**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

H.C.A. No. 601 of 1991

**BETWEEN**

**MAY JOSEPHINE HUMPHREY**

**Plaintiff**

**AND**

**TRINIDAD AND TOBAGO NATIONAL PETROLEUM MARKETING LIMITED**

**First Defendant**

**AND**

**SECURICOR SERVICES LIMITED**

**Second Defendant**

**Before The Honourable Madam Justice Dean-Armorer**

**Appearances:**

Mr. Fyard Hosein S.C. and Mr. Rishi Dass for Plaintiff
Mr. Gregory Delzin for First Defendant
Mr. Frederick Gilkes for Second Defendant

# ***JUDGMENT***

## ***Introduction***

1. The Plaintiff, Josephine May Humphrey, became the owner in fee simple of premises situate at # 122 , 124 and 126 Duke St. Port of Spain ( "*the subject premises")* when the property was conveyed to her by Deed dated the 1st November, 1961, by Humphrey and Company Limited.

2. In 1963, the Plaintiff, by Deed , granted a lease of 30 years to Shell Trinidad Ltd. The residue of the lease was later assigned to the first Defendant, Trinidad and Tobago National Petroleum Marketing Co. Ltd. *( "N.P.").*
3. In 1986, Mrs. Nicole Fuertado-Toby Corporate Secretary of N.P. held discussions with the Plaintiff with a view to surrendering the residue of the lease. It is a fact in issue in this case whether the discussions ended in a binding agreement.
4. In 1991, despite the protestations of the Plaintiff and her agents, N.P. purported to assign the residue of the lease to Securicor Services Ltd., the second Defendant, *("Securicor").* The Plaintiff, by these proceedings, has challenged the validity of the assignment and has sought specific performance of the alleged oral agreement for surrender.

***The Pleadings and Brief History of Proceedings***

1. These proceedings, were instituted by a Generally indorsed Writ of Summons filed on 18th February, 1991. The Writ of Summons was amended pursuant to Order 20 rule 1 ***RSC*** and later re-amended on the 24th March, 1998, pursuant to the leave of the Honourable Master Doyle.
2. The Plaintiff's Statement of Claim was filed 19th March, 1991 and amended pursuant to the Order of Master Doyle on 24th July, 1998.
3. The first Defendant's Defence was served on 10th June, 1991.
4. The Plaintiff filed her Reply on 12th October, 1995. The Reply was amended with my leave on the 12th February, 2004, at the commencement of the trial and eventually re-amended by consent on the 13th February, 2004.
5. On 24th July, 1998, Securicor Services Limited was joined as the Second Defendant in these proceedings.
6. Securicor Services Limited filed its Defence and Counterclaim on the 29th September, 1998.
7. The Plaintiff, in response to Securicor's Defence and Counterclaim, filed her Reply and Defence to Counterclaim on 16th November, 1998. This was amended pursuant to my order on the 12th February, 2004.

8. In answer to a request by the second Defendant, the Plaintiff supplied further and better particulars of her Amended Statement of Claim on 22nd February, 1999.

9. By the date of the commencement of the trial, the following pleadings were before the Court:

   (i) A Re-Amended Generally Indorsed Writ;

   (ii) An Amended Statement of Claim, amended Pursuant to the Order of Master Doyle on 24th July, 1998.

   (iii) Further and Better Particulars of the Amended Statement of Claim

   (iv) Defence of the first Defendant.

   (v) Defence and Counterclaim of 2nd Defendant

   (vi) Amended Reply and Defence to Counterclaim Amended pursuant to my order of 12th February 2004 (in response to the Defence of the second Defendant.

   (vii) Re-Amended Reply in response to the Defence of the first Defendant.

10. By ***the Re-Amended Writ***, the Plaintiff made the following claim as against the first named Defendant:

   *1. A declaration that the oral agreement between the Plaintiff and this Defendant made sometime in 1986 whereby this Defendant agreed with the Plaintiff to surrender to the Plaintiff lease made between the Plaintiff and this Defendant on the 24th June, 1963 and registered as No. 9529 of 1963 (hereinafter referred to as "the said lease" with respect to that property know as 122, 124 and 126 Duke Streets, Port of Spain is a binding agreement between the Parties.*

   *2. Specific performance of the above mentioned agreement.*

   3. *An order that this Defendant do execute a Deed of Surrender of the said lease within 21 days of the Court's*

*Order and in default that the Registrar of the Supreme Court do execute the same on behalf of this Defendant.*

*4. An injunction restraining this Defendant from assigning Or sub-leasing to anyone the said lease to the said Property.*

*5. Damages for breach of contract in lieu of or in addition to specific performance.*

11. As against the Second Named Defendant, the Plaintiff has claimed *:*

*6. Damages for trespass;*

7. *An injunction restraining this Defendant from assigning or subleasing to anyone assignment of lease dated 4th February, 1991 registered as No. 1963 of 1991 made between the first named Defendant of the one part and the second named Defendant of the other part (hereinafter referred to as "the purported assignment of lease") and or from remaining in or continuing in occupation thereof.*

*12.* As against both Defendants:

*8. A declaration that the purported assignment of lease is null and void and of no effect.*

*9. An order setting aside the said purported assignment of lease;*

10. *Mesne profits;*

11. *All necessary and consequential accounts directions and* enquiries."

13. Essentially, the Plaintiff's contention in her Amended Statement of Claim consists of the following :

- That an oral agreement for the surrender of the lease was formed between herself and N.P.; that her son, John had been her agent and that Mrs. Toby, had been acting for N.P.
- That in consideration of the Plaintiff foregoing rents due to her , N.P. would prepare the deed of surrender for the execution of the parties.

- That the Plaintiff held several meetings with representatives of N.P., but that N.P. refused to give effect to the agreement and contended that the agreement would have to be varied to require the Plaintiff to pay compensation in the sum of $300,000.00.
- That the Plaintiff refused to agree to a variation and indicated her intention to rely on clauses 2(e) (i) and 3(c) of the Deed of Lease.
- That the first Defendant assigned the residue of the lease to the second Defendant on the 4th February, 1991 that the Second Defendant now wrongfully occupied the subject premises.
- That because of the offer of N.P. and the resulting agreement, the Plaintiff has had dealings with the property and has acted to her detriment.

14. The essence of ***the Defence of the First Defendant*** is a denial that an agreement for the surrender of the lease had ever been made. The First Defendant further denies that the Plaintiff has acted to her detriment. In addition to its denials, the First Defendant advances the arguments that no sufficient note or memorandum was signed by the First Defendant, as required by S.4 of the ***Conveyancing and Law of Property Ordinance***. The First Defendant also mounted a plea of limitation.

15. In its ***Defence and Counterclaim*** the Second Defendant, does not admit the agreement to surrender, as alleged by the Plaintiff. The Second Defendant denies that its occupation of the subject premises was wrongful and joins the First Defendant in advancing an argument on the basis of S.4 of the ***Conveyancing and Law of Property Ordinance***.

16. In its ***Counterclaim*** , the Second Defendant refers to the deed of assignment dated the 4th February,1991 by which the First Defendant assigned to the second Defendant the residue of the term of 30 years.

17. The Second Defendant refers to the term at clause 4(b) of the Lease, which clause entitles the lessor to a renewal of the lease for a further term of 20 years. The Second Defendant contends that the Plaintiff has failed or refused to renew the lease for a further term. On the ground of matters pleaded in its Counterclaim, the

Second Defendant seeks declaratory relief as to its entitlement to have the lease renewed for a further term of 20 yeas and an order requiring the Plaintiff to renew the lease.

