THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2018-00671

BETWEEN

RUPLAS INDUSTRIAL COMPANY LIMITED

Claimant

AND

EVOLVING TECKNOLOGIES AND ENTERPRISE DEVELOPMENT COMPANY LIMITED

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JOAN CHARLES

Appearances:

Claimants: Mr. Joseph Toney instructed by Ms. Adanna Toney

Defendants: Mr. Vijai Deonarine instructed by Ms. Odette Clarke

Date of Delivery: 9th March 2022

JUDGMENT

[1] The Claimant claimed against the Defendant:

i. Damages for the Defendant's unlawful termination of a Lease Agreement between the Claimant Company and the Defendant and breach of contract in the sum of $4,244,735.00 as outlined below:

(i) Average loss of revenue in the total sum of $3,944,735.00 for the period March 2014 to December 2017 in the sum of $1,042,105.00 per annum;

(ii) The sum of $250,000.00 which amounts to one quarter (1/4) of the proceeds from an insurance policy made to the Defendant in or about February 27th 2011, for the reinstatement of building 17G which was destroyed by fire;

(iii) Interest pursuant to Section 25 of the **Supreme Court of Judicature Act Ch 4:01**;

(iv) Costs.

THE CLAIMANT'S CASE

[2] The Claimant was and is at all material times a Company duly incorporated under the laws of Trinidad and Tobago with its registered office situate at No. 3 Citrine Drive Diamond Vale, Diego Martin.

[3] At all material times the Defendant was and is a Special Purpose State Enterprise under the Ministry of Trade and Industry with its registered office situate at 9-15 E-Teck Boulevard, Tamana In Teck Park, Wallerfield.

[4] In or about the year 1986 the Defendant was formerly the Industrial Development Corporation (IDC) and the Claimant Company performed its operations at the Defendant's Industrial Park, Morvant.

[5] By letter dated 27th November 1996, the Defendant (then IDC) wrote to Messrs. Glenn and Adrian Cumberbatch of the Claimant Company in response to their application for a factory shell accommodation at Diamond Vale Industrial Estate.

[6] On the 4th December 1996 the Claimant accepted the offer of the Defendant (then IDC) for same and the keys to the building were officially handed over to the Claimant on the 4th December 1996.

[7] The Claimant made insurance payments between the period 1996 to 2010.

[8] On or about 27th February 2011, a fire started at the Defendant's Diamond Vale Industrial Park which destroyed Building 17D, 17E, 17F and 17G which was occupied by the Claimant.

[9] On 3rd March 2011 a meeting was held by representatives of the Defendant and the tenants affected by the fire, the purpose of which was to reassure the latter of the Defendant's commitment in recommencing business activities as soon as possible. Possible relocation to the other vacant buildings in the park was also discussed during the said meeting. The Claimant as well as the other tenants were advised that Building 12B, E, F and J on the same park were vacant and asked to consider these sites for possible relocation.

[10] It was agreed between the Defendant and the affected tenants during meetings held between the parties that the proceeds from the said insurance policy shall be applied to reinstate the Factory Building which housed Buildings 17D, 17E, 17F and 17G. By letter dated 1st May 2012, Mr. Willis of the Defendant advised that *"we estimate that you will regain beneficial occupation of the said building by 31 December 2012".*

[11] Unfortunately by 31st December 2012 the Defendant was not in beneficial occupation of the said building. However on the 14th March 2013, there was a meeting between the Defendant and the affected tenants during which the architectural design layouts for the reinstatements of Building 17 was discussed.

[12] By letter dated 26th August 2013, Mr. David Gunn, Vice President of the Real Estate Assets Business Unit of the Defendant wrote to the Claimant outlining the options to convert its twenty five year lease to a ninety nine year leasehold arrangement or alternatively to access a rental cap on twenty five year old leasehold arrangements. The Claimant Company responded to the Defendant indicating its noninterest in pursuing the new lease options offered.

[13] The Defendant did have several meetings, discussions and consultations with the Claimant and the other affected tenants regarding measures being taken to reinstate the affected buildings.

[14] On 3rd December 2013, the Defendant wrote to the Claimant indicating that it was experiencing delays in the start of the construction and in light of same was unable to provide a further specific timeline as to when construction and/or reinstatement would be possible.

