

Aling Robert

CL T024 and 151/2001 (consolidated)

BETWEEN TEWANI LTD

PLAINTIFF

AND INDRU KHEMLANI

DEFENDANT

AND COMMERCIAL CORP.

**1st ANCILLARY DEFENDANT
TO THE COUNTERCLAIM**

AND GORDON TEWANI

**2nd ANCILLARY DEFENDANT
TO THE COUNTERCLAIM**

AND JENNIFER MESSADO

**3rd ANCILLARY DEFENDANT
TO THE COUNTERCLAIM**

C. Davis for Plaintiff

**H. Phillips Q. C. & D. Kitson instructed by Grant
Stewart Phillips & Company for Ancillary Defendants**

**Heard: November 30, 2004; December 1, 2, 3, 6, 2004; December 1, 2, 5, 6, 7, 9, 2005;
March 7, 8, 9, 10, 13, 14, 15, 16, 17 and May 22, 24, 25, 26 and June 19, 21,
July 13, and December 4, 2006**

Beswick J

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Introduction

1. American Jewellery Company Limited (American) and Mr. Gordon Tewani (Mr. T), entered into a contract where Mr. T agreed to purchase #3 Tropical Plaza, located at #12 ½ and 14 Constant Spring Road, St. Andrew. The registered owner of the property was American of which Mr. Indru Khemlani (Mr. Khem) is the Managing Director and majority shareholder.
2. Mr. T paid a portion of the purchase price. By this sale agreement which was dated August 16, 1999, American had also agreed to lease, "the one half section of the said premises being the shop now known as American Jewellery Company Limited" for three years from the date of completion. That was the same shop that American was occupying at the time of entering into the Sale Agreement. The precise terms of this lease were not agreed. Negotiations and communication continued between the parties and their lawyers and Mr. T paid further amounts towards the sale price.
3. Disagreements arose on some important issues including the details of the lease, and the nature of the undertaking to pay the balance of the purchase price.
4. Correspondence continued between the lawyers, Mr. Clough on behalf of American and Mr. Khem, and Ms. Messado on behalf of Mr. T. The completion date passed without the sale being completed, but Mr. T paid more of the balance of the purchase price. Mr. Clough did not produce the documents to register the name of a new owner on the Title. Later, Ms. Messado caused one of Mr. T's companies, Commercial Corporation Ja. Ltd. (Commercial), to be registered as owner of the Tropical Plaza property. American remained in possession.

5. Eventually, Roshan; Sham and Raj Khemlani signed a lease agreement as lessors, with Commercial for Shop #3A, effective January 1, 2001. The premises were described as "one-half of ...#12 ½ and 14 Constant Spring ...known as Lot #3A...part of Lot #3 of #12 ½ and 14 Constant Spring Road". They paid rental on three occasions only. American continues to occupy that shop.

6. Meanwhile Mr. Khem himself, not American, owned property at 70A King Street, Kingston. He owed monies on its mortgage to the Bank of Nova Scotia. Whilst negotiations continued about the Tropical Plaza property, the Bank of Nova Scotia put the King Street property up for sale by public auction, to recover the monies due on it.

7. The local **Gleaner** newspaper carried notices of the auction and Mr. T attended the public auction of the King Street property accompanied by Ms. Messado, his lawyer.

8. Persons placed bids on the property. Mr. T's bid was the highest made. He paid the amount of the bid and subsequently received the registered Duplicate Certificate of Title for the King Street premises in the name of his nominee, Tewani Limited (T Ltd).

9. Mr. Khem has remained in possession of the King Street property although he was requested to vacate. Several suits were filed by the parties to resolve the issues that arose, and five were consolidated to be determined in these instant proceedings.

The claims

10. American and Mr. Khem filed **Suit CL A018/2001** seeking to recover damages from Commercial and Mr. T for breach of the contract for the sale of the Tropical Plaza property alleging that the full purchase price was not paid and that Commercial's name was wrongfully registered as owner.

11. American therefore also *claims damages against Ms. Messado for breach of her professional undertaking not to deal with the Tropical Plaza premises until the purchase price was paid.*
12. American also *seeks to recover the monies described as the balance of the purchase price for the premises*. The amounts claimed differ. The *Further Amended Writ of Summons and Endorsement* claims the amount to be \$1,709,738.50. The *Further Amended Statement of Claim* claims the amount to be \$1,657,488.91 and in the written submissions the amount outstanding is said to be \$1,656,825.57
13. American also *asks for a declaration that the lease of the premises would commence when that sum was paid.*
14. American and Mr. Khem, in this suit, also *claim damages from Commercial, T Ltd., and Mr. T for conspiracy to injure and/or to defraud and/or damages for fraud.*
15. Mr. Khem, as against T Ltd., asks for an *Order that the transfer of the King Street property be set aside and that an injunction be granted restraining it from dealing in or parting with that property.*
16. Commercial and Mr. T in their defence say that all monies due to American were paid and American remained in occupation of a portion of the premises and were thus liable to pay for that occupation.
17. Mr. T and Commercial contend that they were entitled to set off certain amounts from the purchase money for American's use and occupation of part of the Tropical Plaza property, i.e. the American shop. Their *counterclaim therefore is for American's use and occupation of one half of the Tropical Plaza property (the American shop) with General Consumption Tax (GCT) between February 8 and December 31, 2000*. The

Special Damages are particularized as being use and occupation of shop 3 Tropical Plaza from March 1, 2001 to present and continuing with GCT. They deny any conspiracy to defraud, or any fraud and or any wrongdoing and plead that the purchase of the King Street property was a separate transaction from the purchase of the Tropical Plaza property.

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

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

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

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

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

23. Mr. Khem contends that there was a conspiracy involving Mr. T, Mr. T's companies and Ms. Messado, T's lawyer, focussed on defrauding Mr. Khem by deliberately delaying payment to him of the balance of the purchase price of Tropical Plaza. Mr. T, so it was alleged, knew that without that money, Mr. Khem would be unable to pay his debts on the King Street property, and an auction of the premises would be inevitable. Mr. Khem asserts that in furtherance of the conspiracy, Mr. T then stood ready to purchase that King Street property and did in fact make that purchase at an undervalue, thereby fraudulently depriving Mr. Khem of the property.

Earlier suits

24. In November 2001, Brown J (Ag) had granted an Order for Summary Judgment for recovery of possession of 70A King Street and refused an injunction seeking to restrain Mr. T from dealing in or parting with the premises.

25. American and Mr. Khem appealed that judgment. Arguments commenced before the Court of Appeal on March 19, 2003.

26. Meanwhile the several consolidated suits in the instant matter commenced on November 30, 2004 as the attorneys-at-law agreed that the suits involved allegations of fraud whereas the matters being appealed did not. The issues would therefore be

different so that any reference they might make to the then pending Court of Appeal judgment would solely be to it as an historical fact.

27. On December 2, 2004, the Court of Appeal delivered a majority judgment allowing the appeals. These proceedings, which were in progress, were ordered to be stayed..