18. In her ***Re-amended Reply***, the Plaintiff invokes the doctrine of part performance and denies that she is barred by S.4 of the ***Conveyancing and Law of Property Ordinance*** to bring the instant action. She contends further that the alleged oral agreement constituted a promise by the First Defendant, which was intended to create legal relations between herself and First Defendant. The Plaintiff contends that she acted on the promise which was binding on them. The Plaintiff contends further that as a result of the agreement to surrender, she acted to her detriment.

19. In her ***Amended Reply and Defence to Counterclaim***, the Plaintiff, in answer to the Second Defendant's claim to an entitlement to a further 20 years , the Plaintiff alludes to the letter, which, written on her behalf , sought to inform the Second Defendant of the impropriety of the assignment. In the alternative the Plaintiff pleads that the counterclaim is statute-barred.

***The Evidence***

1. The ***Evidence for the Plaintiff*** consisted of the oral testimony of the Plaintiff's son and agent, Mr. John Humphrey, as well as her grand-daughter, Joanne. Additionally, the evidence for the Plaintiff included statements of the Plaintiff herself and of Nicole Fuertado-Toby.

2. Mr. John Humphrey testified as follows :

- He was the son of the Plaintiff, who was at the time of the trial in her late 90's. Mr. Humphrey testified further that, the Plaintiff became the owner of the subject premises in 1961, when ownership was transferred from Mr. Humphrey's father to the Plaintiff. Mr. Humphrey testified further that in 1963 his mother the Plaintiff leased the premises to Shell.
- In his oral evidence, Mr. Humphrey told the Court of his letter dated the January, 1986 to the First Defendant, N.P. In this

letter, Mr. Humphrey wrote on behalf of his parents and appealed for either a review of the terms of the lease or that N.P. exercise its option to purchase at a fair market price.

- Mr. Humphrey told the Court of the cottage industry carried on by his daughter at his Newbury Hill home in 1986. At this time, according to Mr. Humphrey, he received a telephone call from Mrs. Fuertardo-Toby, who represented to him that N.P. wished, at that time, to relinquish the lease.
- Mr. Humphrey told the Court of collaboration with his siblings and of the agreement with Mrs. Toby that N.P. would surrender the lease, that N.P. would prepare the Deed and that there would be no expense to either party.
- Mr. Humphrey told the Court of subsequent discussions with Mr. Jeffrey Herrera. He testified that the subject premises had been abandoned and that when he subsequently observed activity on the subject premises, he called N.P. to enquire what had transpired.
- Mr. Humphrey told the Court that the Plaintiff continued to accept rents after her conversation with Mrs. Toby and only refused them after the assignment to Securicor. He stated that he had received an offer for the sale of the premises in the sum of $1.5 million.
- Mr. Humphrey was shown a letter dated 1st October, 1987 from Mr. Herrera to the Plaintiff. In this letter, which was tendered into evidence as "*JH7*," Mr.Herrera referred to telephone conversations between himself and Mr. Humphrey. Mr. Herrera wrote further:

> *"After due consideration of the opportunities presented by the relinquishment of the service station dealership by Burmac Limited, we have decided to retain, at least for the time*

*being possession of premises…”.*

- Mr. Humphrey told the Court that he responded to the letter by speaking to Mr. Herrera and that as a result of this conversation, Mr. Herrera, visited the Plaintiff.
- Mr. Humphrey told the Court that on account of the Plaintiff's illness Mr. Herrera's visit took place in the Plaintiff's bedroom with Mr. Humphrey and his brother Keith present. On this occasion, Mr. Herrera indicated N.P.'s willingness to relinquish the lease for payment of compensation of $300,000.00.
- Mr. Humphrey told the Court that notwithstanding his reference to conversations with Mrs. Toby and the plans of his daughter, Joanne for the expansion of her business, Mr. Herrera was adamant that N.P. would surrender the lease only if the Plaintiff paid compensation in the sum of $300,000.00.
- Mr. Humphrey told the Court that Mr. Herrera visited a second time. Mr. Humphrey referred to a letter dated 21st September, 1990 from Mr. Herrera to the Plaintiff as well as a letter dated the 25th January, 1991 from Mr. Herrera to Mr. Lennox Sankersingh. This letter was tendered in evidence as *“JH8”*. By *“JH8”* Mr. Herrera informed Mr. Lennox Sankersingh that N.P. had agreed to assign the residue of the lease to Securicor Services Limited.
- Mr. Herrera also informed Mr. Lennox Sankersingh on behalf of N.P. of their willingness to meet with Mr. Humphrey on 28th January, 1991.
- After having received the letter of Mr. Herrera *(JH8),* Mr. Lennox Sankersingh wrote to the General Manager, Securicor, informing him of the alleged agreement to surrender.
- Mr. Humphrey told the Court of a meeting at N.P's Office Sealots. He recounted that together with Mr. Lennox Sankersingh and Mr. Max Ferreira, he accompanied his mother, the Plaintiff to the meeting. Mr. Humphrey testified that he presented their position to the

incumbent CEO, Mr. George Sun, asking the latter to execute the deed of release. Mr. Humphrey recounted Mr. Sun's reluctance in response to his request that Mr. Sun check his records.

- Mr. Humphrey testified that the residue of the lease was eventually assigned by N.P. to Securicor. He admitted that the Plaintiff had continued to accept payments of rent until the assignment.
- Under cross-examination, Mr. Humphrey admitted that he never wrote to N.P. after 1986 for the purpose of confirming the agreement which the Plaintiff allegedly made with N.P. for the surrender of the lease.
- Mr. Humphrey agreed with Learned Counsel for the First Defendant, that the alleged agreement was formed by two conversations and that in a matter of months Mr. Herrera had adopted a position quite different from Mrs. Toby's.
- Mr. Humphrey also accepted under cross-examination that it is likely that his meeting with Mr. Sun took place in 1991 and not in 1987.
- In cross-examination, learned Counsel for the First Defendant put to Mr. Humphrey that all that had been agreed on behalf of N.P. was that there would be an agreement to surrender subject to compensation; that N.P. would prepare a deed of release, which would be subject to the completion of negotiations. Mr. Humphrey disagreed with the suggestion.

2. Joanne Ferreira , the grand-daughter of the Plaintiff also gave evidence, as follows:

- Ms. Ferreira is the Plaintiff's grand-daughter and the daughter of Mr. Humphrey.
- She told the Court that she was a trained artist and held her own factory for the production of hand-painted clothing and that in or around 1986-1987, her grandmother told her that she was getting the subject property, which would

have enabled this witness to set up her factory. She told of her father's visit to the subject premises for the purpose of taking measurements.

- Joanne told the Court that she had been living in cramped conditions with staff and grandparents. She stated further that she had orders from Barbados and that her grandmother offered her the property on Duke Street, to facilitate the expansion of her factory.
- Joanne told the Court of the loan of $40,000.00 which she obtained from her grandmother, the Plaintiff. She gave evidence of her two trips to New York, during which she purchased stocks and equipment. These were stored at Mr. Humphrey's home at 16, Newbury Hill. Her stated intention was to use the newly purchased machines at the subject premises.
- In respect of the loan Ms. Ferreira testified that she intended to repay the Plaintiff when the proposed factory began to earn income.

