

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2018/0039

BETWEEN:

CARLTON LEWIS

Appellant

and

NEIL COCHRANE
(As President of the Antigua Turf Club)

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Marshall Jnr for the Appellant
Mr. George Lake for the Respondent

2022: February 23;
May 27.

Civil Appeal - Leasehold interest- Equitable interest- Whether an unincorporated association can own or acquire an estate or proprietary interest in real property- Whether the leasehold interest acquired by the appellant is subject to the equitable interests of the Antigua Turf Club ('ATC')- Whether the equitable interest in land is an overriding interest protected by Section 28(g) of the Registered Land Act- Hierarchy of laws principles- Whether judge's finding of a licence coupled with an equitable interest is in conflict with section 4 of the Crown Lands (Regulation) Act- Proprietary estoppel- Whether the principles of proprietary estoppel apply to Crown Lands- Whether occupation of Crown Lands by the ATC gave rise to an equitable interest on the basis of proprietary estoppel- Whether proprietary rights in Crown Lands in Antigua and Barbuda can be created by any authority other than by the Cabinet- Power of the Crown to divest itself of its property - Free alienability of land- Whether the judge's finding that the ATC held a licence coupled with an equitable interest created a right or interest in perpetuity and impugned the principles of the free alienability of land

The Antigua Turf Club ("ATC") is an unincorporated entity. It (and its predecessor in name, the Cassada Gardens Turf Club) has occupied, promoted and conducted horse racing from

the property known as the 'Cassada Gardens Race Track' ("the disputed property"), since 1964. The disputed property is owned in fee simple by the Government of Antigua and Barbuda as the sole registered proprietor thereof. In April 2000, the Government of Antigua and Barbuda granted a lease of 31.21 acres of the disputed property to the appellant for a term of 25 years from 1st April 2000.

In 2012, the appellant brought a claim against the respondent, Neil Cochrane, as the court-appointed representative of the ATC. The appellant claimed that the ATC had engaged in acts of trespass including excavation of lands, construction of structures and entering the land without the appellant's permission. He therefore sought orders for the: (i) possession of the disputed property; (ii) a declaration that neither the respondent nor the ATC is entitled to enter upon or use the leasehold lands of the appellant; (iii) an injunction restraining the respondent, whether by himself or his servants or otherwise howsoever from entering on the said land; (iv) an account of any income and profits made by the ATC from the disputed property and an order for payment to the appellant of any such income and profits; (v) damages for trespass; (vi) interest upon any damages found due; and (vii) costs.

It was not in dispute that the ATC has conducted horse racing from the disputed property since 1964 with the permission of the Government of Antigua and Barbuda, however the precise bases, terms, and legal effect of the arrangement between the Government of Antigua and Barbuda and the ATC and its predecessor Turf Club in relation to their use of the disputed property for horse racing activities, was a matter of much contention.

The respondent in its Amended Defence and Counterclaim admitted that the appellant held a leasehold interest in the disputed property. However, he asserted that the Government of Antigua and Barbuda and the ATC had entered into an oral agreement whereby it was agreed that in exchange for the Government allowing the ATC to occupy the disputed property, the ATC would develop the said property for horse racing. In keeping with this agreement, the ATC claims to have invested over two million dollars in the upgrade and maintenance of the facility. Importantly, the respondent maintained that the ATC has an overriding interest in the disputed property and that any interest which the appellant has in the said property "is held subject to the equitable interest of the ATC which interest it has never surrendered and which is protected by law". The respondent also counterclaimed for loss and damages for damage occasioned by the appellant when he entered the disputed property, and with the use of heavy equipment dug a large trench across the race track damaging the infield and destroying the race track.

At trial, the learned judge considered and went on to find that there was ample evidence of the existence of a licence coupled with an equitable interest over the disputed property in favour of the ATC, which interest constituted an overriding interest protected by section 28(g) of the Registered Land Act and could not be defeated or determined by an assignment or lease of the property to the appellant. The learned judge held that it would be unconscionable after all these years for the Crown to escape its promise, and for the lack of formality to defeat ATC's rights in the disputed property. On 28th September 2018, the learned judge, in a written judgment, dismissed the appellant's claim and found the appellant liable on the respondent's counterclaim for loss and damage in the sum of \$291,170.29 plus interests and costs.

The appellant being dissatisfied with the judgment, appealed. In summary, the appellant challenges the learned judge's decision on the following grounds: (1) whether the ATC, as an unincorporated body, has the legal capacity to hold any interest in the disputed property, including a licence coupled with an equitable interest constituting an overriding interest pursuant to section 28 of the Registered Land Act; (2) the learned judge erroneously found that the appellant's lease is subject to the equitable interest of the ATC, and that such a finding is, as a matter of law, in conflict with the authority vested in the Cabinet by section 4 of the Crown Lands (Regulation) Act and disregards the principles of hierarchy of laws by holding equity superior to statute law; (3) despite there being no evidence of a disposition or gift being made or assurances or affirmative consent from the Government, the judge erroneously found that the occupation by ATC over the years gave rise to an equitable interest in the disputed property on the basis of the principles of proprietary estoppel, and for which interest it would be unconscionable for the Government to defeat for lack of formality; (4) whether a letter to the respondent in February 2008 was indisputable evidence of Cabinet exercising its powers to make regulations under the Crown Lands (Regulation) Act thereby retaining control of the disputed property, subject to the appellant's lease; and (5) whether the finding that an interest had been acquired by the ATC in the disputed property based on proprietary estoppel had the impermissible effect of creating a right in perpetuity and offends against the principles of free alienability of land.

Held: dismissing the appeal; affirming the judgment and orders of the learned judge in the court below and awarding costs to the respondent in the appeal to be assessed if not agreed within 21 days from the date of delivery of this judgment, such costs not exceeding two-thirds of the prescribed costs awarded in the court below, that:

1. An unincorporated organisation is not a legal person and does not have the capacity to enter into a binding contract or to sue and be sued. As such, an unincorporated body cannot hold or acquire title or interest in land, legal or equitable, including but not limited to, an overriding interest protected by section 28(g) of the Registered Land Act, unless such interest is acquired through individuals or trustees on behalf of the unincorporated body.

Halsbury's Laws of England, Volume 34 'Sale of Land', page 225 at paragraph 376 applied.

2. The issue as to the legal capacity of the ATC, as an unincorporated organisation to hold an interest, legal or equitable, in the disputed property was not pleaded by the appellant in the court below. This issue was raised by the appellant for the first time on appeal. No issue was joined with the respondent's defence to the claim that, in any event, it must fail because the ATC does not have the legal capacity to hold the equitable interests or any interest it was contending to have in the disputed property. Likewise, no point was made or sought to be made by or on behalf of the appellant that the respondent's counterclaim for loss and damage must fail because of the ATC's lack of capacity to hold any interest in real property upon which to ground such a claim. Despite its obvious importance, it would be an injustice to the respondent to permit this issue to be raised for the first time at this late stage. There was ample opportunity for the appellant to raise such an important issue, going as it does, to the root of the defence and counterclaim filed by the respondent in the

court below, thereby affording to the respondent a fair and adequate opportunity to properly respond to it. .

