REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2019-03665

BETWEEN

NERISA GARRETTE

Claimant

AND

SCOTIABANK TRINIDAD AND TOBAGO LIMITED

First Defendant

TIFFANY OLIVER

Second Defendant

FITZWILLIAM STONE FURNESS-SMITH AND MORGAN

Third Defendant

DICKEY SEEPERSAD

Fourth Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: December 6, 2021.

Appearances:

1. Mr C. Neptune, Mr A. Neptune and Mr R. Eccles Attorneys-at-law for the Claimant.
2. Mr F. Hosein and Ms T. Rowley, Attorneys-at-law for the First Defendant.
3. The Second Defendant being unrepresented.
4. Mr C. Sieuchand and Ms S. David-Longe, Attorneys-at-law for the Third Defendant.
5. Mr F. Mohammed, Attorney-at-law for the Fourth Defendant.

DECISION

1. Before the Court for its determination is the Claimant's Claim Form and Statement of Case filed on 9 September 2019 whereby the Claimant sought the following reliefs against the Defendants:
    a. Recovery of the sums (inclusive of interest paid) expended pursuant to the purchase of the said parcel of land;
    b. Rescission of the agreement for sale and the deed of conveyance, repayment of all the sums paid under same;
    c. Recovery of all legal fees expended on the purchase of the subject parcel of land;
    d. Recovery of all monies reasonably expended pursuant to the obtaining of buildings approvals and/or approval of building plans for the subject parcel of land;
    e. Recovery of all monies expended on the maintenance of the subject parcel of land;
    f. Damages for negligence/ breach of contract;
    g. Damages for fraudulent misrepresentation;
    h. Interest at such rate and for the period as to the Court may deem just;
    i. Costs;
    j. Such further and other relief as the Court may deem just.

Claimant's facts:

2. Around August 2015 the Claimant was at the First Defendant's Chaguanas branch where she saw an advertisement for sale of land on its notice board. The First Defendant's loans officer directed her to the vendor, the Fourth Defendant, and she contacted the vendor concerning the land and conveyed her intention to build her house. The land was located on Dynasty Boulevard, Longdenville, Chaguanas and a site visit was conducted with the Fourth Defendant.

3. The Claimant was subsequently taken to the Fourth Defendant's attorney's office to execute an agreement for sale and it is her case that the Fourth Defendant stated that he had all relevant approvals for the said parcel of land with the exception of the WASA Clearance

certificate. The agreement for sale was executed and reflected, *inter alia*, that the purchase price was $340,000.00.

4. The Claimant made arrangements with the Bank for the purchase of the parcel of land following which she was directed by the First Defendant to the offices of the Third Defendant as they were the attorneys on the Bank's panel.

5. She attended the Third Defendant's office, signed instructions to act, paid fees for legal services and on 30 September 2015 she executed the deed of conveyance and deed of mortgage which said deeds were prepared by the Second Defendant.

6. Clause 4(c) of the Agreement for Sale provided as follows: "Subject to the Vendor providing the Purchaser with proof of residential approval from the Town and Country Planning Division and/or relevant Government Authorities".

7. In March 2016 the Claimant expended approximately $5,000.00 for the preparation of a house/building plan for the construction of her house and submitted same to the Couva/Tabaquite Regional Corporation (the regional corporation) for review and approval. On the 11 May 2016 she received correspondence from the Regional Corporation that the requested approval was withheld because the land belonged to a larger parcel which did not have the requisite approval for sub-division.

8. Subsequent to the purchase, the Claimant spent on average $500.00 monthly for maintenance and upkeep of the land and she is unable to build her home although she spends the monthly sum of $2,569.63 to facilitate her mortgage with the First Defendant.

9. The Claimant also pleaded that in 2006 the Fourth Defendant applied to the regional corporation for approval to develop the site but same was not granted. She further outlined that she also made an application for final planning permission for the erection of a single unit but was unsuccessful.

10. The Claimant subsequently granted the Second Defendant authorisation for her to liaise with the Assistant Director of TCPD to obtain information, documents and to oversee any other approvals relating to the application for final planning permission so as to enable her to erect a home.

First Defendant's facts:

11. In its defence filed on 11 December 2019 this Defendant neither admitted nor denied, *inter alia*, the assertion that the Claimant attended its Chaguanas branch and had sight of an advertisement for the sale of the subject land.

12. The First Defendant accepted that Deeds of Conveyance and Mortgage were made between the Claimant and the Fourth Defendant on 30 September 2015.

13. In addressing the particulars of negligence as pleaded by the Claimant, the First Defendant stated that it did not advertise the parcel of land but it permitted members of the public to post on the notice board at its branch subject to the terms and conditions which included that persons placing advertisements were responsible to ensure the information was accurate.

