlawful."

It would be for a trial court to decide if indeed there was a conspiracy and if so into which category that conspiracy falls. What seems undeniable is that on the affidavit evidence there is a serious issue to be tried.

The most important issue of law is whether it is probable that "Khemlani" can recover his property in view of the fact that "Tewani" is now the registered owner. That depends on the application of the provisions of sections 153 and 154 and 163 of the Registration of Titles Act. The foundation of Ms. Hilary Phillips, Q.C.'s submission was that this was an appropriate instance to invoke these three sections of the Act. Firstly section 153 reads:

"Procedure and Practice

> **153.** In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination."

It was her submission that the registered title to 70A King Street was wrongfully obtained and wrongfully retained by "Tewani" and that the Registrar is empowered to require in writing "Tewani" or Tewani Ltd. to give it to the proper party namely "Khemlani". "Khemlani" would then be put on terms to pay over $10m to "Tewani". Further these provisions enable a judge or the

Supreme Court to summon "Tewani" and Tewani and Co. Ltd. to show cause as to why the Title should not be delivered up if "Tewani" and Tewani and Co. Ltd. fails to comply with the Registrar's requisition.

Secondly it is imperative to cite section 154 which reads:

> **"154.** Upon the appearance before the Court or a Judge of any person summoned or brought up by virtue of warrant aforesaid, it shall be lawful for the Court or Judge to examine such person upon oath and, in case it shall seem proper, to order such person to deliver up such certificate of title or instrument as aforesaid and, upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to prison for a period not exceeding six months unless such certificate or instrument shall be sooner delivered up; and in such case, or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the Registrar shall, if the circumstances of the case require it, issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any certificate of title being lost or destroyed, and shall enter in the Register Book notice of the issuing of such certificate, and the circumstances under which the same was issued, and thereupon the certificate of title or instrument as aforesaid, so refused or neglected to be delivered up as aforesaid, shall be deemed for all purposes to be null and void as far as the same shall be inconsistent with the certificate or instrument so issued in lieu thereof."

In construing this section it must be noted that the powers are accorded to the Registrar and a Judge of the Supreme Court in the last resort.

To my mind these two sections confer on the Registrar and the Judge or Supreme Court powerful statutory powers for restitution. In the case of the

Judge or Court there are additional powers to enable the Judge or Court, to do substantial justice between the parties.

The crucial words to construe are "wrongfully obtained" and "wrongfully retained" and they are being construed against a background of specific facts. They are statutory words which introduce equitable principles to the draconian provisions pertaining to the provisions on the indefeasibility of titles. Sections 153 and 154 contain much more extensive powers than those accorded to the Registrar in section 80. They are more extensive because they bring into play a Judge or Court and once the registered owner refuses to comply with the Registrar's requisition, the Registrar may apply to the Judge to issue a summons for the registered owner to appear before a Judge or the Supreme Court. Section 154 gives the Judge or Court further statutory powers.

There are statements of principle from the Privy Council which are of importance to resolving the issues in this case. In **Assets Company, Limited v Mere Roihi** [1905] A.C. 176 Lord Lindley said of comparable provisions in New Zealand at pages 194-195:

> "The provisions relating to the correction of certificates of title and of the register have been recast, and the powers of the registrar in this respect have been enlarged (ss. 68-71). Subject to regulations under the Act, he is empowered to correct errors and supply omissions, and to require certificates of title or other instruments to be delivered up to be cancelled or corrected if issued in error, or if they contain any misdescription of land or boundaries, or if fraudulently or wrongfully obtained. He can apply to the Supreme Court to compel people to appear before him and to deliver up documents as

> required. Appeals lie from his decisions to the Supreme Court (ss. 191 et seq.). Large, however, as these powers are, it has been decided that they cannot be exercised to the prejudice of a registered bona fide purchaser: **In re Macarthy and Collins** (1901) 19 N.Z.L.R. 545."

Be it noted that once fraud was defined as "actual fraud" the words "wrongfully obtained" had to be construed by the Courts.