3. The equitable principles of proprietary estoppel are well established. They apply equally to Crown Lands and to lands which are owned by private individuals or corporate entities. In the appropriate circumstances, it may be established by the evidence that the permission or promises made by the Crown can constitute assurances which, over a significant period of time, lead to a conclusive finding that the occupier of Crown lands, who has acted to his or her detriment, in reliance on such assurances or promises, has acquired an equitable interest in the Crown Lands, such that it would be unconscionable for the Crown to unilaterally act in a way contrary to or to determine such occupation.
4. It is indisputable as a matter of fundamental principle and statutory interpretation that while equity prevails over the common law, equity does not prevail over Acts of Parliament. Section 4 of the Crown Lands (Regulation) Act grants to Cabinet the power to make regulations setting out the terms and conditions under which Crown Lands may be rented, leased, occupied, sold or otherwise dealt with. Section 4 does not itself create or vest the Crown with the power to rent, lease, sell, permit occupation of or otherwise dispose of Crown Lands. This power exists, and already existed, separate from the Crown Lands (Regulation) Act. On its proper interpretation, until the power granted by section 4 is exercised by Cabinet and regulations specifying the terms and conditions are prescribed, the Crown's power to rent, sell, lease or permit occupation and possession of Crown Lands remains unfettered. No such regulations were produced or relied upon in the instant case. In any event, section 4 does not expressly or by necessary implication, exclude or preclude the application of the equitable principles of proprietary estoppel to Crown Lands. It follows therefore that the judge's finding of proprietary estoppel in favour of the ATC cannot be said to be in conflict with the statutory powers granted by section 4 of the Crown Lands (Regulation) Act or the lease granted to the appellant by the Cabinet. Put another way, the learned judge did not err in failing to apply the hierarchy of laws principles when she found, on the equitable principles of proprietary estoppel, that the ATC acquired a licence coupled with an equitable interest.

Section 4 of the **Crown Lands (Regulations) Act**, Cap 120 of the Laws of Antigua and Barbuda considered; Sections 19 and 21 of the **Eastern Caribbean Supreme Court**, Cap 143 of the Laws of Antigua and Barbuda considered.

5. A licence coupled with an equitable interest is different in law from a bare or contractual licence. It gives rise to an equitable interest in the real property itself, which equitable interest may be accorded the status and protection of an overriding interest pursuant to section 28 of the Registered Land Act. The grant of a lease to someone over land or property does not, without more, have the effect of determining a licence coupled with an equitable interest in the said land or property already acquired or created by operation of the doctrine of proprietary estoppel.

Section 28 (g) of the **Registered Land Act**, Cap 374 of the laws of Antigua and Barbuda applied; **Stanford International Bank v Austin Lapps** [2006] UKPC 50 considered.

6. Unconscionability is the bedrock principle of the doctrine of proprietary estoppel. Its applicability or non-applicability is dependent upon the established facts and circumstances of each case. It involves the trial judge making an assessment and judgment based on the evidence adduced. Accordingly, unless there is no evidence to support the trial judge's conclusion, an appellate court ought to be slow to set it aside. Although there was no formal evidence before the learned judge of any decision made by the Cabinet permitting the ATC or its predecessor in 1964 to occupy and use Crown Lands for the development and promotion of horse racing in Antigua and Barbuda, there was ample evidence of the Government, over a 45 plus year period, dealing with the ATC and its predecessor in relation to the disputed property as if it held such rights. This evidence included, importantly, the Cabinet itself as evinced by the Report of the then President of the Turf Club Mr. Berridge, dated 11th October 1972 and the 22nd February 2008 letter from the Permanent Secretary in the Ministry of Education, Sports & Youth Affairs to Mr. Cochrane of the ATC. Importantly, the Berridge Report recounts the receipt by the predecessor Turf Club of a letter dated 30th June 1972 from the Accountant General of the Government of Antigua and Barbuda requesting immediate payment of all outstanding 'entertainment duty' in respect of race meetings held since Easter 1971, and detailed the efforts made with respect to the Turf Club's application to the Government for an exemption from the payment of entertainment tax, including a promised interview with the then Premier of Antigua and Barbuda. The Berridge Report also evinces that the predecessor Turf Club was required to apply to the Cabinet for a licence to hold race meetings and that such an application had been submitted by Mr. Berridge, on behalf of the Turf Club, to the then Premier as the head of Cabinet. This evidence points to knowledge, acknowledgement, assurances or affirmative consent from the Cabinet to the Turf Club and its successor ATC at various stages in the 45 plus years of its occupation and use of the disputed property. This evidence is not of the character of 'mere negative or silent consent.' Taken collectively it is confirmatory of not just the presence or occupation by ATC of the disputed property, but its long occupation, expenditure on and improvement of the facilities on the disputed property, and its conduct of horse racing therefrom. The Court therefore finds no reason to interfere with the learned judge's finding that the ATC had acquired a licence coupled with an equitable interest based on the principles of proprietary estoppel and that it would be unconscionable for the Crown to defeat such rights for want of formality.
7. A letter is not a regulation. The word 'regulation' is specifically defined in the Interpretation Act and once made in accordance with the powers granted by a particular statute, is considered subsidiary legislation. It is therefore wholly incorrect to classify a letter addressed to the respondent from the Ministry of Education, Sports and Youth Affairs, as indisputable evidence that the Cabinet had exercised its statutory powers under section 4 of the Crown Lands (Regulation) Act to retain control of the disputed property, as the appellant contended. The letter is nothing

more than a communication to the ATC of a policy decision taken by the Cabinet with regard to all sporting venues in Antigua and Barbuda, which includes the disputed property. Furthermore, the letter does not speak to or inform of any regulation made by the Cabinet to the effect stated in the letter.

8. A finding by the court that a person has acquired a licence coupled with an equitable interest in land does not divest the owner of the land of their estate and title in the land. The fee simple ownership remains vested in the registered proprietor (in this case, the Crown), which it can freely divest itself of. The court having found that a licence coupled with an equitable interest in the disputed land had been established on the evidence in favour of the respondent, simply means that any subsequent divestment by the registered proprietor of the disputed property would, by operation of the law of Antigua and Barbuda, be subject to such interest. It follows that the finding by the learned judge of proprietary estoppel in favour of the respondent does not offend against the principles of the free alienability of land. Furthermore, the appellant's reliance on sections 16(1)(b) and 16(2) of the Crown Proceedings Act as persuasive authority for the proposition that a finding of equity in favour of the respondent, in effect, grants a right in perpetuity to the ATC to use and occupy the disputed property for horse racing, contrary to the Crown's rights as intended by the said provisions, is entirely misplaced. These provisions concern 'proceedings brought against the Crown for the recovery of land'. They do not pertain, nor do they apply, to a situation where there is a claim in equity to an interest in or over Crown Lands as a defence to a claim to possession of the lands brought by another private individual.