14. The First Defendant pleaded that the Claimant acted on the advice of skilled professionals and was not induced to purchase nor did she rely on representations by the First Defendant. Furthermore, the First Defendant denied that it knew that the intended purpose of the mortgage loan was for the construction of a house. The Bank emphasised that it never acted as the Claimant's advisor regarding the purchase of the parcel of land and that it was not in a fiduciary relationship with the Claimant. The First Defendant denied that its recommendation of the Third Defendant amounted to a representation as to the suitability of the parcel of land or to the existence of the requisite approvals.

The Second and Third Defendants' Facts:

15. The Second and Third Defendants pleaded that there was correspondence between themselves and the First Defendant in relation to the conduct of searches with respect to the parcel of land and for the preparation of the deeds of mortgage and conveyance. The Third Defendant sought instructions from the First Defendant as to whether the land was approved by the relevant authorities and in response, the First Defendant presented, *inter alia*, the letter from Acting Director of TCPD dated 28 March 2014 which informed the Fourth Defendant, *inter alia*, the property was located in an area allocated for residential purposes, it fell within an approved layout and before the commencement of any development an application for development of land was to be submitted to TCPD and approved.

16. The Claimant attended their office for the first time on 30 September and at no time prior to execution of the deeds of conveyance and mortgage, did they make any representations to the Claimant about the parcel of land.

17. These defendants pointed out that by agreement for sale dated 8 September 2015 it was agreed that the land was being sold subject to the Fourth Defendant providing the Claimant with proof of residential approval from TCPD and/or other relevant Government Authorities.

18. On 10 November 2016 an officer of the First Defendant contacted the Second Defendant and informed her that the Claimant encountered problems with getting approval of her building plans. She was then presented with the notice of defects issued by the regional corporation.

19. As an act of good faith and though not having a duty of care towards the Claimant, the Second Defendant elected to assist the Claimant. By letter of 29 November 2016 the Second Defendant wrote to TCPD referring them to a 18 March 2015 letter and requested a status update on the approvals. A follow up letter was sent to the Senior State Counsel in Ministry of Planning and Sustainable Development.

20. The Second Defendant was subsequently informed that a letter of grant of planning permission was prepared in the Claimant's name in the care of Randy Teebenny.

21. The Second Defendant tried to get the said letter but was notified that she needed authorisation to receive same but the Claimant refused as she insisted that she had previously signed one in November 2016.

22. The Second Defendant, after the receipt of a pre-action protocol letter from the Claimant, was informed that the Claimant signed the letter of authorisation and the Second Defendant eventually obtained approvals from TCPD.

23. Subsequently and after requests by the Second Defendant concerning the approvals, and on 6 February 2018, the Second Defendant and another attorney from the Third Defendant met with representatives from the regional corporation which confirmed that the parcel of land formed part of a larger parcel which was not approved for sub-division and that consideration for approval would only be given if infrastructural works were completed to the regional corporation's satisfaction.

24. The Second and Third Defendant denied the existence of any retainer contract between the Claimant and themselves and advanced that at all material times they discharged their professional duties in accordance with the instructions provided.

Fourth Defendant's facts:

25. In his Defence filed on 26 June 2020 the Fourth Defendant Vendor confirmed that the Claimant contacted him with respect to the parcel of land, they made a site visit to view same and subsequently an agreement for sale was prepared on 8 September 2015 in relation to the purchase of same. This defendant stated that the agreement was a standard agreement and there was no actual discussion in relation to Clause 4(c). He also denied that he told the Claimant that he had all approvals for the parcel of land but he outlined that he told her that there was outline approval approved for residential use and gave her the status letter from TCPD dated 18 March 2014.

26. The Fourth Defendant pleaded that he never made any application to the regional corporation for approval and denied that he was negligent or that he made fraudulent misrepresentations.

The Evidence:

27. At the trial the Court heard evidence from Ms Nerisa Garrette (Claimant), Mr Randy Teebenny, Ms Cindy Seemungal, Ms Tiffany Oliver (the Second Defendant) and Mr Dickey Seepersad (the Fourth Defendant).

28. The Claimant testified that she accepted that title for the parcel of land vested in her by virtue of the deeds of mortgage and conveyance which was signed by her.

29. The Claimant when asked to describe the advertisement notice which she allegedly saw at the Bank, could not remember the particulars of same.

30. She stated in cross-examination that Ms Ramphal, an employee of the First Defendant, gave her the contact number for the Fourth Defendant and after she saw the advertisement on the notice board. She then spoke to the Fourth Defendant and subsequently went to his attorney's office to sign the agreement for sale on 8 September 2015.

31. She stated that the only questions she asked at the Fourth Defendant's Attorney was whether there were approvals for building and a WASA Clearance and during cross-examination she said that the Fourth Defendant stated that there was approval for building and that she would not have problems with respect to building. These assertions were however not contained in her witness statement. During cross-examination she was directed to an apparent conflict between paragraph 10 of the Statement of Case where she said that the Fourth Defendant said the WASA Clearance was outstanding and paragraph 13 of her witness statement where she deposed that it was Mr Mohammed who said so. In response the Claimant said both individuals made statements regarding the WASA Clearance.