28. Thereafter, varied applications ensued and on February 8, 2005 American and Mr. Khem joined Ms. Jennifer Messado as defendant in **CL A018/2001** – the suit concerning the sale of the Tropical Plaza property.. She, as well as Commercial and Mr. T, were joined as Ancillary Defendants to the counterclaim in **CL T 024 and 151/2001**, the suits concerned with the King Street premises.

29. Procedural applications followed and on December 1, 2005, the consolidated matters which had been stayed in December 2004, continued with the additional parties and amended pleadings.

Suit CLA018/2001 - The Tropical Plaza Property

30. In the Sale Agreement, the parties agreed that Mr. T would pay a deposit and then would pay the balance of the purchase price and the other amounts payable in a sale or would give an undertaking acceptable to American's attorneys-at-law to do so.

American, in exchange, would deliver the Duplicate Certificate of Title with a registrable transfer. The sale was to be completed on or before September 30, 1999:

Payment of the balance of the purchase price.

31. Ms. Phillips, Counsel for Mr. Khem argues that Mr. T did not complete payment of the agreed \$17,000,000.00 purchase price for the property. She acknowledges that the scheduled September 30, 1999 date for completion could not have

been met, as, inter alia, an injunction existed restraining the sale of the Tropical Plaza property. However, she urged, as soon as it was discharged, the Agreement for Sale could have been completed.

32. Ms. Phillips argues that Ms. Messado had in her possession all documents for perfect Title for Tropical Plaza but nonetheless would not pay the balance of purchase price. She does state however, that Ms. Messado did not have in hand the Duplicate Certificate of Title for Tropical Plaza. Union Bank held it because of a mortgage on the premises.

33. Mr. Clough, who at that time represented Mr. Khem testified that he would have been able to reduce the interest that Union Bank was charging Mr. Khem on the monies he owed on Tropical Plaza, but that Ms. Messado interacted directly with the bank, prompting the bank to send a notice requiring payment of the debt in 30 days rather than entering into negotiations. By this unauthorized action of Ms. Messado, American was forced to rely on Mr. T to quickly provide money to pay the mortgage due on the Tropical Plaza property. Ms. Phillips argues that Union Bank had given Ms. Messado an undertaking to provide the Title and therefore American itself did not have to provide the Title to her. She also contended that in those circumstances Mr. T could have paid the entire balance purchase price. Alternatively, since Mrs. Messado had the Bank's undertaking she could have given American an acceptable undertaking for the balance, based on the strength of the Bank's undertaking.

34. Therefore, by December 30, 1999, Counsel submits, completion of the sale was possible and Mr. T was in breach of the Agreement for Sale as the agreed purchase price had not been paid though documents for title were available.

35. However, in a letter of January 26, 2000, Mr. Clough indicated that he did not intend to stamp the documents to transfer the property to the purchaser until Ms. Messado gave a suitable undertaking to pay the balance of the purchase price. The agreement had been that the Transfer would be impressed with the Government Stamp Duty and Transfer tax and would be exchanged with the Duplicate Certificate of Title and discharge for the mortgage for the balance of the purchase price or undertaking. What the balance was, remained in dispute.

36. There had been correspondence concerning the correct amount owed. Ms. Phillips submits that Mr. Clough and Ms. Messado's statements of account differed only in two ways:

1. Mr. T had stopped payment on a cheque which Ms. Messado had included in her account but Mr. Clough had not.
2. Each had applied different exchange rates to the United States Dollar components of their calculations.

37. Ms. Phillips contends that by February 2000, Ms. Messado could have used simple Arithmetic to determine the amount which was outstanding for the purchase price and could have paid the amount.

Variation in the Sale Agreement

38. Ms. Messado sent \$4,000,000.00 by cheque to Mr. Clough during the course of the transaction. It was enclosed in a letter which said the payment was conditional on Mr. Khem agreeing to some variations in the Agreement for Sale. Mr. Clough negotiated the cheque but Mr. Khem has testified that he had not agreed to the variation

nor had he authorised Mr. Clough to accept any variation. His evidence is that he did not know that Mr. Clough had even received a cheque.

39. Ms. Phillips argued that Mr. T was attempting to unilaterally vary the Agreement. which would have resulted in American vacating Tropical Plaza before the purchase money had been paid in full and where there was no undertaking for payment of the balance of the purchase price. This would have been unacceptable, she maintained. The original Agreement for Sale should have been honoured, but instead, she says, it had been breached by the introduction of the variations.

Possession

40. The property was comprised of two shops. American occupied one shop and the other was vacant.

41. According to Ms. Phillips, there was no correspondence to indicate that the purchaser wished both shops vacant. Further, neither the lawyers nor the litigants expected early possession of the shop occupied by American. Though Mr. Clough had in a letter referred to the entire premises when discussing the matter of possession, he had explained in evidence, that this had been a mistake and that he was in fact referring to a portion of the premises.

42. Therefore, American had given to Commercial, vacant possession of one shop, not the two shops. Ms. Phillips supports that position by arguing that the correspondence shows that Ms. Messado viewed rental to be outstanding and payable because Mr. Khem had continued to occupy the premises in breach of the Agreement for Sale itself and not because he had remained in possession based on a letter giving possession of both shops.

43. Ms. Phillips' submits therefore that the issues of outstanding purchase money, documents of title and the right to possession to specified portions of the property were clear and Mr. T nonetheless chose to breach this clear agreement by not paying the balance of the purchase price.

44. Ms. Messado had written a note by hand to Mr. Clough that although he had already negotiated the cheques before signing in agreement to the variations, she would authorise him to use one of the cheques to stamp the agreement if he gave her the keys to the empty shop that day. She would then give the proper undertaking for completion of the sale as per the original agreement.

45. Ms. Messado in a letter of February 16, 2000 to Mr. Clough wrote of having left that note herself on his desk. In that letter she stated that the documents would require no more than \$2,500,000.00 for stamping.

46. In the evidence contained in his witness statement, Mr. Clough said: "Ms. Messado then said in a handwritten note to me....", and referred to the contents of the note.

47. However, during cross-examination by Mr. Bailey, Counsel for Commercial, Mr. Clough testified that he never got the note and that he had in fact written her on February 17 asking her what handwritten note she was talking about. Exhibited is Mr. Clough's letter dated February 17, 2000 where he asks Ms. Messado for a copy of the note.

48. Nonetheless, Mr. Clough forwarded to Ms. Messado:

1. Keys for the shop in accordance with the Agreement for Sale and

2. Letter of Possession dated February 8, 2000 to Ms. Messado and headed..

“Re: Sale of Shop No. 3, Tropical Plaza, St. Andrew
Registered as Volume 935 Folio 174
American Jewellery Company Ltd. to Commercial
Corporation Ja. Ltd.

...Commercial Corporation Ja. Ltd is entitled to possession of the premises as of the date hereof.”

Completion

49. One of the first issues to be determined is whether the sale of Tropical Plaza has been completed.

50. The Agreement specified completion:

“On payment in full of the Sale Price and cash fees and costs of transfer and such other amounts payable by the Purchaser ... and in exchange for the delivery of the Duplicate Certificate of Title for the said land with a transfer executed by the Vendor, along with discharges of mortgages ...duly impressed with Government Stamp Duty and Transfer Tax along with a cheque ... for the registration fee ... on or before September 30, 1999.”