National Provincial Bank v Ainsworth [1965] 2 All ER 472 considered; **Halsbury's Laws of England**, Volume 32, paragraph 561 considered; Sections 16(1)(b) and 16(2) of the **Crown Proceedings Act** considered.

JUDGMENT

- [1] **FARARA JA [AG]:** This is an appeal by the appellant, Carlton Lewis, (the claimant in the court below) against the judgment of Henry J ("the learned judge" or "the judge"), dated 28th September 2018 by which the judge dismissed a claim in trespass brought by the appellant against the respondent Neil Cochrane ("Mr. Cochrane") as President of the Antigua Turf Club ("ATC"), an unincorporated organization; and found the appellant liable on the respondent's counterclaim for loss and damage in the aggregate sum of \$291,170.29 plus interest and costs ("the Judgment").

- [2] The dispute between the appellant and the respondent concerns a piece of land in Antigua known as the 'Cassada Gardens Race Track' registered as Registration Section Barnes Coolidge, Block 41 2094A, Parcels 420 and 421 ("the disputed property"). The disputed property is owned in fee simple by the Government of Antigua and Barbuda as the sole registered proprietor thereof. The ATC (and its predecessor in name the 'Cassada Gardens Turf Club'), has been in continuous occupation of the disputed property since 1964 and used it for the development of horse racing in Antigua and Barbuda. The ATC has expended substantial sums of money in carrying out improvements to the horse racing facilities on the disputed property, including to the race track and buildings thereon. The appellant has, since April 2000, held a registered leasehold interest in the disputed property granted by the Government of Antigua and Barbuda for an initial term of 25 years. His lease of the disputed property was admitted by the respondent in its filed defence.¹

Brief Overview

- [3] The ATC is a Club. It is not an incorporated entity. Its charter or other 'constitutional' document was not produced and put into evidence in the proceedings before the court below. Mr. Cochrane was at the material times the President of the ATC. He gave evidence at the trial. Mr. Ralph A. Francis, an Attorney-at-Law by profession and a person who has been involved in horse racing in Antigua and Barbuda for over 60 years as a jockey, trainer, horse owner and member of the Cassada Gardens Turf Club, which name was later (in or around 1973) changed to the Antigua Turf Club, also gave evidence at the trial. Mr. Francis has, over the years, held various positions in the Turf Club. Certain documents, including a Report of Mr. Berridge dated 11th October 1972, as past President of the Turf Club, were admitted into evidence at the trial.
- [4] The ATC has, since 1964, with the permission of the Government of Antigua and Barbuda, occupied, promoted and conducted horse racing from the disputed property known as the 'Cassada Gardens Race Track'. The evidence also discloses

¹ Further Amended Defence and Counterclaim filed 10th August 2012, paragraph 3.

that the disputed property has been used as a horse racing track for over a century. Prior to 1956, horse racing on the disputed property was conducted under the auspices of 'the Syndicate Estates Limited' from whom the Government of Antigua and Barbuda later acquired the said property. No racing was held there during the period 1956 to 1964. While it was not in dispute that the ATC has conducted horse racing from the disputed property since 1964, the precise bases, terms, and legal effect of the arrangement between the Government of Antigua and Barbuda and the ATC and its predecessor Turf Club in relation to their use of the disputed property for horse racing activities, was a matter of much contention between the appellant and respondent at the trial and before this Court.

- [5] What is not in dispute is that in 2000, the Government of Antigua and Barbuda, as the registered proprietor of the disputed property granted to the appellant, trading as "Tyre Master", a lease of 31.21 acres of the disputed property for a term of 25 years from 1st April 2000. The appellant's leasehold interest is registered on the land register with respect to the said property and a copy of the Certificate of Lease was in evidence at the trial. However, a copy of the instrument of lease itself was not put in evidence in the proceedings below.
- [6] The appellant's claim to possession of the disputed property is rooted in its leasehold interest. He pleaded that the ATC has since January 2012 and before, trespassed upon the disputed property and taken possession of it or parts thereof. The acts of trespass were said to include excavation of the lands; construction of structures; entering upon the disputed property and carrying out a commercial activity therefrom, that is a horse racing enterprise, all done without the consent or permission of the appellant. In the High Court proceedings, the appellant claimed against the ATC seeking: (i) possession of the disputed property known as 'Cassada Gardens Race Track'; (ii) a declaration that the ATC is not entitled to enter upon and to use the disputed property; (iii) an injunction restraining the respondent whether by themselves, their servants or otherwise howsoever from entering upon or using the disputed property; (iv) an account of any income and profits made by

the ATC from the disputed property and an order for payment to the appellant of any such income and profits; (v) damages for trespass; (vi) interest upon any damages found due; and (vii) costs.

[7] In its Amended Defence and Counterclaim, the ATC, having admitted that the appellant held a leasehold interest in the property, asserted that beginning with the Easter Race in 1964, it has, with the agreement of the Government of Antigua and Barbuda, promoted and held horse racing at the disputed property, which has been used to accommodate horse racing for over 100 years. The respondent pleaded that the Government and it agreed in 1964 that in exchange for the respondent having the said lands, it agreed 'to develop said lands for horse racing'.² It was also pleaded by the ATC that "[b]eginning in 1964 and continuing to this day, [the ATC] and its predecessor organization have invested over two million dollars in the upgrade and maintenance of the facility. In addition, [the ATC] has received vast sums of assistance from private individuals, companies and even the government itself towards the [d]evelopment of horse racing at Cassada Gardens."³

[8] The ATC maintained that at all times it has been in occupation of the property, "and has an overriding interest in said [lands] superior in title to that of [the appellant]"; and that any interest which the appellant has in the said property "is held subject to the equitable interest of [the ATC] which interest it has never surrendered and which is protected by law."⁴ It was also pleaded in the defence that the Government of Antigua and Barbuda has not given "any notice of any revocation of [the ATC's] occupation of the said lands."⁵ Accordingly, the ATC counterclaimed for damage and loss to the property as a result of the appellant having entered upon the disputed property in June 2010 with heavy equipment (trucks, excavators and backhoes), "dug a large trench across the horse racing track damaging the infield and

² Further Amended Defence and Counterclaim filed 10th August 2012, paragraph 7.

³ Ibid, paragraph 12.

⁴ Ibid, paragraph 13.

⁵ Ibid, paragraph 15.

destroying the said track”, rendering it unusable,⁶ and causing “great loss and damage to the Members of the Defendant Association”, including, among other pleaded losses, loss of business opportunity to put on races for a period of some 20 months.⁷

- [9] In his ‘Defence to Counterclaim’, the appellant stressed that “at all material times in entering his lands [he] was exercising his proprietary rights pursuant to the Registered Land Act as the [a]bsolute proprietor of the Lease”, and in protection of such rights.⁸ Accordingly, the appellant denied the counterclaim for loss and damage.

