Action No. CL 48/2017

IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

BETWEEN:

MAXWELL WALKIN

Plainti

-and-

THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

Defenda

BEFORE THE CHIEF JUSTICE, THE HON. MME. JUSTICE RAMSAY-HALE
Heard on 10 April 2018
Mr. Ariel Misick QC and with him, Ms Deborah John-Woodruffe for the Plaintiff
Ms. Motheba Rakuoane-Linton, Senior Crown Counsel, for the Attorney General's Chambers
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JUDGMENT

Introduction

1. This is the judgment on the Plaintiff's action commenced by Writ issued on 20 April 2017 and amended on 24 October 2017 seeking, *inter alio*, a declaration that he is entitled to a transfer of Freehold Title to Crown Land of which he is in possession following a grant to him in 2006 of a Conditional Purchase Lease ("the 2006 CPL") by the Turks and Caicos Islands Government ("TCIG").

Background

2. The Plaintiff was first granted a Conditional Purchase Lease of land known as parcel number 60602/120/1 Norway and Five Cays ("the Land") on 8 June 1999. The CPL was for a period of three years and was granted for the construction of Apartments ("the Approved Development") to a value of $120,000. The CPL was in standard terms and required the Plaintiff to pay annual rent of US$230 for a period of three years and gave the Plaintiff an option to purchase the property for $4,600 at the end of the term if certain covenants were fulfilled. The purchase price represented the market value of the property discounted by 50% in accordance with the Crown Land Policy then in force which allowed Belongers to acquire Crown land at a discount. For its part, the Crown agreed that, in the event the Plaintiff *"duly and punctually"* complied with his covenants and obligations under the CPL and paid the purchase price, the Crown would transfer the Freehold Title to the Plaintiff.'

3. Clause 2 of Part II of the CPL provided that if the Plaintiff showed sufficient and satisfactory cause for delay in completion of the development, TCIG would give consideration to an extension of the

W a g e [1] CPL exhibited at pp 64-68 of the Trial Bundle

CPL. In 2003, the Plaintiff applied for an extension of the CPL and his application was granted by TCIG on 23 April 2003, conditional on the payment of arrears and a registration fee. [2] In 20 April 2006, the CPL was further extended in the same terms save that the Approved Development was now to have a value of $150,000.

4. In late 2008, the Plaintiff applied to TOG for the Freehold Title to the Property. By letter dated 19 December 2008, TCIG approved the transfer of the Property to the Plaintiff on payment of a sum less than the purchase price reserved in the CPL as well as arrears of rent and the registration fee for the transfer. The letter, under the signature of then Minister of Natural Resources, the Hon. McAllister Hanchell, stated,'

"Reference is made to your application for Freehold Title to Parcel 6060 2/1 20 Norway & Five Cays, Providenciales.

I am pleased to advise that having reviewed your application; I have found that you have met the conditions for grant of Freehold Title. Therefore, in accordance with the authority granted to the Minister of Natural Resources by Cabinet of the Turks and Caicos Islands, I hereby approve Freehold Title on Parcel 60602/120.

The Open Market Value of Parcel 60602/120 is $9,200.00. Normally, Freehold Title on this parcel would incur a Freehold Purchase Price of US$4,600.00, which is 50% of the Open Market Value. However, you are eligible for an additional 25% discount on the Freehold Purchase Price in accordance with Cabinet Minute No. 0 8/7 56, valid until March 31, 2009.

Accordingly, the revised Freehold Purchase Price is US$3,450.00. In addition, a sum of US$230.00, representing one (1) year arrears in land rent and, a Registration Fee of US$10.00 must be paid before Freehold Title is granted.

Further, a charge will be placed on this parcel for a period of ten years representing the Discount Sum of US$4,600.00

I should be grateful if you would contact the Crown Land Unit in Providenciales to have the necessary documents prepared for execution."

5. Pursuant to this 19 December letter, the Plaintiff contacted the Crown Land Unit in Providenciales and was provided with receipt vouchers for the payment of all sums set out in the Minister's letter purchase price of US$3,450.