(a) *Did the purchasers pay the monies due?*

51. There was a collateral contract for the sale of American’s chattels in the store to Mr. T for \$3,000,000.00.

52. There is no dispute that American paid a total deposit of \$4,000,000.00 whilst the common conveyancing practice is for a total deposit of 15 percent.

53. The uncontroverted evidence is that Mr. T had made two payments of \$4,000,000.00 each and one of \$2,000,000.00 to Mr. Clough for Mr. Khem, and

had also paid Union Bank US\$156,032.02 to discharge the mortgage on the duplicate Certificates of Title for the Tropical Plaza premises.

54. The exchange rate to be applied to this payment is in dispute. Ms. Messado had written to Mr. Clough, in a letter dated December 2, 1999 that the exchange rate would have to be J\$41.50 to US\$1.00. However, in her Statement of Account of July 18, 2000 she applied the lower rate of J\$41.00 to US\$1.00 showing that the amount paid to Union Bank was equal to J\$6,397,312.82.

55. Mr. T had therefore paid \$16,397,312.82 according to Ms. Messado's accounts. The accounts showed that rental would be withheld from the purchase price from March 2000, the month which followed delivery of possession, to December 2000, the month before the lease was expected to commence.

56. There is no exhibited response by Mr. Clough objecting to the exchange rate used though correspondence exhibited shows that Ms. Levers, the attorney-at-law who took over from Mr. Clough for a brief period, on behalf of Mr. Khem, had written that the rate should have been different. The correspondence does not indicate the basis for any rate chosen.

57. No evidence has been provided by either party as to the appropriate exchange rate to be used.

58. I accept the rate of J\$41.00 to US\$1.00 as used by Ms. Messado in her Statement of Account as there was no objection to it by Mr. Clough, it was lower than her initial suggested rate and Ms. Levers in her brief involvement for Mr. Khem, gave no basis for a different rate.

59. When Ms. Messado paid Union Bank the mortgage monies due, she received the title for the Tropical Plaza Property and in a letter dated November 8, 1999 addressed to Mr. Clough stated:

“We undertake not to deal or part with the Duplicate Certificate of Title...which will be sent to us from the Union Bank Ltd. until and unless the balance purchase monies and costs owing are paid.”

60. Subsequently, in a letter dated March 15, 2000 Ms. Messado wrote to Mr. Clough:

“...[T]his ... serves as the irrevocable professional undertaking of Jennifer Messado & Company to pay to you the sum of ... \$6,120,892.18 IN EXCHANGE for duplicate Certificate of Title registered at Volume 935 Folio 174 ... duly free and clear of all encumbrances....”

This letter ended:

“Kindly sign and return to us the attached copy letter in acknowledgement of receipt and in acceptance of the terms and conditions herein.”

In handwriting was Mr. Clough’s initial with the word “Agreed.”

61. In my view this represented a second undertaking and was accepted by Mr. Clough. I find that Mr. T was ready to pay the balance of the purchase price.

(b) *Balance of purchase price due on Tropical Plaza property.*

62. The actual balance due on the purchase price became less than clear with the passage of time. I accept the evidence that Ms. Messado sent by facsimile, a Statement of Account dated July 18, 2000. It showed a balance of \$388,402.18 due and payable by Gordon Tewani. Ms. Messado’s evidence is that she and Mr. Clough had agreed on the Statement of Account from July 21, 2000.

63. Ms. Messado's letter dated August 29, 2000 to Mr. Clough referred to a cheque in that amount being enclosed, "in full and final settlement of our client's obligation herein." She asked that he sign and return the attached copy letter, "in acknowledgement of receipt and in discharge of our client's obligations herein."

A copy letter bearing Mr. Clough's signature and a date was returned.

64. Mr. Clough testified in cross-examination that he had signed and returned the letter dated August 29, 2000 which Ms. Messado had sent to him enclosing a cheque for \$388,402.18.

65. The first mention of general disagreement with the Statement of Account was in October.

66. It is my view that a short payment of more than \$1,500,000.00 which is being alleged would have been discerned by the experienced conveyancer before two months had passed.

67. I find that there was no short payment. Mr. T had paid the amount agreed to be the balance of purchase price of the Tropical Plaza premises to Mr. Clough, American's attorney-at-law. The agreement specified that Mr. Clough held the monies as stakeholder. He was thus not obliged to pay out the funds until the completion of the sale.

68. The undisputed evidence is that Mr. Khem did not immediately receive the funds. It was not until he had been arrested and had been reported to the General Legal Council for professional misconduct that Mr. Clough paid the outstanding funds to Mr. Khem representing the balance purchase price.

69. It is my view that the Agreement of Sale had been fully consummated and spent when the money was accepted in settlement and that Mr. Clough was at liberty to disburse funds to the Vendor, American and present the documents of Title to Mr. T.

(c) *Were the documents available to be exchanged?*

70. Mr. Clough testified that he was awaiting the balance of the purchase price before providing the registrable documents.

71. From September 22, 1999 Ms. Messado had started writing Mr. Clough to send the Agreement for Sale endorsed with Stamp Duty and Transfer Tax. Her letter of June 1, 2000 indicates that up until then she had not received it.

72. It is agreed that:

- 1 There were mortgages registered on the Duplicate Certificates of Title for the Tropical Plaza property in favour of Union Bank Limited.
- 2 The Duplicate Certificates of Title were not in the possession of American. They were being held by Union Bank Ltd.
- 3 American wished assistance from Mr. T to settle the indebtedness of the mortgages by way of an advance from the purchase price.
- 4 American, through its Attorney-at-law, Mr. Clough, failed to provide registrable Transfer or to stamp documents.

73. I find that when Mr. T was ready to pay the balance of the purchase price, Mr. Clough representing American, did not have registrable documents available for completion.

74. I consider now whether there was an acceptable reason for that.

(d) *Had there been a unilateral change in the conditions?*

75. Ms. Phillips submits that Ms. Messado was unilaterally demanding such fundamental changes that they could not be incorporated into the original Agreement thus causing delay in Mr. Clough handing over the registrable documents.

76. In the Agreement for Sale and Purchase of August 1999 Condition 11 specified:

“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 ... from the date of completion”

77. Ms. Messado's letter dated January 17, 2000 to Mr. Clough refers to their discussions concerning the release of that condition.

78. She enclosed two cheques in the name of American for \$4,000,000.00 as an immediate payment to the Vendor emphasising that it was in exchange for certain variations. She wrote that this amount would result in the Purchaser having paid approximately \$14,000,000.00 towards the purchase price.

79. The deposits to be paid under the Sale Agreement were 20% of the sale price of \$17,000,000.00 which is \$3,400,000.00.

80. There were three other variations:

- (a) delivery of vacant possession on or before February 28, 2000 in exchange for the difference in purchase money;
- (b) interest on the amounts that had been paid if new condition (a) was not met;
- (c) time was made of the essence.