The Judgment

- [10] After a trial, the learned judge gave a written judgment on 28th September 2018 in which she dismissed the claim and upheld the counterclaim. The learned judge first considered as a preliminary issue whether the respondent in its Defence and Counterclaim had properly pleaded or relied upon the doctrine of proprietary estoppel. On this issue, she concluded that-

“[13] The Further Amended Defence together with the details supplied in the witness statement of Neil Cochrane have raised the issues of promise or assurance, reliance and detriment. Notwithstanding that the term proprietary estoppel was not used in [the respondent’s] pleading it is clear that it has asserted all the elements and that it was invoking the equitable doctrine, and was sufficient to inform [the appellant] of the case it had to meet. The Court is of the view that [the respondent] can properly rely on Proprietary estoppel.”⁹

- [11] In the judgment, the learned judge, having considered the aspect of the decision of the Privy Council in **Stanford International Bank Ltd v Austin Lapps**¹⁰ concerning the creation and determination of a tenancy at will, including the necessity for an

⁶ Ibid, paragraph 17.

⁷ Ibid, paragraph 18.

⁸ Reply to Amended Defence and Defence to Counterclaim filed 25th April 2013, paragraphs 2-3.

⁹ *Carlton Lewis v Neil Cochrane* (As president of the Antigua Turf Club) ANUHCv2012/0256 (delivered 28th September 2018, unreported) at paragraph 13.

¹⁰ [2006] UKPC 50.

affirmative consent by the landowner and not a mere negative or silent consent, found that the status of a tenancy at will could not be accorded to the ATC. From this finding, there has been no appeal. The learned judge then considered and went on to find that there was 'ample evidence of the existence of a licence' over the disputed property in favour of the ATC.¹¹

[12] Next, the learned judge considered the ATC's claim to a proprietary estoppel. Having advised herself of the four elements of the modern doctrine of proprietary estoppel set out authoritatively in **Taylor Fashions v Liverpool Victoria Trustees**¹², the learned judge underscored that the fourth principle, unconscionability, is at the heart of the doctrine. The judge found that the ATC had established something more than a bare licence over the property; that it held a licence coupled with an equitable interest to occupy and use the property, which interest constituted an overriding interest under section 28(g) of the Registered Land Act and could not be defeated or determined by an assignment or lease of the property to the appellant. These primary findings of fact and conclusions of law, which are at the heart of this appeal, are as follows:¹³

"[40] The Court is satisfied, based on the evidence, that the ATC has established that it has been in occupation with the knowledge and encouragement of the Government during the past forty years; that it was given an assurance that as long as they developed horse racing at the disputed land, the ATC could remain in occupation; that over the years the Club expended substantial sums in building and maintaining the track and buildings on the premises in reliance on the Government's assurance. It would be unconscionable after all these years for the land owner to escape its promise and for lack of formality to defeat the ATC's rights. The Defendant [the ATC] has established that it has more than a bare licence but a licence coupled with an equitable interest which is protected under section 28(g) of the Registered Land Act.

[41] Where the person in possession is a bare licensee or a gratuitous licensee, the occupation is not protected as an overriding interest under section 28(g) of the Act. Further such a licence is determined by an assignment of the land over which the license is granted. Here however,

¹¹ Carlton Lewis, *supra* note 9 at paragraph 37.

¹² (1982) QB 133.

¹³ Carlton Lewis, *supra* note 9 at paragraphs 40-41.

the Defendant [the ATC] has established that the Turf club is in occupation as a licensee coupled with an equitable interest. The Defendant's [ATC's] interest was never determined by the Government prior to the grant of the lease to the claimant [the appellant] in 2000. In fact the evidence is to the contrary. As recent as 2007, well after the claimant [the appellant] acquired his lease, the Government continued to recognize the Antigua Turf Club as the occupants of the Cassada Gardens Race track. The claimant [the appellant] therefore took its lease subject to the interest of the ATC."

[13] The learned judge, accordingly, dismissed the appellant's claim. As to the counterclaim, the judge noted that the pleaded allegations of the appellant's entry upon the property in June 2010 with heavy equipment and digging a large trench across the horse racing track damaging the infield and destroying the track, had not been denied by the appellant who had, instead, asserted his right to do so as the absolute registered proprietor of the lease. She also made reference to the appellant's evidence given in cross-examination where, essentially, he admitted that he or his agent had gone on to the property and dug up the track in "several areas", using "an excavator but not on the track", and, further, his admission that he "did do some work on the infield with permission from one of your agents to clean drainage."¹⁴ Instructively, the appellant went on in answer to questions during re-examination, to explain that the reason why he had sought the permission of the ATC to do some work on the infield, was because he "didn't want any problem. I was trying to help because I did not want them to think I trying to stop racing. They ask me to help and I went and did that."¹⁵

[14] The judge found that the appellant's defence to the counterclaim had failed. She found as a fact that the appellant "did enter the track, and with the use of an excavator did cause substantial damage as alleged by the ATC." She therefore found the appellant liable for any damage done. In assessing the proof and quantum of damages, the learned judge held that the ATC's claim for loss of business opportunity to put on races for a period of 20 months failed because of a lack of credible evidence upon which to base such an award. Similarly, the particulars of

¹⁴ Carlton Lewis, *supra* note 9 at paragraph 45.

¹⁵ *Ibid*, at paragraph 46.

the ATC's counterclaim for monies spent to employ persons to care for race horses owned by members of the ATC and for loss of use of animals whose racing life had expired or was reduced when the race track was unusable for 20 months, also failed because of a lack of evidence. This notwithstanding, the learned judge reasoned that it was permissible to make an award of nominal damages where these items of special damages had not been proven, and accordingly made an award of \$5,000.00 in nominal damages. As to the claim for the costs of repairing the track, the judge, having examined the numerous receipts for materials and labour, concluded that they established a sum of \$232,021.13, for the cost of materials and \$14,149.16 for labour costs, all totaling \$246,170.29.¹⁶ She then awarded the sum of \$40,000.00 in general damages as compensation for non-pecuniary loss such as inconvenience as a result of the destruction caused by the appellant on the disputed property, of which she considered there was 'ample evidence'. The ATC's claim for exemplary damages was dismissed as not falling within either of the two categories set out by Lord Devlin in **Rookes v Barnard**.¹⁷

- [15] In summary, the learned judge gave judgment in favour of the 'Antigua Turf Club' on its counterclaim in the sums of \$40,000.00 general damages, \$251,170.29 special damages (of which \$5,000.00 was nominal damages), interest at the rate of 5 percent [per annum] from the date of judgment, and prescribed costs.
- [16] The appellant being dissatisfied with the judgment has appealed. His notice of appeal sets out nine grounds of appeal. These grounds, in different ways, challenge the judge's finding that the ATC held a license coupled with an equitable interest in the disputed property.

The Grounds of Appeal

- [17] The appellant, in his written submissions filed 21st May 2021, distilled the nine grounds of appeal in his notice of appeal into five grounds. These five grounds were

¹⁶ Carlton Lewis, *supra* note 9 at paragraph 54.

¹⁷ [1964] AC 1129 at 1226.

addressed in his written and oral submissions. They were also dealt with in the respondent's written and oral submissions before the Court. For convenience and consistency, I will adopt, with some refinement, the appellant's stated five grounds of appeal. I will address grounds 1 and 2 separately. Grounds 3 and 4, which each challenge the judge's findings of fact and conclusion of a licence coupled with an equitable interest in the respondent, may conveniently be dealt with together. Ground 5, which is essentially a legal point dealing with the principle of the free alienability of land, will be dealt with last.