6. The Plaintiff avers, and the Crown denies, that his wife, Marie Therese, attended the Treasury to pay for the Land but the Treasury refused to accept the payment. The Plaintiff avers that his wife was later advised by the Crown Land Unit that all Crown Land transactions had been suspended as a result of the Commission of inquiry.

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[2] p 69 of the Bundle

[3] *ibid* at p 224

7. In June 2009, the Plaintiff applied for a renewal of the 2006 CPL.[4] On 5 October 2009, the Crown Land Unit advised the Plaintiff that renewals of CPLs were no longer being routinely undertaken and that his application was unsuccessful.' On 12 February 2010, the Plaintiff again applied to renew the CPL but received no response.

8. On 6 June 2011, the Plaintiff renewed his request for the transfer of the Freehold Title. The Crown Land Unit responded by letter dated 8 November 2011[6] informing him that the application would not be considered until rent arrears were paid in the amount of $488.99. These arrears were paid on 10 November 2011.' There was no further correspondence from TCIG until 21 November 2013 when Leroy Charles, Director of the Crown Land Unit, wrote to the Plaintiff in the following terms,

"Reference is made to your application, dated 6" June 2011, for Freehold Title over Parcel 6050 2/1 20, situate at Norway and Five Cays, Providenciales.

Please be advised that our records shows [sic] *that approval was granted to you on the 17th February 2012 for Freehold Title over Parcel 60602/120. However, after investigating the matter, it was discovered that the approval letter were* [sic] *never issued to you for some unknown reason. Accordingly, the Crown Land Unit wishes to apologize for the delay and wish to inform that Freehold Title is hereby granted to you over Parcel 60602/120 under the terms of the Crown Land Policy.*

The value of the parcel has been re-appraised and the Open Market Value is US$24,000.00. Therefore, the cost of the Freehold Title is US$18,000.00 which is 75% of the Open Market Value. In addition, you are required to a pay a Registration Fee of US$10.00.

Further, please be advised that a charge, representing the discounted sum, which is US$6,000.00 will be placed on this parcel for a period of ten years from the date of the actual transfer of the title. Also, the covenants contained within your Conditional Purchase Lease will be registered against the land at the Land Registry.

Enclosed are the requisite payment vouchers and instruments for your execution. Kindly make the required payments and return the executed documents to any of the offices or the Crown Land Unit.

Please note that this offer is valid for three months from the date of this letter. Failure to complete the transaction within this timeframe will result in the application being treated as abandoned."

9, The Plaintiff avers that this letter was a repudiation of the terms of the 19 December agreement to transfer the Freehold Title for the sum of $3,450.

10. In February 2014, the Plaintiff requested an extension of time to pay the sum of $18,000 now demanded by TOG to purchase the Freehold!' On 25 March 2014, the Crown Land Unit advised

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[4] p 229 of the Bundle
[5] *ibid* at p 230
[6] *ibid* at p 260
'Voucher Receipt *ibid* at pp 261-2 of the Trial Bundle [8] *ibid* at p 267

the Plaintiff that an extension of 3 months would be granted but, if the money were not paid, he would need to resubmit an application under the CPL Limited Time Offer Scheme for an Extension

of Lease for two (2) years or acquire the freehold on the basis of yet another valuation.[9]

11. As he was unable to raise the funds within the allotted time, the Plaintiff submitted the application

for the CPL on 29 April 2014 and paid the requisite sums to extend the CPC˚ This was granted on or about May 2015, ("the new CPL") for a period of two years, the terms of which included a rental increase from $230 per annum to $675 per annum, with an option to purchase the Freehold Title in the sum of $20,250 which sum reflected a discount of 25% of the current open market value.

12. The Plaintiff alleges that he executed the new CPL under duress as the family had invested significant sums of money in the Land to construct their home and apartments and were faced with the threat of having to surrender the Land to TCIG. The Plaintiff paid the rents reserved under the new CPL and remained in possession of the Land.

13. As the new CPL neared the date of expiry, the Plaintiff sought legal advice and these proceedings

were thereafter instituted.

These Proceedings

14. The Plaintiff contends that the new CPL is void for lack of consideration or, alternatively, should be avoided on the ground that it was obtained by duress and avers that the Defendant is bound by the agreement created by the 19 December letter or, alternatively, by the terms of the 2006 CPL as varied by the 19 December letter.