[15] By letter dated 16th December 2013, the Claimant wrote to the Defendant indicating that it had no interest in cancelling its present lease agreement until it was in receipt of the reinstated factory shell; further, that the delay in reinstatement was causing *"further hardship and affecting our credibility with machine suppliers".*

[16] The Defendant by letter dated 28th February 2014 informed the Claimant Company as follows:-

> *"Please be advised that the two (2) years for reinstatement has expired and as such, we are exercising our right of termination of the existing lease arrangement. Accordingly, this termination will take effect from the expiration date of reinstatement, which is 26 February 2013.*
>
> *With respect to the progress of the reconstruction of the replacement building, we will keep you updated regarding progress."*

[17] In response, the Claimant wrote to Mr. Gunn in a letter dated 16th April 2014 stating:-

> *".....you attempted to terminate our lease agreement, because of your failure to meet our stated obligation to rebuild the factory shell Bldg 17G Diamond Vale Industrial Estate within two years.*
>
> *Firstly, we should point out, that we paid the insurance on this building for fifteen years with the specific purpose to rebuild said building in the event of destruction of this building as specified by you. Our understanding is that you have received payment on this insurance policy.....*

Several meetings and correspondence with Eteck's staff left us with no doubt that Eteck will honour the terms of agreement. To this end, we redesigned our plant, solicited quotes, looked at equipment and on April 22 2014, the writer leaves Trinidad to look at the production line in operation. We are therefore troubled, that a senior executive of a body charged with facilitation of investment in Trinidad and Tobago can make such an unethical and wrong decision. Furthermore, at this point in time, we cannot accept your decision to terminate our lease agreement, which expires in December 2021."

[18] On or about the 19th August 2014, the Defendant emailed the Claimant enquiring whether the Claimant was interested in acquiring a lease for Lot 17, and demanded they respond to this enquiry by 22nd August 2014. On the 28th August 2014 the Claimant Company instead requested a lease from the Defendant for one half of Lot 17.

[19] On or about the 11th day of November 2016, the Claimant requested a copy of the tenancy agreement between itself and the Defendant from Mr. Neil Willis, Property Officer of the Defendant. The Claimant Company was advised by Mr. Willis via email dated the 14th day of November 2016 that *"A search of our records has revealed that no instructions were ever issued with respect to the preparation of the lease agreement for building 17G".*

[20] Pursuant to the instructions of the Claimant, by letter dated 7th December 2016, Ms. Adanna Toney, Attorney at Law wrote to Mr. Norris Herbert, Permanent Secretary (Ag.) of the Ministry of Trade and Industry apprising him of the aforementioned matters and calling upon his intervention to resolve this matter as follows:-

(a) Provide a Lease Agreement between RIC and Eteck for the period 1996-2021;

(b) Call on Eteck to account for the proceeds of the Insurance pay out;

(c) Reimburse to RIC the loss of income for the period 2013 (the expiration date of reinstatement) to date in the sum of $3,897,429.00 (average earnings of $1,299,143.00 per annum for three (3) years);

(d) Reverse the decision of Eteck communicated to RIC via letter dated February 28, 2014; or in the alternative to (d)

(e) Provide RIC with a 25 year lease agreement wherein it can construct its own building on a 10,000 square feet parcel of land within Eteck's Industrial Park, Diamond Vale at a reasonable monthly rent"

The said letter was also copied to Mrs. Erica Prentice-Pierre, Mr. Neil Willis and Mr. David Gunn of the Defendant.

[21] The Claimant was invited to a meeting with the Defendant on the 5th April 2017.

[22] By letter dated 20th June 2017, Ms. Toney on behalf of the Claimant requested a formal response to the said letter of 7th December 2016 on or before 4th July 2017 failing which legal proceedings shall be initiated.

[23] By letter dated 21st July 2017, Mrs. Deedra R. Maharaj, Legal Officer of the Defendant wrote to Ms. Toney outlining the lease options suggested to the Claimant at the meeting of 5th April 2017 which were – Lot 22 Diamond Vale Industrial Park or Building 17A Diamond Vale Industrial Park.

