REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2014-02286**

BETWEEN

AGRICULTURAL DEVELOPMENT BANK

Claimant

AND

21ST CENTURY INSURANCE AND REINSURANCE BROKERS LTD.

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Seenath Jairam SC, Mr. J Singh and Mr. L. Lalla instructed by Ms. A Rampersad –Sagar for the Claimant.
2. Mrs. L Maharaj SC and Ms. T. Tuitt instructed by Ms. S. Allahar for the Defendant.

Date of Delivery: 6th December, 2016

DECISION

1. By its Claim Form and Statement of Case the Claimant sought inter alia the following relief:
    i. Damages for breach of a material term of the lease dated May 2, 2012 and entered into between the ADB (hereinafter referred to as "ADB") and 21st Century Insurance and Reinsurance Brokers Ltd. (hereinafter referred to as "21st Century");
    ii. Damages for misrepresentation.

2. In its Defence and Counterclaim filed on 22nd September 2014, the Defendant sought inter alia the following relief:
    i. Payment of the outstanding rent and electricity charges for the period of 5 months from April, 2013 to August 2013 whilst the ADB was still in occupation of the building in the sum of $1,033,968.71.
    ii. The cost of improvements in the sum of $2,195,000.00 to the building as required by the ADB during the period 2011 to 2013 so as to meet to the ADB's specific needs as a Bank.
    iii. The cost of rental of 25 car park spaces at Centre City Car Park from George Aboud & Sons Ltd., pursuant to the Tenancy Agreement dated 26th June, 2013 at the rate of $14,375.00 per month for the month July 2013-September, 2013 in the total sum of $43,125.00.
    iv. The cost of electrical and restoration expenses after ADB returned keys and vacated the building in or about September, 2013 in the sum of $45,000.00.
    v. Loss of Rental Income in the sum of $1,400,000.00 for the period of 7 months from September, 2013 to March, 2014 at the rate of $200,000.00 per month until the property was rented.
    vi. Further and/or alternatively damages for breach of contract and/or deceit.

Factual Matrix

3. A tenancy agreement was entered into between the Defendant, as landowner, and the Claimant, as tenant, for the rental of the Defendant's property situate at No. 2 Mulchan Seuchan Road, Chaguanas in the island of Trinidad (hereinafter referred to as "the property"), for use as a Bank, at the monthly rental of $200,000.00 for the period commencing May 2, 2012 and ending May 1, 2016. A written agreement was executed but same was never registered.

4. The Claimant thereafter entered into possession of the property on which stood an incomplete 4 storey building and commenced interior and exterior work on and in the building so as to customise same for use as a Bank and the Defendant landlord also effected work to complete the building so as to meet some specific requirements of the Claimant and in an attempt to comply with requests of the relevant Planning Authorities.

5. The dispute arose between the parties after the Claimant called upon the Defendant to produce final Planning Permission for the building and thereafter, the Claimant proceeded to place the monthly rent into an escrow account but continued to occupy the building.

6. The Defendant obtained, on July 10, 2013, an approval from the Town and Country Planning Department but same was subject to certain expressed conditions and, thereafter, it invoked clause 13 of the Lease Agreement and served a notice of termination of the tenancy upon the Claimant. The Claimant by a lawyer's letter dated August 21, 2013 advised the Defendant's attorneys that the Claimant had "accepted the termination notice" and the Claimant eventually vacated the premises.

The Evidence

7. The Claimant relied on the evidence of Mr. Brendon Nelson and Mr. Sheivan Ramnath. The Defendant relied on the evidence of Mr. Wayne Gosine and Mr. Winston Naidoo.

Summary of the evidence

The Claimant's witnesses

Brendon Nelson

8. Mr. Nelson acted as the ADB's CEO from February 1, 2011 to July 2012 but is no longer employed at the ADB. He, along with the deceased Ms. Ann Marie Mohammed, were two of the ADB's representatives who had dealings with the Defendant's representatives in relation to the lease of the subject property.

9. He stated that, on or around June 2011, the ADB began to look for a property to relocate its central branch office, which at the time was located at #29 Ramsaran Street, Chaguanas. The Defendant's building was one of ten (10) buildings referred to the ADB by the ADB's real estate agent and by letter dated September 21, 2011 the Defendant's CEO, Wayne Gosine, wrote to ADB and indicated that the subject building was available for viewing.

10. Mr. Nelson admitted that the letter disclosed plans for a 2 storey building but a subsequent site inspection revealed that a 4 storey building stood on the site. He explained that Ann Marie Mohammed had discussed this discrepancy with Mr. Gosine and the ADB was assured that all necessary approvals for the existing building would be forthcoming by the time that the lease for the subject building was signed. He further explained that at the time there was no reason for any apprehension about approval plans for the building being produced. No documentation was however produced that recorded any such discussion between Ms. Mohammed and Mr. Gosine.

11. On or around May 2012, the witness, along with various members of the ADB's Board, made a site visit to the subject building and various health and safety issues were discussed with Mr. Gosine. Thereafter, the ADB's Board made the decision to rent same.

12. Mr. Nelson's evidence was that the initial intent was to relocate the ADB's head office in the subject building, but it was drawn to the Board's attention that, by law, the ADB's head office had to be located in Port of Spain. The Board then decided, in any event, to

proceed with the lease since there was optimism that the ADB's line Minister would secure an appropriate amendment of the law and in any event the ADB had need for a larger office in central Trinidad.

13. He stated that the lease was prepared by the Defendant and before the lease was signed, on his recommendation, an exit clause was inserted. That exit clause allowed either party to terminate the lease on 3 months' notice.

14. At paragraph 21 of his witness statement he stated that *"At the time of signing of the lease the said Rudy Maharaj raised the issue of approved plans and in my presence Mr. Gosine gave the assurance that such approvals would be in order and soon available. I understood that business is conducted with an element of trust and confidence and very often when one or both parties stand on "legalese" this often leads to great delay and increase in costs, time-wasting etc. So with all of these in mind the option of deferral of signing the lease was not a viable one".*

15. At paragraph 36 of his witness statement Mr. Nelson stated *that "I also cannot recollect having any conversation with Mr. Gosine on relevant approvals being in order before the ADB moved into the building."*

16. Mr. Nelson further testified that *"we were reasonably confident that such approvals would be forthcoming [since] we and in particular I was not aware that the Defendant was encountering problems with the Chaguanas Borough Corporation and had been served with a "Show Cause" and "Stop" Notice. As far as I am aware the Defendant never disclosed this fact."*

17. At paragraph 34 he went on to state that *"At no stage prior to the building being rented from the Defendant by the [ADB] did the Defendant or any its representatives inform the ADB that plans for the building had to be resubmitted to the Town and Country Planning Division…Furthermore, as far as I am aware, the ADB did not accept that an application would be made to Town and Country Planning Division for approval of the building as renovated."*

18. During his cross-examination, Mr. Nelson stated as follows:

    i. The ADB is a creature of statute with a Statutory Board appointed by the line Minister.
    ii. The role of the Chief Executive Officer of the ADB was to be responsible for the day to day management of the Bank and running of the business.
    iii. The Chief Executive Officer sits at meetings of the Board of Director (hereinafter referred to as 'the Board') but does not have a vote.
    iv. The Board can, under the Act, take specific directions from the line Minister.
    v. The Board had appointed appropriate persons to find an appropriate building.
    vi. The ADB received copies of letters dated September 21, 2011 from the Defendant and enclosed were the Deed, valuation report, town and country plans for a two storey building, T&TEC utility bill, WASA Utility Bill, and a Land and Building Tax receipt,
    vii. The ADB also received copies of the building inspection certificates from T&TEC, WASA Clearance Certificate and the last land and building tax receipt;
    viii. He visited the premises prior to the signing of the agreement and saw a four (4) storey building;
    ix. The ADB had obtained legal advice prior to signing the lease.