15. The Plaintiff seeks the following relief:

(i) an order setting aside the May 2015 CPL;

(ii) a declaration that the Plaintiff is entitled to a transfer of the Freehold Title in the Property upon payment of the sum of $3,450 being the purchase price offered in the letter of 19 December 2008; or alternatively upon payment of the sum of $4,600 reserved under the 2006 CPL;

(i an order that the Defendant transfer the Freehold Title in the property to the Plaintiff upon payment of the relevant sum;

(i restitution of all sums paid to the Defendant by way of rent since 20 April 2009.

16. The parties have agreed the issues to be determined by the Court are, [11]

Did the letter dated 19 December 2008 from TCIG to the Plaintiff constitute a new agreement to transfer the freehold title in Parcel No 60602/120 Norway and Five Cays, Providenciales to the Plaintiff;

[1°] *Ibid* pp272-3
" Agreed list of Issues filed 21 March 2018

(ii) Alternatively, whether the letter constituted a variation of the 2006 CPL;

(iii) Did the Plaintiff attempt to pay the sums due pursuant to the terms of the new agreement or the variation of the 2006 CPL;

(iv) Was the effect of the new agreement to transfer the equitable interest in the Property to the Plaintiff;

(v) Is the 2015 CPL void for lack of consideration and/or economic duress or is it a valid and enforceable lease as the Crown contends?

(vi) Is the Plaintiff entitled to the declaration sought?

Is the Plaintiff entitled to the restitution of all sums paid to TCIG by way of rent since 20 April 2009?

The Evidence for the Plaintiff

17. There are only two issues of fact requiring resolution by the Court. The first is whether the Plaintiff did in fact tender the purchase price to the Treasury in March 2009 as alleged and the second, whether the Plaintiff executed the 2015 CPL under duress.

18. It became clear during the trial that Mr. Walkin was not actively involved in this process of acquiring the Land over the years, as his health deteriorated over time. It would appear that the monies which were expended in developing the Land came largely from his wife's earnings. In his *viva voce* evidence, he said he gave all documents he received to his wife who, with their daughter, Kimberley, dealt with the government agencies. He was unable to say if or when his wife sought to pay for the Land. His evidence was that she had the money and didn't have to consult him before paying as, in his words, paying for the Land was her right as his wife.

19. In her evidence, Mrs. Walkin said that on 10 March 2009, she went to the office of the Crown Land Unit on Providenciales with the letter from the Minister and they gave her a "*receipt.*" She took this to the Treasury three days later in order to pay for the Land. She said that, at the Treasury, they checked the system and told her the receipt numbers were not in the system.

20. Mrs. Walkin, a Haitian national who can neither read nor write, went home and enlisted the aid of her daughter, Kimberley, who was only 15 at the time.

21. In her *viva voce* testimony, Kimberley said that her mother had not understood why payment was not accepted and thought something might have been wrong with the '*receipt*' (payment voucher) that she had received from the Crown Land Unit, so she and her mother went back to the Treasury to make inquiries. They were told that the receipts were not in the system.

22. They then went together to the Crown Land Unit. Kimberley said she showed someone the receipt and told her that Treasury had said the receipt was not in the system. The

person to whom she spoke "*checked*" *and* then said, "*The Commission of Inquiry is in and everything on land is put on*

hold." She said she then asked the lady what else could be done and was told they would have to wait, and re-apply at a later date and so they left. In response to the suggestion in cross-examination that they had not sought to pay before the Lease expired, Kimberley insisted that they had attempted to pay a few days after her mother had gotten the receipts from the Crown Land Unit, as they didn't want the receipts to expire.

23. Kimberley said that both her parents were upset when they were unable to pay for the Land, particularly her mother who was the one "*who was working and putting in the all the money.*"

24. On the question of duress, Mr. Walkin's evidence was that he signed the CPL in May 2015 because he didn't want to lose the Land. He said he didn't have legal advice at the time and felt forced to sign the CPL because he had made "*a deal*" with the TCIG which "*they changed*". His evidence on oath was halting but the inference I drew from what he said and from his demeanour in the witness box was that, when the TOG presented the new CPL for execution, he signed it believing he had to accept the new "deal" which was being offered.