81. Ms. Messado asked that the Vendor sign acknowledging agreement to the variation of the conditions.
82. The response was a handwritten note from Mr. Clough indicating that he felt he could deal with the matter but that the cheque had to be in "our name".
83. Ms. Messado thereafter, on January 25, 2000, forwarded cheques valued at \$4,000,000.00, now in the name of Clough Long & Company, repeating the conditions and adding:
- "Kindly note that YOU ARE NOT TO CASH OR
NEGOTIATE THIS CHEQUE UNLESS YOUR CLIENT
SIGNS THIS LETTER IN AGREEMENT."
84. In a letter of January 31, 2000 to Mr. Clough, Ms. Messado stipulated that the \$4,000,000.00 should be returned by February 2, 2000 unless he would "adhere to the Terms and Conditions of our letter dated January 28, 2000". There is no dispute that that reference was erroneous and ought to have been to the letter dated January 25, 2000 referred to above.
85. Mr. Clough's reply dated February 2, 2000 asked that he be given "until Friday to respond". He stated that he could not get instructions from his client on Ms. Messado's last proposal.
86. Mr. Clough negotiated the cheques .
87. The evidence is that Mr. Khem protested to his lawyer about details of the lease in a letter dated September 20, 2000 but there is no evidence that the agreement which had been accepted when the money was negotiated, was later changed.
88. Correspondence shows that monies were paid to Mr. Khem in response to certain requests he made. Mr. T's evidence is that he left all details of the sale to his

lawyer. Ms. Messado testified that Mr. T was, however, specific as it concerned disbursement of the second \$4,000,000.00. He wished a condition to be attached that he should in return get possession of the entire premises for the additional money paid.

89. Mr. Clough described the situation in his letter dated February 22, 2000 to Ms. Messado where he wrote:

“Possession of the premises was given to the Purchaser on the understanding and in consideration that we had been paid and had in hand an additional amount of \$4,000,000.00 on account of the sale price.”

90. In that letter he was complaining of the fact that payment of a portion of that money had been stopped. However, that money was soon replaced.

91. Mr. Clough had not been obliged to accept either the money or the conditions. He could present a registrable Transfer and demand the entire balance of the purchase price.

92. However, he chose to accept the money before making the registrable Transfer available.

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

94. The variations did not provide a reason for the delay in the availability of the documents that were to be exchanged.

(e) *Did Mr. Khem know what Mr. Clough had done on his behalf?*

95. Mr. Khem held out Mr. Clough as being his attorney-at-law. There has been no documentary evidence of his authority being limited. Indeed, Mr. Khem testified that he authorized Mr. Clough to accept monies on his behalf. Simultaneously, he says that Mr. Clough had authority to act on his behalf but only to a certain extent. Mr. Clough could not sign “behind [his] back”. Mr. Khem said that he knew that monies had been paid for both shops and neither he, Mr. Khem, nor Mr. Clough returned the monies.

96. Lewis J. A. in the Jamaican case of *Thompson v Alexander* [1946] 6 WIR 538 at 541 said

“[T]he instructions given [the solicitor] to ... complete the sale included an implied authority to do whatever was reasonably necessary to bring the sale to a successful conclusion.”

97. The correspondence exhibited many letters that were exchanged between Ms. Messado and Mr. Clough trying to resolve difficulties that arose on the way to completion.

98. The presumption must be that Mr. Khem knew of the impediments which stood in the way of a registrable transfer.

99. I am fortified in my view by the words of Sir John Romilly M.R. in *Thompson v Cartwright* (1863) 33 Beav. 178 at 185 as approved by the House of Lords in *A/S Rendal v Arcos, Ltd* [1937] 3 All ER 577:

“... [T]he client must be treated as having had notice of all the facts which in the same transaction, have come to the knowledge of the solicitor and that the burden of proof lies on him (the client) to show that there is a probability, amounting to a moral certainty, that the solicitor would not have communicated that fact to his client.”

100. Throughout the transaction Mr. Clough was Mr. Khem's attorney-at-law, except for a brief period when Mr. Khem obtained representation from Ms. Levers. Within about a month, he returned to Mr. Clough to act on his behalf. Ms. Messado had every basis for proceeding with the understanding that the new conditions had been accepted by Mr. Khem as Mr. Clough had negotiated the cheques. If Mr. Clough had exceeded his authority, this would need to be resolved between Mr. Khem and Mr. Clough.

(f) Conclusion

101. The money for the balance of the purchase price had been ready. The documents in evidence are replete with entreaties from Ms. Messado to Mr. Clough for him to provide the pertinent documents or proof that they existed. His reply was that he wished the balance of the purchase money, inter alia.

102. Special Condition 2 of the Agreement for Sale states:

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

103. Mr. Clough had in hand a deposit of \$4,000,000.00, paid by Mr. T when the agreement was signed. There is no dispute that this was more than the transfer tax and stamp duty due.

104. Within 30 days of the signing of the Agreement, it is to be submitted to the Stamp Office for assessment of stamp duty and transfer tax payable. Those payments must then be made within 14 days of that assessment. There is no evidence of payment of transfer tax and stamp duty.

105. Mr. Clough failed to stamp the documents for the Tropical Plaza property and provide a registrable transfer when Mr. T was ready to pay the balance of the purchase

price. Mrs. Messado eventually paid all the agreed outstanding amounts and has registered the property in the name of Mr. T's nominee, Commercial. The sale has been completed, but has a fraud been committed?

The Fraud

106. It is not necessary, or perhaps possible, to define fraud. Fraud is a fact to be proved....” (Per Higgins J in *Wicks v Bennett* [1921] 30 CLR 80 at 94)

107. Cairn L J's opinion in *Lloyd's Bank Ltd. v Marcan* [1973] 3 All ER 754 at 760 was that, 'fraud involves dishonesty.'

108. Lord Lindley in the Privy Council case of *Assets Company Limited v. Mere Roihi and Others* (1905) AC 176 at 210 said that fraud there means “.....actual fraud, i.e. dishonesty of some sort”

109. This was relied on by the Jamaican Court in *Edward Lynch and Dennis Lynch v. Dianne Ennevor and Eli Jackson* [1985] 19 JLR 161 at 174.

Knowledge of the fraud is essential.

110. The ultimate goal of the fraud alleged was to allow Mr. T to purchase the King Street property and to do so at an undervalue. This he would accomplish by delaying the payment to Mr. Khem of the proceeds of the Tropical Plaza property sale thereby preventing Mr. Khem from paying off the debt on the King Street property. This would result in that property being put up for sale by the Bank of Nova Scotia which held the mortgage on it.

111. Ms. Phillips identified what she regarded as delaying tactics. These included:

1. obtaining of an undertaking from a foreign bank addressed to Ms. Messado instead of to Mr. Khem,

2. the delay in submitting the undertaking to replace that from March 20, 2000 to April 7, 2000
- 3 Mr. T's attempt to vary the Agreement for Sale in January 2000 when Ms. Messado sought to exclude the condition that Mr. Khem would lease a portion of the premises.

112. As time passed, Mr. T paid another \$4,000,000.00 which Mr. Clough had asked for to assist Mr. Khem to clear goods from the wharf. Ms. Messado introduced new conditions. The correspondence concerning the conditions and additional money was prolific. Mr. Clough sometimes expressed his disagreement with the new conditions but he kept the additional money.