19. Mr. Nelson stated that he had personal knowledge that there was only Town and Country Planning approval for a two storey building and that he visited the site prior to the execution of the agreement for lease. After the said visit, and notwithstanding the absence of Town and Country planning approval for a four-storey structure, the Claimant executed the lease. In cross examination Mr. Nelson stated that he had tried to delay the signing of the Lease Agreement but, notwithstanding his advice, the Board proceeded with the Agreement.

<u>Sheivan Ramnath</u>

20. Mr. Ramnath, the ADB's current CEO, took over from Mr. Nelson on July 30, 2012 and the lease was entered into prior to Mr. Ramnath's appointment.

21. Mr. Ramnath stated that when he became CEO he did not make enquiries from the Defendant about approvals for the building and assumed that all was in order in that regard and said that "*at no point did the Defendant inform me that the approvals were not in order and that they had to be re-submitted to the Town and Country Planning Division.*"

22. The witness testified that it was in March 2013 when the building was close to completion and almost ready for occupation, the Public Services Association made enquiries about the building approvals which led him to enquire about same from the Defendant. At this time, Mr. Gosine informed him that "*the relevant approvals…were already sent to the ADB*." He went on to state that Mr. Gosine *"…never informed me that there was an issue with the said approvals and that they had to be resubmitted to the Town and Country Planning Division"*

23. Around April 2013 Mr. Ramnath directly contacted the Chaguanas Borough Corporation (hereinafter referred to as "the CBC") and he then realized that Mr. Gosine was renting the ADB an illegal structure. By letter dated April 15, 2013, the CBC stated as follows:
    a) In January 2011 a complaint was made to the CBC that illegal construction was taking place at the property;

    b) In February 2011 a "Stop" notice or "Show Cause" notice had been served on Mr. Gosine by the County Superintendent calling upon him to show cause why the building should not be removed or pulled down;

    c) A pre-action protocol letter dated March 24, 2011 had been sent by Mr. Winston Seenath, Attorney-at-Law acting on behalf of the CBC;

    d) A second "Show Cause" and "Stop" notice was served on March 24, 2011 by Larry Seecharan, Building Inspector;

e) On May 31, 2011 Mr. Gosine furnished the CBC with a receipt from the Town and Country Planning Division (hereinafter referred to as "the TCPD") for an application for planning permission which had been submitted on his behalf;

f) On October 18, 2011 the CBC received a Notice of Refusal of Planning Permission from the TCPD

g) On September 28, 2011 the subject building was advertised by the CBC on a list of "Unauthorized Structures/Buildings."

24. Mr. Ramnath maintained that the documents showed that the property was an illegal structure and that these were not disclosed to the ADB prior to the execution of the lease.

25. By letter of May 9, 2013 Mr. Ramnath wrote to the Defendant on the issue of approvals for the building and received a response dated May 15, 2013. Enclosed was a receipt from the TCPD for an application for planning permission.

26. By letter dated June 14, 2013 Mr. Ramnath expressed the ADB's dissatisfaction with the Defendant's conduct and non-disclosure of the true picture, re: the building approvals, and by letter dated July 23, 2013, Mr. Gosine responded and sent to the ADB various documents which included a Fire Service Approval and Town and Country Approval document.

27. Mr. Ramnath stated that the Defendant was not in possession of all the required approvals and elected to withhold the payment of rent and placed same in an escrow account until the Defendant was able to obtain and produce the requisite approvals.

<u>The Defendant's evidence</u>

<u>Mr. Wayne Gosine</u>

28. At paragraph 19 of his witness statement, Mr. Gosine stated that he acted on behalf of the Defendant in negotiations with the ADB and that at all times, he made full and frank disclosure to the ADB's representatives with respect to all the relevant facts and matters**.**

29. The witness's position was that he had no obligation to disclose to the ADB the fact that:

a) In January 2011 a complaint was made to the CBC that "illegal" construction was taking place at his building;

b) Since February 2011 he had been served a "Stop" notice or "Show Cause" notice by the County Superintendent calling upon him to show cause why the building should not be removed or pulled down;

c) He had been sent a pre-action protocol letter dated March 24, 2011 by Mr. Winston Seenath, Attorney-at-Law acting on behalf of the CBC;

d) He was served a second "Show Cause" and "Stop" notice on March 24, 2011 by Larry Seecharan, Building Inspector;

e) On October 18, 2011 the CBC received a Notice of Refusal of Planning Permission from the TCPD or that;

f) On September 28, 2011 the subject building was advertised by the CBC on a list of "Unauthorized Structures/Buildings."

30. At paragraph 3:5 of his witness statement Mr. Gosine said that_"*From inception I told the ADB's representatives, including Mr. Rudy Maharaj that the renovation works being undertaken would continue but that new or amended statutory approvals were yet to be applied for*." Mr. Gosine went on to state at paragraph 3:10 as follows:

"3.10 Prior to the preparation of the Lease Agreement I was in daily communication with then Chief Executive Officer of the Claimant Mr. Brendon

Nelson and several meetings were held between him and other representatives of the Claimant including the then Minister with responsibility for the Claimant, Mr. Vasant Bharath, the former Chairman of the Board, Mr. Rudy Maharaj and former member of the Board, one of its legal advisers Mr. Nirvan Maharaj in relation to agreeing the terms and conditions of the tenancy to be included in the written Lease Agreement. These representatives also visited the property on several occasions over the period September 2011 to the date of execution as well as after."

31. At paragraph 3:11 he further stated, "*The ADB's representatives agreed with me that the ADB would lease the property on the basis that the Defendant would complete renovation works to the building including further renovations which the ADB would require for its occupation of the building and at the same time the ADB would carry out its own works to facilitate its occupation of the building provided that the Defendant sought and obtained all the relevant approvals before the ADB was ready to move in*."

Mr. Winston Naidoo

32. The witness confirmed that in "April or May 2013" Mr. Gosine retained his services to assist in applying to the TCPD for permission for "alteration of the existing building".

33. In cross examination Mr. Naidoo stated that a "Stop Notice" did not automatically result in the stoppage of work and that, at times, the CBC would give a party time to address the concerns raised in the notice.

The issues

34. The central issues that fell to be determined by the Court are as follows:
    i. Whether the Defendant misrepresented that it had the requisite planning approval for the 4 storey structure erected on its land and whether the Defendant should be liable in damages for misrepresentation.
    ii. Whether the Defendant breached either a fundamental or implied term of the lease and whether the Claimant is entitled to damages as a result.

iii. Whether the Claimant breached express provisions of the lease agreement and whether the Defendant is entitled to the sums claimed on the counter claim.

iv. The appropriate quantum of damages that ought to be paid and by whom to whom?

35. The determination of the aforementioned issues also required the Court to construe the lease agreement and determine inter alia whether the Defendant was permitted to issue a termination notice for the nonpayment of rent and whether the Defendant has any remedy against the Claimant.

36. Pursuant to Section 3 of the **Landlord and Tenant Ordinance Chap. 27 No. 15**, leases for terms of three years or more must be registered but the instant lease was not. The parties in this case had an intention to create a legal estate in the property and this said intention was reduced into writing. Consequently, and notwithstanding the failure to register same, the Court proceeded to consider the terms of the lease agreement and proceeded on the basis that the parties, having agreed to same, were bound by the terms of the agreement that was executed.

Did the Defendant Misrepresent to the Claimant that it had the requisite planning permission for a 4 storey structure?

37. The Claimant pleaded that the false and misleading representations upon which it relied were as follows:

(i) "._,the Defendant represent[ed] to the Claimant that the building was available to be rented as a commercial property".