3. Attorney-at-Law, Mr. Lennox Sankersingh also testified on behalf of the Plaintiff

- Mr. Sankersingh gave evidence as to his professional relationship and personal friendship with the Plaintiff and Mr. Humphrey.
- He was shown the exhibits *"JH9, JH10, JH12, JH14, JH15 AND JH16."* These documents were tendered into evidence through Mr. Lennox Sankersingh by consent.
- Mr. Sankersingh told of his interaction with Mr. Herrera concerning the subject premises and told the Court of a meeting which was held at the Plaintiff's home in early 1990. Those present at the meeting were: the Plaintiff, Mr. Humphrey, Mr. Lennox Sankersingh and Mr. Herrera. Mr. Sankersingh testified that he told Mr. Herrera of NP's agreement to surrender the lease, without conditions.
- Mr. Sankersingh quoted Mr. Herrera as having said that NP had spent a lot of money on the premises.
- Mr. Sankersingh told the Court that Mr. Herrera never expressly admitted or denied that there was an agreement for surrender.

4. ***Faizal Hosein***, testified in this matter on behalf of the Plaintiff. He established himself as an expert by his evidence that he practiced as a Government Valuator between the years 1975-1983 and had been in private practice for more than 21 years.

- He testified that he had visited the subject premises on the 22nd February, 2004 but that he having been denied access, was restricted, in his evaluation to the external view of the premises.
- Mr. Hosein nevertheless prepared a Valuation Report with his opinion of a rental valuation. Mr. Hosein surmounted the hurdle of having been denied access by relying on an earlier valuation by Charles B. Lawrence and Associates for the gross space of the building, its capital value and its general description.
- Mr. Hosein expressed the view that the property would have fetched $1,797,169.00 rental over the last fifteen (15) years.

***5. The Statements of the Plaintiff and Mrs. Toby***. Included in the documentary evidence, is the hand written statement of Josephine May Humphrey. This document was tendered for the purpose of identification only. It was marked *"X"*. The hand-written statement of Mrs. Fuertado-Toby was tendered for identification and marked *"Y"*.

- Mrs. Josephine May Humphrey, in her hand written statement alluded to Mrs. Toby's telephone call in 1986 when the latter asked her whether she would be prepared to accept a surrender of the lease.
- Mrs. Humphrey wrote in her statement that Mrs. Toby told her that she would call when the Deed was ready, but that she (Mrs. Humphrey) never heard from Mrs. Toby again.
- Mrs. Humphrey's statement accords with the evidence of John Humphrey, in so far as they both recount Mr. Herrera's approach in 1987 and his subsequent offer in 1990 of surrender for compensation.
- Mrs. Humphrey's statement is also consistent with the evidence of Mrs. Joanne Ferreira, her grand-daughter, as to the loan of $40,000.00.

6. By Notice filed and dated 23rd October, 2002, the Plaintiff sought the Court's leave to admit the statement of Rosalie Fuertado-Toby. The handwritten statement of Mrs.

Rosalie Fuertado-Toby was marked "y" for identification. After describing her role in N.P., Mrs. Toby recounted the events which took place at management meetings in 1986, when the subject premises were discussed. Mrs. Toby stated that it was felt at management meetings that N.P. would be required to pay a penalty for early surrender. Mrs. Toby stated that in late 1986 the Managing Director and the General Manager gave her the responsibility to negotiate a surrender of the premises from N.P. to Mrs. Humphrey. Mrs. Toby's evidence was that she telephoned Mrs. May Humphrey, who referred the matter to her son.

- Mrs. Toby's statement referred to a telephone conversation with Mr. Humphrey. She stated:

> "*I informed Mr. Humphrey that I would prepare the surrender and I did prepare same…….*"

Mrs. Toby recounts that at Manager's meeting it was suggested that the land must have been valuable if the Plaintiff would accept a surrender so readily. According to her evidence Mrs. Toby was instructed to defer executing the Deed and that if Mr. Humphrey called she should "stall" him. It is useful to set out Mrs. Toby's exact words:

> *"At one of the meetings at which all the line Managers and Assistant Managers were present in early 1987 one person made the point that if Mr. Humphrey wanted the property without paying anything, it must be valuable so there must be something the company could do with it. As a result I was told that the Company would defer executing the deed of surrender and if Mr. Humphrey called I should stall him and fix another date. I was asked not to tell Mr. Humphrey anything certainly not to tell him the Company was re-considering the decision to surrender……"*.

- The Plaintiff attempted to introduce a second statement signed by Mrs. Toby. Learned Counsel for both Defendants expressed strong objections to the reception of the second statement by the Court on the ground that the signature which it bore was

questionable. From the Court's records of the evidence, Learned Senior Counsel abandoned further efforts to have the statement received into evidence.

7. ***Evidence for the Defendants***

- The principal evidence for the first Defendant was that of Jeffrey Herrera .
- Mr. Jeffrey Herrera, testified on behalf of the First Defendant, N.P., with which he took up employment in 1985 as a Legal Assistant.
- He gave evidence that at the commencement of his employment he reported to the Head of Corporate Services, Ms. Fuertado-Toby.
- Mr. Herrera testified that in 1987 he was given responsibility for the Legal Department. He told the Court of changes within N.P. following the General Election of 1987. At this time he was required to report to Mr. Harold Cuffy, who became Managing Director. The company was re-organised and Mr. Herrera became responsible for Legal matters.
- He told of his encounter with Mr. Humphrey, pursuant to instructions from Mr. Cuffy to enquire whether N.P. had agreed to surrender the lease of the subject premises. Mr. Herrera testified that the premises had been occupied by Burmac which had given up the premises in March or April, 1987 saying that it was uneconomical to continue its business.
- Mr. Herrera testified that he spoke to Mr. Humphrey, who told him that there had been an agreement with N.P. to surrender the lease.
- This witness testified further that following discussions with the Managing Director, he, Mr. Herrera wrote the letter tendered herein as *"JH7"* and that thereafter nothing happened for two (2) years.
- Mr. Herrera testified that in the interim the premises were occupied by a lubricating oil company and that in or around the year 1989, N.P. began considering its options on account of the poor performance of the lubricating company.
- Mr. Herrera told the Court of the meeting which he arranged with Mr. Humphrey, with his mother and his brother present. According to his evidence, he proposed the surrender of the lease in return for compensation to be paid by the Plaintiff to N.P. for the buildings which had been constructed on the premises.

- Mr. Herrera testified that Mr. Humphrey responded by indicating that there was already in existence an agreement for surrender, with no costs to either side.
- Mr. Herrera testified that he responded to Mr. Humphrey by saying that he knew nothing of the alleged agreement.
- According to the evidence of this witness, there were at relevant time, discussions with Securicor Limited.
- Mr. Herrera told the Court of a meeting with Mr. Sankersingh and Mr. Humphrey, in which Mr. Herrera disclosed the possibility of an assignment to Securicor. At this meeting, Mr. Herrera raised the possibility of a surrender of the lease for compensation in the sum of $300,000.00. In response, Mr. Humphrey insisted that he already had an agreement.
- Mr. Herrera referred to the execution of the Deed of Assignment to Securicor for $300,000.00 in February, 1991.
- Under cross examination, Mr. Herrera admitted that he was unable to give evidence of what transpired in 1986.

8. The second Defendant , Securicor Ltd. called ***Mr. Sheldon Mendes***, who now resides in the United Sates of America. Mr. Mendes testified that in 1991, he had been the Executive Director of Neal and Massy Holdings and Chairman of its subsidiary, Securicor.

   - Mr. Mendes told the Court how he became interested in the subject premises. He recounted that Securicor had been looking for premises for its vehicle maintenance division.
   - He stated that the N.P. Service Station was not in use and that he was of the view that it would have been an ideal location.
   - Mr. Mendes volunteered that N.P. did not own the property, but had a 30 year lease, with an option to renew for twenty (20) years.
   - Mr. Mendes told the Court that N.P.'s response to his enquiry was that N.P. was prepared to assign their lease, on condition that Securicor was prepared to pay $300,000.00 to renovate the premises.
   - Mr. Mendes narrated his successful approach to the Board of Directors of Securicor, which approved an offer of $300,000.00 to N.P. According to the

evidence of Mr. Mendes, Securicor made the offer to N.P. on the 16th October, 1990.