113. Ms. Phillips submits that the time spent in arguing about conditions was another part of the plan to delay giving the money to Mr. Khem.

114. She identified what she described as another factor which formed part of the fraud. It was the disregard paid by Mr. T to Mr. Khem's urgent need for the money. Ms. Phillips argued that Mr. T and Ms. Messado both knew that Mr. Khem urgently needed the money from the Tropical Plaza sale to pay the King Street debt. She said that that had been discussed openly between the parties, but the money was fraudulently withheld until the property was put up for auction.

Would the proceeds from the sale by American of the Tropical Plaza property have been sufficient to pay off Mr. Khem's indebtedness to the Bank for the mortgage on the King Street property?

115. The Tropical Plaza property belonged to American and American had no interest in the King Street property. It belonged to Mr. Khem. The evidence is that there

were other shareholders of American besides Mr. Khem, including his brother. There were, at the time of the signing of the Agreement for Sale, serious disputes among them. Witness Barbara McNamee testified that Mr. Khem had told her that he wished to use some of the proceeds of the sale to settle disputes with these shareholders. I believe her.

116. Further, I accept as true, the evidence that Mr. Khem requested some of the purchase money to be paid quickly to allow him to use it to clear some of his goods at the wharf.

117. There is thus credible evidence as to other important uses to which the Tropical Plaza proceeds were to be put. There is no evidence that what was available of the proceeds from the sale of Tropical Plaza would have been sufficient to pay off the indebtedness of the King Street property.

Did Mr. T or Ms. Messado know that the monies were required for an urgent purpose?

118. Mr. Clough in cross-examination said that he had told Ms. Messado that the money was to be used to pay off the King Street debt but he also testified that nowhere in the correspondence between himself and Ms. Messado, spanning over 1 ½ years is there any mention of Ms. Messado having been told of the purpose for the funds.

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

120. He further testified that he told Ms. Messado he needed the money for the Bank of Nova Scotia, but did not mention the King Street property.
121. The contradictions in Mr. Clough's testimony cause me to regard his evidence of having informed Ms. Messado about the urgent need for the money as unreliable.
122. Interestingly, the urgency of the need is not reflected in any documentation that is exhibited. The Agreement for Sale does not have a condition making reference to any urgent need for the money. Mr. Herbert Grant, attorney-at-law, gave evidence on behalf of American/Mr. Khem. He testified that it would have been prudent to insert such a condition in the Agreement to reflect that situation. In fact the clause making Time of the Essence was struck out of the Agreement. The unchallenged evidence is that Mr. Khem did not serve any Notice making Time of the Essence. It was Ms. Messado who served one on Mr. Clough.
123. There is no evidence that Mr. Khem made any request for monies to pay off all, or even a portion of, the mortgage debt owed on the King Street property. The evidence is that the requests were to pay mortgage monies on the Tropical Plaza property and to pay to clear goods on the wharf.
124. I believe Mr. T when he says that he was unaware of any urgent need for the money to pay off the Bank of Nova Scotia.
125. In my view the evidence shows that neither Mr. T, T Ltd., Commercial nor Ms. Messado was informed that Mr. Khem required the Tropical Plaza sale proceeds urgently to pay off the debt of the King Street property.

126. The delay in the payment of the balance of the purchase price to Mr. Khem was not due to dishonesty on the part of Mr. T, T Ltd., Commercial or Ms. Messado. The evidence which I accept as being true indicates several other factors causing the delay.

127. Firstly, an Order by the Supreme Court obtained by Vashi and Shashi Khemlani restrained the sale of the property up until October 21, 1999 which was later than the original date set for completion .

128. Further, there is much evidence that Mr. Clough played the major role in causing delay in the completion of the sale as follows.

1. The Agreement for Sale was not stamped with Stamp Duty or Transfer Tax although Mr. T had paid a deposit of \$4 million and that could have covered the amount for the duty and tax..
2. Mr. Clough in a letter dated April 14, 2000 stated, "The writer will attend with a copy of the stamped agreement and/or fax you the front page thereof." This gave the impression that these amounts had been paid. That was a false impression.
3. Mr. Khem was informed by Mr. Clough that he was stamping the documents but that was untrue.
4. Mr. Khem's evidence is that American did not have the money to discharge the mortgage on the Tropical Plaza property.
5. Ms. Messado did not receive information that Union Bank had received US\$156,032.02 and had closed the loan to American until January 3, 2000 when she received a letter from Union Bank. It was Mr. T who had supplied that money.

6. Union Bank refused to accept Mr. Clough's undertaking according to the unchallenged evidence of Ms. Messado.
7. Mr. Clough was requesting an account from Union Bank in a letter exhibited dated January 6, 2000, months after the original date set for completion. This, he wrote to them, was delaying the completion of the sale of the Tropical Plaza premises.

129. It follows that I find that it was not Mr. T who failed to pay the balance of the purchase price promptly. On December 31, 1999, Mr. Khem was still not in a position to complete the sale.

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

131. It is my finding therefore that no fraud has been proved to have been committed by Mr. T, T. Ltd, Commercial or Ms. Messado. They were not dishonest in this transaction.

The Conspiracy

132. "The law is that a conspiracy to do a lawful act by unlawful means (e.g. ... inducing breaches of contract), is actionable if it causes damage" **Bullen and Leake and Jacobs**, Precedents of Pleadings 12th edition 341.
133. The claim for conspiracy is based on allegations that persons planned together to deprive Mr. Khemlani of money from the sale of American and thereby deprive him of paying off the King Street property mortgage. The sale of King Street to Mr. T was the ultimate goal.
134. "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." [*Mulcahy v. R* (1968) LR3 HL 306 at 307]
135. Mr. T is the Managing Director of T Ltd .and of Commercial. Ms. Phillips for Mr. Khem, described him as the "moving spirit" of Commercial. I agree with her.
136. Mr. T is the "mind" of Commercial and T Ltd.
137. Those entities could thus not conspire with themselves and/or with Mr. T himself. They are in fact one mind.
138. Henderson-Downer JA, in allowing the appeals referred to above as against, inter alia, the earlier summary judgment in favour of Mr. T for possession of 70A King Street said:
- "[I]t follows that Tewani could not conspire with Tewani Limited and [Commercial]...." [*American Jewellery et al v. Commercial Corporation Ja. Ltd* SCCA 155 &156/2001 at 34]
139. The learned Judge of Appeal opined further, that it was possible for Mr. T to have instead conspired with Ms. Messado and Mr. Clough.

140. Initially, the suits filed in the Supreme Court alleged a conspiracy involving Mr. T, T Ltd. and Commercial. However, subsequent to the delivery of the Court of Appeal's judgment, American and Mr. Khem added Ms. Messado to three of the suits, alleging that she was part of the conspiracy. However, even where there is a breach of contract, this in itself does not necessarily indicate the existence of a conspiracy. A party is at liberty to breach a contract provided that he is prepared to pay the consequences at law, which may be, inter alia, payment of damages or adhering to an Order for specific performance. Further, a party is at liberty to breach a contract, being prepared to pay the consequences, in order to take advantage of another opportunity. The wrong he commits in such a case, without more, is that of breach of contract, not the tort of conspiracy.