(ii) "the Defendant further represented, intending that the Claimant should rely on such representation, that the Defendant was in possession of all the necessary TCPD approvals for the building and that the Claimant could lawfully occupy the building as tenant".

(iii) "That it relied on the Defendant's representation in respect of the building and consequently entered deed of lease dated May 2, 2012 for rental of the building from the Defendant",

(iv) By its letter dated September 21, 2011 the Defendant represented:

"a) That the building was constructed in accordance with and in compliance with all the .necessary statutory provisions pertinent thereto;

b)That the Defendant was in possession of all the necessary statutory approvals for the building as constructed;
c)That the Defendant was not in breach of the law in relation to the construction of the said building;
d)That the Claimant could lawfully occupy the said building as tenant and carry on the business of a bank in same."

(v) Further the Claimant stated that the Defendant made the following material misrepresentations:

"(a) that the building was constructed in accordance with and in compliance with all the necessary .statutory provisions pertinent thereto;

(b) that the Defendant was in possession of all the necessary statutory approvals for the building as constructed;

(c) that the Defendant was not in breach of the law in relation construction of the said building;

(d) that the claimant could lawfully occupy the said building as tenant and carry on the business of a bank in same."

The Law

38. By virtue of the provisions of the **Misrepresentation Act Chapter 32:35**, a party who entered into contractual relations that were premised upon representations that were inaccurate can rescind the contract and may be entitled to damages. The Act does not define the term 'misrepresentation' but under the common law, to be actionable, a misrepresentation, must normally be a positive statement of fact, as opposed to opinion which was made by a party to a contract and was untrue. The statement may have been made fraudulently, carelessly or innocently.

39. Where the representor made a misrepresentation which had the object and result of inducing the representee to enter into the contract, the representee may then elect to regard the contract as rescinded and may seek a declaration from the Court to regard the contract as rescinded or may set up an entitlement to regard the contract as rescinded.

40. T

o prove misrepresentation the following has to be established:

i. that the representations complained of were made by the representor to the representee
ii. that these representations were false in fact
iii. that the representor, when he made them, either knew they were false or made them recklessly without knowing whether they were false or true
iv. that the representee relied on the representation(s) and was actually induced to enter into the contract and,
v. that immediately on or at least within a reasonable time after the discovery that the representations were false an election to avoid the contract and repudiate same was made.

41. Representations can be expressed, implied or inferred and the law recognises that where there are statements connected by an express or implied reference, it may form part of a single representation. The combined effect must be considered when determining whether the representation is false. A representation is deemed to be false if, at the material date, the representation was false in substance and in fact and the issue of falsity is fact dependent.

42. In **Watts v. Hobb (1878)** 4 App cases 13, the law recognised that mere non-disclosure does not constitute a misrepresentation unless there is evidence that there was a breach of a duty to disclose known material facts. If the non-disclosure is viewed as an express or implied representation, then it may be deemed a misrepresentation if the representation was false. The law has also recognized that in certain circumstances silence can amount to a. misrepresentation where the fiduciary relationship that existed warranted disclosure of the information for the benefit of the other party.

43. The laws governing the regularization and/or construction and/or approval of building(s) are found in the **Town and Country Planning Act Chapter 35:01** and in the **Municipal Corporations Act Chapter 25:04**. Section 14 (1) of the Town and Country Planning Act expressly vests in the TCPD the discretion to retroactively approve any alteration and/or additions to a building. **Section 14(1) of the Town and County Planning Act** *states "the power to grant permission for the retention on land of any buildings or works constructed or carried*

out thereon before the date of the application, or for the continuance of any use of land instituted before the date whether without permission granted under this Part or in accordance with permission so granted for a limited time period only; and reference in this Part to permission to develop land or carry out any development of land, and to applications for permission shall be construed accordingly."

44. **Section 14 (2) of the Town and Country Planning Act**, further provides for the retroactive effect of such permission and the aforesaid provision sets out that *"Any such permission as is mentioned in subsection (1) may be granted so as to take effect from the date on which the building or works were constructed out…"*

45. **Section 124(2) of the Municipal Corporations Act Chap. 25:04** defines what is deemed to be the erection of a new building for the purposes of the Act and Section 124(2)(h) states *that "the making of any addition to an existing building by raising any part of the roof or altering a wall or making any projection from the building, but so far as regards the addition only"* is to be treated as the erection of a new building.

Analysis of the evidence

46. Mr. Nelson, acting on the Claimant's behalf, visited the Defendant's property prior to the entry into the lease agreement and he was aware that the building was a 4 storey building and he knew that there was Town and Country Planning permission for a 2 storey building.

47. The issue as to the alleged non-disclosure of the notices served upon the Defendant by the Chaguanas Municipal Corporation was raised at paragraphs 15, 16 and 17 of the Statement of Case. On the evidence, there was also a dispute as to whether the Claimant had been informed by Mr. Gosine that the plans for the requisite approval of the 4 storey building had to be resubmitted. Mr. Gosine said that this communication took place prior to the execution of the lease agreement.

48. The Defendant's building had been substantially renovated and the renovation had to be considered as against **section 124(2)(h) of the Municipal Corporations Act** and without the requisite approval the Defendant may have been guilty of a statutory offence.

49. In relation to the communication between the parties as to the status of the requisite approvals, the parties advanced conflicting versions. The Court therefore had to critically analyse the evidence and with the benefit of having seen and heard the witnesses, on a balance of probabilities, decide which version was more plausible and probable.

50. An assessment of the credibility and reliability of the witnesses also had to be undertaken and the evidence had to be cross checked against the pleadings and the documentary evidence that was presented. The Claimant stated that neither party should be permitted to rely upon oral evidence so as to vary or contradict the terms of the executed lease as this would be in breach of the parole evidence rule. This position notwithstanding, the Claimant did adduce evidence to explain the background facts that led to the execution of the lease. In this case, the Court formed the view that all of the circumstances and facts that operated prior to the execution of the lease were relevant to the Court's determination as to whether terms additional to those contained in the executed lease were agreed between the parties. The Court therefore considered the evidence as it pertained to the circumstances that existed prior and subsequent to the execution of the lease.

51. The Claimant relied on the terms of the written Lease Agreement and founded its claim for relief on the alleged misrepresentations by Mr. Wayne Gosine. The Defendant pleaded that there was no misrepresentation as claimed by the Claimant and set up that the Claimant knew at the material time, that is, before and at the time of execution of the written Lease Agreement, that planning permission for the 4 storey structure was not available.

52. The Court critically looked at the evidence of Mr. Nelson and Mr. Gosine as well as the evidence of Mr. Ramnath with respect to the issue of the knowledge of the status of planning permission prior to the execution of the lease agreement and up to the time the lease was terminated, and considered whether the Claimant first knew of the unavailability of the Town and Country planning permission for the building, in April 2013 or prior to the execution of the Lease Agreement.

53. The Court noted that the Claimant did not adduce evidence on behalf of all the representatives who were involved in the decision making process relating to the rental of the subject property from the Defendant.

54. The Corporate Secretary of the ADB, Ms. Sonia Flores was one such representative who was involved throughout the process, as she sat at Board Meetings, liaised between the CEO and the Board, and she had control of the minutes of all Board Meetings, but she did not testify.

55. Mr. Nelson, in his witness statement, testified that the Claimant's pleading was inaccurate as the issue of planning permission had been raised and considered and that the Board decided that it would proceed with the Lease Agreement as they were confident that the approvals would be forthcoming.

56. In **H.C.A. No. 2387 of 2000 Ian Sieunarine v DOC'S Engineering Works (1992) Limited** Rajnauth-Lee J (as she then was) examined the line of authorities referred to in the case of Wisniewski v Central Manchester Health Authority (1998)PIQR Volume 7 p 324 and relied upon the principles set out in the judgment of Brooke LJ as follows:-

> (1) In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words there must be a case to answer on that issue.