- Mr. Mendes told of a subsequent meeting with N.P.'s Mr. Joseph Tesheira and Mr. Jeffrey Herrera, who advised that they had to meet with Mr. Humphrey.
- Mr. Mendes told of a subsequent meeting with Mr. Herrera. On this occasion, according to the evidence of Mr. Mendes, Mr. Herrera informed him that Mr. Humphrey was reluctant to pay $300,000.00 and that N.P.'s Board has approved the offer of Securicor.
- Mr. Mendes testified that Securicor eventually obtained the assignment of the lease on 4th February, 1991.
- In cross examination Mr. Mendes admitted that he received a letter from Mr. Lennox Sankersingh before the 4th February, 1991. In this letter, Mr. Sankersingh forewarned N.P. of a meeting between the Plaintiff and Mr. Sun on 5th February, 1991.
- Mr. Mendes also admitted that it was with full knowledge of the contents of Mr. Sankersingh's letter that he proceeded to sign the Deed of Assignment. Mr. Mendes also agreed with Senior Counsel Mr. Hosein, that upon signing the Deed of Assignment, he had been prepared to take the risk of bad title.

***9. Documentary Evidence***

The parties to this matter submitted a bundle of agreed documents comprising

- 4 Deeds.
- Valuation report of Charles B. Lawrence on which Mr. Faisal Hosein relied.
- 12 items of correspondence

The Four (4) Deeds are not in dispute. They serve however to delimit the outer boundaries of matters, which are in dispute in this case. They are:

- Deed of Conveyance dated the 1st November, 1961, whereby Humphrey and Company Limited conveyed the subject property to the Plaintiff. This Deed establishes the Plaintiff as the owner in fee simple of the subject property.
- The Deed dated the 24th June, 1963 whereby the Plaintiff conveyed a thirty (30) year lease to Shell Trinidad Limited.

By this Deed, the lessee, Shell Trinidad Limited agreed to pay the annual rent of $10,800.00, to be paid in monthly instalments of $900.00.

By paragraph 3 (b) of the Deed, the lessor, the Plaintiff covenanted to

*"……… permit the lessee at any time during the term hereby created to underlet or assign the demised premises……"*

By paragraph 4 (b) of the Deed the lessor conferred on the lessee an option to renew for twenty (20) years. It is stipulated in the Deed:

*"……that the lessor will on the written request of the lessee made three (3) months before the expiration of the term ………granted to it a lease of the demised premises for the further term of twenty (20) years……"*

- The Deed made on the 28th January 1991, assigning the lease to National Petroleum Marketing Company.
- The Deed of 4th February, 1991 whereby the National Petroleum Marketing Company assigned its rights to Securicor Limited.

9. ***Letters tendered in evidence:***

- The letter dated 12th January, 1983 from Mr. Humphrey to Mr. Talma tendered in evidence as *"J.H.6."* By this letter, Mr. Humphrey appealed for either a review of the terms of the lease or the exercise by the company of their option to purchase at a fair market price.
- The letter dated the 1st October, 1987 from Mr. Jeffrey Herrera to the Plaintiff was tendered in evidence as *"J.H.7."* The author of this letter referred to earlier conversations with Mr. Humphrey and declared as follows:

  *"After due consideration of the opportunities presented by the relinquishment of the service station dealership by Burmac……we have decided to retain at least for the time being possession of the premises………".*

- The letter dated 21st September, 1990 from Jeffrey Herrera to the Plaintiff demonstrates N.P.'s inclination at that time to surrender the lease for compensation. Mr. Jeffrey Herrera writes:

  > *"One possibility is to give up the property at or prior to the expiration of the current lease term with suitable compensation for buildings on site……"*

- Letter dated 29th October, 1990 from Mr. Lennox Sankersingh to the chairman of N.P. This letter seeks clarification, on behalf of the Plaintiff, of N.P.'s intention to assign the lease to Neal and Massy.
- By letter dated the 31st October, 1990, Mr. Lennox Sankersingh, writing on behalf of the Plaintiff referred to the history of the lease. On behalf of the Plaintiff, Mr. Sankersingh stated:

  > *"Sometime in 1986, your Mrs. Toby contacted Mrs. Humphrey and offered termination of the lease with no further obligation on the part of the lessor or lessee. Mrs. Humphrey shortly thereafter accepted this offer and requested Mrs. Toby to prepare the Deed of release. Most recently, your Mr. Herrera has been in contact with us indicating that N.P. is desirous of terminating the said lease but subject to suitable compensation".*

  Significantly, Mr. Sankersingh requested information:

  > *"We respectfully wish to get from you what is fair compensation".*

- By letter dated 29th November, 1990, Mr. Lennox Sankersingh again wrote to the Chairman of N.P. on this occasion . Mr. Sankersingh wrote to indicate the Plaintiff's strong objection to the assignment of the lease to Neal and Massy Limited.
- By letter dated 20th December, 1990 Mr. Jeffrey Herrera wrote to Mr. Sankersingh, indicating N.P. preparedness to surrender the lease for

compensation and their understanding that the Plaintiff was unwilling to pay compensation. Mr. Jeffery Herrera wrote:

> *"Consequently we are considering our options under the terms of lease originally made between your clients and Shell Trinidad Limited…".*

- By letter of 25th January, 1991 Mr. Jeffrey Herrera again wrote to Mr. Lennox Sankersingh. In this letter the Plaintiff was invited to a meeting on 28th January, 1991 at the Sealots Office. By this letter, Mr. Herrera advised the Plaintiff of their assignment of the residue of the lease to Securicor Service Limited.
- By letter of the 30th January, 1991, Mr. Lennox Sankersingh warned the General Manager of Securicor, that it would be improper for N.P. to attempt to assign the lease.
- By his letter of 20th October, 1992, Mr. Lennox Sankersingh responded on behalf of the Plaintiff to a request for a renewal of the lease. Mr. Sankersingh informed the Manager of Securicor that their company was viewed as a trespasser on the subject premises.

10. In the course of the evidence, learned Counsel for First Defendant, sought to introduce a file note under s.39, ***Evidence Act***.

In spite of objections on behalf of the Plaintiff. I have exercised my discretion to admit this file note for the truth of its contents. It is useful to set out the full text of the file note

*File Note*

*Re: Service Station situate at 122 Duke Str., Port of Spain (Formerly occupied by Burmac Ltd.)*

1. *"The land owned by May Josephine Humphrey.*
2. *The property is leased to NP. The Lease expires in 5 years time i.e. on the 31st December, 1992 with an option to renew for 20 years on 3 months prior*

*written notice.*

3. *Burmac Limited has given up the premises because the gallonage was low.*
4. *I was requested by the Sales Manager to find out whether Mrs. Humphrey would allow us to give up the station without a cost to us.*
5. *I spoke to Mrs. Humphrey on 2nd June, 1987 who said she would like to have back the premises but all these matters are handled by her son the Minister of Works, Settlement and Infrastructure the Honourable Mr. John Humphrey. Further they were concerned as to whether NP wanted to be paid for the release of the property. She offered to call him for me and get his views. I spoke to her again and she informed me that they would like us to prepare the release.*
6. *The Honourable Mr. John Humphrey called me later on and explained that they would like to have the property released- both parties not requesting any payments – NP to prepare legal documents and they will sign them. He also pointed out that the family had wanted the property for some time but his father had made what the considered a bad arrangement by tying up the property for 50 years.*

*Sgd. R. Feurtado-Toby (Mrs.)*

*3rd June, 1987".*

***Issues:***

1. The first issue which arises in this case is whether, hearing regard to the evidence the Plaintiff has succeeded in proving on a balance of probabilities that there was an agreement between Mrs. Humphrey and N.P. for the surrender of the subject premises.