[24] The said letter also stated that *"the Property Manager, Mr. Neil Willis was available to conduct a site visit with Mr. Cumberbatch should he wish to view the premises before a decision is made....."*

[25] In response by letter dated 25th October 2017, Ms. Toney wrote a Pre-Action Protocol Letter to Mrs. Maharaj of the Defendant stating, inter alia that subsequent to a site visit with Mr. Willis, Mr. Cumberbatch was informed that Lot 22 was not a viable option given its 7000 square foot size which would not be approved by the Town and Country Planning Division for construction of a building. Further Building 17A had the following issues:-

(a) there was no water connection;

(b) there was no sewer connection;

(c) there was no electrical connection;

(d) the present size of the available space in the said building is 12,000 square feet with a proposal that it be subdivided to comprise two spaces of 8,000 square feet and 4,000 square feet respectively – the 8,000 square feet is the proposed space for our Client Company (Claimant Company);

(e) the price for the rental of the 8,000 square feet is $30,000 plus VAT every month.

THE DEFENCE

[26] The Defendant pleaded that a Letter of Offer of accommodation at Building 17G, Diamond Vale Industrial Estate was sent to Messrs. Glenn and Adrian Cumberbatch relative to their application for a factory shell at this site. A draft lease was attached to that Letter of Offer. The Defendant also asserted that there was a lease agreement evidenced in writing by an exchange of documents[1](the said draft lease).

[27] While the Defendant admitted that the Claimant paid insurance premiums for the period 1996-2010, such sums being recoverable as rent, the Defendant asserted that it had always been a term of the said draft lease [2] contained in the draft lease which accompanied the Letter of Acceptance of the Claimant's Application for tenancy that:

> *The landlord covenants with the Tenant that this insurance will be for the full cost of reinstatement of the leased premises including (without) limitation debris removal, demolition and site clearance and the obtaining of all planning and statutory approvals.*

[28] The Defendant further averred that this provision was circumscribed by Clause 6(d)(v)[3] of the said draft lease:

The Landlord need not reinstate while prevented by any of the following:

[1] Para 5 of the Defence
[2] Clause 6 (a) (iii); paragraph 8 of the Defence
[3] Paragraph 8 of the Defence

1. *Failure by the Landlord to obtain the Permissions despite using its reasonable endeavours;*

2. *The grant of any of the permissions subject to a lawful condition with which it would be unreasonable to expect the Landlord to comply or the planning of highway authority's insistence that as a pre-condition to obtaining any of the Permissions the Landlord must enter into an agreement with the planning or highway authority that would contain a term with which it would be unreasonable to expect the Landlord to comply;*

3. *Some defect in the site upon which the reinstatement is to take place so that it could not be undertaken or undertaken only at excessive cost;*

4. *War, act of God, Government action, strike, lockout or any other similar circumstances beyond the control of the Landlord.*

And further at Clause 6 (e)(1):

> *"Whenever Insured damage occurs and the Leased Premises or any part of it is still unfit for use two (2) years after the date upon which it first became unfit, either party may for so long as the Leased Premises or part remains unfit, serve on the other a notice referring to this clause whereupon this lease will immediately come to an end".*

[29] The Defendant pleaded that it was an express term of the written agreement that any proceeds from the insurance policy belonged to the Landlord. He relied upon Clause 6(e)(1) of the said draft lease as outlined below:

> *"Termination under the preceding clause will not affect any rights that either party may have against the other and all insurance money received in respect of the Leased Premises will belong to the Landlord".*

[30] The Defendant also pleaded that by letter dated 28th February 2014, it notified the Claimant that the period for reinstatement had expired and as such, it was exercising its right of termination, such termination to take effect from the expiration date of reinstatement being 26th February 2013.

[31] The Defendant denied the Claimant's assertion that Mr. Willis informed him in 2012/2013 that the sum of one million dollars was paid by the insurers to the Defendant for the loss of the building. The Defendant also denied the Claimant's account of the meeting between the Claimant and affected tenants and the Defendant held on the 3rd March 2011 and asserted the following:

i. that a meeting was held with the tenants affected by the fire on the 3rd March 2011, the purpose of which was to reassure them of the Defendant's commitment in assisting them in recommencing business activities as soon as possible as well as possible relocation to other vacant buildings in the park and the time frame for reconstruction of the destroyed factory shells. The Claimant and the other tenants were advised that Buildings 12B, E, F and J on the same Park were vacant and asked to consider these sites for possible relocation. The Claimant and other affected tenants were reminded that under the time frame in the written agreements, the Landlord has a period of two years to reinstate the buildings and if this does not occur, either party can serve notice with a view to terminate the lease.