(4) If the reason for the witnesses' absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is such credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

57. Mr. Nelson, in cross examination admitted that material issues were within the knowledge of Sonia Flores, the Claimant's Corporate Secretary, yet the Claimant proffered no reason or explanation for its failure to call her as a witness. In the circumstances of this case, the Court formed the view that the Claimant did not furnish it with the requisite assistance so as to properly determine the issues that needed to be resolved.

58. Mr. Nelson admitted that he received Mr. Gosine's letter which disclosed plans for a 2 storey building and that he subsequently inspected the site and saw a 4 storey building. He said that Mr. Gosine had assured Ms. Mohammed that all the approvals would be provided before the lease was executed. Ms. Mohammed died prior to the time delimited for the filing of witness statements and no documentation was produced that recorded any such discussion. Further, during his cross examination, Mr. Gosine was not challenged as to whether such assurances were in fact given.

59. The Claimant submitted that the difference between Mr. Nelson's evidence and the Claimant's pleading was due to the fact that the information from Ms. Mohammed was not recorded on any ADB file. Mr. Nelson stated that he maintained files separate from the Property Management Department which contained detailed information and correspondence, as well as notes from site visits etc. and that he left same upon reverting to his position as Corporate Manager of Finance. He also stated that he conducted a handover of the files to Mr. Sheivan Ramnath upon his appointment as CEO in July 2012 and he continued to work with the ADB until September 24, 2014, save for when he went on vacation from October 2012 to May 31, 2013. Notwithstanding the existence of documentation as outlined by Mr. Nelson, no such documentation was produced that supported the assertion that Ms. Mohammed did have discussions pertaining to approvals

with Mr. Gosine. In the circumstances, the Court placed no weight on the statements that were attributed to Ms. Mohammed.

60. The Claimant also advanced that at the time of the signing of the lease the Chairman of the Board, Mr. Rudy Maharaj, raised the issue of outstanding approval plans and that, in Mr. Nelson's presence, Mr. Gosine gave an oral assurance that approvals would be in order and soon available. The position was not put to Mr. Gosine when he was cross-examined; no contemporaneously drawn document that reflected such a conversation was exhibited nor was Mr. Rudy Maharaj called as a witness. In the circumstances the Court did not, on a balance of probabilities, accept the Claimant's contention that Mr. Gosine represented that the approvals were forthcoming.

61. The Defendant claimed that at all material times Mr. Gosine disclosed to the ADB the level of planning permission attained and the fact that it had submitted its application for retention of the existing premises and that Mr. Rudy Maharaj, Mr. Nirvan Maharaj and the then ADB Line Minister, Mr. Vasant Bharath, were all aware of this fact.

62. On a balance of probabilities, the Court found that the Defendant's version of events was more plausible and probable. The nature and history associated with the Claimant's occupation and outfitting of the building appeared to be consistent with Mr. Gosine's assertion that the parties proceeded on the basis that all the necessary and required work would be effected by either party while the issue of the requisite approvals was being sorted out and the understanding was that the Defendant would have in place all the required approvals by the time the Claimant was ready to commence its operations from the building.

63. Having reviewed the evidence, the Court found that the Claimant did not establish that it had been induced by the Defendant to execute the agreement to lease and that the said inducement was hinged on false representation as to the status of the planning approvals for the building. The Court is unable to find that the Defendant represented matters which were subsequently proven to be false and that the said representations, when made, were intended to, and did in fact, induce the Claimant. At all material times the Claimant had actual

knowledge that the requisite approvals had not been obtained. Mr. Gosine did not make full and frank disclosure as he never revealed the fact that stop notices had been issued but this was not a circumstance that operated as an encumbrance on the property or affected the title to same.

64. Ultimately, the onus of proving that there was misrepresentation by non-disclosure rested upon the shoulders of the Claimant and the Court ultimately preferred the Defendant's version of the events and found as a fact that Mr. Gosine did disclose, prior to the execution of the lease, the fact that the statutory approvals had to be obtained and that the relevant approvals would have been obtained before the Claimant was ready to move into the building. Consequently, the Claimant's claim for misrepresentation is without merit and must fail.

The Court next considered the issues to whether the Defendant had breached a fundamental term of the lease.

65. The Claimant also alleged that the Defendant breached a fundamental term and/or condition and/or covenant of the Lease Agreement and at paragraphs 16 and 19 of its Statement of Case, it outlined the particulars which were allegedly breached.

66. At paragraph 19 of the Statement of Case the Claimant pleaded that:

> *".... by reason of the matters set out at paragraph 16* [of the Statement of Case] *above the Defendant breached a fundamental term or condition and/or covenant of the lease requiring the Defendant to "comply with, orders, ordinances and other public requirements now or hereafter affecting the leased premises".*

67. In its resolution of this issue, the Court therefore had to determine:

> (i) Whether the "compliance with law" clause was a fundamental term or condition or Covenant of the Agreement for lease and;
>
> (ii) Whether the 'Compliance with Law' clause was breached by the Defendant and if

it was, the the effect of such a breach of the Lease Agreement had to be considered.

<u>Whether the "compliance with law" clause is a fundamental term or condition or covenant of the Agreement for lease?</u>

68. A “compliance with law” clause seeks to impose an obligation on the landlord and/or tenant to be compliant with all laws in force for the time being as well as any new laws that come into force during the term of the lease.

69. In **<u>Chitty on Contracts 30th Edition Volume .1: General principles, at paragraph 1.202,</u>** ‘fundamental term’ is defined as a term which goes to the ‘core’ of the contract which, if not performed, has the effect of destroying the substance of the agreement.

70. The material terms of a Lease Agreement are usually the tenant's and landlord's express covenants and such covenants as implied by law into the leases.

71. Clause 24 of the Lease Agreement stated that the Claimant had to observe all the public laws and regulations relating to its use of the premises which would include inter alia planning regulations and fire safety conformity. The Landlord was also obligated to ensure that all laws and public requirements affecting the land, including the rates and taxes conformity, planning matters and building regulations were observed.

72. The Court formed the view that the “compliance with law” clause therefore had to be read in conjunction with the other provisions of the lease, such as the covenants for repair and alterations as well as the covenants for the payment of rent and it had to be interpreted against the backdrop of the factual matrix that operated between the parties and catalyzed their joint decision to execute the lease agreement.

73. The standard express covenants of leases generally include inter alia: (i) A Covenant to pay rent, rates and taxes (ii) A Covenant to repair, (iii) A Covenant not to assign, sub-let, or part with

possession of demised property, (iv) A Covenant for option to purchase the reversion, and (v) A Covenant for option to renew.

74. Apart from the standard express covenants there are certain implied obligations and/or terms of leases which may be borne by the landlord such as the covenant for quiet enjoyment, the covenant not to derogate from grant, and a Covenant as to fitness for habitation

75. The Claimant cited no authority to establish that the “compliance with law” clause ought to be viewed as a fundamental clause in the lease, and it appears that the inclusion of same was to ensure that both the landlord and tenant were cognizant that they had to utilize the demised property in a way that was not contrary to the relevant laws.