32. The Claimant also stated at the trial that she went to the office of the Third Defendant on the 30 September 2015 and between the date of signing the agreement for sale i.e. 8 September and the 30 September 2015, the only person she spoke to was Ms Ramphal regarding the loan. At the meeting on 30 September 2015 the Claimant said she could not recall if anything concerning approvals came up and accepted that no mention of same was made in her witness statement.

33. When asked what the "instructions to act" which was referenced in paragraph 12 of the Statement of Case meant, the Claimant stated that this was in relation to the letter of authorisation.

34. The Claimant testified that she was unsure if Mr Teebenny submitted the building plans to TCPD. Furthermore, she stated that the first time that she knew about the denial for building approval was by the letter of 11 May 2016. She however stated, in cross-examination, that she was aware of an earlier letter dated 21 April 2016 where the house plan was refused by the regional corporation but this was not reflected in her witness statement.

35. With respect to the letter dated 28 March 2014, the Claimant stated that she understood it to mean that an application was to be made to TCPD for approval to build. When asked whether Mr Teebenny submitted same to TCPD, she said he made an application but did not enquire if any approvals came back from TCPD. In addition, she accepted that she did not at any time visit the office of TCPD.

36. The Claimant accepted that the First Defendant had no power to give any approval to build on the land and she also accepted that she made an application to TCPD and approval was given by TCPD for construction of a single family dwelling via letter of 21 April 2016.

37. The Claimant agreed that Ms Oliver never gave assurances that the land had approvals. She also accepted that at all times after execution of the deeds on 30 September 2015, she had the obligation to apply for building plans.

38. When cross-examined by Mr Mohammed for the Fourth Defendant the Claimant testified that before seeing the advertisement, she was on the lookout for other properties and looked at the newspapers and websites.

39. Mr Teebenny outlined the process for getting final approval. He stated, *inter alia*, that the building plan must first go to TCPD, then TCPD would forward same to the regional corporation. Next it goes to the Ministry of Health and then back to the regional corporation for final approval. This witness could not recall what documents he attached to the building plan when he made the application.

40. Mr Teebenny accepted that he received the approval letter of 21 April 2016 and contacted the Claimant. He also acknowledged receipt of the letter from the regional corporation dated 11 May 2016. He explained that he submitted the house plans to the TCPD and not the regional corporation because the regional corporation first needs approval from TCPD. The witness stated that although the job for which he was hired by the Claimant i.e. to get the final approvals was incomplete, he could not do anything further because the defect concerning subdivision approval, first had to be rectified.

41. Ms Seemungal's evidence was amplified and she stated that it was not the First Defendant's policy to share the information of one customer with another and that there were no exceptions to this policy approach.

42. This witness testified that she only became aware that the Claimant had problems obtaining approvals when the claim was filed. The witness was asked about the letter dated 4 February 2016 from the Third Defendant which at "*Item (vi) on Page 2*" certified that, "The mortgage property (land only) has been approved by the relevant authorities for building purposes" and she accepted that since the relevant approvals were not obtained, this aspect of the letter was incorrect. She further accepted that the Claimant got the parcel of land without the relevant approvals.

43. When asked by the Court whether her portfolio at the material time covered mortgages the witness stated yes and she indicated that she had substantive experience with mortgages.

The witness accepted that with residential land, the issue of relevant approvals is important. Based on her experience, Ms Seemungal said that approvals would be obtained from bodies such as TCPD and the regional corporations and further testified that the absence of approvals would impact upon the bank's ability to divest its security. Consequently, she stated the lack of the requisite approvals would likely lead to a decision by the Bank, not to finance the sale transaction.

44. **The Second Defendant also testified and her evidence was significant as the Court formed the view that she was a witness of truth. As an attorney, she admirably discharged her obligations to the Court as she testified, at times against her own interest, in a manner which was frank and forthright. She testified that she acted for both the First Defendant and the Claimant however the First Defendant was her primary responsibility. The witness stated that she had a duty to the Claimant to ensure that the land had all approvals and accepted that prior to the 30 September 2015, she did not seek from the regional corporation information as to whether the subject land had approvals. This was not done because of the letter of 28 March 2014 which, in her opinion and based on advice she obtained from her senior at the Third Defendant, led to the opinion that property had all the required approvals**.

45. When asked by the Court if there was any interplay between TCPD and the regional corporation with respect to statutory obligations the witness replied that when one applied to TCPD, a notice of outline is generated and this is forwarded to the regional corporation for its independent approval. Ms Oliver further stated that when dealing with residential land she would look for both the regional corporation and TCPD approval and would ascertain that there is the notice of outline and the final approval. In this instance, she accepted that she did not follow this procedure and frankly stated that in hindsight, she ought to have addressed her mind to the absence of approval from the regional corporation as regional corporation approval was needed to build. She further accepted that the absence of such approval affected its marketability of the land and the utility of the land was curtailed.