Thirdly what is important is that the Registrar's powers in the context of the instant case are applicable to a person who was not a bona fide purchaser. In this context section 163 of the Registration of Titles Act is very important. It reads:

> "163. Nothing in this Act contained shall be so interpreted as to leave subject to an action for the recovery of the land, or to an action for recovery of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is registered as proprietor, any purchaser *bona fide* for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever." [Emphasis supplied]

This is a basis for stating that it is bona fide purchasers who are protected by the Act. The major submission of Ms. Hilary Phillips is that "Tewani" was not a bona fide purchaser of 70A King Street on the basis of the affidavit evidence. This she contended is the foundation of her submission that "Khemlani" has an arguable case for an Interlocutory Injunction to prevent any dealing with 70A

King Street and also has a defence to resist a claim for possession. To my mind the submission is well founded.

The most important dictum on this aspect is Lord Wilberforce's observation in **Frazer v Walker** [1967] 2 W.L.R.411 at 419 which reads:

> "First, in following and approving in this respect the two decisions in **Assets Co. Ltd. v. Mere Roihi** [1905] A.C. 175 and **Boyd v. Mayor, Etc., of Wellington** [1924] N.Z.L.R. 1174 their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized in the courts of New Zealand and of Australia: see for example, **Boyd v. Mayor, Etc., of Wellington** [1924] N.Z.L.R. 1174, 1223, and **Tataurangi Tairuakena v Mua Carr** [1927] N.Z.L.R. 688, 702.
>
> Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The principle must always remain paramount that those actions which fall within the prohibition of sections 62 and 63 may not be maintained."

See **Gardener v Lewis** [1998] 1 W.L.R. 1535; (1998) 53 W.I.R. 236.

Then His Lordship continues thus:

> "The second observation relates to the power of the registrar to correct entries under sections 80 and 81.

> It has already been pointed out (as was made clear in the **Assets Co.** case [1905] A.C. 176, 194-195) by this Board that this power is quite distinct from the power of the court to order cancellation of entries under section 85, and moreover while the latter is invoked here, the former is not. The powers of the registrar under section 81 are significant and extensive: **Assets Co.** case [1905] A.C. 176, 194-195. They are not coincident with the cases excepted in sections 62 and 64. As well as in the case of fraud, where any grant, certificate, instrument, entry or indorsement has been wrongfully obtained or is wrongfully retained, the registrar has power of cancellation and correction. From the argument before their Lordships it appears that there is room for some difference of opinion as to what precisely may be comprehended in the word "wrongfully." It is clear, in any event, that section 81 must be read with and subject to section 183 with the consequence that the exercise of the registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section."

The point to note is that the indefeasible title relates to a bona fide purchaser only. It is also important that "Khemlani" secures an interlocutory injunction before "Tewani" disposes of the property to a bona fide purchaser for value. The nub of "Khemlani's" case is that "Tewani" was not a bona fide purchaser. It is true that the vendor from whom "Tewani" purchased the property was the Bank of Nova Scotia. However the Bank was exercising its power of sale pursuant to section 106 of the Registration of Titles Act. The substance was that "Khemlani" was the "forced vendor". The three entries on page 16 of Volume I of the Record tell the story:

> "(i) Mortgage No. 1002016 registered in duplicate...on the 29th of April, 1998 to BANK OF NOVA SCOTIA JAMAICA LIMITED at

Scotiabank Centre, Duke and Port Royal Streets, Kingston, to secure the monies contained in the Mortgage stamped to cover Ten Million Dollars with interest.

for Registrar of Titles

(ii) Discharge No. 1133505 entered on the 5th day of January, 2001 of Mortgages Nos. 363 and 1002016.

for Registrar of Titles

(iii) Transfer No. 1132919 registered on the 5th day of January, 2001 all estate and interest INDRU ISSARDAS KHEMLANI on the 29th of April, 1998 to TEWANI LIMITED of 20 Constant Spring Road, Kingston 10, St. Andrew. Consideration money Twelve Million Dollars Power of Sale under Mortgage No. 992364.

Registrar of Titles."

It is appropriate to set out section 106 of the Act which empowered the Bank of Nova Scotia (the "Bank") to exercise a power of sale.

> "106. If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether

> such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the property or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power."

This section is applicable to the action of the Bank and **Moses Dreckett v Rapid Vulcanising Company Ltd.** (1988) 25 J.L.R. 130 illustrates how the power of sale ought to be executed. Sections 153 and 154 are applicable to the purchaser who wrongfully obtained or retained the estate and interest of "Khemlani" in 70A King Street. A recent instance of rectification of the Register is **Racoon Ltd. v Turnbull** [1996] 3 W.L.R. 353. This is in contrast to **Norwich Building Section v. Steed** [1992] 3 W.L.R. 669.