76. The breach of a fundamental term of a Lease Agreement would frustrate the operation of a Lease Agreement but such a circumstance would arise only when the substance of the Agreement is destroyed and the Agreement cannot be performed. In the instant case there was no circumstance that prevented the Claimant and Defendant from proceeding with the tenancy on the terms that they did i.e. to take possession and outfit the building while the requisite approvals were being secured. At paragraph 15 of the Statement of Case, the Claimant pleaded that it learnt, in late 2012, that the Defendant had not obtained planning permission, but armed with the knowledge it continued to pay rent, occupy and outfit the property, and make demands of the Defendant to undertake further repairs/renovations. The absence of the requisite approvals did not prevent the parties from entering into an agreement and from effecting works so as to ensure that the building met the Claimant’s commercial needs and the Claimant was not ready to open the building. The Defendant’s version that its obligation was to obtain the requisite approvals by the time the building was ready to be opened was, as stated earlier, deemed by the Court to be more probable and plausible than the position advanced by the Claimant.

77. The Court formed the view that in the circumstances there was no breach by the Defendant of Clause 24 of the Lease Agreement and that the said clause was not a fundamental term and/or condition and/or covenant of the Lease Agreement. Although the ‘compliance with law’ clause

was not fundamental to the Lease Agreement it was however an express term of the agreement.

78. Mr. Naidoo at paragraph 6.1 of his witness statement stated that:

> *"... the Chaguanas Borough Corporation will inspect the premises to verify that the structure is in accordance with the approved building plans and that the conditions set by -the Town and Country Planning Division have been fulfilled. There- is no set period as to how long this process takes and 1 have in my experience known some applications to remain pending for a period of up to 1 year but the practice in the Borough Corporations is that the buildings could be occupied pending the issuance of the Completion certificate."*

79. By virtue of the Town and Country Planning Act the TCPD can only bring enforcement proceedings against a building owner within four (4) years from the date of completion. Under the Municipal Corporation Act Chapter 25:04 breach of the provisions constitute a summary offence and a limitation period of six months operates with respect to the institution of changes for breach of the provisions.

80. The TCPD has at times elected not to take a draconian stance in relation to the application of the law and landowners have been granted opportunities to seek to make changes to rectify and/or to alter buildings so as to ensure compliance with the development standards as set out by the Act. Several prominent buildings and at least one main mall were constructed without the requisite approvals and the approvals were obtained subsequent to construction.

81. Based on the evidence adduced, the Defendant submitted an application for permission in 2011 following the renovations and alterations to customise its existing two storey building, but this first application was denied and reasons were given.

82. The Defendant then performed remedial works to the building following the receipt of a Notice of Refusal of Permission to Develop Land dated October 11, 2011 with reasons attached.

83. By that notice the Defendant knew that TCPD refused permission to retain a building comprising

587.2m^2 in an area for use as offices and storage based on the fact that it did not conform with the site development standards required to be maintained under existing planning policy namely:

- A maximum building coverage of 50%
- A maximum site coverage of 75%
- A maximum building height of 12.5m not exceeding three (3) storey from ground level to ridge of roof
- A minimum building line setback of 7.5m from the face of the building to the front site boundary along. Endeavour Road
- A minimum building line setback distance of 1.25m from the closest part of the building to either side and near site boundaries.
- One (1) car parking bay 5.5m x 2.5m for each 100m^2

84. During his cross-examination Mr. Gosine confirmed that he subsequently purchased the neighboring Lot at 1 Mulchan Seuchan Road to address some of the TCPD concerns with respect to the site.

85. The Defendant submitted a second application for permission to retain the 4 storey building in 2013 and retained Mr. Naidoo to make the application on its behalf. The second application was to retain the building that then stood on lands at Lot Nos. 1 and 2 Endeavor Road formerly known as (Mulchan Seuchan Road) Chaguanas, which comprised 1194.2m^2, for use as offices.

86. A notice of Grant of Permission to develop land was granted on July 10, 2013 subject to certain conditions, namely that the structural integrity of the building met the requirements of the Ministry of Works and Infrastructure; (ii) that the consent of the Chief Fire Officer was obtained; (iii) that the proposals for provision of the potable water supply and for disposal of sewage of the site met the requirements of WASA; (iv) that the existing portion of the building shown 'to be demolished' be demolished upon completion and that the consent of the local authority be obtained; and (vi) consent of the local authority was obtained.

87. The Defendant met the health and safety requirements for the building and obtained a fire service approval.

88. On 6th September 2012, the Fire Department, Fire Prevention Administration Section inspected the four (4) storey building and by letter dated September 10, 2012, the Chief Fire Officer notified the CBC that the owner/occupier had satisfactorily complied with the requirements issued by the department and that there was no objection for the premises to be used for Assembly/Residential purposes in keeping with the Public Health Ordinance.

89. The said certification from the Fire Services was with respect to the four (4) storey building that stood at the time of inspection. The property was, prior to the substantial renovation, classed as a commercial property. Notwithstanding the wording on the letter in relation to classification, it is more probable to conclude that the approval received must have been issued in relation to use of a commercial nature.

90. By letter dated October 13, 2012, the Occupational Safety and Health Authority and Agency notified the Defendant that following an inspection on September 26, 2012 and re-inspection on December 1, 2012, there was no objection to the premises being used for the specified purpose.

91. The evidence led also established that the building is still occupied and accessed by members of the public and there is no evidence that the planning authorities have taken any action against the Defendant in relation to the continued occupation of the building. Consequently, the Court formed the view that the Defendant did not breach express provisions of the agreement to lease.

The next issue the Court considered was whether there was an implied term in the lease that required the Defendant to provide the requisite planning approvals and if so whether the implied term was breached.

92. **Vol 32 *Halsbury's Laws of England* (2012)** at **paragraph 381** states that.

> "**381. Implied terms.**
>
> *Provisions may be implied in an instrument, and in particular in a contract, on a*

variety of grounds. With certain exceptions, a provision will be so implied only where the instrument is devoid of any express provision dealing with the matter which is the subject of the implied provision, and the latter must not be inconsistent with, and may be moulded by, the express provisions of the instrument. The cases in which provisions may be implied may be put into a number of overlapping categories. First, where the instrument effects a transaction relating to a particular trade, profession, or branch of commercial or mercantile life or to the letting of land, and notorious usages, reasonable and certain in character but not unlawful, exist either generally throughout the kingdom or in a relevant larger or more local area, the parties will be presumed to be intending to follow and be bound by these usages. Secondly, where it is clearly necessary to imply some unexpressed term in order to give to the transaction effected by the instrument that efficacy which all parties must have intended it to have, a reasonable term will be implied for that purpose, provided that it is clear what term ought to be so implied. Thirdly, implications of particular well-defined terms are made in certain particular transactions by the law merchant or the common law as developed and determined by judicial decisions; many of these detailed particular ***implied terms*** *originated as usages or terms implied by* ***necessity*** *but are now regarded as part of the general law. Fourthly, terms may be implied by statute; some of these statutory implications are a codification of terms implied previously by judicial decisions".*

93. In the case of **<u>The Moorcock</u>** (1889) 14 P.D. 64 it was also noted that the Court would imply a term into the contract in order to give efficacy to same and at **p 68** Bowen L.J. opined as follows:

"Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication

from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

94. The Court may also imply a term into a contract where the contract would otherwise be incomplete. In **Chitty's On Contracts (2015) 32nd ed Vol 1** it is stated as follows:

> *"14-011* ***Incomplete contract.*** *There is yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms: "[i]n this sense the court is searching for what must be implied". In* ***Liverpool City Council v Trwin*** *the contract by which dwelling units in a council block were let to tenants consisted of "conditions of tenancy" which imposed obligations upon the tenants, but which were silent as to the contractual obligations of the landlord. The House of Lords implied an obligation on the part of the landlord to take reasonable care to keep the essential means of access and other communal facilities in reasonable repair."*

95. In the case of **Best v Glenville** [19601 1 W.L.1L 1198 it was held that the parties were able to enter into an agreement to rent even though permission had not been obtained prior to the execution of the contract and for which development permission was required under Town and Country Planning Act. The English Court of Appeal concluded that despite the lack of planning permission, it was not an illegal contract as there was a legal purpose and the tenant was aware prior to the execution of the rental agreement that an application would have to be made to use the premises for a particular purpose and the lessor was entitled to collect the rent.