46. Mr Seepersad testified that the subject land was subject to a mortgage with the First Defendant prior to sale to the Claimant. He also accepted that his documents in relation to the land and contact information were in possession of the Bank. This witness maintained that his understanding of the 28 March 2014 letter was that the property had outline approval. Mr Seepersad also testified that he gave the Claimant documents relating to the land such as the status letter of March 2014, the deed and tax receipts before she signed the agreement for sale.

Issues to be determined:

47. The Court determined that the following issues had to be resolved :
    a. Whether the First Defendant owed a duty of care to the Claimant and if so, whether it is liable in the tort of negligence to the Claimant;
    b. Whether the Second and Third Defendant owed a duty of care to the Claimant to ensure the land had all approvals and if so, whether it is liable in the tort of negligence to the Claimant;
    c. Whether the Fourth Defendant fraudulently misrepresented to the Claimant that the subject land had all approvals.

Resolution of the Issues:

First Defendant:

48. In determining whether the First Defendant is liable in the tort of negligence the Court considered the case **Civ App 23 of 1991 Bank of Commerce (T&T) Ltd v David Lakhan** which established that at common law, a remedy can exist concurrently in tort, in respect of a relationship which is governed primarily by contract. In determining whether the First Defendant owed the Claimant a duty of care the Claimant submitted that the Community board was located within the First Defendant's premises and there existed a duty as the

First Defendant should have ensured that the information placed on the noticeboard was accurate given that the target audience of the noticeboard was the Bank's customers.

49. Ms Seemungal stated that it was not the Bank's policy to share a customer's information with another customer and there were no evidence which contradicted this position. Although the Claimant testified that she received the Fourth Defendant's contact information from Ms Ramphal, Ms Ramphal was not called a witness in these proceedings and the Court considered the dicta of Madam Justice Rajnauth-Lee (as she then was) in **HCA 2387 of 2000 Ian Seunarine and Doc's Engineering Works (2000) Ltd** where the Court stated that a court may be entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence relative to an issue in an action.

50. During cross-examination, the Claimant accepted that the actual notice she allegedly saw was not in her evidence and she was unable to give a description of the said notice. The Claimant also testified that she was on the lookout for other properties and she searched newspapers and websites. During re-examination, the Fourth Defendant stated that when the Claimant contacted him, he assumed that she got his contact information from the "Trini Homes" website. Having seen and heard the Fourth Defendant, the Court formed the view that his testimony was plausible, probable and accurate and the Court accepted his evidence that he did not put an advertisement on the Bank's noticeboard. Notably the alleged notice, according to the Claimant, did not even contain a contact number and it is probable to conclude that the Fourth Defendant would have included his contact information, if he placed any such notice. The Court also considered the First Defendant's Terms and Conditions for use of the noticeboard at its branch.

51. Clause 2 of the Terms and Conditions effectively amounts to an exemption clause as it categorically states, "*We will not accept liability for any claims for consequential losses damages resulting from such action*". The Court further considered the general rules of contract interpretation and did not import language or intent that was not envisaged by a

reasonable person in the circumstances or which could not have been contemplated as being relevant terms of the contract. The Court had regard to the natural and ordinary meaning of the wording of the clause, the other provisions and the overall intent of the transaction and considered the facts and circumstances known by the parties at the material time. In addition, the Court considered in a general way the issue as to what made commercial sense in the circumstances following the approach which was set out in **Arnold v Britton [2015] UKSC 36** as well as its previous stance in **CV2016-00788 Wayne Bruce v More Money Pawnshop and Jewellery Stores Limited,** which was outlined at paragraph 5 thereof.

52. The Court remained mindful of the provisions of the Unfair Contract Terms Act Ch 82:37 and in particular, sections 6 and 13 thereof and considered that parties should not be able to contract out of statutory obligations and further noted that the Court had to consider what is fair and reasonable in all of the circumstances.

53. When one considers the nature of the noticeboard and its purpose, it can be equated to an advertisement placed by a vendor in a daily newspapers, social media or on a website. If the information advertised in such an advertisement is misrepresented, the aggrieved party ought not to ordinarily bring a claim as against the entity who posted or published the information but rather, action should be taken as against, the party who placed the advertisement.

54. The First Defendant, being a financial institution, would usually seek to ensure that the property has all the requisite approvals so as to ensure that it could easily dispose of the property if it needed to terminate the financing arrangement with the customer. During cross-examination Ms Seemungal accepted that if the bank is holding residential land then the issue of relevant approvals is important. She also accepted that the required approvals would usually emanate from bodies such as TCPD and the regional corporations and she outlined that the lack of approvals would impact on the bank's ability to divest the security

in circumstances where they need to. She further stated that if one aspect of the required approvals was absent, then the bank would generally not pursue the transaction.

55. In the circumstances this Court is resolute in its view that it is unlikely that the First Defendant knew that the required approvals were not obtained and it is more probable to conclude that it may not have issued the Claimant the mortgage facility if the lack of regional corporation approval was brought to its attention.