2. If I find for the Plaintiff on this first issue, I must then consider whether the limitation period operates to prevent the Plaintiff from seeking to enforce the agreement.
3. If the Plaintiff succeeds on that issue, the Court would then be required to consider whether the enforceability of the agreement is precluded by the provisions of the ***Landlord and Tenant Ordinance*** and the ***Conveyancing and Law of Property Ordinance*** .
4. My answer to the third issue depends on my findings on the argument of Learned Counsel and Second Defendant that the provisions of the ***Landlord and Tenant Ordinance*** being a special provision ought to prevail over the more general provisions of the ***Conveyancing and Law of Property Ordinance.***
5. In the event that this submission is rejected, I must consider whether there had been part performance by the Plaintiff, so as to enable her to claim the exception under s.4 of the ***Conveyancing and Law of Property Ordinance*** and /or that the surrender was by operations of law under s. 10 of the ***Conveyancing and Law of Property Ordinance***.
6. Regardless of my finding on item #4 hereinabove, I would then be required to consider whether the principles of promissory estoppel are applicable to the Plaintiff's situation.
7. Whether the principles of estoppel can operate in the face of a statutory provision.
8. Whether the said lease was validly assigned by the First Named Defendant to the Second Named Defendant by deed registered as No. 1963 of 1991.
9. If so, whether the Second Named Defendant did in the 17th September, 1992 properly exercise the option contained in clause 4 (b) of the said lease for the grant of a lease for the further term of 20 years after the expiration of the term of the said lease.
10. Whether the Second Named Defendant's action by way of counterclaim to enforce the said option is founded upon a simple contract without specialty which the Second Named Defendant is barred from maintaining after the expiration of 4 years from the exercise of such option. Or, whether the said action is founded

upon a specialty as defined by Section 3 of the ***Registration of Deeds Act*** (Chap. 19:06) and therefore maintainable at any time within 20 years after the exercise of the said option.

***Submissions and Law***

At the end of the oral evidence, the Court gave directions for the filing of written submissions. These, duly filed on behalf of each of the three (3) parties, were supplemented by oral submissions on 29th July, 2004 and 28th September, 2004.

Both Counsel for the Defendants relied on the provisions of s. 3 of the ***Landlord and Tenant Ordinance*** Ch. 27 No. 16 and ss.4 and 10 of ***Conveyancing and Law of Property Ordinance.***

***<u>Law</u>***

1. Learned Counsel, Mr. Gilkes referred to the ***Limitation of Personal Actions Ordinance*** Ch. 5 No. 6, is which s. 4 provides:

> *"………all actions founded upon any simple contract*
> *without specialty ……shall and may be commenced*
> *and sued for within four years next after the cause of*
> *such actions and not after……?"*

2. Section 3 of the ***Landlord and Tenant Ordinance*** provides:

> *"No lease for a term exceeding three (3) years*
> *or surrender of any land shall be valid as a*
> *lease or surrender, unless the same shall be*
> *made by deed duly registered; but any*
> *agreement in writing to let or surrender any*
> *land shall be valid and take effect as an*
> *agreement to execute a lease or surrender……"?*

3. In the case of ***Deryck Mahabir v Courtney Phillips,*** C.A. #30 of 2002, the Court of Appeal overruled earlier learning as to the effect of the limitation provisions

on the remedy of specific performance. At. p. 3 of his decision the Honourable Justice of Appeal Kangaloo wrote:

> *" the Learned Judge was apparently not referred*
> *to the authority of **"Talmash v Mugleston"** (1826)*
> *4 LJ 200 which decided that a suit for specific*
> *performance is within neither the words nor*
> *the purview of the statute Limitations………"*

4. Section 4 of the ***Conveyancing and Law of Property Ordinance*** provides:

> *"1) No action may be brought upon any contract for the*
> *sale or other disposition of or any interest in land,*
> *unless the agreement upon which such action*
> *is brought or some memorandum or note thereof*
> *is in writing ……*
>
> *2. This section applies to contracts whether made before*
> *or after the commencement of this Ordinance and does not*
> *affect the Law relating to part performance".*

5. Section 10 of the ***Conveyancing and Law of Property Act*** provides:

> *1. All conveyances of land or any interest therein are*
> *void for the purpose of conveying ……unless*
> *made by Deed……*
>
> *2. This section does not apply to ………*
>
> *b) surrenders by operation of Law"*

6. ***On the Meaning of Conveyance***

The meaning ascribed to the word "conveyance" in the 7th edition of ***Black's Law Dictionary*** is :

> *1. The voluntary transfer of a right or of property………*
>
> *2. The transfer of a property right that does not*
> *pass by delivery of a thing or merely by agreement.*
>
> *3. The transfer of an interest in real property from one*
> *living person to another by means of an instrument*

*such as a deed……"*

7. I must now consider whether as submitted by Learned Counsel for the Plaintiff s.4 of the ***Conveyancing and Law of Property Ordinance***, impliedly repeals s.3 of the ***Landlords and Tenants Ordinance.***

8. Courts have leaned against finding an implied repeal and if earlier and later statutes can reasonably be construed in such a way that both can be given effect to this must be done. See *Maxwell on the Interpretation of Statutes* (12th ed) p. 191. See too Benion, ***Statutory Interpretation***(2nd Ed.) p.204.

9. An implied repeal may however be found where the provisions of the later statute are so inconsistent with or repugnant to the earlier one that the two cannot stand together. See *Maxwell on the Interpretation of Statutes* (12th ed) p.193.

10. "*Repugnant"* in this context must mean totally contradictory . The two provisions are not totally contradictory . The earlier statute addresses the validity of "*surrenders"* only , whereas the later is concerned with the wider issue of "*contracts for sale or other dispositions of land"*. Both statutes appear to have the same underlying policy in respect of their particular subject areas. I therefore respectfully disagree with learned Senior Counsel for the Plaintiff that s.4 of the ***Conveyancing and Law of Property Ordinance***, impliedly repeals s.3 of the ***Landlords and Tenants Ordinance.***

11. Learned Counsel for the second Defendant submitted that the maxim of *"generalia specialibus non derogant"* is more appropriate. See *Maxwell on the Interpretation of Statutes* (12th ed) p. 197. In so far as there exists any inconsistency between s.3 of the ***Landlords and Tenants Ordinance*** and s.4 of the ***Conveyancing and Law of Property*** the latter being of general application to *"contracts for sale other dispositions in land……"* cannot derogate from a section of a statute which specifically provides for the validity of surrenders.

12. The only inconsistency between the two sections is the protection provided by the ***Conveyancing and Law of Property*** to the law relating to part performance.

    The rules relating to part performance are expressly preserved by s.4 of the ***Conveyancing and Law of Property.*** The same cannot be said for s. 3 of ***Landlords and Tenants Ordinance,*** which given its literal meaning, allows only

one exception. In one situation only is a surrender other than by way of Deed valid. That situation, by s.3 of the ***Landlords and Tenants Ordinance,*** presents itself where there is an agreement in writing.

An oral agreement that has been partly performed does not fall within the single exception of s.3 of the ***Landlords and Tenants Ordinance*** and would therefore be invalid.