[18] Before setting out the five grounds relied on by the appellant, I observe that while the appellant in his notice of appeal has appealed against the orders of the learned judge awarding damages to the respondent on its counterclaim, none of the nine grounds of appeal (or the appellant's distilled five grounds) address or challenge these findings and awards of damages. Accordingly, there has been no effective challenge before this Court to the said awards, which remain unchallenged before us. Likewise, there is no counter-appeal or counter-notice of appeal filed by the respondent against the judgment below.

[19] The five (distilled) grounds are:

Ground 1: Whether the ATC, as an unincorporated association without legal personality, has the capacity in law to own or to acquire any estate or interest in real property, legal or equitable, including a licence coupled with an equitable interest constituting an overriding interest pursuant to section 28(g) of the Registered Land Act. **(ATC's Lack of Capacity/Legal Personality)**

Ground 2: Whether the trial judge failed to apply principles of the hierarchy of laws in sections 19 and 21 of the **Eastern Caribbean Supreme Court Act**¹⁸ whereby the **Crown Lands (Regulation) Act**¹⁹ is secondary and subject only to the **Antigua and Barbuda Constitution Order 1981** ("the Constitution"), but superior to

¹⁸ Cap. 143 of the Laws of Antigua and Barbuda.

¹⁹ Cap 120 of the Laws of Antigua and Barbuda.

Treaties, the common law and equity and, accordingly, whether the judge erroneously found that the ATC had established that it is in occupation of the property under a licence coupled with an equitable interest, and that the appellant's lease is subject to such interest, which finding is, as a matter of law, in conflict with the authority vested in the Cabinet by section 4 of the **Crown Lands (Regulation) Act. (Failure to apply Hierarchy of Laws Principles)**

Ground 3: Whether, having regard to the powers conferred on the Cabinet pursuant to section 4 of the **Crown Lands (Regulation) Act** to make regulations with respect to the terms and conditions on which Crown Lands (as therein defined) may be rented, leased, occupied, sold or otherwise dealt with, and the learned judge having determined that there was no evidence of Cabinet's involvement in, any agreement or decision to make a gift or disposition of the disputed property to the ATC or of any affirmative assent by the Cabinet to the ATC's occupation of the disputed property, or any negotiations for a lease or that the ATC went into occupation under an agreement for a lease, or of any agreement for the payment of rent by the ATC to the Government during its occupation, the learned judge erroneously determined that over the years of the ATC's occupation, having expended substantial sums in carrying out improvements to and maintenance of the track and buildings on the premises in reliance on the Government's assurance, it would be unconscionable for the Government, as the landowner, to escape its promise, and for a lack of formality to defeat the ATC's rights. **(No evidence of a disposition or assurance by Cabinet)**

Ground 4: The learned judge erred in not finding that the letter dated 22nd February 2008 from the Permanent Secretary in the Ministry of Education, Sports and Youth Affairs to Neil Cochrane stating that at a meeting of Cabinet on 19th December 2007 it was "agreed that all sporting venues throughout Antigua and Barbuda including the Cassada Gardens Race Track are to fall within the management of the Ministry of Sports", was indisputable evidence that the Cabinet had exercised its statutory authority under section 4 of the **Crown Lands (Regulation) Act** to retain control of

the disputed property, subject to the appellant's lease of the property for 25 years from 1st April 2000, in exclusion of any legal or equitable right alleged by the ATC in the disputed property. (**The effect of the February 2022 letter on ATC's claim to an equitable interest in the property**)

Ground 5: The finding that a proprietary estoppel had been established was wrong in law as it had the impermissible effect of creating a right or interest in the disputed property *in perpetuity*, and the learned judge failed to consider and/or take into account the principle of the free alienability of land and to recognize and to hold that the Government of Antigua and Barbuda, as the registered owner in fee simple of the disputed property, has the power to freely divest itself of the said land particularly where, as in the instant matter, the ATC had no leasehold interest, no agreement for a lease, and nothing in writing evidencing any contract between the ATC and the Government, and where there was a contrary decision of the Cabinet as set out in the letter of 22nd February 2008. (**The free alienability of land and Government power to divest itself of the property**)

Ground 1 – ATC's lack of capacity and legal personality

[20] The appellant submits that the ATC, being indisputably an unincorporated organization (as the judge recognized at paragraph 1 of the judgment), is not a 'person' in law and does not have the capacity to own or to hold any interest in real property, including an equitable interest. In support of this primary submission, the appellant relied on an extract from **Halsbury's Laws of England**²⁰ where the learned authors state: "*Unincorporated bodies of persons cannot, as such, acquire land, but only as individuals in their private capacity...*" The appellant also relied on an extract from the judgment of Master Corbin Lincoln in **Buzzmaker LLC v Lindsay Fitz-Patrick Grant**²¹ where, at paragraphs 31 and 32, the Master opines that one cannot contract with an unincorporated body which is not a legal person, has no corporate or separate legal existence, and cannot sue and be sued. Mr.

²⁰ Volume 34, 'Sale of Land', page 225 at paragraph 376.

²¹ SKBHCV2015/0280 (delivered 12th September 2016, unreported).

Marshall, learned counsel for the appellant, drew a distinction between the provision in rule 21.1(1) of the **Civil Procedure Rules 2000** (“CPR”) which permits a court by order to appoint someone, in the instant matter Mr. Cochrane, to represent a party (the members of the ATC), and the position in law whereby the ATC, as an unincorporated body, lacks the capacity to contract and to hold an interest, legal or equitable, in real property. The former is a procedural device designed to allow the Club (the ATC) to have *locus standi* and does not clothe the representative party (Mr. Cochrane) with the legal status or capacity regarding the substance of the matter in dispute. It therefore remains, as submitted by Mr. Marshall, the position that in law, the ATC as a Club cannot acquire land or any interest in land in its own right, but only by and through individuals in their private capacity.²²

[21] Mr. Marshall also submitted that where an unincorporated association or body has trustees, they may hold title to real property or an interest therein in that capacity and on behalf of the unincorporated body. There was no evidence produced as to whether the ATC, as a Club, had trustees duly appointed and no documentary evidence was produced as to the constitution of the ATC, its membership, and the appointment of its officers at the trial.

[22] In response to ground 1, Mr. Lake, learned counsel for the respondent, submitted that the issue of the lack of legal capacity of the ATC was not raised before the learned judge, and was only raised by the appellant for the first time in his appeal. It is for this reason he posited that none of the constitutional documents of the ATC were tendered by it into evidence before the trial court. He also stated, from the Bar table, that Mr. Cochrane is in fact a trustee of the ATC, and the effect of the appellant’s newly advocated position on the issue of lack of capacity is that, having put Mr. Cochrane in jeopardy by suing him as a representative of the membership of the ATC, he is saying that he cannot take the benefit of the decision of the court

²² Currie v Barton [The Times, February 12th 1988 (CA)]. See also the Submissions on behalf of the Appellant, paragraph 9.

below with regard to the disputed property on behalf of the membership which he represents.