56. Based on the evidence adduced the Court holds the view that the First Defendant owed no duty of care towards the Claimant as it relates to the issue of the existence of the requisite approvals, it did not act negligently in relation to the Claimant nor did it sanction any advertisement for the said land and it never encouraged the Claimant to acquire same.

Second and Third Defendants: Negligence

57. It is important to note that the Second Defendant was employed by the Third Defendant at the material time as a consultant and there is no dispute between the parties as to the fact that the First Defendant had the Third Defendant on its panel and its interaction with the Second Defendant was in her capacity as a consultant with the Third Defendant. The Claimant also elected to deal with the Third Defendant's firm as they were on the panel of lawyers used by the First Defendant.

58. In determining whether the Second and Third Defendants acted on behalf of the Claimant and whether they were negligent and should be held responsible for any losses suffered by her, the Court had regard to the recent UK Supreme Court decision **Manchester Building Society v Grant Thornton UK LLP [2021] 4 All ER 1**. This decision redefined the principles advanced in an earlier decision of South Australia Asset Management Corp v York Montague Ltd [1996] 3 All ER 365 (SAAMCO). In SAAMCO Lord Hoffmann drew a distinction between a duty to provide 'information' for the purpose of enabling

someone else to decide upon a course of action and a duty to 'advise' someone as to what course of action he should take. The court proposed a form of counterfactual analysis as a way to assist in identifying the extent of the loss suffered by the claimant which fell within the scope of the defendant's duty, by asking, in an 'information' case, whether the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct.

59. In *Manchester Building Society* (supra) the Supreme Court held that the society had suffered a loss which fell within the scope of the accountants' duty of care. The headnote states as follows:

> "***The scope of duty question should be located within a general conceptual framework in the law of the tort of negligence. The proper approach to the scope of duty issue was to derive it from the purpose of the duty, without placing the emphasis on causation and the counterfactual test, and without reference back to policy***. The scope of the duty of care assumed by a professional adviser was governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice had been given (and, as was often the position, including in the present case, paid for). ***In the case of negligent advice given by a professional adviser the court looked to see what risk the duty was supposed to guard against and then looked to see whether the loss suffered represented the fruition of that risk.*** The distinction between 'advice' cases and 'information' cases drawn by Lord Hoffmann in SAAMCO had not proved to be satisfactory. It should not be treated as a rigid straitjacket. For the purposes of accurate analysis, rather than starting with the distinction between 'advice' and 'information' cases and trying to shoe-horn a particular case into one or other of those categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant. Counterfactual analysis of the kind Lord Hoffmann had proposed should be regarded only as a tool to cross-check the result given pursuant to analysis of the purpose of the duty, but one which was subordinate to that analysis and which

should not supplant or subsume it. Identifying the scope of the duty of care by reference to its purpose was a reasonably determinate test, applicable in principle from the outset of the parties' relationship. A focus on that criterion was a surer and simpler guide than a causation-based analysis. While the two modes of analysis might often lead to the same outcome, problems arose where it was unclear whether they did or not. In the present case, the purpose of the accountants' advice had been clear. ***The society had looked to the accountants for technical accounting advice whether it could use hedge accounting in order to implement its proposed business model within the constraints arising by virtue of the regulatory environment, and the accountants had advised that it could. That advice had been negligent. It had had the effect that the society had adopted the business model, entered into further swap transactions and had been exposed to the risk of loss from having to break the swaps, when it had realised that hedge accounting could not in fact be used and the society had been exposed to the regulatory capital demands which the use of hedge accounting had been supposed to avoid. That had been a risk which the accountants' advice had been supposed to allow the society to assess, and which their negligence had caused the society to fail to understand. It followed that the society had suffered a loss which fell within the scope of the duty of care assumed by the accountants, having regard to the purpose for which they had given their advice about the use of hedge accounting***…" (Emphasis Court's)

60. In **Meadows v Khan [2021] UKSC 21** Lords Hodge and Sales stated at paragraph 41:

"41. "In addressing the scope of duty question in the context of the provision of advice or information, the court seeks to identify the purpose for which that advice or information was given. Where the claimant has asked for advice about a risk or about a proposed activity which involved that risk, the court asks: 'what was the risk which the advice or information was intended and was reasonably understood to address?'."

61. The Third Defendant in submissions stated that the only retainer contract that existed in this case was outlined in the letter issued to the Third Defendant by the First Defendant on 15 September 2015. The Third Defendant also relied on the Claimant's response in cross-examination that the "instructions to act" which she referenced at paragraph 12 of her Statement of Case was in relation to the authorisation letter as well as her statement that prior to 30 September 2015 the Third Defendant was not her attorneys. This defendant submitted that the Claimant was neither their client nor the Second Defendant's client.