96. The Court, at page 1203 of the judgment stated that:-

> *"If neither party took the trouble to take any steps to obtain planning permission, or if each party knew that no steps were to be taken, as might well be the case, if proved that there was something unlawful in this agreement But that is not the case and I can see no reason why the plaintiff 'should be held to have entered into an illegal agreement."*

97. The Defendant disclosed and provided to the Claimant copies of the title documents, copies of WASA Clearance Certificates, the latest WASA utility bill, and the last land and building tax receipt.

98. The Stop Notices issued by the Municipal Corporation and the sanctions that were outlined under the Municipal Corporation Act and/or the Public Health Ordinance, did not create an encumbrance or cause a defect to the Defendant's title but the issues raised therein had to be addressed by the Defendant.

99. The law also acknowledges that a purchaser/tenant is obliged to conduct its own preliminary enquiries. **Gibson's Conveyancing 21st Edition pages 90-91** outlines some of the types of the areas of enquiry that a prospective purchaser/tenant may explore and the text states:

> *"For example, among the questions the purchaser will need answered are:*
>
> (1) *What was the user of the property at the [particular period] and what is its present user?*
>
> (2) *Whether the present user conforms with the present development plan; whether any necessary planning permission was obtained and if so whether the permission is temporary or permanent or subject to any conditions.*
>
> (3) *Whether any application for planning permission has been made, the result of any such application and whether it has been revoked or modified.*
>
> (4) *Whether there are proposals in the development plan which suggest that the property may be subject to compulsory purchase.*
>
> (5) *Whether the local planning authority has taken, or is contemplating, enforcement action."*

100. In **Edler v. Auerbach** [1950] 1 KB 359 the Judge at 374 stated *'It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purposes for which he wants to use them, whether that fitness depends on the state of their structure or the state of the law or any other relevant circumstances'.*

101. In the case of **Lawrence and Another v Lexcourt Holdings Ltd** [1978] 2 All ER 810, the English courts considered the distinction between representations of law, such as, if one is to state that a certain development did not require planning permission and a representation of fact, such as, if one is to state that the land was in an area zoned for office use or that planning permission had been granted for a housing development.

102. The case of **Lexcourt Holdings Limited** is distinguishable from the present case as the evidence did not establish that the instant Defendant made any positive representation to the Claimant. In **Lexcourt Holdings Limited,** the landowner's description of the premises as offices was a representation not merely as to the physical state of the premises but also as to the availability of planning permission for them to be used for the full term of 15 years for the intended purpose as offices. The landlords had, however, only obtained limited planning permission for the use of the second floor and part of the first floor as offices for a limited period (i.e. 2 years) as a new road plan for the area had been passed by the county council and submitted to the Secretary of State for the Environment for approval.

103. In the instant case when the lease agreement was executed in May 2012 the parties were aware that the Defendant had to obtain approval for the four storey structure and the Defendant was obligated to obtain same before the Claimant was ready to commence its operations from the property.

104. At paragraph 13 of his witness statement, Mr. Nelson stated that:

> "*while the letter attached to the Statement of case … discloses plans for a two (2) storey building the truth about it is that when we went on site to inspect the building was in fact a four (4) storey building on the site. ... The position was quite fluid and there was no reason for me to suspect or be apprehensive about the lack of approved plans being obtained.*

105. In the instant case, TCPD had at all times classed the building as a commercial property and there were no restrictions placed on the type of business that could be operated from same.

106. Prior to the execution of the lease agreement the Claimant was aware that the Defendant did not have planning approval for a four storey building and after it received notification of the stop notice it took no steps to terminate the lease agreement with the Defendant but continued to expend sums on the outfitting and customization of the property and unilaterally decided to place the rent in an escrow account.

107. As it relates to rent, the lease agreement provided as follows:

> "*The Tenant shall pay to the Landlord during the term a rental of* ***TWO HUNDRED THOUSAND DOLLARS ($200,000.000)*** *for each and every consecutive month payable in advance on the first day of each calendar month to the Landlord or the Landlord's duly appointed agent or at such other place designated by written notice by the Landlord or the Landlord's agent".*

108. The lease agreement also contained a termination clause which provided as follows:

> *"<u>Termination</u>*
>
> *The rights granted to the Parties herein shall determine:*
>
> *(a) For the Tenant, immediately on notice given by the Landlord at any time following any material breach by the Tenant of its undertakings contained above.*
>
> *(b) On not less than three (3) months' notice given by either the Landlord or the Tenant to the other party to expire on the last day of the three month period.*
>
> *(c) In any event at the end of the expiry period."*

109. The Claimant paid rent to the Defendant from May 2012 to March 2013. Thereafter, no rent was paid but the parties held discussions in an attempt to resolve the issue of non-payment of rent. By letter dated June 11, 2013, the Defendant reminded the Claimant that rent had not been paid for 3 months and in response, the Claimant contended in its correspondence

dated June 14, 2013, that payment would only be released upon receipt of final approval for the building.

110. The lease agreement contained no provision that enabled the Claimant to withhold rent under any circumstances. The lease agreement provided at clause 13 as follows:

> *"Default*
> *If default shall at any time be made by the Tenant in the payment of rent when due to the Landlord as herein provided, and if said default shall continue for up to FOURTEEN (14) days THE TENANT SHALL PAY TO THE LANDLORD THE SUM OF ONE THOUSAND DOLLARS ($1,000.00) BEING LIQUIDATED DAMAGES AND A FURHTER SUM OF ONE THOUSAND DOLLARS ($1,000.00) FOR EVERY FURTHER DELAY OF FOURTEEN DAYS. If default shall be made in any of the covenants or conditions to be kept, observed and performed by the Tenant INCLUDING THE COVENANT TO PAY RENT and such default shall continue for two months without correction thereof then the Landlord may declare the term of this Lease ended and terminated by giving the Tenant written notice of such intention, and if possession of the Leased Premises is not surrendered, the Landlord may re-enter said premises. The Landlord shall have, in addition to the remedy above provided, any other right or remedy available to the Landlord on account of any the Tenant default, either in law or equity. The Landlord shall use reasonable efforts to mitigate its damages."*

111. The agreement between the parties was for occupation and outfitting of the property while the approvals were being secured and that same would be produced at the time the Claimant was ready to open its office. The evidence established that in March 2013 the Claimant was not ready to open its office as work was still ongoing. Accordingly, no circumstance existed that enabled the Claimant to elect to withhold the rent.

112. By its letter, the Claimant breached the Lease Agreement and in effect sought to vary the terms of the Lease Agreement. The Defendant, by its letters dated July 11 and July 23, 2013, forwarded documentation from the TCPD in an attempt to demonstrate that the TCPD had

approved the application to retain the structure but the Claimant still did not release the outstanding payments. In the circumstances, the Court formed the view that the Claimant's decision not to pay the rent amounted to a breach of a material term of the lease agreement.

113. Clauses 7 and 13 of the Lease Agreement provided that, if there was a material breach by the Tenant of its undertaking, the landlord could terminate the agreement immediately on notice. In a circumstance of nonpayment of rent, the Landlord had additional powers as set out under Clause 13.

114. By letter dated August 16, 2013, the Defendant's attorney wrote to inform the Claimant that it was in arrears of rent for the period from March 2013 and owed $1,000,000.00. It further stated that pursuant to the terms of the Agreement for lease that liquidated damages of $25,000.00 was owed as well as $33,968.72 for the electricity supplied during the tenancy. In response, the Claimant by letter dated August 21, 2013 'accepted' the termination and claimed the sum of $13,383,973.74 representing rents paid and monies spent by it to outfit the building for occupation.