- [23] It was also submitted on behalf of the respondent, that, in any event, the judge was correct to find that the ATC had the legal capacity to hold an equitable interest in the property in dispute, the judge having not found that the ATC owned or had acquired the said property, having expressly found that there was no evidence of a disposition or gift of the disputed property from the Government of Antigua and Barbuda or from the Cabinet to the ATC. It was also submitted that the “collective body can have such an interest and in fact did have” such an equitable interest in the property, which interest was not one acquired by contract or by any disposition.²³ The decision of the judge was not based on the existence of a contract between the Government of Antigua and Barbuda and the ATC, such as to require the ATC to have the legal capacity to contract or to enter into a binding agreement with regard to its occupation and use of the disputed property for the conduct of horse racing activities. What the learned judge made clear was that the ATC had a licence coupled with an equitable interest in the property permitting it to occupy and to operate horse racing therefrom, which licence “requires no formalities and it may arise from spoken word or from tacit acceptance of a state of affairs.”²⁴

Decision on Ground 1

- [24] It is correct that the issue as to the capacity in law of the ATC and its inability as an unincorporated body to hold an interest, legal or equitable, in the disputed property was not pleaded by the appellant. It was not raised in his filed witness statements, in his pre-trial memorandum filed 8th July 2014, or in the evidence given at the trial, whether in examination-in-chief or cross-examination. Likewise, it was not raised in written or oral submissions or put by the appellant before the trial judge in any way for her consideration and adjudication. While the judge, at paragraph 1 of the judgment, recorded the fact that the ATC is an unincorporated body, no objection or

²³ Submissions on behalf of the Respondent, paragraph 14(a).

²⁴ Submissions on behalf of the Respondent, paragraph 14(c).

no issue was raised by the appellant or on his behalf in the proceedings below that, in any event, the ATC's defence to the claim must fail because it does not have the capacity in law to and cannot hold the equitable interests it was contending for or any interest in the disputed property. Furthermore, no point was made or sought to be made by or on behalf of the appellant that the ATC's counterclaim for loss and damage must likewise fail because of its lack of capacity to hold any interest in real property upon which to ground such a claim. Furthermore, this issue was not raised or relied on by the appellant in his application filed 22nd May 2012 for an interim injunction, which application was determined by Astaphan J (as he then was) in a written judgment dated 5th September 2012.

[25] In the appellant's final trial submissions filed 31st August 2017, he argued that what "the Antigua Turf Club in fact had, at the most, was a Tenancy at Will where either party, the Government of Antigua and Barbuda or the Antigua Turf Club, could terminate the tenancy and simply walk away from the alleged agreement that the Antigua Turf Club could occupy the premises as long as they held horse racing there."²⁵ These written submissions were filed in response to the written submissions of the respondent which, in part, stated: "This is essentially a claim for the Court to determine which party has a superior title to the other and should be in possession of a certain parcel of land owned by the Government of Antigua and Barbuda....." At paragraphs 7 to 15, the respondent lists nine (9) legal contentions or issues arising for the court's consideration and determination, none of which concerned or was in response to any issue raised by the appellant as to the capacity of the respondent to hold an interest in real property, whether legal or equitable.

[26] What is clear from the record, is that on 5th April 2012, the appellant filed an application to have Mr. Cochrane joined in the proceedings as a named defendant in his capacity as the President of the ATC. The order appointing Mr. Cochrane was made on 15th May 2012. Thereafter, Mr. Cochrane has been the 'substantive' defendant in the proceedings below and has continued to represent the ATC as the

²⁵ Appellant's final trial submissions filed 31st August 2017, paragraph 12.

respondent in this appeal, in his capacity 'as President of the Antigua Turf Club'. Following Mr. Cochrane's appointment by the court as the representative of the ATC in the proceedings below, he was served with a notice of application filed by the appellant seeking an injunction preventing members of the ATC, its servants, agents and Mr. Cochrane from trespassing or otherwise entering upon the lands of the appellant constituting the Cassada Gardens Race Track.

[27] It is so well-established as to be trite, that an unincorporated body is not a legal person and as such does not have the capacity to enter into a binding contract or to sue and be sued. In this respect, the statement of principle relied on by the appellant at paragraph 376 of **Halsbury's Laws of England**²⁶ is apt. The effect of this fundamental principle is that an unincorporated body cannot acquire or hold title to land. This includes acquiring or holding any interest in land, legal or equitable, such as would constitute an overriding interest pursuant to section 28 of the **Registered Land Act** of Antigua and Barbuda. Such a body, club or association can only do so through individuals. For an unincorporated body, such as the ATC, to hold a legal or equitable interest in the disputed property, it must do so through trustees.

[28] While there is no evidence produced at the trial as to whether Mr. Neil Cochrane, as President, is also a trustee for or of the ATC, we were informed by counsel Mr. Lake that he is such a trustee. As the issue of lack of legal capacity was not an issue pleaded or raised in any way by the appellant (or anyone else) during the proceedings below, it was not one of the issues which fell to be interrogated and determined by the trial judge. It is therefore not surprising that the respondent did not produce any documentary evidence to establish or seek to establish whether the ATC acted through trustees and whether Mr. Cochrane was indeed a trustee of the said Club.

[29] In my view, despite its obvious importance, the appellant ought not to be permitted to raise this issue for the first time in his appeal. The era of trial by ambush has long

²⁶ Halsbury's, *supra* note 20.

passed in the civil practice before the Eastern Caribbean Supreme Court. Such an issue, going as it does to the root of the defence and counterclaim filed by the respondent, must be specifically pleaded or raised in the appellant's witness statements or in the appellant's pre-trial memorandum or during the course of taking evidence at the trial, thereby affording to the respondent a fair and adequate opportunity to properly respond to it, including producing any relevant documentary evidence. This was not done, and it would do an injustice to the respondent to permit this issue to be raised for the first time by the appellant in and for determination on appeal. The proper and just determination of that issue would require the respondent having a full opportunity to answer it, to produce any documentary evidence as to whether the ATC has trustees and, if so, who they are, and for the court to fully interrogate this issue at the trial.

[30] What is clear, is that Mr. Cochrane was, on the application of the appellant as far back as April 2012, appointed to represent the ATC as the defendant in his claim in these proceedings, which included a claim for possession of the disputed property, a permanent injunction, and damages for trespass. At the time, no issue was raised as to his capacity to do so fully and effectively in these proceedings, and no such issue was raised when he, on behalf of the ATC, filed a defence and counterclaim. The pleadings and proceedings having proceeded on the basis that the ATC, being an unincorporated body, may, at minimum, have held a tenancy at will from the Government of Antigua and Barbuda to occupy the property in dispute, to conduct horse racing therefrom and to effect, at the costs of its members, substantial improvements to the property and the buildings thereon, and to be properly represented in the proceedings by Mr. Cochrane, it is impermissible, at this late stage, for the appellants to assert that the ATC does not have, through Mr. Cochrane or otherwise, the legal capacity to hold a license coupled with an equitable interest in the property.