I therefore agree with Learned Counsel for the second Defendant .The specific application of s.3 to surrenders cannot be derogated from by another statute of general application to contracts for the sale or other dispositions of Land.

13. ***Estoppel***

The Law relating to promissory estoppel can be traced back its origins in the formulation of Lord Denning in case of ***Central London Property Trust Limited vs High Trees Limited*** (1947) KB. 130.

It is useful to revisit the ***High Trees*** Case, regardless of its antiquity, because it provides the philosophical wellspring which gave rise to the later cases. At p.134, there may be found Lord Denning's analysis on the effect of a promise.

> *"There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the Courts have said that the promise must be honoured. …………As I have said they are not cases of estoppel in the strict sense. They are really promises – promises intended to be binding, intended to be acted on; and in fact acted on".*

Lord Denning alluded to the case of ***Jorden v Money*** *(1)* and found that it was distinguishable in that the promisor had made it clear that she had not intended to be legally bound. By contrast, Lord Denning observed that the cases to which he referred the proper interference was that the promisor in fact intended to be bound.

At page 134, Lord Denning's examination of the doctrine continued :

> *"In each case the Court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consider-ation for it. The Courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel."*

At page 135 :

> " *In my opinion, the time has now come for the validity if such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration": ……*

14. Learned Senior Counsel for the Plaintiff relied on the decision and on judicial statements in ***Amalgamated Investment & Property Company Limited (in liquidation) v Texas Commerce International Bank Limited":*** [1981] All E.R.923, in which Goff J held as follows :

> *"……………………….the doctrine of equitable estoppel was not confined to certain defined categories, and where the estoppel alleged arose out of a situation where both parties proceeded on the same mistaken assumption. The inquiry which the Court had to make was*

*whether in all the circumstances* ***it was unconscionable for the representor to seek to take advantage of the mistake***

Goff J held further :

*Where the estoppel alleged was founded on active encouragement or representations made by the representor, it was only unconscionable for the representor to enforce his strict legal rights if the representee's conduct was influenced by the encouragement or the representation .However, it was not necessary for the encouragement or representation to have been the initial cause of the representee's conduct in order to be unconscionable but merely that his conduct was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his legal rights…………………………*

*Where there was a representation by one party to another that a transaction between them had an effect which in law it did not have, an estoppel arose if it was then unconscionable for the representor to go back on his representation because it had caused or contributed to the representee's error as to his true legal rights or deprived him of the opportunity to renegotiate the transaction to render it legally enforceable in terms of the representation. Moreover, the estoppel arose despite the fact that the effect of the estoppel in the circumstances was to reduce the representor's rights or increase his obligations and would thus enforce what was in effect a gratuitous promise.*

5. *Where an estoppel related to the legal effect of a transaction between the parties, the estoppel would be enforced even if the underlying transaction would, but for the estoppel, be devoid of legal effect, since it was not necessary in such a case for the underlying relationship to constitute a binding legal relationship".*

15. Learned Senior Counsel for the Plaintiff referred as well to ***Greasly v Cook*** (1980) 1 W.L.R. 1306, where it was held that the Defendant who relied on the assurances given to her did not carry the burden of proving that she had acted to her detriment. In the absence of proof of the contrary by the Plaintiff, the court would infer that her actions to her detriment were induced by the assurances of the Plaintiff.

16. The Court also found the local case of ***Marshall v Mark*** H.C.A. #5070/87 to be useful in providing guidance as to how a plea of estoppel should be analysed. In the case of ***Marshall v Mark,*** the Plaintiff was the legal personal representative of her father, who had owned lands in Cedros. Every year she journeyed to Cedros to collect the rent, which had been paid by the tenants to Lovington Mark. In October, 1987, the Plaintiff discovered that Mark was constructing a building on her father's land and commenced proceedings.

    In his defence, Mark averred that the Plaintiff had given her permission for the construction of the house and that it was in reliance on this permission that he commenced construction.

    Mr. Justice Blackman classified the case as one "in equity and referred to the words of Lord Justice Nourse in ***Brinnand v Ewens and Anor***. Estates Gazette Law Reports 3rd June, 1987.

1. *"The claimant must show that he has incurred expenditure or otherwise prejudiced himself or acted to his detriment.*
2. *The acting in that way must have taken place in the belief that either that the claimant owned a sufficient interest in the property to justify the expenditure, or that he would*

*obtain such an interest.*

3. *The claimant's belief must have been encouraged by the owner of the lands, or others acting on his behalf.*
4. *There should be no bar to the equity; for example, that it should in some way contravene some statute".*

Justice Blackman stated further that the onus of proof lies on the defendant, who raises the issue of estoppel and that the standard of proof is on a balance of probabilities.

It is further of significance that all the leading authorities in this area of the law emphasize that an estoppel can be created only where it would be inequitable or unconscionable for the representor to insist on her strict legal rights in the light of the representation and the representee's actions to her detriment.

17. ***Estoppel in the face of Statutory Prohibition***

Learned Counsel for First Defendant and Second Defendant have argued that the Plaintiff cannot plead estoppel in the face of statutes which invalidate unwritten agreements for surrender. The relevant principle was considered and stated by the Judicial committee of the Privy Council in ***Kok Hoong vs Leong Cheong Mines*** (1964) ALL ER at P. 308 PER Viscount Radcliffe:

> *"It does not appear to their Lordships that the principle invoked is confined to transactions that have been made the subject of legislation or that, where legislation is in question, the bare prescription that a transaction is to be void or unenforceable is sufficient by itself to justify the principle's application. Thus, on the one hand, the common law may itself prohibit the enforcement of certain contracts, such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppel against an infant who had so contracted. An infant who has*

*obtained goods from a tradesman by representing himself to be of full age cannot be estopped from setting up his infancy, if sued to the price of the price of the goods.* ***On the other hand, there are statutes which though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds".***

*17.* Learned Counsel for both First Defendant and Second Defendant referred to the cases of ***Yaxley vs Gotts & anor*** (2000) Ch. 162, in which the Court of appeal considered a claim where the Plaintiff and Defendant had agreed that a 99 years lease of the ground floor of a house would be transferred to the Plaintiff. In return the Plaintiff had promised to convert the house into flats, supplying materials, labour and management services.

The Court of Appeal considered the ***Law of Property Act*** 1989 (UK) which differs significantly from the ***Conveyancing and Law of Property*** by creating an exception for constructive trusts. The Court of Appeal held that a constructive trust had been created in the Plaintiff's favour.

18. Learned Counsel for the Defendants also relied on ***Shah v Shah*** (200) Q.B. 35 in which the Court of Appeal applied ***Yaxley v Gotts***. In a nutshell, the case of ***Shah v Shah*** arose out of the Plaintiff's claim on a Deed executed by the Defendant. The Court held that the Defendant was estopped from denying the validity of the deed on the ground that the deed had not been signed in the presence of a witness who attested the signature as required by s. 1 of the ***Law of Property Act*** 1989. The Court of Appeal is reported at p. 35 to have held:

*"That failure to comply with the additional formality of attestation should not permit a party to escape the consequences of an apparently valid deed by claiming that the arresting witness was not present at the time of signature; that, since the lack of proper attestation would be peculiarly within the knowledge of the signatory*

*and would often not be within the knowledge of other parties, there were sound policy reasons for not permitting a party to escape his obligations under a deed by reason of a defect in attestation; that, in the circumstances, the delivery of the document was a clear representation that the third and fourth Defendants had signed it in the presences of the witness, and that they had validly executed it as a deed";*

At paragraph 44 of the report, Phill, LJin the Court of Appeal referred to the case of ***Yaxley vs Gotts*** and to the earlier Privy Council decision :

> *"In my judgment, that statement of Beldam LJ, reflecting as it does the Judgment of the Privy Council in the* ***Kok Hoong*** *case (1964) AC 993 is, with respect, an accurate statement of the Law of England and Wales. The Court is entitled to consider the particular statutory provisions, its purpose and the social policy behind it when deciding whether an estoppel is to be allowed".*

***Re: the Sword/Shield Argument***

20. Learned Senior Counsel for the Plaintiff referred to the case of ***Azov v Baltic,*** in support of his answer to the submission that estoppel may be used as a shield and not sword. The following extracts from that case are useful :.At p.173 , the Court highlighted the need for a sufficiently clear manifestation of acceptance of the term of the agreement.