141. In my view there is no action of conspiracy maintainable at law, which arises from a party breaching a contract so that they can enter into and take benefit of another. In any event, in view of my finding that the claimants have failed to prove fraud against anyone, it follows that there is no proof of a conspiracy which would involve, inter alia, an agreement to breach the Sale Agreement and to thereby commit the alleged fraud.

142. It is interesting that far from damaging Mr. Khem, Mr. T assisted by paying the Union Bank mortgage on the Tropical Plaza property, and by paying to release his goods from the wharf.

Use and occupation of the Tropical Plaza property

143. Mr. Bailey for Commercial submitted that the evidence is that Mr. Clough is an experienced conveyancer of over thirty (30) years practice. Mr. Clough was the author of that letter of February 8, 2000 which Mr. Bailey argued gave unqualified possession to the purchaser of the entire premises, not a portion of it.

144. The letter referred to "Sale of Shop No. 3, Tropical Plaza...registered at Volume 935Folio174" . It advised that Commercial "is now the owner of the abovementioned premises....entitled to possession of the premises" as of that date.

145. Consequently, argues Mr. Bailey, where American remained in occupation of one of the shops, monies became due for use and occupation of that portion of the premises.

146. I disagree. Although the words used in the letter are "the premises", I accept on a balance of probabilities that the intention was to give possession of the vacant shop only. This, I find, because when that letter was written:

1. The entire purchase price had not yet been paid.
2. The letter of possession in turn referred to Ms. Messado's letter of February 7, 2000. In that letter Ms. Messado asked for vacant possession of the empty shop.
3. In that February 7, 2000 letter, Ms. Messado referred to instructions to complete the sale in accordance with the original Agreement of Sale. In that Agreement, Mr. Khem had agreed to lease one-half of the premises being the shop known as American Jewellery Company Limited.
4. The keys were for the empty shop only.

147. Further, I accept the evidence of Mr. Herbert Grant, conveyancer, that "the practice of conveyancing is not something like litigation where every argument is analyzed for its meaning.....we deal with the practice, not what the Court will rule."

148. It is my finding therefore, that in exchange for the additional monies paid, Mr. Clough gave early possession of the empty shop only. I reject the submission that

American was liable for payment for use and occupation of the shop being occupied by it before the entire purchase price had been paid.

149. 16th June, 2000 is noted on the Certificate of Title as the date of transfer of the Tropical Plaza premises to Commercial Corporation Jamaica Ltd. American became liable for use of the premises from then until 31st December, 2000. 1st January, 2001 marked the commencement of the lease to Roshan, Sham and Raj Khemlani.

150. The Statement of Account was agreed and the final balance was acknowledged on 30th August, 2000, as having been paid. However, in view of my finding that American was not liable for payment for the use and occupation of the shop at the specified time, the amounts deducted for rental and General Consumption Tax (GCT) for March to December 2000, must be adjusted. The amounts deducted for March to June 15,2000 must be returned to American by Mr. T. In this period, American was still the registered owner of the premises and thus not liable for rent.

151. That amount according to the agreed Statement of Account dated July 18,2000 is \$575,000.00 This shortpayment in my view was not due to fraud or dishonesty, but rather to the purchasers making decisions contrary to mine, as to when American would become liable for rent.

152. However, American must pay interest at a commercial rate on the amounts which Mr. T had paid in excess of the agreed initial \$4 million deposit from the original completion date of September 30, 1999 until the actual date of completion of June 16, 2000.

153. The payments of those sums were done in tranches so the commercial rates applicable at the time of each payment are to be agreed within 30 days of today failing

which they are to be determined by the Registrar of the Supreme Court, after submissions.

154. Commercial and Mr. T counterclaimed against American for payment for occupation of the shop at Tropical Plaza if the Court found that Commercial and Mr. T were not entitled to deduct sums for occupation for 8th February to 31st December 2000.

155. This condition was partially met as the Court has found that they were not so entitled for March to June 2000. American was still the owner but is to pay interest on the purchase money paid over and above the agreed initial deposit.

156. For the period July to December 2000, they were so entitled to deduct, and the deduction was already made in the Statement of Account. There is therefore no claim arising for the period July to December, 2000, and in respect of the period March to June 2000, the claim by Commercial and Mr. T fails as American was still the registered proprietor of the premises and entitled to occupation.

Breach of Undertaking

157. It was Ms. Messado who caused the name of Commercial to be entered on the Title of the Tropical Plaza property as the owner. Normally, it would have been Mr. Clough, for the vendor, who would have done that, ensuring the purchase price had been paid.

158. Ms. Messado had given two undertakings. In a letter dated 8th November, 1999, Ms. Messado's undertaking to Mr. Clough was:

"not to deal or part with the Duplicate Certificate of Title for the [Tropical Plaza] premises which will be sent to us from Union Bank Ltd, until and unless the balance purchase monies and costs owing are paid."

159. Circumstances changed and in March 2000, Ms. Messado's undertaking was to pay \$6,120,892.18:

"in exchange for duplicate Certificate of Title....duly endorsed in the name of Commercial Corporation (Ja) Limited duly free and clear of all encumbrances."

160. Ms. Phillips argued that Ms. Messado breached her undertaking by herself causing the transfer of the Tropical Plaza property to Commercial.

161. Ms. Messado had caused a transfer to Commercial to be registered on the Title on 16th June, 2000. However, the sale price noted was incorrect. Ms. Messado brought this to the attention of the Registrar of Titles and a new Certificate of Title with accurate information was issued in the name of Commercial Corporation Jamaica Limited on 18th October, 2001.

162. Mr. McBean, for Ms. Messado, argues that all the monies owed were paid by 30th August, 2000 which was before the registration date of 18th October, 2001.

163. Alternatively, he argues that if the effective date of registration was 16th June, 2000, the balance was paid 30th August, 2000 so that the breached undertaking caused no loss to the claimant.

164. It is my view that the second undertaking, being entirely incompatible with the first, must be substituted for the first. The first undertaking in effect states that Ms. Messado must pay before taking any step towards registration of the Transfer. The second undertaking however implies that Ms. Messado must pay after registration has occurred. It would follow that Ms. Messado would be at liberty to register the transfer to Commercial and would then be subject to the undertaking to pay the balance purchase money and costs.

165. Any breach of the undertaking would then be a failure to pay the balance purchase money and costs after registration. Although no time was specified for payment, I hold that a reasonable time for payment of the balance would be 7 days after the completion of the registration of the transfer in the name of Ms. Messado's client. However payment in fact did not occur until the 29th August, 2000, when a final payment of \$388,402.18 was delivered to Mr. Clough and acknowledged by him on 30th August, 2000.

166. Mr. Clough signed the letter in acceptance of a full discharge of Ms. Messado's client's obligations and for receipt of the enclosed balance. Mr. T's obligations were thus acknowledged as having been discharged.

167. Ms. Messado, in a letter dated June 23, 2000, to Mr. Clough, stated:

"It is quite clear that your client has absolutely no intention whatsoever of completing this sale in an honourable manner.