ii. by letter dated 31st March 2011, the Defendant reassured the Claimant of its commitment to ensure that the latter's business was re-established and further sought the Claimant's final position on the possibility of relocating to one of its other available buildings on the same site. However, the Claimant failed to consider this option and/or accept the offer of relocation.

iii. that on 20th September 2013, it executed a contract with Alpha Engineering and Construction Limited for the reinstatement of the damaged premises. However, despite its best efforts to reinstate the affected premises, it was unable to meet the stipulated timelines it had scheduled for reconstruction. The Claimant and other affected tenants were always kept abreast of any new developments and/or setbacks. The Defendant wrote to the Claimant on 3rd December 2013, indicating that it was experiencing delays in the start of construction and in light of same was unable to provide a further specific timeline as to when construction and/or reinstatement would be possible. The Defendant

went on to inform the Claimant that it should surrender its subsisting lease agreement until a new (longer if so desired) lease could be issued once the affected premises were reinstated.

iv. by letter dated 16th December 2013, the Claimant indicated that it had no interest in cancelling its present lease agreement until it was in receipt of the reinstated factory shell and further that the delay in reinstatement was causing *"further hardship and affecting our credibility with our machine suppliers."*

v. that on or about 19th August 2014, it wrote to the Claimant via email enquiring as to the Claimant's interest in acquiring a lease of Lot 17, the site that it had previously occupied with a deadline to respond of 22nd August 2014. By email dated 26th August 2014, the Claimant requested more time during which to make a decision. The Defendant granted an extension to the 29th August 2014. On 28th August, the Claimant wrote requesting a lease of half of the land site of Lot 17. Since the site could only be leased as a whole, the Defendant rejected that proposal.

vi. on the 19th September 2014, the Defendant terminated the contract with Alpha Engineering and Construction Limited.

vii. by letter dated 15th October 2015, Mr. Glenn Cumberbatch wrote to the Honourable Minister Mrs. Paula Gopee-Scoon on behalf of the Claimant herein seeking the Minister's intervention.

[32] The Defendant admitted that it invited the Claimant to a meeting on April 5th 2017 and that the sole issue discussed was the available spaces for leasing in the Diamond Vale Industrial Park.

[33] The Defendant contended that the Claimant's claim for damages for breach of contract in the sum of four million two hundred and forty four thousand seven hundred and thirty-five dollars ($4,244,735.00) for the period March 2014 to December 2017 is excessive and/or without merit. It also contended that Ruplas' claim for one quarter of the insurance proceeds to the value of two hundred and fifty thousand dollars ($250,000.00) was baseless and without merit.

[34] Eteck pleaded that the Claimant is not entitled to damages for breach of contract or any of the reliefs claimed against the Defendant as the claim is statute barred and/or in the alternative, the Defendant was at all material times acting within his legal and contractual rights in terminating the lease agreement.

EVIDENCE FOR THE CLAIMANT

Glenn Cumberbatch

[35] Mr. Cumberbatch testified that since the fire in February 2011, the Claimant Company has continued its operations at his home situate at #3 Citrine Drive, Diamond Vale, Diego Martin, on a significantly smaller scale since it only imports toothbrushes as it no longer has a factory to manufacture its products. He explained that the importation of toothbrushes attracts a twenty percent duty tax which has resulted in an increase in the retail price of the toothbrushes. The Claimant Company lost many of its local and regional customers, as its toothbrush prices were no longer competitive. In addition, as a result of the loss of its manufacturing capability, the Claimant Company also lost control of its stock levels[4].

[36] Mr. Cumberbatch testified further that the Claimant Company also manufactured bottle covers, combs, injection moulding products and soap dishes. The Company's ability to manufacture these products was lost due to non-reinstatement of a factory shell for which the Claimant Company paid insurance premiums against damage by fire.

[37] The Claimant stated that as a local manufacturer the Claimant received the benefit of duty free concessions for raw materials. This benefit was lost following the destruction of the factory shell and the nonreplacement of same by the Defendant.

[4] Paragraph 29 of the Witness Statement of Glenn Cumberbatch filed on 31st October 2019

[38] During the years 1996 to 2010, the revenue of the Claimant Company was in the average range of $1,272,352.00 per annum. However, since 2011, it has averaged at $230,247.00 per annum[5].