Turning to **Thomas and Another v Johnson and Another** (1997) 52 W.I.R. 410, 420 Gault J. delivering the opinion of the Privy Council assuming that section 153 of the Registration of Titles Act gave the Registrar a distinct power said this in the context of the facts of that case:

> "There is also the issue as to whether the registration of their proprietorship could be said to have been "wrongfully obtained" by the Johnsons. The meaning of the word "wrongfully" in corresponding section in the New Zealand Act was left open by the Privy Council in **Frazer v Walker**. More recent decisions at first instance in New Zealand and New South Wales have considered the matter. In **Congregational Christian Church of Samoa**

> **Henderson Trust Board v Broadlands Finance Ltd** [1984] 2 NZLR 704 at page 715 Barker J expressed the view that wrongful conduct in its New Zealand context involved more than that the instrument pursuant to which it was procured was void and that it involved acting other than honestly and in good faith. In **Scallan v Registrar-General** (1988) 12 NSWLR 514 Young J, with reference to the corresponding New South Wales provision, followed the New Zealand cases accepting that a registration would be wrongfully obtained by an intentional act which was not rightful but which might fall short of "fraud" within the meaning of the statute.
>
> Their lordships have not been persuaded that the law is developing on any erroneous line nor would they be inclined to accept on the material placed before them that merely employing the wrong procedure without any intentional objective of defeating the rights of others would amount to wrongful conduct in this context. They would be disposed to take the same view in relation to the formal steps of obtaining *ex parte* a further order directing execution of a transfer by the Registrar of the Supreme Court and carriage of completion of a contract for sale following the death of a party who had been ordered specifically to perform a contract. Those matters, however, may well fall for determination by the registrar in due course."

Here again the Privy Council has emphasized that the basis of the indefeasible title is applicable to a purchaser acting in good faith. The relevant statement is that a registration would be wrongfully obtained by "an intentional act which was not rightful but which might fall short of fraud within the meaning of the statute."

Turning to **Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd.** [1984] 2 NZLR 704, 714 Barker J. said:

> "The third point deals with the power of the Registrar under s 81 of the Act, to correct any entry on the Register wrongfully obtained or wrongfully retained. This section was specifically alluded to in **Frazer v Walker;** the meaning of the word "wrongful" has been the subject of some academic discussions; see D. W. Morland, "Registrar's Powers of Correction" [1968] NZLJ 1138 and "Indefeasibility of Title since **Frazer v Walker"** in **The New Zealand Torrens System Centennial Essays** (1971), edited by G W Hinde, at p 33."

Further on the same page Barker J. said.

> "In **De Chateau v Child** [1928] NZLR 63, the vendors of the land, who had the same solicitors as the purchaser, added to the memorandum of transfer, after it had been executed and signed correct, a covenant which bound the purchaser to pay some money; the purchaser did not consent to the alteration. The transfer was registered together with the mortgage back under which the purchaser defaulted. When the vendors tried to exercise their power of sale, the purchaser sought a declaration that the transfer and mortgage were wrongfully obtained and sought rectification of the Register. The Court held in the circumstances that the registration had been wrongfully obtained because the material alterations to the transfer after execution avoided it; the void instrument was not certified correct for the purposes of the Act as the instrument certified was not the same as that presented for registration."

Be it noted that the claimant sought a declaration. It is open to "Khemlani" to seek a declaration that "Tewani" wrongfully obtained and retains the registered title to 70A King Street and that he "Khemlani" is entitled to be the registered

proprietor. He should also invoke section 158 of the Registration of Titles Act. It seems that if "Tewani" was not a bona fide purchaser, "unlawfully obtained" and "unlawfully retained" the Certificate of Title then, "Khemlani" having recovered his Title by virtue of sections 153 and 154, he can resort to section 158. This was an amendment in 1967 and reads:

> "158.-(1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar –
>
> (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
>
> (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,
>
> and the Registrar shall give effect to that direction.
>
> (2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar -
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
>
> (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

There are two further citations in the **Church of Samoa** case (supra) which are pertinent to understanding the instant case. Barker J. said at page 715:

> "Professor Hinde, in the essay referred to earlier, suggests that there should be no reason for holding that registration has been "wrongfully" obtained, if the registered proprietor or mortgagee acted honestly and in good faith and where he or his solicitors had diligently carried out every conveyancing procedure normally required and appropriate in the circumstances."