25. In response to questions in cross- examination intended to suggest that he signed the new CPL, not in response to any illegitimate pressure brought to bear by TOG, but simply because he wanted to keep the Land, Mr. Walkin accepted that he had applied for an extension of the CPL in 2003 for that reason and believed that, if he had not applied for the extension, he would lose the Land. He agreed that in 2006, he applied for an extension of the CPL for the same reason: that he would otherwise lose the land and that he had signed the new CPL for the same reason.

26. Kimberley, in her evidence, recounted her family's dealings with TCIG and the Crown Land Unit after payment was refused in March 2009. Asked by the Court why the family made some applications for CPLs and some for the Freehold Title, Kimberley responded that they were at all times acting on advice from personnel at the Crown Land Unit. When they would say, "*We want to pay for the freehold,*"*they* would be told, "*You're occupying the land. You have to pay rent until you get the freehold title.*"

27. After years of uncertainty, TCIG in 2014 agreed to transfer the Freehold Title but at a price which, Kimberley said, the family could not afford. She said her father objected to the increase in the value ascribed to the Land by the Crown Land Unit and she contacted the Department to voice these objections. She says she was told that they could either buy the freehold, enter into a new lease or leave the Land.

28. It was from Kimberley that we learned that there were three "*units*" *on* the Land, that the development was "*practically finished*" *except* for paint and that the family had, over the 13 years since her father first leased the Land, invested over $100,000. It was her evidence that given the investment her parents had made in the Land, they simply could not walk away from the only property in which they had an interest. As a result, when they were unable to raise the new purchase price within the time given to them by the Crown Land Unit, they had no choice but to execute the new CPL.

29. In her *viva voce* testimony, Mrs. Walkin said, with respect to the 2014 offer to purchase the Freehold Title for $18,000 and the subsequent decision to execute the new CPL,

"*I didn't do anything. I see the money become too high...They told me I had to pay for an extension. $600 per annum. Then they give me another bill of $20,000. Before it was $3,450. I went* [to the Crown Land Unit] *and I told them the money they are charging me I can't pay. They say if I don't pay, I will lose it. So I pay...They didn't ask me to pay then... I had to pay by 2017 or I would lose the property...*

"*...They said they'd extend it for 2 years and give me time to pay for the Land. They said if I agreed, I'd have to pay for the land in 2 years. It's the only property I have, so I agreed to pay.*"

Issues 1 and 2: did the letter dated 19 December 2008 from TCIG to the Plaintiff constitute a new agreement to transfer *the* Freehold Title in Parcel No 60602/120 Norway and Five Cays, Providenciales to the Plaintiff; alternatively, did the letter constitute a variation of the 2006 CPL?

30, Mr. Misick QC submits that the 19 December letter constituted a new agreement to transfer the

Freehold Title for the sum of $3, 450. In support of this submission, learned Queen's Counsel relies on the decision of this Court and of the Court of Appeal in *AGTCI v M&A Services Limited* Action No. CL 155/2013,

31. In that case, the question of whether the Minister's letter to a Lessee under a CPL, granting it the

Freehold Title in similar terms to the 19 December letter under consideration here, constituted a new agreement, Forte JA observed,

"*...it is difficult to come to any other view but that the letter disclosed a new agreement granting the transfer of the land to the Respondent on his performing his responsibility under that agreement to pay the arrears of rent.*"

32. Mr. Misick contends that the fact that the Plaintiff owed arrears in rent at the date of the 19 December letter or that the Approved Development was not complete as required by the CPL did not prevent the agreement from being effective as, properly construed, the Minister's letter constituted a waiver of past breaches. The only requirement thereafter for the Freehold Title to be transferred to the Plaintiff was that the arrears of rent and the new purchase price be paid.