[31] In the premises, ground 1 fails.

Ground 2 – Failure to apply hierarchy of laws principles

- [32] The learned judge found at paragraph 34 of the judgment, that “from the evidence submitted by the ATC, there was nothing to show that a gift or any other disposition of the land to the ATC was perfected. There was no evidence as to the process of “the gift” other than to say that the “Government gave” the land to [the ATC] for a particular purpose.” The learned judge also found: “Other than the last-minute evidence of Neil Cochrane, which the court rejects, there was no evidence of Cabinet’s involvement in a gift or disposition of the disputed land to [the] ATC. In the absence of a Cabinet decision evidencing disposition of the land or testimony of a similar nature from a person authorized by Cabinet, the evidence from the ATC of a disposition of the Crown Lands to the Turf Club lacks sufficiency.”
- [33] At paragraph 41, the learned judge found that the ATC had established that it was in occupation of the property as a “licensee coupled with an equitable interest”, which interest had not been determined by the Government prior to the grant of the lease to the appellant in April 2000. She observed that contrary to any determination of the ATC’s interest in the property, “the Government continued to recognize [the ATC] as the occupants....” of the property. Accordingly, the ATC were not trespassers in 2012. It is with this finding of a license coupled with an equitable interest that the appellant’s ground 2, dealing with the judge’s alleged failure to apply the principles of the hierarchy of laws, takes aim.
- [34] Reference was made by the appellant to section 2 of the Constitution which declares the said instrument to be the supreme law of Antigua and Barbuda and that, in situations of a conflict between any of its provisions and that of any other law, the provisions of the Constitution shall prevail. Reliance was also placed by the appellant on sections 19 and 21 of **the Eastern Caribbean Supreme Court Act**. Section 19 mandates the High Court and the Court of Appeal and each judge thereof to “recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom, or created by any statute...” and section 21 declares that the rules of equity

shall prevail over the rules of the common law in circumstances “where there was formerly or is any conflict or variance.”

[35] The point being made by the appellant under this ground in reliance upon these provisions, is that while equity prevails over the common law, equity does not prevail over Acts of Parliament (statutes).²⁷ Indeed this much is indisputable as a matter of principle and statutory interpretation and is, I would add, uncontroversial. However, the appellant submits that where the learned judge went wrong was in “finding proprietary estoppel in favour of the respondent even though the respondent is not a legal entity capable of owning rights to property”, thereby putting equity in conflict with the statutory authority of the Cabinet under section 4 of the **Crown Lands (Regulation) Act** and the legal lease granted to the appellant by the Cabinet acting in accordance with section 4.²⁸ This is the issue raised by ground 1 concerning the capacity of the ATC to hold a license coupled with an equity interest in the disputed property. I have already found that this is not a matter upon which the appellant can rely at this stage of the proceedings, for the reasons stated above.

[36] In response to the appellant’s second ground, the respondent submits that, in the instant matter, there is no such conflict between the common law and the Constitution or between the principles of equity and the powers of the Cabinet under section 4 of the **Crown Lands (Regulation) Act**. Under section 4, Cabinet may grant a legal lease to the appellant and is not in any way fettered in the exercise of its power to do so. However, once granted, the said lease may be “subject to an overriding interest and an equitable interest that the ATC had acquired based on the principles of proprietary estoppel.”²⁹ Accordingly, the respondent submits, the learned judge did not err in failing to apply any principles of the hierarchy of laws.

²⁷ Submissions on behalf of the Appellant, paragraph 13.

²⁸ Ibid.

²⁹ Submissions on behalf of the Respondent, paragraph 15(b).

Decision on ground 2

- [37] In my opinion, this ground is misconceived. I do not accept the submissions of the appellant that the learned judge erred in not applying principles of the hierarchy of laws, and that she ought to have concluded that the powers granted to Cabinet pursuant to section 4 of the **Crown Lands (Regulation) Act** displaces or prevents the application of the equitable principles of proprietary estoppel. In my view, there is no conflict and none existed in the lower court finding that the principles of proprietary estoppel apply to the Crown and, in the proper circumstances, it may be established that the permission or promises made by the Government of Antigua and Barbuda can constitute assurances which, over a significant period of time, lead conclusively to a finding that the occupier of Crown lands who has acted to his or her detriment in reliance on such assurances or promises, has acquired an equitable interest, on the basis of the well-established principles of proprietary estoppel, in the Crown Lands, such that it would be unconscionable for the Crown to unilaterally act in a way contrary to or to determine such occupation. Having said this, it must be stressed that neither the Crown nor the Government of Antigua and Barbuda was a party to these proceedings. Mr. Cochrane, on behalf of the ATC, had on 2nd August 2012, filed an application supported by his affidavit, for an order of the court below under Part 18.4 of the **Civil Procedure Rules 2000** granting permission for the respondent to file an Ancillary Claim against the Attorney General of Antigua and Barbuda as an ancillary defendant. This application was opposed by the Attorney General and no order was made for the commencement of such an ancillary claim.
- [38] Section 4 of the **Crown Lands (Regulation) Act** (which statute came into effect on 1st June 2017) provides: *"It shall be lawful for the Cabinet to make regulations with respect to the terms and conditions on which Crown Lands may be rented, leased, occupied, sold or otherwise dealt with, and all such lands as aforesaid may be rented, leased, occupied, sold or otherwise dealt with."* The expression "Crown Lands" is defined in section 2 of the Act to cover all lands either already acquired or which may hereafter be acquired by the Government, which lands, unless otherwise

vested, “are hereby vested in the Governor General and shall be known as Crown Lands.”

[39] The power granted to Cabinet under section 4 is to make regulations setting out the terms and conditions under which Crown Lands may be rented, leased, occupied, sold or otherwise dealt with. Once that power is exercised and regulations are made setting out such terms and conditions, the exercise by the Crown of its inherent power as the owner of Crown Lands to rent, lease, permit occupation, sell or otherwise deal with the said lands must be exercised in accordance with the regulations. However, no such regulations, which by section 5 are required to be published in the *Gazette*, were produced or relied on in these proceedings. Section 4 does not itself create or vest in the Crown a power to rent, lease, sell, permit occupation of or otherwise dispose of Crown Lands. Such a power exists, and already existed, separate from the **Crown Lands (Regulation) Act**. Indeed, on its proper interpretation, until the power granted by section 4 is exercised by Cabinet and regulations specifying the terms and conditions are prescribed, the Crown’s power to rent, sell, lease or permit occupation of and possession of Crown Lands remains unfettered by any such terms or conditions.

[40] Accordingly, such terms and conditions do not arise or become effective unless and until the power in section 4 of the said Act to make regulations has been exercised by Cabinet. Likewise, the power vested in the Cabinet to make such regulations setting out such terms and conditions, do not expressly or by necessary implication, exclude or preclude the operation of the equitable principles of proprietary estoppel to Crown Lands. Viewed in this way, ground 2 of the appellant’s appeal is misconceived. It accordingly fails.