> *"Consequently, if that conduct did not amount to a sufficiently clear manifestation of acceptance of the terms of that agreement, it cannot as a matter of principle, have amounted to a clear and unequivocal representation in cases of waiver and estoppel of any kind. The requirement that the foundational representation in cases of waiver and estoppel should be unequivocal is now*

*firmly established":*

At p. 175, the Court held thus

> *"Thus it is reasonably clear that, at least in cases of proprietary estoppel and estoppel by convention, the claimant may formulate his cause of action on the basis of a mutually-assumed factual of legal relationship which differs from that which truly exists.* ***The estoppel is not in itself the cause of action but prevents the party estopped from relying by way of defence on that factual and legal basis which truly exists":***

***<u>Reasoning and Decision</u>***

***Analysis of Facts:***

1. It is undisputed that the Plaintiff, as the owner of the subject premises, granted a lease in 1963 for 30 years to Shell Trinidad Limited, the predecessor of the First Defendant.
2. Shell Trinidad Limited assigned the residue of the lease to N.P. by Deed registered on the 29th January, 1991.
3. The material time, for the purpose of this action, spans 1986 to 1991. The Plaintiff, in 1986, aged and ailing, was still receiving the original monthly rental of $900.00 for the subject premises.
4. Her son, John, who throughout the events of this case had acted as her agent, made exploratory enquires in 1983 of N.P. with a view to having the terms of the lease reviewed or to having N.P. exercise its option to purchase. The possibility of surrender emerged for the first time in 1986.
5. Mrs. Nicole Fuertado-Toby, at the time holding the position of Corporate Secretary at N.P., held discussions with either the Plaintiff or Mr. Humphrey with a view to effecting the surrender of the lease of the subject premises.
6. It has not been disputed, that Mrs. Fuertado-Toby left the employment of N.P. between 1986-1987 and that Mr. Jeffery Herrera initially wrote to the Humphreys

indicating that N.P. wished to retain the premises and that subsequently, on behalf of N.P., Mr. Herrera offered to the Plaintiff, the surrender of the lease, on the condition that the Plaintiff compensated N.P. for existing structures.

7. It is accepted by all parties that Mr. Humphrey, on his mother's behalf, insisted at that time (1990) that N.P. had already agreed to surrender, at no cost to either party. It has also been accepted that Mr. Herrera, not sharing Mr. Humphrey's view, proceeded, notwithstanding the contentions of Mr. Humphrey to assign the residue of the lease to the Second Defendant.

8. The area of controversy in this case is the content of discussions passing between Mrs. Toby and the Humphrey's. The only evidence before the Court as to the content of those discussions emanated from the Plaintiff's side. Learned Counsel for both Defendants attempted to discredit the evidence by drawing the Court's attention to discrepancies between the three (3) available versions.

9. The first discrepancy to which learned counsel, Mr. Delzin and Mr. Gilkes pointed concerned the person with whom Mrs. Toby made the alleged agreement. The Plaintiff, by her written statement, alluded to a telephone conversation between herself, the Plaintiff and Mrs. Toby. Mr. Humphrey on the other hand referred to a conversation between Mrs. Toby and himself.

10. Learned Counsel for both Defendants submitted that the evidence of Mr. Humphrey differs from the Plaintiff's in that the critical conversation took place between himself (on the Plaintiff's behalf) and Mrs. Toby on behalf of N.P.

11. In my view, a careful reading of the account of Mr. Humphrey's evidence suggests by Mr. Humphrey's account, that Mrs. Toby in fact spoke to the Plaintiff on the telephone. The relevant portion of Mr. Humphrey's evidence is set out at page four (4) of the Written Submissions of the Learned Counsel for the Second Defendant.

> *Q. "Did anything else happen*
>
> *A. Well she had to call my mother so she called that line.*
> *I went downstairs.*
>
> *Q. What happened after that conversation ………"?*

12. In my view, it is clear from this portion of Mr. Humphrey's evidence that he was testifying that Mrs. Toby spoke to the Plaintiff but refrained from saying what passed between them.

13. Learned Counsel also submitted that Mrs. Toby's evidence contradicts the evidence of both the Plaintiff and Mrs. Toby. I respectfully disagree and find that Mrs. Toby's statement supplies the missing link, by showing that Mrs. Toby's telephone conversation with Mrs. Humphrey, preceded her conversation with Mr. Humphrey. Mrs. Humphrey reportedly told Mrs. Toby:

    *"she informed me that her son John handled*
    *all her affairs……".*

14. Even if I am incorrect in finding the three (3) versions compatible, in my view John, at all material times acted as his mother's agent and the discrepancy is negligible.

15. Learned Counsel have also drawn the Court's attentions to the absence in the statements of both Mrs. Toby and Mrs. Humphrey of any reference to any discussion on the cost of the surrender to either party. On the other hand, Mr. Humphrey testified that the terms of the oral agreement were that:

    *"………the deed would be terminated and that there*
    *would be no expense on the part of either party………"?*

16. Under cross-examination by Learned Counsel, Mr. Gilkes, Mr. Humphrey was forthright:

    *Q. "You are clear that expenses were discussed.*
    *A Correct.*
    *Q ………what did you understand your mother was waiving.*
    *A. She would forgo further rent.*
    *Q What expenses would N.P. be waiving".*
    *A. The expenses of removing the building and fuel tanks………".*

    In my view, Mr. Humphrey's gave evidence in a forthright and trustworthy manner. Although the other two (2) witnesses were silent on this aspect of the matter, there is no evidence to contradict Mr. Humphrey's testimony. What the

Court has on the other side of the scale are statements of Mrs. Humphrey and Mrs. Toby which are merely silent as to discussions on costs.

17. It is necessary for me to consider the effect of the file note marked "Z" which was tendered at the request of the First Defendant. In my view this document enhances the Plaintiff's case rather than detracting there from.

The Exhibit marked "Z" is a contemporaneous documents which was prepared for the sole purpose of providing a record for posterity.

This file note confirms that there were discussions between Mrs. Toby and the Humphreys.

The file note confirms that there were discussions as to whether N.P. wished to be paid for the release of the property. The file note marked "Z" also provides information as to the final understanding between the parties, as Mrs. Toby left them. It is useful to quote the last paragraph:

> *"The Honourable John Humphrey called me later on and explained that they would like to have the property released both parties not requesting payments – N.P. to prepare legal documents and they will sign them………".*

18. Certain aspects of the Plaintiff's conduct are inconsistent with the creation of a binding agreement in 1986. The first is the complete lack of protest in response to Mr. Herrera's missive in 1987 to the effect that N.P. would retain possession of the premise for the time.

19. Secondly, the Plaintiff continued to receive rental payments from N.P. following the alleged agreement with Mrs. Toby , notwithstanding that the waiver of rental by the Plaintiff was her consideration for the surrender of the lease. That this was the Plaintiff's consideration was pleaded in the amended Statement of Claim .