33. Ms. Linton for the Crown says in response, however, that the 19 December letter did not constitute a new agreement as the letter makes it clear that the Minister's offer to transfer the Freehold Title was made in response to the Plaintiff's application which had been made pursuant to the 2006 CPL. She submits that the letter was not intended to constitute a fresh agreement but was rather intended to facilitate the Plaintiff's exercise of his rights under the 2006 CPL. She submits further that all CPLs have provisions which make it clear what terms and conditions a CPL agreement should entail. The letter does not contain those terms and conditions. In any event, she says for the letter to have amounted to a new CPL it would have **to** be executed by both parties.

34. She submits, further, that, for there to have been a new CPL, there would have to be some form of agreement between the parties showing a clear intention to abandon the original CPL and

adopt the November letter as a new agreement. She relies on the statement of principle in Chitty on Contracts, 31 Edition at paras 3-079 to 3-080 that,

"First the parties may agree to rescind an existing contract and to enter into a new one, on different terms, in relation to the same subject matter ..."

35. The CPL, she submits, was not rescinded.

36. Ms. Linton further observes that the December letter reduced the Freehold Purchase Price from $4,600 to $3,450, a reduction in $1,150 in favour of the Plaintiff and argues that a reduction that favours one party to a contract does not, without more, amount to a variation on which that party can rely. She relies on Chitty at para 4-081 [12] where the authors state,

".._ that parties may agree to vary a contract that is considered capable of conferring a legal benefit on one party only, "e.g. where one party agrees to pay more for the performance of the other party's original obligation, or to accept less than the other party had originally undertaken without any corresponding variation (that could benefit him) of his obligation. In some situations of this kind, it is settled that there is no consideration."

37. Learned Crown Counsel submits that in the absence of any consideration for the new purchase price for the Freehold Title contained in the Minister's letter, the letter did not constitute a binding variation of the contract.

Discussion

38. Ms. Linton appears to me to have misunderstood the case for the Plaintiff which is not that the letter created a new CPL but was an agreement to transfer the Freehold in consideration of the sum of $3,450. it is not suggested that a new **CPL** was thereby created, only that the Minister's letter created this new agreement, and that cannot be in doubt following the decision of the Court of Appeal in M& *A Services.*

39. That said, Ms. Linton is correct that the rule is that a one-sided variation to an existing contract whereby party A agrees to accept less in return for party B's agreement to perform its obligations under the existing contract is not a binding contract due to a lack of consideration flowing from party B.

40. In the same paragraph in Chitty on which Ms. Linton relies, however, the learned authors make the point that the promise to take less may have a limited effect as a waiver, or in equity. At para 4-086, they note that equity focusses, not on the *intention* of the party granting the forbearance, but on that party's *conduct* and on its effect on the conduct of the other party. They refer to the leading case of *Hughes v Metropolitan Railway* (1877) 2 App Cas 439 where the Court held that if one party leads another *"to suppose that the strict rights arising under* the *contract will not be enforced or will be kept in suspense or held in abeyance, the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."'*

[12] In 32' Edition, para 3-080 in the edition on which Ms. Linton relied.
[23] At p 448

41. Equity requires that the promise be clear and unambiguous. As in *M &A,* the Minister's offer was clear and unambiguous and intended to affect the legal relationship between the parties. At para 4-095, the authors of **Chitty** note that if the promisee has performed, *or the promisee has made efforts to perform the altered obligation* then it would be inequitable for the promisor to act inconsistently with his promise.

42. It follows that had the Plaintiff tendered the sum called for by the Minister on or before 31 March 2009, TCIG could not thereafter have demanded the sum originally reserved under the CPL be paid. TCIG would be bound by the letter as constituting a waiver of TCIG's strict rights under the CPL.

43. If the money were not paid - or not tendered and refused as the Plaintiff alleges - by 31 March, then, it seems to me, as the Plaintiff had given no consideration for the Minister's offer to take less for the Freehold Title, TCIG would not be bound to take the lesser sum after the offer had expired. TCIG would still be obliged to transfer the Freehold Title for the price of $4,600, originally agreed.

44. With respect to the particular issue raised for resolution, it follows from the forgoing that, in my view, the Minister's letter was a binding agreement to transfer the Freehold Title for less than the price reserved, a variation of the CPL for which there was no consideration but which would, nonetheless, be binding on TCIG in equity if the Plaintiff tendered the sums due by 31 March 2009.