115. Under **<u>section 70 of the Conveyancing and Law of Property Act Chap. 56:01</u>**, once a breach is remediable, an opportunity to remedy the breach should be afforded. Instead of accepting the opportunity to remedy the breach and pay the rent and although it was furnished with the Town and Country Planning document as well as the approvals from OSHA, Fire Services and WASA, the Claimant proceeded to "accept" the termination.

116. By letter dated August 22, 2013, the Defendant's attorney requested that the Claimant remove its chattels from the building by Saturday 24th August 2013. On August 26, 2013, the Claimant notified the Defendant's attorney that it needed fourteen (14) days to deliver vacant possession and by letter dated September 2, 2013, the Defendant's attorneys notified the Claimant that it was willing to accede to that request.

117. Clause 15 of the lease agreement provided that:

"<u>Condemnation</u>

If any legally, constituted authority condemns the building or such part thereof which shall make the Leased Premises unsuitable for leasing, this Lease shall cease when notice thereof is received by the Landlord and the Tenant shall account for rental as of that date. Such termination shall be without prejudice to the rights of either party to recover compensation from the condemning authority for any loss or damage caused by the condemnation. Neither party shall have any rights in or to any award made to the other by the condemning authority.

118. The evidence established that even after it received the copies of the stop notice, the Claimant continued to retain possession of the premises. In the circumstances, the Claimant had an obligation to continue to pay the agreed rent and if either party was dissatisfied or uncomfortable with the agreement, the termination provisions at clause 7 provided each party with a reasonable exit recourse.

119. Under clause 13 of the lease agreement the Defendant had a separate legal right to claim liquated damages of $1,000.00 per every 14 days that the rent remained unpaid.

120. According to **Hill and Redman's Law of Landlord and Tenant 15th Edition**, the remedies for breach of an agreement for a lease are specific performance or damages.

121. The Lease Agreement at clauses 7 and 13 stipulated the recourse that either party had in the event of a default and/or breach. Clause 7 of the Lease Agreement stated that both the Landlord and Tenant had the right to determine the agreement *"On not less than three (3) months' notice given by either the Landlord or the Tenant to the other party to expire on the last day of the three month period."* The Claimant exercised no such option.

122. Clause 13 of the Lease Agreement dealt with default and the recourse that a Landlord had if there was default of payment of rent by the Tenant as well as the Landlord's right of re-entry. This clause did not address and/or provide any recourse if there was a default made by a Landlord.

123. The Claimant claimed that when it discovered that there was lack of planning approvals it enquired of the Defendant as to whether the said approvals had been obtained. It however continued to occupy the property and furnished and outfitted same and no notice pursuant to Clause 7 of the Agreement of the Lease was forwarded nor were steps to end the business relationship taken.

124. By its continued occupation of the property, the Claimant received consideration for the rent that was agreed. The Claimant was not ready to move into the building so the Defendant still had time to obtain all the necessary approvals. In such a circumstance, the absence of the requisite approvals did not render the lease agreement void.

125. In **Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited [2008] HCA 10 (Aus); Highway Properties Ltd. v. Kelly, Douglas & Co [1971] S.C.R. 562**). The Court held

> "*Under general contractual principles, an innocent promisee can terminate the contract, and recover loss of bargain damages, when there is repudiation or a fundamental breach, or a breach of condition i.e. breach of an essential term. And under these principles it is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision- not only in order to support a power to terminate the contract, which the Lessee concedes, but also to support a power to recover loss of bargain damages.*"

126. Applying the rationale adopted in the ***Gumland*** *case* (supra), this Court formed the view that the 'payment of rent' clause in the lease agreement was a fundamental cause and by its failure to remedy the breach, the Claimant opened itself to a claim for damages.

127. The law recognises that where a tenancy has been ended by proper notice, if the premises are un-rentable due to damage caused by the tenant, the landlord is entitled to claim damages for loss of rent in addition to the cost of reinstatement i.e. the cost to restore the premises to its original condition so that it is in good tenantable condition. The landlord is however required to mitigate the loss by completing the repairs in a timely manner.

128. In the Australian case of **Vickers v Stichetenoth Investment Pty Ltd (1989) 523 SASR 90** at 100, the Supreme Court of South Australia stated

> *"There is no reason why in modern times mitigation of damage should not apply. It is a ordinary principle of contract law. With modern leases the law should recognise the importance of the contractual aspect of a lease. Why should not a landlord faced with abandonment take steps to try to reduce his loss? Why should a vendor of tomatoes faced with refusal to take delivery by his purchaser suffer if he does not sell if he can to another purchaser and yet a quiescent and immobile landlord not suffer if he fails to seek another tenant? Modern ideas say there is no reason for this anomaly.*

129. The duty of mitigation is an established principle in contract law and therefore has to be considered when an assessment of damages is undertaken. In the case of **British Westinghouse Co v Underground Ry (1912) AC 673 at 679** the English Courts have held that, *"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of damage which is due to his neglect to take such steps."*

130. The principal meaning of the term 'mitigation' itself comprises three different, although closely inter-related rules:-

(1) The innocent party must take all reasonable steps to mitigate the loss to him consequent upon the defaulting party's wrong and cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable action or inaction, to avoid.

(2) Where the innocent party takes reasonable steps to mitigate the loss to him consequent upon the defaulting party's wrong, he/she can recover for loss incurred in so doing, even if the resulting damage is greater than it would have been had the mitigating steps not been taken.

(3) Where the innocent party does take steps to mitigate the loss to him consequent upon the defaulting party's wrong and these steps are successful

the defaulting party is entitled to the benefit accruing from the innocent party's action and is liable only for the loss as lessened.

131. Ultimately, the question of mitigation of damage is a question of fact and the onus of proof is on the defaulting party and if the defaulting party fails to show that the innocent party ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply.

132. In this case the Defendant is entitled to recover all sums due and owing as arrears of rent from the Claimant for the period that the Claimant remained in possession of the property. In addition, the Defendant is also entitled to liquated damages for the non-payment of rent as provided for under the lease. In his evidence Mr. Gosine said that, in or about September 2013, after the Claimant moved out of the subject premises, the Defendant engaged service providers to restore the building and for a short period a part of the building was utilised by the Independent Liberal Party (ILP) political party at no cost while the repairs to the remaining structure were ongoing. On or about March 2014, the Defendant was able to let the property to new tenants.

133. During the course of the Trial, by joint notice filed on November 7, 2016, the Claimant and Defendant set out the quantum of the Claimant's claim and the Defendant's counterclaim which they agreed on the basis that there was documentary evidence in support of those claims and counterclaims but both parties reserved their rights to address in their respective submissions the issue as to the parties' entitlement to the sums claimed.

134. In the circumstances of this case the Court feels compelled to point out that **Section 7 of the Agricultural Development Bank Act** (hereafter "the ADB Act") expressly provides that the place of business of the Defendant "*shall be in Port of Spain and there shall be established branch offices in such other areas of Trinidad and Tobago as may be considered necessary"*. The law was not altered and the level of expenditure as claimed by the Claimant was excessive especially in a circumstance where it could not treat with the Chaguanas office as a head office.

135. Mr. Nelson at paragraph 20 of his witness statement stated:

> "*Although the lease was originally intended to house the Claimant's head office it was soon drawn to the attention of the Board of Directors that the laws governing the Bank only allows its head office to be located in the city of Port of Spain. But the Board decided to proceed anyway because it was optimistic that either the Honourable Minister under whose portfolio the Bank falls would have taken a proposal to parliament to amend the Bank's Act in order to allow it the flexibility to relocate the head office.*"

136. During cross-examination, Mr. Nelson admitted that during 2011 to 2012 no request was made to the line Minister for the Act to be amended and that his instructions to proceed came from the Board.