62. The Court rejects the Third Defendant's submission that the advice tendered to the First Defendant with regard to the confirmation that the subject land had all approvals was not meant for the Claimant. The assertion that neither the Second nor Third Defendant owed a duty of care towards the Claimant is quite frankly absurd. The Second Defendant prepared the deed of conveyance for the subject property and the Third Defendant's firm was chosen because of its presence on the Bank's panel of attorneys. Ms Seemungal testified that after signing the Personal Credit Agreement the Bank indicates to the customer that it maintains a panel of attorneys and the customer has the option to choose from the panel or retain their own attorney. If they choose to latter all documents will be subject to the review by an attorney on the bank's panel. Ms Seemungal further testified that the Claimant chose the Third Defendant after she was given the options of attorneys on the panel and she stated that Ms Oliver acted behalf of the Bank and the Claimant.

63. The deeds executed on the 30 September 2015 were both prepared by the Second Defendant, who was a consultant at the time of the Third Defendant. Although the Third Defendant submitted that the Bank was their client, the Bank was not a party to the Deed of Conveyance which was executed. Ms Seemungal's evidence established that the Claimant elected to use the Third Defendant and thereafter the First Defendant wrote to the Third Defendant and issued instructions.

64. The Third Defendant stated that it certified that the subject property was fit for building (as opposed to residential) purposes and this was done for the exclusive purpose of assisting the First Defendant in determining the sufficiency of the security to be provided for the sums advanced and that such information was not intended for Ms. Garrette. There was no adduced evidence to establish that the land could be used for building but not residential purposes and the argument advanced was yet again disingenuous.

65. Based on the factual matrix as it unfolded in these proceedings, the Second and Third Defendant were requested by the letter of 15 September 2015 by the First Defendant to confirm that, *inter alia*, "the mortgaged property (land only) has been approved by the relevant authorities for building purposes".

66. The Court with certainty finds that the Second and Third Defendants acted on behalf of the Claimant and the First Defendant. The Third Defendant's position that the Claimant was not its client or Ms Oliver's client is disappointing. Attorneys-at-law who are on the panel of financial institutions enjoy lucrative positions of privilege. They often get significant work to prepare both the conveyance and the mortgage when customers elect to buy property. The election to use an Attorney on the institution's panel is often more convenient and very often discounts are offered on the mortgage fees if one of the panel attorneys does both the conveyance and the mortgage. The position outlined by the Third Defendant should cause alarm bells to ring in the minds of those bank customers who elect to use their services to prepare their conveyances when their acquisition is to be secured by way of a mortgage, given that the Third Defendant, seemingly holds the view that in such a circumstances, they act primarily on behalf of the bank. Based on the Third Defendant's position the phrase "Buyer beware" should resonate in the minds of those who are similarly circumstanced to Claimant and have elected to use the Third Defendant's services as by self-proclamation they shockingly see their duty as being primarily towards the bank. The position adopted by the Third Defendant poignantly highlights the

conflict of interest which frequently arises when the Attorneys on the banks' panels deal with both the conveyance and the mortgage as it appears that with complete disregard for the provisions of the Legal Profession Act Chap 90:03, it is more convenient to sacrifice the individual purchaser so as to preserve the lucrative relations with the financial institutions.

67. The Court considered the letter dated 4 February 2016 issued by the Second and Third Defendant which confirmed, *inter alia*, at clause (vi) that, "the mortgaged property (land only) has been approved by the relevant authorities for building purposes". The evidence of the Second Defendant categorically confirmed that she acted for both the First Defendant and the Claimant but it appears that the First Defendant was her primary responsibility. She also accepted that she had an obligation to ensure that the subject property had all approvals. Ms Oliver candidly testified that she did not seek from the regional corporation information as to whether the subject land had approvals. This occurred primarily as a result of her interpretation of the letter of 28 March 2014 as she formed the view that the said letter outlined that the property had the approvals. Ms Oliver however accepted that the letter was not issued by the regional corporation and its approval was needed for building upon the subject land. The witness also accepted that the absence of this approval affected its marketability.

68. This Court based on the evidence adduced, finds as a fact that the Second and Third Defendants owed a duty of care to the Claimant and to the First Defendant. They had to confirm the title to the subject property and had to ensure that all of the necessary statutory approvals were in place so as to facilitate the construction of a residential home and to ensure that the marketability of the subject land was not adversely affected by the absence of statutory approvals.

69. The confirmation of 4 February 2016 by the Third Defendant was instrumental and paved the way for the closing of the transaction as it indicated that the approvals were in place.

Ms Seemungal stated in cross-examination that if the Bank knew that the land lacked all the approvals, it would not have proceeded with the transaction.

70. As a direct result of the Second Defendant's decision there was a "fruition of the risk". The information conveyed was inaccurate as the subject property did not, at the time it was purchased by the Claimant, have the requisite statutory approvals from the regional corporation to facilitate the construction of a residential building thereon. To date the Claimant has been unsuccessful in obtaining the required approval and she cannot access a building loan using the said land as "security" from any institution due to the absence of the relevant statutory approvals.