45. That brings me to the next question for resolution which is whether the Plaintiff sought to pay that sum as alleged.

Issue 3: Did the Plaintiff attempt to pay the sums due pursuant to the terms of the new offer

46. The Defendant's only witness was Leroy Charles, the Director of the Crown Land Unit. He gave evidence that confirmed the existence of the "*stimulus package*" being operated by TCIG in which lessees were able to purchase land held under a CPL at a further discount. He explained that the vouchers for payment Mrs. Walkin received from the Crown Land Unit were generated by SIGTAS, government's accounting system. Once the voucher was created, any government officer with access to SIGTAS can see the voucher and the reason for which it was created. He suggested that if a person with a voucher was refused the opportunity to pay, it meant that they sought to pay outside the period:

"*If you had a payment deadline, Treasury could cancel the voucher or our own Department could cancel it once the deadline had passed.*"

"*Up to the 31" March 2009, that payment voucher would have remained valid.*"

47. Mr. Charles also observed the Plaintiff could have paid the sum of $4,600 for the Freehold Title before the expiry of the CPL, even if he had missed the stimulus.

48. Despite the ongoing Commission of Inquiry, Mr. Charles said no instructions were given that there were to be no dispositions in land. He accepted that a decision was taken by his Department

internally not to renew Crown leases, as the Plaintiff was told in their letter of October 2009, as there was an air of uncertainty and "a *jittery attitude.*"

Findings of Fact

49. The evidence of Marie Therese and Kimberley has the sort of detail that suggests it is a true account, including the evidence that the lady at the Treasury said the vouchers were not in the system as they had no reason to know there was a 'system' which allowed Treasury to see the vouchers issued by another Department. I also found the evidence that when they returned to the Crown Land Unit, the staff member checked the system before remarking that the Commission of Inquiry was "*in everything*" and that "*everything on land is put on hold*", particularly striking and consistent with the prevailing atmosphere of uncertainty in the Crown Land Unit.

50. It's certainly not hard to believe that a family of such limited means, being offered the right to purchase the Land on which they lived - even though they had not managed to complete the development under the CPL - would apply for the vouchers but then not seek to pay.

51. Mr. Charles can only, as he says, postulate that the vouchers were not in the system at Treasury because the deadline had passed and the vouchers were cancelled. It could equally have been a system error, as Mr. Misick submits, or the vouchers countermanded by some other agency.

52. Having considered the evidence in the round, I say I accept Mrs. Walkin and Kimberley as witnesses of truth and am satisfied on a balance of probability that together they went to pay for the Land, some three days after the vouchers were issued and that Treasury refused to accept payment as the vouchers were no longer "*in the system.*"

53. Under the rule in *Hughes v Metropolitan Railway* then - given that the Plaintiff had acted upon TCIG's promise to transfer the Freehold Title on payment of the sum of $3,450 - had the transaction proceeded, it would have been inequitable for TCIG to demand payment of the original sum reserved thereafter, notwithstanding that the promise to transfer at a price less than the Plaintiff was obliged to pay under the CPL was not, in the absence of consideration, enforceable at common law.

54. The larger question is whether, when Cabinet approved the transfer of the Freehold Title, the beneficial interest in the Land vested in the Plaintiff such that he was no longer a lessee but a purchaser in possession.

Issue 4: Was the effect of the 19 December letter to transfer the equitable interest in the Property to the Plaintiff?

55. The common law has long recognized that a valid contract for the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest in the property. Jessel M.R. summarized this principle in *Lysaght v. Edwards* (1876), 2 Ch. D. 499 at p. 506:

"Mt appears to me that the effect of a contract for sale has been settled for more than two centuries ... [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser..."

56. At the time the Minister wrote the 19 December letter, there was an existing lease - to - purchase agreement in place under which the TCIG made an offer to transfer the Freehold to the Plaintiff if certain conditions were met within the period of the Lease. If the Plaintiff fulfilled his covenants under the CPL, he could request the transfer of the Freehold and if TCIG agreed, signifying the conditions had been met, then a binding contract was formed for the sale and purchase of the land.