137. The Claimant however engaged various service providers to conduct work to facilitate the relocation of the Head Office and paid approximately $10,356,186.90 to outfit and furnish the building, to install IT infrastructure, to pay project management fees, and for health and safety audits. Upon vacating the building it retained all the furnishings and most of the infrastructure that it placed in the building was removed.

138. Although the arrangement with the Defendant was valid, the Claimant's primary intention was to use the building as a relocated Head Office. This was not authorised and as a public body, the course of action adopted was irregular. It appears to the Court that the level of expenditure undertaken by the Claimant was reckless and demonstrated little regard for the welfare of the public purse and this type of behavior appears to be undertaken far too often by statutory bodies. Efficient, effective and considered use of the state's limited resources has to be a focal point of concern, and accountability when there is a breach should be pursued. The other alarming issue this matter raised was the lack of requisite approvals by the Borough of Chaguanas. This is not the first matter determined by this Court in which there was an absence of approval from the CBC and it appears to the Court that there are

many structures in the Borough that do not have the requisite approval but apparently no enforcement action is taken. Laws are only effective when they are enforced but enforcement needs to evenhanded and not arbitrary. Corporations are by nature political, and care has to be exercised to ensure that the discretion that is vested in them is not exercised unreasonably. There is need for a clear and revised policy in relation to national development and issues such as adequate car parking facilities to cater for the projected number of users of the building to be erected should be considered as an integral element of the approval criteria. As a Nation, we have to strive to ensure that infrastructural development is planned, ordered and decentralized away from the traditional urban centres. The haphazard development that has characterized the last 25 years has contributed to the traffic gridlock that now confronts us and there is also need to review the reclassification/zoning of areas as many residential areas are now commercial hubs. Consequently, even greater care is now needed so as to ensure that existing residential areas are not slowly converted into commercial centres as owners gradually, and without the requisite approval, change the character of their property. The lack of enforcement encourages people to disregard the planning requirements, they erect structures and then apply for retroactive approvals and even the grant of approval at that stage is very often clothed in suspicion.

139. In its counterclaim the Defendant claimed as follows:

> " (1) *Payment of the outstanding rent and electricity charges for the period of 5 months from April, 2013 to August, 2013 whilst the Claimant was still in occupation of the building in the sum of **$1,033,968.71.** Copies of the invoices for the rent and T&TEC bills are annexed hereto in a bundle marked **"W.G 9"***
>
> *(2) The cost of improvements in the sum of **$2,195,000.00** to the Building as required by the Claimant during the period 2011 to 2013 so as to configure and change the building to meet the Claimant's specific needs as a Bank**.** Copies of the invoices, bills and receipts are annexed hereto in a bundle marked **"W.G 10"***

*(3) The cost of the rental of 25 Car Park spaces at Centre City Car Park from George Aboud & Sons Ltd, pursuant to the Tenancy Agreement dated 26th June, 2013 at the rate of $14,375.00 per month for the period July, 2013 – September, 2013 in the total sum of **$43,125.00.** A copy of the Tenancy Agreement is hereto annexed and marked **"W.G11"***

The Defendant will contend that after the lease was entered into the Claimant insisted on the provision of more car parking spaces for its personnel and visitors which the Defendant in order to maintain the tenancy agreed to provide.

*(4) The cost of electrical and restoration expenses after ADB returned keys/remotes and vacated the building in or about September, 2013 in the sum of **$45,000.00.***

The Defendant will contend that after the Claimant removed its belongings from the building the Defendant had to restore the building to a tenantable condition before it could re-let the building.

*(5) Loss of Rental Income in the sum of **$1,400,000.00** for the period of 7 months from September, 2013 to March, 2014 at the rate of $200,000.00 per month until the property was rented.*

The Defendant states that after the Claimant vacated the building and the building was restored to a tenantable condition, the Defendant despite advertising the building for rent was only able to re-let the building in March 2014 at a rent which is lower than the rent agreed with the Claimant.

(6) Further and/or alternatively damages for breach of contract and/or deceit

(7) Interest upon such damages as may be awarded pursuant to section 25 of the Supreme Court of Judicature Act Chapter 4:01 of the Laws of Trinidad and Tobago

(8) Costs

(9) Such further and/or other relief as the Court may deem just."

140. By the joint Notice filed November 7, 2016 the parties agreed that there are documents in support of the sum claimed for electricity charges for the period April, 2013 to August 2013 in the sum of **$33,968.71** which had to be paid to T&TEC. Pursuant to Clause 12 of the lease, the obligation to pay this charge was the Claimant's and the Claimant must therefore pay the said sum.

141. By the said joint Notice parties also agreed that there are documents (receipts and vouchers) in support of the Defendant's claim for:-
    (i) the cost of improvements to the building as required by the Claimant during the period 2011 to 2013 so as to configure and change the building to meet the Claimant's specific needs as a Bank and
    (ii) the cost of the rental of 25 car park spaces at Centre City Car Park from George Aboud & Sons Ltd pursuant to the tenancy agreement dated June 26, 2013 at the rate of $14,375.00 per month for the period July, 2013 to September, 2013.

142. No evidence was adduced to establish that the improvement to the building effected by the Defendant at the Claimant's request has not contributed to the commercial viability of the building or that the requests made by the Claimant were so specific or unique or that they were unusual requests that required the building to be customised in a way which did not accord with regular commercial activity. In the circumstances, the Court is of the view that the Defendant is not entitled to recover sums that were expended by it to improve the building. The sum claimed for the rental of the car park spaces was inherently tied to the

monthly rental sum of $200,000.00 and there is no entitlement to this sum as the Defendant in consideration of the monthly rent of $200,000.00 agreed to provide car park space.

143. The Claimant remained in occupation of the premises until September 9, 2013. Pursuant to clause 2 of the Lease Agreement the Claimant covenanted to pay rent in the sum of $200,000.00 per month whilst they remained in occupation of the premises and having remained in occupation they are liable to pay the rent as claimed in the sum of $1,000,000.00. The Defendant however acknowledged that when the Claimant entered into the Lease Agreement in May, 2012 it paid a deposit of $200,000.00, for the first month's rent as well as the last month's rent. Consequently, the sum can be applied for the rent due for September 2013 thereby, resulting in the sum of $1,000,000.00 being owed for the period March 2013 to August 2013.

144. The evidence established that the Defendant did effect works to restore the building after the Claimant vacated and the Defendant applied the deposit paid by the Claimant in the sum of $200,000.00 towards the cost of the restorative works that were undertaken and is entitled to the balance owed for the said work in the sum of $45,000.00.

145. The Defendant was very fortunate to have entered into this peculiar lease agreement, although the requisite approvals had not been obtained, the parties did operate on the premise that the requisite approvals would have been obtained by the time the Claimant was ready to move into the building and open for business. After the Claimant vacated the premises, the requisite approvals were still not in place and in the circumstances the Defendant is not entitled to claim for a loss of profits.

146. For the reasons outlined, the claim is hereby dismissed and on the counterclaim, the Claimant is to pay to the Defendant:

i. The sum of $1,000,000.00 owed on account of arrears for rent as well as the sum claimed of $25,000.00 as damages under Clause 13 of the lease.

ii. The sum of $45,000.00 as the balance on restorative works.

iii. The sum of $33,968.11 for electricity charges.

iv. Statutory interest shall accrue on these sums from the date of this Judgment until payment.

v. There shall be a stay of execution of 28 days.

vi. The Claimant shall pay to the Defendant costs to be assess in default of agreement.

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FRANK SEEPERSAD

JUDGE