Accordingly, this letter therefore serves as our notice that we have stamped the Sale Agreement and transferred the said Duplicate Certificate of Title herein ...

Please note that this was the least embarrassing way to deal with the matter without exposing your actions."

168. I accept that Ms. Messado was permitted to register the transfer to her client Commercial on the basis of her undertaking to pay the balance due after registration. This after all, was the purpose of the Agreement for Sale and the majority of the purchase price had already been paid, the balance being secured by the second undertaking furnished by Ms. Messado. Indeed, there was no allegation of fraud in respect of the actual transfer of the Tropical Plaza property to Commercial Corporation Jamaica Ltd.

169. That does not alter the fact that she did breach her undertaking by failing to make prompt payment after registration. There was no issue raised about the actual amount which was paid, and indeed Mr. Clough made no protest to Ms. Messado about her stamping the Agreement for Sale or proceeding with registration, when she paid the balance due in a letter dated 29th August, 2000, which was acknowledged by Mr. Clough on 30th August, 2000.

170. I find that Ms. Messado breached the second undertaking by her failure to pay the agreed balance purchase money and costs within a reasonable time after completion of the registration of her client's name on the Title. Accordingly, she is liable for the loss to the vendor American in withholding the balance due from 23rd June, being 7 days after the registration of the transfer to Commercial and also the date on which Ms. Messado notified Mr. Clough that the registration had been effected, to 29th August, 2000. This loss I award as interest on the amount of \$388,402.18 for this period at a commercial rate to be determined either by agreement within 30 days of today or by the Registrar of the Supreme Court after submissions.

Suit C.L 149/2001 The Lease –Tropical Plaza property

171. Mr. Bailey submits that Commercial, being the registered proprietor of the Tropical Plaza property, holds a good title. American had been in occupation and all that remained was the conclusion of a formal lease between Commercial and American. Discussions on the details of the lease led to lengthy delays. Draft leases were exchanged. When these parties could not agree, Roshan, Sham and Raj Khemlani, whom I accept as being the sons of Mr. Khem, entered into a lease agreement with Commercial for the property. Ms. Phillips argues that these three named persons are the

agents or nominees of American and bear no responsibility for the payment of the monthly rental. The responsibility would have been American's but the sale was not complete and so American could properly remain in possession without payment until the full purchase price was paid. She submits that the rental which had been paid by them was paid by mistake, on the erroneous instructions of attorney-at-law Ms. Levers who at that time had replaced Mr. Clough.

172. The lease document is clear. The parties are clear. There is no reference to American. There is neither documentary nor parol evidence to indicate that the sons are empowered to represent American. Mr. Khem's evidence is that although, of the three sons it is only Roshan who is named as a director of American, by his Indian culture the other sons are part of the business and are agents of the Company, so that he instructed Mr. Clough to draft the lease with the sons as agents.

173. This transaction is governed by Jamaican law, not Indian culture. The lessees are liable to the lessor for the amount agreed in the lease of \$125,000 per month plus General Consumption Tax.

174. Roshan, Raj and Sham Khemlani are jointly and severally responsible for the outstanding rent.

Suit CLC 255/ 2001 Recovery of Possession of the Tropical Plaza property

175. Mr. Bailey asks for an Order that the Khemlani sons vacate the premises forthwith. Exhibited is a Notice to Quit the premises endorsed as having been served on July 27, 2001. Rental has not been paid for years. The Khemlani sons signed a lease from January 1, 2001 to pay monthly to occupy the premises. They paid thrice. Commercial,

as lessor, is entitled to recover possession of the property from the Khemlani sons who are the lessees.

The King Street property

176. Ms. Phillips, on behalf of Mr. Khem, argues that it was the failure of Mr. T to pay monies that caused Mr. Khem to be unable to discharge his indebtedness on this property.

177. However, Mr. Khem's evidence was that, "because of the dispute the monies were not being paid." It was his evidence that he did not know what the monthly payments were that he should have been paying to the Bank of Nova Scotia in 2000. He was not able to pay because the business was being sold to pay the bank.

178. The monies for King Street remained outstanding and on August 31, 2000 the King Street property was put up public auction. Mr. T's \$12,000,000.00 bid was the highest and he paid the amount. That is not disputed. The bidding sheet exhibited shows Mr. T's bid was four times the first bid made at the auction that day for the property.

179. The evidence of two expert valuers is that that was a fair market value. Exhibited is a letter dated September 4, 2000 acknowledging Mr. Tewani's deposit of \$1.8million on the King Street property. Ms. Phillips argues that Mr. T used the money which he should have paid for Tropical Plaza to instead pay for King Street.

180. However, the auction was on August 31, 2000 and a letter dated before that, on August 29, 2000 from Ms. Messado to Mr. Clough indicated that \$388,402.18 was enclosed in final settlement of the Tropical Plaza property sale. Mr. Clough's signature, dated August 30, 2000 acknowledged that he had received the amount in discharge of Mr. T's obligations for that sale of the Tropical Plaza property..

181. Further, there is uncontradicted evidence that Mr. T has several companies and businesses and that Ms. Messado collects approximately \$6,000,000.00 monthly on his behalf for the various premises which he rents.

182. I therefore accept as true that Mr. T had funds available to purchase both the King Street property and the Tropical Plaza property simultaneously. There would be no need to retain the balance from the Tropical Plaza purchase to pay for the King Street property.

183. In any event, Mr. T testified that he was not aware that the King Street property belonged to Mr. Khem until the day before the auction. That has been unchallenged.

184. In addition, Mr. Khem filed suit on September 7, 2000 claiming that the sale of the King Street premises was void. He agreed that his affidavit supporting that claim had seven grounds as to why he made the claim. Not one of those grounds made any reference to either Mr. T or T Ltd.

185. Also Mr. Clough wrote to Ms. Messado in a letter dated January 24, 2001 that that suit had nothing to do with the lease and the sale of Tropical Plaza.

186. The Bank of Nova Scotia sold Mr. Khem's King Street property to Mr. T, being the highest bidder, at a public auction. Mr. T paid the purchase price and the name of his nominee, T Ltd., was placed on the Title by the Registrar of Companies as being the registered proprietor.

187. Section 68 of the Registration of Titles Act provides:

"...[E]very certificate of title issued under ... [the Registration of Titles] Act shall be....evidence of the particulars therein...and, shall...be conclusive evidence that the person named in such Certificate as the proprietor of...the land...is ..possessed of such estate."

188. The title bears the name of T Ltd as proprietor. That is evidence that T Ltd is in fact the owner. Absolutely no evidence has been presented to show dishonesty by anyone in the process by which Mr. T acquired the King Street property.

189. Shortly after the auction, Mr. T offered to sell the King Street property for \$19,000,000.00 to Mr. Khem. Mr. Khem refused to buy. Ms. Phillips regarded this fact as part of the evidence of fraud/conspiracy.

190. T Ltd, having been registered as the proprietor, was at liberty to ask any amount as the selling price. That is not dishonesty. That is business. It is open to any or all to refuse to purchase at the price asked.