57. Put another way, the CPL granted the Plaintiff the right to enter the Land and develop it and gave him the option of purchasing the Freehold at the end of the term of the lease, all conditions in the lease having been met. It was an irrevocable offer to sell the land to the Plaintiff during the period of the CPL and, once the Plaintiff's application to purchase the Freehold Title was accepted by TCIG, a contract for the purchase and sale of the Land was constituted. All that was required thereafter was that the Plaintiff pay the purchase price and the arrears of rent.

58. It is a fact that the Plaintiff had not performed the Lessee's covenants and was not entitled under the terms of the CPL to acquire the Freehold, but the Minister, in approving the grant of the Freehold, plainly waived the performance of the unperformed covenants and agreed to accept something less than the Approved Development of the Land. TCIG cannot now refuse to transfer the Freehold Title on the ground that one or other condition in the CPL had not at the time of the writing been fulfilled.

59. Mr. Misick's submission that the Plaintiff thus became a purchaser in possession with a beneficial interest in the Land is, in my judgment, correct and supported by the judgment of this Court and the Court of Appeal in *M&A Services.*

60. The effect of TCIG's refusal to accept payment was, therefore, to repudiate the contract.

61. As a matter of law, if the innocent party accepts the repudiation, the contract comes to an end. On the facts here, the Plaintiff did not accept the repudiation of the contract. To the contrary, the Plaintiff's subsequent behaviour in seeking to extend the CPL and reapplying for the transfer of the Freehold Title after TCIG's refusal to accept payment, is consistent only with their trying to keep the agreement on foot.

62. Kimberley's evidence, which I accept, is that the family did not seek legal advice because they thought that what they were being told by TCIG was right and that they were obliged to do as TCIG told them to do, whether it was to reapply for the Freehold Title or execute a new CPL when that was presented as their only option.

63. As the Plaintiff remained on the Land as a purchaser in possession under an agreement for sale and purchase which had not been terminated, the question which arises is, what is the status of the new CPL executed by the Plaintiff in which he agrees to pay the sum of $22,000 for the same piece of Land?

Issues 5: is the 2015 CPL void for lack of consideration and/or economic duress or is it a valid and enforceable lease as the Crown contends?

64. I do not think it is necessary to consider whether the Plaintiff's agreement to enter the *new* CPL was obtained by TOG under duress, as submitted by the Plaintiff, as it is evident from the foregoing that it was executed by both parties under a mistake, the mistake being that they did not already have a binding agreement for the sale and purchase of the Land before the 2006 CPL expired. This mistake can only be described as fundamental and, in my judgment, it entitles the Plaintiff to an order setting aside the new CPL.

65. Authority for this proposition can be found in the decision of the Court of Appeal in *Salle v Butcher* [1949] 2 All ER 1107 where Lord Denning held that at p 1120,

> "*A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*"

66. The Plaintiff's failure to pay the sums due - because TOG refused to accept payment - did not have the effect of terminating what was a binding agreement. TCIG would have had to do something more to bring the agreement to an end.

67. Plainly, in demanding that the Plaintiff pay a new price for the Freehold Title, TCIG was acting under the mistake that the 2006 CPL had expired without there being a binding agreement between the parties for the transfer of the Freehold Title. The Plaintiff was similarly in the dark about his legal rights having not sought or received legal advice.

68. In light of the mutual misapprehension about the status of the 19 December letter and the rights it conferred on the Plaintiff which led to the execution of the new CPL, the agreement cannot stand.

69. If I were required to resolve the question of whether the new CPL was obtained by duress, **I** would have no hesitation in so finding. Kimberley's evidence is clear that, confronted with having to either purchase the property for a sum they could not raise within the time limited for payment, entering into a new lease or leave the property, the family felt it had no choice but to execute the new CPL or walk away from the property in which they had invested over $100,000.

70. In *DSND Subsea Ltd v Petroleum Geo-Services* [2000] EWHC 185 the Court summarised the law relating to economic duress and held that the plea is made out where,

(i) there was illegitimate pressure;
(ii) the pressure constitutes a significant cause inducing the other party to enter into the contract; and
(iii) the practical effect of the pressure was compulsion on or lack of practical choice for the victim.