[39] The Claimant through its attorneys wrote to Messrs. Leon Ambrose & Company, Chartered Accountants requesting a statement of the income and expenditure for Ruplas during the period 1996 to 2017. Leon Ambrose & Company submitted the requested information by correspondence dated February 23rd 2018. The said Chartered Accountants, pursuant to the Claimant's further request, provided a statement of the income and expenditure for the period of 2011 to 2018. These reports confirmed the revenue and gross profit of the Claimant Company for the said years 1996-2010 and 2011 to 2018. Mr. Cumberbatch added that the requirement to have the annual financial statements for the period 2004 to 2017 audited was waived by the shareholders of the Claimant Company who are entitled to do so under the **Companies Act**.

Leonardo Michael Ambrose

[40] Mr. Ambrose, a Chartered Accountant, testified that his firm Leon Ambrose & Company became part of Coopers and Lybrand in 1988, but was resuscitated in 2004. He testified that from 1996 to present, his firm or other firms in which he was partner have prepared the Claimant's accounts. In response to a request from the Claimant's attorney in 2018, he prepared a report outlining the revenue generated by the Claimant from 1996 to 2010 and 2011 to 2017.

[41] He also testified that during the period 1996 to 2010 the revenue was $19,085,283.00 and the gross profit was $5,359,762.00. During the period 2011 to 2018 the revenue was $1,907,985.00 and the gross profit was $514,843.00[6].

[42] In cross-examination, Mr. Ambrose revealed that the after tax profit for 1996 was $87,896.00 while for 1995 it was $10,083.00; in 1997 profit after taxation amounted to $79,005.00; in 1998 profit after taxation was $46,798.00[7].

[5] Paragraph 31 of Mr. Cumberbatch's Witness Statement
[6] Paragraph 14 of the Witness Statement of Leonardo Michael Ambrose filed on 31st October 2019
[7] Transcript page 86 lines 1-32

[43] Mr. Ambrose testified about the profit and loss for the Claimant Company from 1998 to 2010 as follows:

a. in 1998 the Profit after taxation was $20,989.00,

b. in 1999 there was a loss of $46,798.00,

c. in the year 2000 the after tax profit was $116,547.00,

d. in 2001 there was a loss of $18,321.00,

e. in 2002, the profit after taxation was $92,415.00,

f. in 2003 there was a loss of $118,791.00,

g. in 2004 there was a loss of $241,441.00,

h. in 2005 there was a loss of $19,685.00,

i. in 2006 there was a loss $22,424.00,

j. in 2007 there was an after tax profit of $27,090.00,

k. in 2008 there was an after tax profit of $2019.87,

l. in 2009 there was a loss of $80,888.31,

m. in 2010 the after tax profit was $18,639.00.

EVIDENCE FOR THE DEFENDANT

Erica Prentice Pierre

[44] Mrs. Pierre is the Manager of Tenant Relations of the Defendant and had held that position for thirteen years. She testified that as Manager of Tenant Relations she had access to and custody of all the Defendant's records relating to the tenancy of the Claimant.[8]

[45] Mrs. Pierre testified that based on Eteck's policies, a tenant may choose to rent a factory shell or a land site. The terms and conditions governing a land site arrangement are different from those governing factory shell arrangements;

[8] Paragraph 2 of the Witness Statement of Mrs. Pierre filed on 31st October 2019

while factory shells are leased for 25 years, land sites are leased for 30 years.[9] Under the factory shell arrangement, the landlord is responsible for the structural integrity of the building as well as payment of insurance which is recovered from a tenant as rent. All properties are leased to tenants for light manufacturing purposes.

[46] Mrs. Pierre stated that Ruplas became a tenant of Eteck on or around the 4th December 1996 after IDC made a formal offer of accommodation at Factory Shell/Unit 17G Diamond Vale Estate by Letter of Offer dated 27th November 1996 and this was accepted by Ruplas. Ruplas then paid a sum of $11,940.40 (comprising of security deposit plus one month's rent in addition to legal and survey fees and insurance premium) and went into occupation. Factory shell/Unit 17G comprised of approximately 4000 square feet or 371 square meters. Factory Shell/Unit 17G was part of a larger building occupied by three other tenants and known as Units 17D, E, F which together comprised 1114 square meters.[10]

[47] In the Letter of Offer, Ruplas was advised that *"On acceptance of this offer, we would begin the preparation of the Agreement to Lease. However, the Memorandum of Lease would not be available until such time as the Company is in a position to issue the same"*[11].