Then further on the same page Barker J. said:

> "Alternatively, Professor Hinde suggested that registration should be considered wrongfully obtained if the person who applied for it was guilty of some intentional wrongful act (or negligent act) in the procuration of the registration. That possibility has no application here."

Further in **Scallan and Another v Registrar-General and Another** [1988] 12 NSWLR 514 at 519 Young J. in following the New Zealand authorities said:

> "It would seem on the New Zealand authorities that registration is wrongfully obtained within the meaning of s 136 if it is obtained by an intentional act which is not rightful but which may fall short of "fraud" within its meaning in the Real Property Act: see **De Chateau v Child** [1928] NZLR 63 and **Re Mangatainoka IBC No 2** [1913] 33 NZLR 23 at 61-63: see also **Assets Co Ltd v Mere Roihi** [1905] AC 176."

The comparable unamended English legislation is the 1925 Law of Property Act section 82(1). Two cases in this section are **Hodges v James** [1935] Ch. 57 and **Chowood Ltd. v Lyall (2)** [1930] 2 Ch. 156.

To reiterate, on the affidavit evidence it is arguable that "Tewani" was not a bona fide purchaser of 70A King Street. If a trial court so finds, it is open to the Court to order the certificate cancelled and the name of "Khemlani" be restored to the Register providing Khemlani pays over to Tewani $10M within a period of say 30 days. Quite apart from the serious issue to be tried there are other factors in favour of the appellant, "Khemlani". He carries on his business at 70A King Street at a strategic point on the major commercial street in Kingston. It was the historic site of Nathan's Department Store and subsequently of Barclays Bank, and its successor National Commercial Bank. In such circumstances damages are not an appropriate remedy. See **American Cyanamid v Ethicon** [1975] 1 All ER 504.

On the basis of the foregoing analysis I am prepared to set aside the order of Brown J. (Ag.) and award an interlocutory injunction in terms of the Summons at page 8 of Volume II of the Record. Such an injunction will enable "Khemlani" to seek a declaration concerning the meaning of "unlawfully obtained" and "unlawfully retained" having regard to the facts found by the Court. The declaration if awarded should also state that "Khemlani" is the proper person whose name should be on the Certificate of Title. Other remedies such as damages for breach of contract, conspiracy to injure and

negligence or compensation for breach of fiduciary duty ought to be considered. Thereafter an approach to the Registrar pursuant to section 153 and 154 of the Registration of Titles Act can be made. Alternatively he may seek relief pursuant to section 158 of that Act.

If there is a resort to section 158 the Registrar of Titles should be made a party to the proceedings so that he can be bound by the declarations sought. It would seem that actions for breach of contract, negligence or breach of fiduciary duty, conspiracy to injure and the declaration that "Khemlani" is entitled to be the registered owner is the most appropriate way to proceed. It is also appropriate to state that statutory proceedings pursuant to section 153 and 154 which deal with the Certificate of Title are in marked contrast to the actions barred and permitted by section 161 of the Registration of Titles Act. That section precludes proceedings for possession in the face of a valid title and the exceptions to that position.

The proceedings on appeal II- The summary judgment

The following passage from the speech of Lord Bridge in **Lonrho plc v Fayed** [1991] 3 All ER 303 is applicable to the circumstances of this case. It must be emphasized that the gist of this case on the affidavit evidence is that there was a combination with a common intention by two officers of the court and "Tewani" to breach the Agreement For Sale and Purchase so as to deprive "Khemlani" of funds to clear his mortgage on his King Street property. The relevant passage on Summary Judgment reads at page 313 of **Lonrho:**

> "In **Dryson v A-G** [1911] 1 KB 410 at 414, 419 Cozens-Hardy M.R. said that the procedure 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance' and Fletcher Moulton LJ in the same case thought it should be confined to cases where the cause of action was 'obviously and almost incontestably bad'. More recently Salmon LJ said in **Nagle v Feilden** [1966] 1 All ER 689 at 697, [1966] 2 QB 633 at 651:
>
> > 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.'
>
> Of course, it is true, as was pointed out by Sir Gordon Willmer in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 at 1105, [1970] 1 WLR 688 at 700: 'The question whether a point is plain and obvious does not depend on the length of time it takes to argue.' However, it is not the length of arguments in this case, but the inherent difficulty of the issues which they have to address which persuades me that the case cannot by any stretch of language be properly described as plain and obvious, nor can **Lonrho's** pleaded cause of action be characterized as unarguable or almost incontestably bad."