71. The Court is consequently resolute in its view that the Second and Third Defendants were negligent as the Second Defendant who acted under the Third Defendant's umbrella proffered inaccurate advice which ultimately led to the First Defendant providing a mortgage facility to the Claimant who bought the subject property with the expectation that she would be able to construct a dwelling house upon same.

72. Having determined that the Second and Third Defendant are liable in negligence, the Court must now consider the measure of damages which should be awarded to the Claimant as against the Second and Third Defendants. The ultimate objective is to ensure that the Claimant is placed back in the position she would have been in if the inaccurate advice was not tendered.

73. In determining this issue the Court considered the recent Privy Council decision of **Charles Lawrence and Associates v Intercommercial Bank Limited [2021] UKPC 30**. It is important to understand the factual matrix of this decision. This case dealt with the loss recoverable by a lender consequent on a valuer's negligent valuation. The valuation was of land that the borrower's guarantor was providing as security, by means of a mortgage over the land, for the loan. The guarantor had no legal title to the land that was being mortgaged

so that the land was of no value to the lender. That is, the security was worthless. The lender recovered a substantial sum of damages by way of settlement of its claim against its attorneys for negligence in relation to the guarantor's defective title to the land. In assessing the damages for the negligent valuation, the central question the Board had to determine was how precisely the scope of duty principle applied to the given facts.

74. In *Charles Lawrence and Associates* (supra) the Bank was approached by a company (Singapore) and another company (Rafferty) was to be the guarantor of the loan and there was to be a mortgage of land owned by Rafferty as security for the loan. Rafferty instructed the appellant to provide a valuation of land for the purposes of the proposed mortgage. Lawrence produced a report dated 10 December 2008 in which the land was valued at $15m. Lawrence made clear in the report that the valuation assumed, amongst other matters, that a good marketable title could be shown, that planning permission would be granted for commercial development of the land, and that the land was free from all encumbrances with vacant possession. In February 2009, in reliance on that valuation report, the Bank loaned $3m to Singapore with Rafferty as guarantor and with a mortgage of the Land as security for the loan.

75. Both Singapore and Rafferty defaulted on the loan without making any repayments. As a result, the Bank appointed a receiver to enforce the security but the highest bid it received in July 2010 was for only $2m. On 23 March 2012, the Bank issued a claim against Lawrence seeking damages in the tort of negligence for a negligent valuation report. Subsequently, the Bank found out that Rafferty did not in fact have good title to the Land. The mortgage of the land was therefore of no value. On 25 January 2013, the Bank brought an action against its own conveyancing attorneys, for negligent failure to investigate title properly and that claim was eventually settled in 2014.

76. The Court of Appeal in upholding the trial judge's decision decided that the appropriate rate of interest to be added was the statutory rate of 12% (per annum) not the contractual rate of interest of 15.75% (per annum). Secondly, there should have been a 20% reduction

for the Bank's contributory negligence in not sending its own officers to inspect the land as that inspection would have revealed the presence of the occupiers.

77. The appellant appealed the Court of Appeal's ruling and in assessing damages, the Board accepted the appellant's argument and stated at paragraph 10 and 11:

> "10. Lawrence has appealed, as of right, to the Board. The central submission of Ramesh L Maharaj SC, counsel for Lawrence, is that the decision of the Court of Appeal (and of the trial judge) is incorrect as a matter of law because it is contrary to the "scope of duty principle" established in *SAAMCO* and recently explained in *Manchester Building Society v Grant Thornton UK LLP* and *Meadows v Khan*. He submits that the loss suffered by the Bank can, and should properly, be split into two distinct losses. First, the loss suffered because the Land was overvalued as being for commercial use rather than residential use (assuming that there was good title to the Land); and, secondly, the loss suffered because the title to the Land was defective. He submits that the second loss was outside the scope of Lawrence's duty of care and therefore irrecoverable. It was outside the scope of Lawrence's duty of care because it was no part of the job of Lawrence to investigate title to the Land. That was the job of the conveyancing attorneys.
>
> 11. Consequent on that submission as to the correct law, Mr Maharaj submits that the correct calculation of the damages should be as follows. One should take the loan sum paid of $3m and deduct the residential value of the land at the date of the loan (assuming that there was good legal title to the Land) which was $2,375,000. That gives a sum of damages for the loss claimed by the Bank of $625,000. One should then deduct from that the 20% contributory negligence of the Bank. Applying section 25 of the Supreme Court of Judicature Act (Trinidad and Tobago), one should then add interest of 12% on the damages from the date of the loss to the date of judgment. According to Mr Maharaj, that would yield a sum of $833,204

which differs from the Court of Appeal's assessment (of $2,079,379) by $1,246,175. Interest on the sum of $833,204 would then accrue at the applicable rate (of 12%) from the date of judgment before the High Court (16 October 2014) to the date of payment."