[48] This witness asserted that a formal Deed of Lease was never executed between Eteck and Ruplas[12]. This is so because the Diamond Vale Park was developed in the 1960s which predated the Town and Country Planning and Development Act 1969. This Act provided that certain regulatory approvals were required which would not have been put in place at the time. As a result, factory shell tenants operating at these sites do not have leases as this requires an approved survey plan at current development standards. Since the Act however, Eteck and its predecessors have been in the process of bringing the factory shells up to industry standards.

[9] Paragraph 5 of the Witness Statement of Mrs. Pierre
[10] Paragraph 7 of Mrs. Pierre's Witness Statement
[11] Paragraph 9 of Mrs. Pierre's Witness Statement
[12] Paragraph 10 of Mrs. Pierre's Witness Statement

[49] Mrs. Prentice-Pierre stated that though a formal Memorandum of Lease was never issued, she is aware that the terms 'lease' 'lease arrangement' and 'lease agreement' were used loosely and/or alternatively at the material time and throughout these proceedings to describe the landlord-tenant relationship between the parties that was governed by the standard form draft lease agreement in tandem with the letter of offer[13].

[50] On or around the 27th February 2011, building 17 comprising of Factory shells/units 17D, 17E, 17F and 17G was destroyed by fire. On the 2nd and 6th December 2011, Eteck received insurance proceeds in the sum of $1,615,892.02[14].

[51] Some of the affected tenants, Mr. Cumberbatch of Ruplas included, indicated that their lease agreement had been destroyed in the fire and Eteck indicated that in light of the destruction, copies of those said agreements would be provided to all the affected tenants[15].

[52] At a meeting on 3rd March 2011 between the tenants and representatives of the Defendant, the affected tenants posed questions about the time frame for reconstruction, and whether or not they would be given first preference once construction was completed. They were advised that in accordance with the lease agreement, the Landlord has a period of two years from the date of the damage to reinstate the buildings but if this does not occur within the same timeframe, either party can serve notice with a view to terminated the lease agreement[16].

[53] On 31st March 2011, she wrote to Ruplas to indicate that its account stood in arrears as at February 2011, and enquired whether or not Ruplas was interested in relocating to either units 12B, E, F, or J – which had been identified as available at the meeting of 3rd March 2011. However, Ruplas failed to accept this offer of relocation[17].

[13] Paragraph 11 of Mrs. Pierre's Witness Statement
[14] Paragraph 14 of Mrs. Pierre's Witness Statement
[15] Paragraph 16 of Mrs. Pierre's Witness Statement
[16] Paragraph 17 of Mrs. Pierre's Witness Statement
[17] Paragraph 18 of Mrs. Pierre's Witness Statement

[54] On March 14th 2013, she attended a meeting which was convened by Eteck with the affected tenants to discuss the architectural design layout for the new factory buildings that Eteck was proposing to build. Mr. Glenn Cumberbatch of Ruplas was present at the said meeting[18].

[55] On September 20th 2013, Eteck executed a contract with Alpha Engineering and Construction Limited for the reinstatement of the destroyed units. The value of the contract was $20,912,320.56. Since the value of the contract far exceeded that of the insurance payout, Eteck had sought funding from the Ministry of Trade. This led to undue delays in the progress of the contract being executed[19].

[56] Eteck, by letter dated 3rd December 2013, advised Ruplas that it was experiencing delays in the construction of the new building due to the finalization of contractual obligations. As a result, it was unable to provide a new timeframe for construction to begin. The letter also outlined that Eteck was in the process of revisiting the terms and conditions of its existing leasing policies however the existing leasing arrangement would have to be extinguished before an offer of a new lease could be made. Ruplas was asked to respond in writing confirming the surrender of its subsisting leasing arrangement[20].

[57] Ruplas replied by letter dated 16th December 2013 indicating it had no interest in cancelling its present lease arrangement. Further it made reference to the draft standard lease agreement and claimed that the said agreement stated that the factory shell was to be rebuilt and returned to it within two years which Eteck had not done[21].