In the instant case Khemlani's Writ of Summons and Statement of Claim require amendment as I observed during the hearing so that the pleadings match the affidavit evidence. It certainly also requires amendment to incorporate the proper parties. Consequently I would also set aside the order of Brown J. (Ag.) refusing to grant an Interlocutory Injunction and grant to "Khemlani" leave to defend the claim for possession and also grant the Interlocutory Injunction pending the hearing and determination of a hearing on

the merits of the case. Should "Khemlani" recover his Title then there will be no need to contest "Tewani's " order for possession.

So the order of this Court ought to be as follows:

ORDER

Appeals allowed, orders in the court below set aside.

Interlocutory injunction granted.

Unconditional leave to defend with the usual undertaking in damages with respect to the Interlocutory Injunction.

Costs in the cause.

BINGHAM, J.A:

I am in agreement with the reasons and conclusion of Downer, J.A. with respect to both appeals and with the Order set out.

PANTON, J.A. (dissenting)

1. I have read the draft of the reasons for judgment written by my learned brother, Downer, J.A. There are fundamental differences in our thinking on this matter. The differences are in relation to the interpretation of section 153 of the Registration of Titles Act, and the manner in which the judgment has been arrived at on the basis of a conspiracy involving certain attorneys-at-law although the pleadings do not reflect that conspiracy. In my view, the matters before us cannot be determined in a speculative way. The conduct of the attorneys-at-law involved in the transactions between the parties prior to the filing of the suits has been called into question in the draft reasons, although:

(a) there is no allegation against them by the parties in the pleadings that have been filed;

(b) no accusations were made against them during the proceedings before us; and

(c) they were not involved in the appellate proceedings before us, and so were not in a position to have had queries directed to them in respect of their conduct.

2. In these appeals, the question for determination is whether Glen Brown, J. (Acting) was correct in (a) granting summary judgment to Tewani Limited; and (b) refusing the application by American Jewellery Co. Ltd. and Indru Khemlani for an interlocutory injunction. The principles guiding each determination are quite different and so, of necessity, ought to be examined separately, notwithstanding the consolidation of the appeals.

Summary judgment

3. I propose to deal with the claim and defence in SCCA 156/2001 first. This relates to the summary judgment wherein Khemlani is seeking, on appeal, unconditional leave to defend. In this suit, Tewani Ltd. is the acknowledged and admitted registered proprietor of 70A King St. which Tewani Ltd bought from the Bank of Nova Scotia Jamaica Ltd pursuant to a power of sale contained in a mortgage. Khemlani, the previous owner, has remained in possession although Tewani Ltd. has required him to deliver up possession.

4. Khemlani denied Tewani Ltd.'s claim and right to possession, saying that Tewani Ltd. acquired the property through a deliberate breach of contract for sale of another property (Tropical Plaza), that contract being between Commercial Corporation Jamaica Ltd. and American Jewellery Company Ltd., and in furtherance of a conspiracy to injure Khemlani.

5. Glen Brown, J.(Acting), in disposing of this matter, held that Khemlani had "no good defence to the action on the merits. Tewani Ltd. was therefore entitled to possession". There had been no pleading alleging fraud; consequently, he said, Tewani Ltd. had obtained an indefeasible title. In arriving at his decision, the learned judge had considered not only the pleadings but also the affidavits that had been filed.

6. Gordon Tewani, the managing director of Tewani Ltd., said in his affidavit that the property was subject to a mortgage held by Bank of Nova Scotia Ltd. and endorsed on the title. It was publicly advertised for sale by auction, and in

August 2000, on behalf of Tewani Ltd., he attended the said auction and successfully bid for and duly purchased the property. He attached to his affidavit copies of three advertisements for the holding of the auction. These advertisements were on August 23, 30 and 31, 2000.