The third inconsistency is that the Plaintiff's claim to the surrender lay dormant between 1986 and 1990. In 1990 , for the first time, the Plaintiff was being represented by an Attorney. The lack of legal advice was not however proffered, in either the pleadings or the evidence as the Plaintiff's reason for their failure to take action between 1986 and 1990.

The Plaintiff's dormancy and that of her agent were compounded by the fact that following the conversation with Mrs. Toby , they observed activity on the subject premises and once again did nothing.

***Resolutions of Issues***

20. The first issue of my determination is one of fact, that is to say whether any agreement was formed between the Plaintiff and N.P. On a balance of probabilities and mindful that the burden of proof lies on the Plaintiff, I hold that Mrs. Toby, in her capacity as agent for the First Defendant, agreed with the Plaintiff that the lease should be surrendered.

21. The Plaintiff and Mrs. Toby agreed further that Mrs. Toby should prepare the deed. In this way, both Mrs. Toby and the Plaintiff and indeed Mr. Humphrey as the Plaintiff's agent, demonstrated their understanding that there could be no surrender without the deed.

22. I also hold on a balance of probabilities that mutual undertaking were exchanged between Mrs. Toby and the Plaintiff. Mrs. Toby, acting for N.P., undertook to waive its entitlement to recover the costs of structures on the premises. The Plaintiff whether through herself or through her agent, undertook to waive her entitlement to rent for the remainder of the term.

23. It is clear, however, that neither party expected to honour their undertakings until the surrender had been effected. The distinct indicator of this expectation was N.P.'s persistence in paying its rental and the Plaintiff's continued receipt and encashment of rental cheques until the residue of the lease was eventually assigned to Second Defendant. Having regard to this latter feature of the agreement, it appears to me and I hold that there was no binding agreement.

The accord which was concluded between the Plaintiff and Mrs. Toby was pre-contractual; in the nature of an agreement to make an agreement therefore not binding in law.

24. In respect of the submission on the ***Limitation of Personal Actions Ordinance ,*** I agree with learned Senior Counsel for the Plaintiff that the equitable remedy of specific performance is not susceptible to the limitation provision This is the clear ruling of the Court of Appeal in ***Mahabir v Phillips*** CA# 30/2002 from which I am not at liberty to depart.

***Application of the doctrine of Part Performance.***

25. In my view s. 10 of the ***Conveyancing and Law of Property Ordinance*** has no application to the instant case. Section 10 ***Conveyancing and Law of Property Ordinance*** is directed at the validity of conveyances. There is no suggestion in the instant case that there had been a conveyance, in fact the agreement which I have found to exist was that Mrs. Fuertado Toby should have prepared the required Deed.

    Similarly , it is my view and I respectfully agree with Learned Counsel, Mr. Gilkes that by virtue of the maxim, *generalia specialibus non derogant ,* the provisions of s.3 of the ***Landlord and Tenant Ordinance*** prevail over any inconsistent provision appearing at s. 4 of the ***Conveyancing and Law of Property Ordinance.*** Since s.3 of the ***Landlord and Tenant Ordinance*** ,by its plain and ordinary meaning allows neither the exception of part performance nor surrender by operation of law, I hold that these avenues were not available to the Plaintiff.

26. ***Statutory Barrier to Equitable Estoppel***

    Section 3 of the ***Landlord and Tenant Ordinance*** are clearly applicable in this case**.** The Plaintiff having neither a deed of surrender nor a written agreement for surrender has encountered an insurmountable barrier in law.

The Court must now consider whether the prohibition created by s.3 of the ***Landlord and Tenant Ordinance*** precludes an argument in equity and more particularly on a plea of equitable estoppel.

I now turn to the submission of Learned Counsel for both Defendants as to the effect of statutory provisions on a plea of equitable estoppel and consider whether a plea

of equitable estoppel is possible in the light of the express provisions at s.3 of the ***Land Lord and Tenants Ordinance.***

In my view the answer is to be found in the words of their Lord Radcliffe in ***Kok Hoong vs Leong Cheong Mines*** (1964) ALL ER at P. 308:

> ***" On the other hand, there are statutes which though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see Humphries v Humphries".***

The provisions of s.3 of the ***Landlord and Tenant Ordinance*** are not essentially prohibitory and are founded on the very philosophy which gave rise to the ***Statute of Frauds.*** Accordingly I hold the view that s.3 of the ***Landlord and Tenant Ordinance*** does not preclude the application of the doctrine of equitable estoppel.

***Application of the doctrine of equitable estoppel***

27. Whether the doctrine of equitable estoppel is applicable in the instant case depends on whether the following findings of fact can properly be made on a balance of probabilities:
    - Whether there was a promise or representation emanating from the first Defendant
    - Whether the first Defendant knew that such representation or promise would be acted upon by the other side
    - Whether in reliance on that promise the plaintiff acted to her detriment
    - Whether the conduct of the first Defendant was unconscionable

28. Applying the foregoing to the instant facts :
    - I have already found that there was a non-binding pre-contractual agreement that N.P. would surrender the premises. According to the authority of ***High Trees*** itself, such promise need not be binding.

- There is no evidence that Mrs. Toby , as N.P.'s agent did not expect the Plaintiff to act on her promise. On the contrary, the Defendant's file note suggests that when Mrs. Toby completed her discussions with the Humphreys there was an agreed position.
- The Plaintiff in fact acted to her detriment by the expenses she incurred in having architectural plans drawn. She also acted to her detriment by giving a loan to her grand-daughter, with the expectation that the subject premises could be used by her grand-daughter. Regardless of her grand-daughter's evidence that she hoped to repay the loan, this seems an unlikely prospect after more than a decade. It is reasonable to infer from the evidence that the ultimate failure of her grand-daughter's business was caused by the unavailability of the premises. It is also reasonable to infer from the evidence that Joanne would have repaid the Plaintiff if her business had not failed. I therefore hold that the loss incurred by the Plaintiff in making a loan that was not repaid was the cumulative effect of her reliance on the promise that the premises would be surrendered.
- As to the issue of unconscionability, it is necessary only to allude to Mrs. Toby's evidence that following her discussions with the Plaintiff and her agent, she was directed to "*stall*" Mr. Humphrey and to conceal from him N.P.'s intention to re-consider its decision to surrender the lease. This she did with the net result of dishonouring the pre-contractual agreement altogether.

29. I accordingly hold that the doctrine of equitable estoppel is applicable in these proceedings. There has been much delay on the Plaintiff's part I will therefore accept the suggestion made by learned Counsel for the Plaintiff at p.10 of their written submissions, that an award of equitable damages should be made in lieu of specific performance.
30. Because of the Plaintiff's delay and the obvious detriment to third parties and in particular on the Second Defendant , I will refrain from making the declaratory orders sought.

31. However, I will dismiss the Counter claim because it would in my view be wrong to perpetuate the effect of the first Defendant's inequitable conduct by ordering that the second Defendant is entitled to a second term of 20 years. I find it impossible on the dearth of evidence as to quantum to assess damages and I will order that this be done by a Master in Chambers.

**ORDERS**

1. **There will be judgment for the Plaintiff**
2. **The first Defendant to pay to the Plaintiff damages in lieu of specific performance such damages to be assessed by a Master**
3. **Counterclaim is dismissed**
4. **The First Defendant to pay the Plaintiff's costs of the action**
5. **The Second Defendant to pay the Plaintiff's costs of the Counterclaim.**

Dated this 15th day of February, 2005.

…………………………………
M. Dean-Armorer
Judge.