[58] When it became apparent to Eteck that it would not be possible to meet the stipulated timelines it had scheduled for reconstruction, Eteck decided to terminate the existing lease arrangement between itself and Ruplas. Accordingly, by letter dated 28th February 2014, it advised Ruplas that it was exercising its right of termination of the leasing arrangement, given the fact that

[18] Paragraph 19 of Mrs. Pierre's Witness Statement
[19] Paragraph 20 of Mrs. Pierre's Witness Statement
[20] Paragraph 21 of Mrs. Pierre's Witness Statement
[21] Paragraph 22 of Mrs. Pierre's Witness Statement

two years from the date of loss had elapsed in accordance with the standard form draft lease agreement[22].

[59] Notwithstanding the termination of the lease arrangement between itself and Ruplas, throughout that said period and continuing thereafter through 2017, Eteck made a number of efforts to accommodate and relocate Ruplas. Following the offer of Factory Shells/Units 12B, D, E and J in March 2011, which it rejected and pursuant to the clearing of the site that once housed Factory Shells/Units 17D,E,F and G (now Lot 17) an offer was made to Ruplas to lease the said Lot 17 as a land site. By electronic mail dated 19th August 2014, ETeck again enquired of Ruplas, its interest in acquiring Lot 17. Ruplas responded on 28th August 2014 indicating an interest in leasing only one half of the said lot. From a surveying and regulatory point of view this was not possible. ETeck would be unable to gain certain regulatory approvals such as Town and Country Planning or register a Memorandum of Lease for what would constitute only half a lot[23].

[60] Mrs. Prentice–Pierre attended a meeting convened by Eteck on the 5th April 2017 in a bid to further try to assist Ruplas. Eteck made Ruplas aware of vacant properties which were available for tenancy. Ruplas' representative Mr. Cumberbatch, expressed an interest in Lot 22 and factory shells/Unit 17 and 17C. She informed Mr. Cumberbatch that Lot 22 was only 7,000 square feet and as a result may not be approved by Town and Country as a land site since it was below the minimum parcel size required for industrial lots which is 10,000 square feet. However, Factory Shells/Units 17A and 17C were 4,000 square feet each, thus equivalent to the size of the factory shell/unit he had previously rented[24].

[61] By letter dated 21st July 2017 Eteck's legal Officer, Ms. Deedra Maharaj wrote to Ruplas outlining the lease options available pursuant to the meeting of 5th April 2017 and indicating that the Property Officer Mr. Neil Willis was available to conduct a site visit[25].

[22] Paragraph 23 of Mrs. Pierre's Witness Statement
[23] Paragraph 25 of Mrs. Pierre's Witness Statement
[24] Paragraph 26 of Mrs. Pierre's Witness Statement
[25] Paragraph 27 of Mrs. Pierre's Witness Statement

[62] Following the site visit there was no response to the proposed sites from Ruplas until 20th November 2017 when Eteck received a pre-action protocol letter from it, dated 25th October 2017, claiming that it was constructively evicted from Eteck's Diamond Vale Industrial Park and that it should be allowed to rent Factory Shell/Unit 17A at a substantially lower cost than that which Eteck was asking[26].

[63] In crossexamination Mrs Pierre explained that the Claimant's lease would have ended in 2021 by effluxion of time. She however stated that tenants of factory shells, like the claimant, were never issued leases. This assertion contradicted her evidence of a promise to the tenants at the March 3rd meeting that copies of the lease agreements would be provided to the tenants. [27]

[64] On the issue of the minutes taken at the said meeting, Mrs. Pierre admitted that they were not signed by either the notetaker or chair of the meeting as was customary. The defendant's witness also admitted that despite requests to the Tenders' Board Committee for minutes of a meeting held during which the decision to terminate its contract with Alpha Engineering was discussed, said minutes were not provided. [28]

ANALYSIS AND CONCLUSION

[65] There is no evidence that there was ever a written lease setting forth the terms of the rental between the Claimant and Defendant. Although the Defendant pleaded that the agreement to rent the factory shell was entered into in terms of a draft lease attached to its Defence, its sole witness Mrs. Pierre admitted that no leases were ever prepared for these tenants. I also note that by letter dated 14th November 2016, the Defendant's Mr. Willis informed the Claimant that a search of the defendant's records revealed that no instructions were ever issued for the preparation of a lease for the factory shell which he rented from the defendant. Even further, by letter dated 26 August 2013, the defendant's David Gunn repeatedly described the claimant's tenancy as 'your current 25 year

[26] Paragraph 28 of Mrs. Pierre's Witness Statement
[27] Transcript page 112 lines 25 to 31;page 113 lines 1 to 2

[28] Page 133 Transcript lines 1- 11.

leasing arrangement'. No reference was ever made to an existing draft lease or any changes to its clauses relative to the proposed new lease being offered. The above led me to conclude on a balance of probability that no such draft lease existed; rather, that the terms of the claimant's tenancy were as noted in the Defendant's letter of offer dated November 27 1996. No provision for termination of the tenancy after the factory became unfit for use after two years was included therein. It therefore follows that the Defendant's termination of the tenancy in February 2014 was unlawful. As a result there was an unexpired period of the tenancy amounting to three years ten months.