7. The ground of appeal relied on to upset the decision of the learned judge states simply that he erred "in granting an order for summary judgment". The contention of the appellant Khemlani is that Commercial Corporation, Tewani Ltd., and Tewani, pursuant to a conspiracy, deliberately determined that they would restrain the disbursement of monies already paid, and refrain from paying the balance due in respect of Tropical Plaza, thus precipitating an auction of 70A King St which to the knowledge of Tewani, Khemlani had been trying to redeem from his bankers. As a result of this conspiracy, so it was argued, the entry of Tewani Ltd. on the certificate of title for 70A King St was "wrongfully obtained". Tewani Ltd., the appellant submitted, was not a bona fide purchaser. Hence, notwithstanding the indefeasibility of the title, Khemlani was entitled to pursue an action against Tewani Ltd. in seeking such relief as the Court may grant. In advancing the appellant's position, Miss Phillips placed great reliance on section 153 of the Registration of Titles Act and the Privy Council cases of **Frazer v. Walker** (1967) 2 W.L.R. 411, a case from New Zealand, and **Thomas v. Johnson** (1997) 52 WIR 409, a case from our own jurisdiction.

8. On the other hand, the respondent Tewani Ltd, represented by Mr. John Graham and Ms. Carol Davis, contended that considering the indefeasibility of a

registered title and the absence of any allegation of fraud, there really was no good defence to the action for recovery of possession on which summary judgment was being sought. There was no evidence, nor even an allegation of, fraud or conspiracy of any kind involving Tewani Ltd. Hence there can be no remedy sought against it, nor any sanction imposed on it. "Wrongfully obtained", the respondent submitted was a new and undefined standard which the appellant was urging the Court to interpret in the same manner as "fraud". In any event, there was no evidence that the registration of the title, or the obtaining of it, was in any way wrongful.

9. In considering the prayer for summary judgment, the learned judge was obliged to consider section 79(1) of the Judicature (Civil Procedure Code) Law which states:

> "Where the defendant appears to a writ of summons specially endorsed with or accompanied by a statement under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed) and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed".

In order that summary judgment may be ordered, the learned judge had to be satisfied that the defendant had no good defence to the action on the merits for recovery of possession; he also had to be satisfied that there were no facts which would have been sufficient to permit the defence of the action generally.

10. As stated in paragraph 7 (supra), Miss Phillips relied on section 153 of the Registration of Titles Act which, she said, shows that there is a good defence to the action. Section 153 states:

> "In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error or contains any misdescription of land or boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party, as the case may require: and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a Judge to issue a summons for such person to appear before the Supreme Court or a Judge, and show cause why such certificate or instrument should not be delivered up for the purpose aforesaid, and if such person, when served with such summons, shall refuse or neglect to attend before such Court or a Judge thereof, at the time therein appointed, it shall be lawful for a Judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a Judge for examination".

When I examine and construe the words of this section, I find it difficult to see how it has been ascribed any relevance in the proceedings that were before Glen Brown, J., and are now before us. The section gives the Registrar of Titles the authority to require of a person the delivery up for cancellation or correction or for the giving to the proper party any certificate of title or instrument that:

> (a) has been issued in error; or
>
> (b) contains any misdescription of land or boundaries; or
>
> (c) has an erroneous entry or endorsement; or
>
> (d) has been fraudulently or wrongfully obtained; or
>
> (e) is being fraudulently or wrongfully retained.

If the request is ignored, the Registrar may apply to a Judge to issue a summons for the party to appear before the Supreme Court to show cause why there should not be compliance.

11. **Thomas v. Johnson** (supra) does not, in my view, give the support that Miss Phillips claims it does to the appellants' cause. Instead, it confirms the indefeasibility of a registered title, and warns that observations on the powers of the Registrar in New Zealand cannot automatically be taken as applicable to the provisions of the Jamaican legislation. The headnote, in part, reads:

> "In proceedings under the Registration of Titles Act, the Court of Appeal held that one party's title to land was indefeasible and that the other party could not invoke section 153 of the Act (empowering the

> Registrar of Titles to cancel or correct a certificate of title issued in error) to deprive the first party of title. The court accordingly dismissed an appeal against declarations that the first party's title to the land was indefeasible and that such party was entitled to possession. On appeal to the Privy Council, **Held,** ...that the appeal be dismissed...."