191. The King Street property is properly registered to, and thus owned by, T Ltd.

Suit CLT024/2001 - Possession of King Street property

192. In his witness statement Mr. Khem said that on January 24, 2000 the Purchaser's Attorney-at-law advised him directly that the King Street property had been transferred to T Ltd. and that Notice to Vacate was being served on him. He has now known for almost seven years that T Ltd wishes him to leave the premises. He must leave.

193. 70A King Street is located near to the Supreme Court. I take judicial notice of the fact that business is being conducted there. Because of that I allow additional time for Mr. Khem. to vacate the premises whilst at the same time making allowance for the fact that almost seven years have now passed since Mr. T bought the property and has been deprived of its fruits.

194. It is my view that Mr. Khem must give up possession within twelve weeks of delivery of the judgment.

Suit CLT151/2001 Rental of the King Street property

195. Mr. Khem has been occupying these premises no longer owned by him. Mesne profits are due to the new owner from the date of registration of Title, i.e. January 5, 2001 until he vacates the premises.

196. The mortgage was paid off by Mr. T. Mr. Khem pays neither the bank nor Mr. T for his occupation of this multimillion dollar commercial premises. Mr. Khem must now pay T Ltd. for the time he has occupied the premises free of charge whilst T Ltd was the lawful owner.

197. **McGregor on Damages**, 17th edition at paragraph 34-041 indicates that the “normal measure of damages is the market rental value of the property occupied or used for the period of wrongful occupation or user.”

198. In *Inverugie Investments v Hackett* [1995] 1 WLR 713, the Privy Council confirmed this position.

199. There is evidence from Mr. Delisser, a valuator who testified on behalf of Mr. T, as to the rental value of the premises. Mr. Harris, a valuator who was called by Mr. Khem as a witness, regarded that value as low.

200. I accept as fair and reasonable the value to which Mr. Delisser testified and award that amount as the amount due for occupation:

For 2001	-	\$1,356,686.70
“ 2002	-	1,493,975.90
“ 2003	-	1,643,373.40
“ 2004	-	1,807,228.90
“ 2005	-	<u>1,987,951.80</u>
Total to 2005	-	<u>\$8,289,216.70</u>
		=====

201. Mr. Delisser further testified that the rental for 2006 would be \$181,500.00 per month. I accept that as being reasonable and award that sum for each month's occupation of the premises for 2006 and until Mr. Khem vacates the premises.

Rental of Tropical Plaza property

202. The lease was agreed to be for three years from January 1, 2001. It is to be honoured. Rental is to be paid at the agreed rate in the lease of \$125,000.00 monthly from the effective date of the lease, i.e. January 1, 2001, to the date marking the end of the lease period, i.e. December 31, 2003. The 3 payments for rent which the sons say were made in error, are to be deducted from the amount. In addition, they are to pay a fair amount for the remaining period, that is, January 2004, to the date of vacating of the premises. There is no evidence of the market rental value. I therefore direct that the amount for the remaining months is to be calculated either:

- (a) by agreement between the parties; or
- (b) by averaging the valuations of two valuers for monthly rentals and applying that average amount.

203. The parties must agree on the amount within thirty days of the delivery of this judgment failing which the Registrar of the Supreme Court is empowered to appoint two valuers.

204. Cost of the valuers is to be shared equally.

205. I have found that the empty shop had been handed over early, before all the purchase price had been paid.

206. "If the purchaser is let into possession before proper time for completion, then, unless the contract otherwise provides, he is entitled to the rents and profits from the time of taking possession" **Halburys 4th edition 42 ...par..190.**

207. The early possession was in exchange for early payment of part of the purchase price.

Orders

208. The orders I make are:

CL A018/2001

1. In the claim by American Jewellery Co. against the defendants Commercial Corporation Jamaica Ltd and Mr. Tewani for damages for breach of contract and a declaration concerning the lease:

Judgment for the defendants Commercial Corporation Jamaica Ltd and Mr. Tewani.

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

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

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

Judgment for the defendants, Commercial Corporation Jamaica Ltd, Tewani Ltd, Mr: Tewani and Ms. Messado.

4. In the claim by Mr. Khemlani against Tewani Ltd to set aside the transfer of premises at Volume 1191 Folio 789 (the King Street property) and to restrain Tewani Ltd. from dealing with it:

Judgment for the defendant Tewani Ltd.

5. In the claim by American Jewellery Co. Ltd against Ms. Messado for breach of professional undertaking:

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

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

Judgment for Mr. Tewani for interest on the amount paid on account of the Sale Agreement in excess of the agreed initial \$4 million deposit, to or on behalf of American Jewellery Co. Ltd., from the original completion date of 30th September, 1999, until the actual date of completion of 16th June, 2000. This interest is at a commercial rate to be determined in accordance with paragraph 153 of this judgment.

CL C149 and 255/2001 (Consolidated)

1. In the claim by Commercial Corporation Jamaica Ltd. against Roshan, Sham and Raj Khemlani for rental for the Tropical Plaza property:
Judgment for the plaintiff Commercial Corporation Jamaica Ltd. Rental amount due to be calculated in accordance with paragraph 202 of this judgment.
2. In the claim by Commercial Corporation Jamaica Ltd. against Roshan, Sham and Raj Khemlani for possession of the Tropical Plaza premises:
Judgment for Commercial Corporation Jamaica Ltd.
Roshan, Sham and Raj Khemlani are to give possession within 12 weeks of today.

CL T 151 and 024/2001 Consolidated

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

Judgment for the claimant Tewani Ltd., for mesne profits in the amount to be calculated in accordance with paragraphs 200 and 201 of this judgment.

2. In the claim by Tewani Ltd., against Mr. Khemlani for possession of 70A King Street:

Judgment for Tewani Ltd. Mr. Khemlani to give possession within twelve weeks of today.

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

Judgment for Tewani Ltd and ancillary defendants Commercial Corporation Jamaica Ltd, Mr. Tewani and Ms. Messado against defendant Mr. Khemlani.

4. In the counterclaims in both suits by Mr. Khemlani against Tewani Ltd to set aside transfer of 70A King Street and to restrain dealing with the premises: -

Judgment for Tewani Ltd.

Interest

209. These suits involve premises where businesses exist or were expected to exist. Commercial interest is appropriate but there is currently no evidence as to the applicable rates.

210. I therefore make an award of commercial interest in respect of all awards herein up to the date of this judgment.

211. The commercial interest award is payable by the party against whom judgment has been awarded and in favour of the successful party.

212. The rate and duration of the commercial interest is to be determined either by agreement between the parties, or in lieu thereof, the parties are to make submissions to the Registrar of the Supreme Court who will thereafter determine the commercial interest rate applicable for each award and its duration.

Costs

213. In all suits, costs are awarded to the successful party/parties except in respect of the claims where it is specified that there is no order as to costs.

214. In Suit CL T151 and 024/2001 where Commercial Corporation Co. Ltd, Mr. Tewani and Ms. Messado were joined as ancillary defendants by defendant Mr. Khemlani, costs are awarded to the ancillary defendants Commercial Corporation Co. Ltd, Mr. Tewani and Ms. Messado as against the defendant Mr. Khemlani.