[66] The fact however, that the Claimant paid insurance premiums does not by itself entitle him to the proceeds of such policy upon the happening of the event insured against. It seems to me that it is the owner of the insured property, on whom the responsibility of replacement lay, who would be entitled to such proceeds of the policy. On the facts of this case that was the Defendant- as such the Claimant, as admitted in its closing submissions is not entitled to receipt of the proceeds of the policy or any part thereof.

[67] On the issue of whether the Defendant took reasonable steps to relocate the Claimant, of note is the fact that the options presented to the Claimant contained materially different and disadvantageous terms than that of the current tenancy. In 2013, Mr. Gunn offered the Claimant an option of a twenty five year or ninety nine year lease but in both cases the rents would be aligned to market value resulting in a substantial increase in breach of the terms of the Claimant's current tenancy. Additionally, a condition of the offer of alternative space, was the surrender of the existing tenancy, the terms of which the Defendant was no longer willing to adhere to since they were not as financially advantageous as the proposed new leases. This is also demonstrated in the Defendant's offer of alternative space by email from Mr. Willis dated 19th August 2014, after the purported termination of the tenancy agreement. Another alternative offered the Claimant in 2017 included Lot 17A which had no water or sewage connection, no electricity; furthermore the Claimant was offered a space comprising 8000 square feet at a monthly rental of thirty thousand dollars, which is significantly higher than the current two thousand

five hundred dollars that he was paying. In light of the foregoing, I concluded that the Defendant did not take reasonable steps to relocate the Claimant.

[68] The Claimant was engaged in the manufacture of articles such as combs, toothbrushes, soap dishes and injection moulding products at the factory shell which he rented from the Defendant. He enjoyed a preferential rent of two thousand five hundred dollars for 4000 square feet of space as well as duty free concessions on raw materials. After the loss of the factory shell, the Claimant then operated from his home on a significantly smaller scale. He now imported toothbrushes and resold same since he had lost the capability to manufacture same. The difference in the commercial rental of the space previously held by the Claimant and the rent that was paid, demonstrates the financial disaster which the Claimant suffered. On the facts of this case, the Defendant should have offered alternative space at the same cost per square foot, paid by the Claimant under his existing tenancy. To require him to pay rent, at a significantly escalated cost for the same space during the existence of his tenancy amounted to a breach of its terms. Given the loss of the protected rent and other tax incentives, it would have been difficult, if not impossible for the Claimant to rent alternative premises in order to continue his operations. In the circumstances of this case, I hold that the Claimant did attempt to mitigate his loss by operating from home on a reduced scale.

[69] With respect to the losses sustained as a result of the Defendant's breach of contract, I am of the view that while the Claimant is entitled to compensation, it will not be based on the total revenue earned but on the net income for the remaining three years and ten months of the tenancy.

[70] I accept the Claimant's calculation of losses over forty six months in the sum of two hundred and ninety two thousand three hundred and thirty dollars ($292,330.00)[29].

[71] In the circumstances I hold:

a. The Defendant breached the tenancy agreement between itself and the Claimant by unlawfully terminating same on 28th February 2013;

[29] Paras 61-63 of the Claimant's Submission filed on 26th February 2021

b. The Defendant to pay to the Claimant damages for breach of contract in the sum of two hundred and ninety two thousand three hundred and thirty dollars ($292,330.00);

c. Interest at the rate of 3.5 percent per annum on the award of two hundred and ninety two thousand three hundred and thirty dollars ($292,330.00) from March 2014 to December 2017;

d. The Defendant to pay to the Claimant prescribed costs on the said sum of two hundred and ninety two thousand three hundred and thirty dollars ($292,330.00) in the sum of fifty thousand seven hundred and seventy three dollars ($50,773.00).

Joan Charles
Judge