The warning is at page 419, paragraphs e-g, and is couched thus:

> "Section 153 appears in a separate part of the Act under the heading "Practice and Procedure". It is unlikely that the legislature would have intended by such a section directed to the procedure for requisitioning outstanding instruments and certificates to confer power on the registrar to determine proprietorship of land and interests therein when the registrar's powers to amend the primary record, the register, are so confined. The true scope of the section is better appreciated if it is kept in mind that a certificate of title issued by the registrar is just that, a certificate as to the title recorded in the register. That is why the registrar's letter of 30th August 1993 called for delivery of the "duplicate certificate of title". Accordingly, the observation of Lord Wilberforce on the registrar's powers under the New Zealand Act cannot automatically be taken as applicable to the provisions of the Jamaican Act".

12. In **Frazer v. Walker** (supra), notwithstanding Miss Phillips' reliance on it,

Lord Wilberforce, in delivering the opinion of the Board, said at page 420F:

> "As the appellant did not in this case seek relief under section 81, and as, if he had, his claim would have been barred by section 183 (as explained in the next paragraph), any pronouncement on the meaning to be given to the word "wrongfully" would be obiter and their Lordships must leave the interpretation to be placed on that word in this section to be decided in a case in which the question directly arises".

Earlier, at page 417A, Lord Wilberforce had said that section 81 was not a section which directly applied in the case before the Board. This was said although title had passed in a situation where one of two proprietors of registered land had forged the signature of the other proprietor in order to secure a mortgage. Failure to honour the terms of the mortgage resulted in the exercise of the power of sale under the mortgage.

13. Section 81 of the New Zealand legislation is equivalent to our section 153. I am not persuaded that in the instant case section 153 provides any route for any challenge to be mounted or upheld so far as the indefeasibility of the registered title held by Tewani Ltd. is concerned. Tewani Ltd. purchased the property at a public auction. It cannot be said with any degree of seriousness that Tewani Ltd. was in any way disqualified from participating in an auction held at the instance of the Bank of Nova Scotia in respect of this property. The appellant has not been bold enough to include in his pleading any allegation of fraud against anyone. Instead, he is, in my view, relying on what may best be described as a twisted, expansive, unwarranted interpretation of section 153.

14. Ms. Davis was correct, in my view, in submitting that section 153 is concerned with proceedings by the Registrar. As I see it, the section provides for action, first and foremost, by the Registrar. There is no record of any application having been made by the appellant to the Registrar. It would be a very dangerous precedent for this Court to allow an appellant, who has not pleaded fraud, to use section 153, while alleging some vague misconduct, to shake the

principle of the indefeasibility of a registered title. I have already quoted the section, and summarized the circumstances that would result in the invoking of the authority and powers of the Registrar (see paragraph 10 above). This Court ought not to sanction the bypassing of the Registrar by an appellant who is claiming that he has a genuine case. The appellant is merely clutching at a perceived straw. I am not prepared to embark on a judicial excursion to assist him in his quest. The principle of the indefeasibility of a registered title is sacrosanct. There should be no tinkering with it. The world of business is not for the faint-hearted; nor is it for one who complains when hoped-for results are not achieved. Men and women in business will receive hard knocks from time to time. That is how it is in the life of genuine entrepreneurs. "You win some, you lose some". In this case, the appellant has gotten himself into a tangle and now wishes to be rescued from the result of his actions. As Mr. Graham reminded us, there is nothing of substance in the pleadings or otherwise that shows Tewani Ltd. as a conspirator in respect of anything. And so, in my view, that accounts for the rush towards section 153; but that section cannot help the appellant at this time in these circumstances. I have no doubt that Glen Brown, J. was right in holding that there is no defence to the action for the recovery of possession.

15. ***The injunction***

In SCCA 155 of 2001, the appellants American Jewellery Co. Ltd and Indru Khemlani state, in their claim (suit no. C.L.A. 018 of 2001), that up to January 5, 2001, Khemlani, who is the managing director of American Jewellery, Company Limited was the

registered proprietor of 70A King St. The third respondent Gordon Tewani is the managing director and principal shareholder of the first and second respondents. On August 16, 1999, American Jewellery and Commercial Corporation Jamaica Ltd., the first respondent, entered into an agreement for sale of two shops at Tropical Plaza. Commercial Corporation and Gordon Tewani knew that the purpose of the sale was to liquidate debts that were outstanding to Union Bank and the Bank of Nova Scotia. The loans were secured by the certificates of title for the shops at Tropical Plaza and 70A King Street.