78. The Claimant has indicated that she is no longer desirous of retaining possession of the subject property. The Court also notes that due to the lack of the relevant building approvals the marketability of the land may be affected. There is a possibility that a the land may be worth less than what the March 2015 valuation ($375,000.00) stated as that valuation was based on the assumption that the land had all relevant approvals. If the Second and Third Defendant had provided accurate advice in relation to the approvals, the Claimant may not have proceeded with the acquisition and she would not have been placed in her current circumstance where she is unable to build her house. As per the Board in *Charles Lawrence and Associates* (supra) at paragraph 18, the scope of the Second and Third Defendants' duty does extend to the recovery of that loss.

79. Based on the evidence the Claimant has acquired the subject property and same has no title defect but the land is affected by the lack of approvals so that no residential building can be erected thereon at this time. The Court also notes that the Claimant has not adduced evidence to establish that she had the requisite resources or had in place financing arrangements which would have facilitated the construction of a dwelling house upon the subject property since she acquired same. In the circumstances the Claimant has not adduced the relevant evidence to properly establish the loss which has flowed from the fact that she has been unable to build on the subject property.

80. In its attempt, however, to place the Claimant in the position that she would have been had the tort not been committed, the Court feels that the appropriate order would be to require a valuation of the subject property which takes into account the fact that the subject property does not currently have the required approval from the Regional Corporation. The Claimant must provide the Court with a list of proposed valuators within 14 days of this judgment and the Court would proceed to appoint a valuator. The cost of the said report

would be borne by the Second and Third Defendants. Once the valuation is obtained, the difference (if any) between the price paid by the Claimant and the current value of the land in its current state must be paid, within 28 days of the said determination, to the Claimant by the Second and Third Defendants.

81. The Court further holds the view that the Second and Third Defendants must also bear all the costs associated with obtaining the required approvals including the cost associated with the submissions of the plans for approval in the sum of $4,000.00.

Fourth Defendant:

82. As against the Fourth Defendant the Court has to determine whether the Fourth Defendant fraudulently misrepresented to the Claimant that the subject land had the relevant approvals. In **Derry v Peek (1889) 14 App Cas P 337**, the leading case on fraudulent misrepresentation/deceit, Lord Herschell at page 374 opined:

> "Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false …. One who makes a statement under such circumstances can have no real belief in the truth of what he states to prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth."

83. The Fourth Defendant in cross-examination testified that it was his understanding that based on the 28 March 2014 letter, it meant that the subject property had the outline approvals and not all the approvals for building as put to him by the Claimant in cross-examination. Holding this belief he related same to the Claimant and presented her with documents in relation to the land such as the 2014 status letter, the deed and the taxes paid for the land. There was no representation made by the Fourth Defendant that the subject

land had all approvals for building. To the Fourth Defendant the status letter meant that the land had outline approval and it was on this basis that the parties executed the agreement for sale on 8 September 2015. This Court having seen and heard the Fourth Defendant felt that his evidence had the ring of truth and he was unshakeable during cross-examination.

84. During cross-examination, the Claimant said that at the meeting at the Fourth Defendant's attorney's office, the only questions she asked was with regard to approvals for building and the WASA Clearance. She also said that the Fourth Defendant told her that there was approval for building and she would have no problems with respect to building. However, she accepted that these assertions were not contained in her witness statement.

85. In addition, the Fourth Defendant stated in submissions that there was no evidence that he was required to produce any approval by the regional corporation by attorneys for the First Defendant with respect to his mortgage with them or in relation to the sale to the Claimant.

86. The Court noted that the Fourth Defendant did not withhold the status letter from the Claimant. The Court accepts the Fourth Defendant's evidence and finds as a fact that he did not tell the Claimant that she could build but he told her he had outline approval. Based on the evidence the Court holds the view that the Fourth Defendant did not engage in any fraudulent transaction nor did he misrepresent to the Claimant. The Fourth Defendant is duty bound to disclose all latent defects in his title and the Claimant in pursuit of her self-interest had a duty to conduct the necessary searches to ensure that the land had the relevant approvals.

87. This Court therefore holds that the claim as against the Fourth Defendant for fraudulent misrepresentation must be and is hereby dismissed and consequently the Claimant's claim for rescission of the sale is also dismissed.

88. In light of the aforementioned, the Court hereby orders the following:

a. The claim as against the First Defendant is hereby dismissed.

b. The claim as against the Fourth Defendant is hereby dismissed.

c. The Court orders that the Second and Third Defendant bear the costs associated with any application being made to obtain the requisite approvals.

d. The Court orders that the Claimant must provide the Court with a list of proposed valuators within 14 days of this judgment and the Court would proceed to appoint a valuator. The cost of the said report would be borne by the Second and Third Defendants. Once the valuation is obtained, the difference (if any) between the price paid by the Claimant and the current value of the land in its current state must be paid, within 28 days of the said determination, to the Claimant by the Second and Third Defendant.

e. The parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE

Assisted by Judicial Research Counsel Liam Labban.