71. In order to determine whether there was illegitimate pressure, the court stated a range of factors should be considered, including: (1) whether there had been an actual or threatened breach of contract; (ii) whether the person allegedly exerting the pressure had acted in good or bad faith; (iii) whether there was any realistic practical alternative for the victim other than to submit to the pressure; (iv) whether the victim protested at the time; and (v) whether the victim affirmed or sought to rely on the contract.

72. it seems to me that, in the circumstances where there was an existing agreement to transfer the Land to the Plaintiff for the sum of $3,450, TC1G's attempt to rewrite the parties' agreement was plainly illegitimate. In the words of the learned authors of Halsbury's Laws of England relied on by Ms. Linton at paragraph 14 of her skeleton:

"*...the typical case of duress involves a choice to submit to the demand or threat rather than suffer the consequence. The lack of a practical or reasonable alternative is an important factor in*
determining whether the claimant entered into the contract ...because of the pressure."

73. Mr. Misick submits, and I accept, that the Plaintiff had no realistic practical alternative other than to submit to the pressure that was being exerted on him by TCIG's refusal to honour the 19 December letter and its demand that he pay a higher price for the Land than originally agreed under the new CPL, given that he had spent substantial sums on construction of the Approved Development and was threatened with loss of the Land and his investment therein.

74. I do not say TCIG acted in bad faith as it plainly failed to appreciate the legal effect of the Minister's 19 December letter" but the pressure was illegitimate nonetheless.

75. None of the monies paid thereunder by the Plaintiff can be construed as affirming the agreement as the Plaintiff was likewise unaware that he was beneficially entitled to the Land under a specifically enforceable agreement for sale. It is neither inequitable or unjust 'for the Plaintiff to now take the point as the duress has not ceased: TCIG continues to insist on its rights under the new CPL.

76. Nothing turns on the fact that the Plaintiff made little or no protest when presented with the new CPL, a fact of which Ms. Linton has made some weather. The Plaintiff and his family are unsophisticated people. His wife, who dealt with the various agencies on the Plaintiff's behalf, is a steward at Beaches, is unable to read or write and who was so uncertain of her command of the English language and her understanding of the process as to turn to her 15 year old for assistance when her attempt to pay for the Land was rebuffed. Kimberley in her evidence explains that the family acquiesced and did not seek legal advice because they thought that what they were being told by the Government was right and that they were obliged to do as the Government told them to do, whether it was to reapply for the Freehold Title or execute a new CPL when that was presented as their only option. Asked by Ms. Linton why she didn't write to the Minister to protest, Kimberley's response was undoubtedly sincere:

'The case of *M & A Services v AG* essentially decided the issue of the effect of the Minister's letter but had not yet been resolved on appeal when this matter was filed.

[15] See *Ting and Others v Borelli and Others* [2010] UKPC 21, pars 37

I've never written to a Minister. I would never. I think it would be insubordinate. I dealt with the Crown Land Unit because they are directed by the Minister."

77. In the circumstances, the fact that the Plaintiff made no protest is not evidence that the new CPL was not signed under duress.

Issues 6 and 7: Is the Plaintiff entitled to the declaration sought and is the Plaintiff entitled to the restitution of all sums paid to TCIG by way of rent since 20 April 2009?

78. The Plaintiff is entitled to the declaration it seeks as it is a purchaser in possession under a binding agreement for the sale and purchase of the Land. It follows that the new CPL, in which the Plaintiff is cast as a lessee and not as the purchaser in possession, must be set aside.

79. The sums demanded and paid by the Plaintiff after March 2009 other than the sum of US$230 for arrears of rent paid on 10 July 2010 should be offset against the sum now owing to TCIG. No interest is payable to the Plaintiff on those sums as the money is due to TCIG in any event as payment for the Freehold Title.

80. In the circumstances where the Plaintiff acted upon the Minister's letter and tendered the sums set out therein, it would be inequitable for TCIG to now insist upon the original purchase price of $4,600. The sum now due and owing to TCIG is the sum of $3,450.

81. Costs follow the event, and the Defendant shall pay the Plaintiff's costs on a standard basis, such costs to be taxed if not agreed.

DATED 19 DECEMBER 2018

CHIEF JUSTICE