16. The sale of the shop at Tropical Plaza was to have been completed in six weeks. Commercial Corporation failed to complete the transaction by the due date. It paid over only a portion of the balance of the purchase price to American Jewellery and Khemlani, and did so on certain conditions which were at variance with the terms of the agreement; thereby preventing disbursement of the funds to the Bank of Nova Scotia, resulting in the premises at 70A King St. being put up for auction by the Bank of Nova Scotia.

17. Commercial Corporation, the claim alleges, conspired with Gordon Tewani and Tewani Ltd. to injure American Jewellery by causing 70A King St. to be put up for auction. The particulars of the conspiracy are itemized thus:

(a) paying $10 million on onerous conditions in breach of the agreement for sale, precluding the disbursement of the funds to the Bank of Nova Scotia;

(b) failing and or refusing to pay the balance of the purchase price; and

(c) refusing to release the conditions referred to in (a) above.

18. In this suit, the following claims are being made:

- American Jewellery is claiming damages against Commercial Corporation for breach of contract

- American Jewellery and Khemlani are claiming damages against the three respondents for conspiracy to injure

- Khemlani is claiming against Tewani Ltd for an order to set aside the transfer of 70A King St., and for an injunction to prevent Tewani Ltd. from dealing in or parting with the said property.

19. The learned judge, in dismissing the summons for interlocutory injunction, expressed himself thus:

> "I am of the view that there was no serious matter to be tried. The plaintiff's remedy would be in damages. In the circumstances the interlocutory injunction was refused".
> (See page 8 of the supplemental record)

On the face of it, this expression by the judge is confusing. If there is no serious issue to be tried, the question of damages does not arise. The authorities make it clear that the first matter for determination is whether there is a serious question to be tried. At this stage, there is no expectation that the learned judge would be embarking on a final determination as to what are the true facts. Indeed, there is also no expectation that he would be determining any difficult legal point. The emphasis here is of course on the word "difficult". It does not mean that he ought not to be deciding a legal point. If the judge does not

envisage any real chance of success by the plaintiff at the trial, that is, there is no real chance of securing a permanent injunction, that is the end of the matter. If, however, there is a real chance of success, the judge is required to consider whether the balance of convenience is in favour of the granting or refusal of the injunction at the interlocutory stage. In the light of this statement of the approach to be taken, when one revisits the judge's expression quoted above, it seems that he is saying:

> (a) there is no serious question to be tried; and
>
> (b) if he is wrong in that regard, the balance of convenience did not lay in favour of the granting of the injunction as damages would be an adequate remedy and Tewani Ltd. would be able to pay them.

20. It was submitted on behalf of American Jewellery and Khemlani that all the material facts which ground the claim for conspiracy to injure were on par with what was required to prove a claim for conspiracy to defraud. To my mind, that is highly fallacious. In any event, looking at the particulars that have been pleaded in support of this conspiracy to injure, there is absolutely no particular that has pinpointed the conspiratorial role of Tewani Ltd. In such a situation, it is not difficult to understand why, from a factual point of view, the learned judge would have held that there was no serious issue to be tried. There cannot be a serious issue for trial if there is no factual base. Further, from a legal point of view, Tewani Ltd. is on firm ground as long as there is no allegation of

fraudulent conduct on its part. The matter was patently a simple one for determination by the judge in the manner in which he determined it.

21. The respondents have posed questions as to the position of the Bank of Nova Scotia, against whom no complaint is being made, if the sale were eventually set aside. They cannot envisage such a state of affairs given the fact that there is no allegation of fraud, and Bank of Nova Scotia would have already liquidated the debt that Khemlani had owed - using the proceeds of the sale to Tewani Ltd. The questions, though interesting, do not require an answer at this stage, considering that the cases are yet to be tried. The appellants were therefore right to ignore those questions. At this stage, however, I wish to say that when a sale takes place at a public auction, some serious misconduct at the auction itself, or in the proceedings leading up to it, would have to be proven for the sale and subsequent transfer to be set aside. Commercial stability in a country demands that there be confidence in matters such as a public auction, so where:

> (a) the power of sale is being exercised by a mortgagee who has done nothing wrong; and
>
> (b) there is no allegation of fraud against the purchaser,

the granting of an injunction, that can have no other end but the mystification of the result of the auction and its process, would be clearly wrong.