**Grounds 3 and 4 – No disposition, gift, decision, or assurance by Cabinet;
Effect of February 2008 letter and appellant’s lease – erroneous finding of
unconscionability and licence coupled with an equity**

Appellant’s Submissions

- [41] In relation to these two grounds of appeal, the appellant contends that the learned judge, having found that there was no evidence of a disposition or gift by the Cabinet of the disputed property to the ATC, and no evidence of an affirmative assent of the Cabinet to the ATC's occupation of the disputed property and, in addition, there being no evidence of an agreement for lease or rent being paid by the ATC to the Government for its occupation of the said property, the learned judge erroneously concluded at paragraph 40 of the judgment, that "it was unconscionable after all these years for the Government to escape its promise and for lack of formality to defeat the ATC rights."
- [42] It is also submitted by the appellant that the judge erred when she concluded that there were assurances made or given by the Government to the Turf Club and the ATC with regard to its occupation and use of the disputed property, sufficient to create or to lead to the establishment evidentially of a licence coupled with an equitable interest in the said property by the respondent. Such a conclusion was wrong in law *"because only the Cabinet of Antigua and Barbuda is statutorily authorized to lawfully make such assurances which might create such an interest. A proprietary right in Crown Lands cannot be disposed of or created by any other authority than the Cabinet."*³⁰ Mr. Marshall further argued that in order for such an assurance to have been made, there would have to have been evidence of a disposition of an interest in the property to the ATC, which entity, in any event, lacked the capacity in law to take such an interest. As there was no evidence of a disposition of an interest by the Cabinet to the ATC or any evidence of a decision by the Cabinet to do so, there could not be any evidence of an assurance given to the ATC such as would lead to a finding of unconscionability and of proprietary estoppel.
- [43] As to the requirement for and lack of factual and documentary evidence as to the bases upon which the ATC was in occupation and use of the disputed property, the appellant submitted that, apart from the issue of ATC's lack of legal capacity, there

³⁰ Submissions on behalf of the Appellant, paragraph 17.

was no evidence before the trial court of the property being given to the ATC, as the learned judge correctly found at paragraph 34 of the judgment. At paragraph 34 the learned judge, having found that the ATC had been in possession of the property from 1964 with the knowledge and encouragement of the Government of Antigua and Barbuda, went on to find that the evidence submitted by the ATC did not “show that a gift or any other disposition of the land to the ATC was perfected” the only evidence was to the effect that “*the government gave*” the land to the ATC for a particular purpose. Interestingly, the learned judge also noted that none of the parties had referred to the **Crown Lands (Regulation) Act**. She considered the provisions of sections 2 and 4 of the said Act, and opined, correctly, that section 4 “gives the Cabinet authority to make regulations with respect to the terms and conditions on which Crown Lands may be rented, leased, occupied, sold or otherwise, dealt with.” The learned judge concluded that, “in the absence of evidence of a Cabinet decision evidencing a disposition of the land or testimony of a similar nature from a person authorized by Cabinet, the evidence from the ATC of a disposition of the Crown Lands to the Turf Club lacks sufficiency.”³¹ This was a finding of no evidence of a disposition or gift of the disputed property to the ATC, which finding was both factually and legally correct.

[44] I observe here that the learned judge, in rejecting the appellant’s submission below that the ATC occupied the property under a tenancy at will, considered, at some length, the learning and guidance from the Board in **Stanford International Bank Ltd v Austin Lapps**.³² While there has been no appeal from that aspect of the judge’s decision, in my view, the **Stanford International** case, although not on all fours with the instant matter, is instructive and of some relevance to the proper determination of these two grounds appeal. I shall therefore return to it later when considering the decision on grounds 3 and 4 of the appellant’s appeal.

³¹ Carlton Lewis, *supra* note 9 at paragraph 34.

³² [2006] UKPC 50.

- [45] I also observe at this juncture, that it was not the case for the ATC that the Government of Antigua and Barbuda had made a disposition of the property to it or had agreed to do so. Likewise, it was not the pleaded case of the respondent that the Government had made or had decided to make a gift of the property to the ATC. The evidence by Mr. Cochrane, given for the first time during cross-examination, to the effect that the arrangement between the Government and the ATC with regard to the latter's occupation and use of the property had been reduced to writing and signed by the Cabinet Secretary, which document he had seen and would have held in his hand, but did not obtain a copy and which had been destroyed in September 1995, was roundly rejected by the learned judge at paragraph 30. The judge found that "the arrangement relied upon by the Defendant [the respondent] is an oral one." From that finding, the respondent has not appealed.
- [46] The appellant also submits that the only documentary evidence before the court as to any decision taken by the Cabinet with regard to the disputed property, is the letter dated 22nd February 2008 from the Permanent Secretary in the Ministry of Education, Sports and Youth Affairs to Mr. Neil Cochrane of the ATC ("the February 2008 letter"). In that letter it was stated that Cabinet, in its meeting held on 19th December 2007, had "agreed that all sporting venues throughout Antigua and Barbuda including the Cassada Gardens Race Track, are to fall within the management of the Ministry of Sports...".
- [47] The appellant submitted also that another important document evidencing a decision of the Cabinet with regard to the disputed property, is the lease granted by the Government to him in April 2000. That lease evinces the act of the Government (the Cabinet) in approving and granting a leasehold interest to the appellant over some 31.21 acres of land comprising the Cassada Gardens Race Track property, which lease and its validity was not in dispute and was admitted by the respondent in its defence. The appellant submitted that the act of granting the lease was itself an exercise of the powers of the Cabinet under section 4 of the **Crown Lands (Regulation) Act**. The appellant also submits that the grant of the lease by the

Crown was an act inconsistent with the continuance of the respondent's bare license over the property, which came to an end once notice of the lease had been brought to the attention of the respondent or the respondent had by its own industry, become aware of its existence. Thereupon, the appellant had a right to occupy the property which is greater than any right which the respondent enjoyed up to that time, and the respondent became a trespasser on the said land. The appellant relies on the learning in **Stanford International Bank v Austin Lapps**, particularly at paragraphs 34, 35 and 36 of the opinion of the Board delivered by Lord Scott of Foscote. As mentioned above, I shall return to this authority.

[48] While the appellant admitted (in oral submissions before this Court) that the ATC had been in lawful occupation of the disputed property and that such occupation amounted to a licence in law, it was submitted that, on the evidence adduced, the ATC's occupation was no more than a bare licence to conduct horse racing from the disputed property, which licence was determinable by the Government and by the ATC. It was also submitted that the appellant's lease of the disputed property for a term of 25 years (with an option to renew) was clear evidence that the Government had determined any rights or permission which it had granted to the ATC in 1964 to occupy and to use the said property, and that such determination was effective once the respondent had notice of the lease. Accordingly, the judge's finding at paragraph 41 that the ATC's interest in the property had not been terminated by the grant of the lease of the property to the appellant since "[a]s recent as 2007, well after the claimant [the appellant] acquired his lease, the Government continued to recognize the [ATC] as the occupants of the Cassada Gardens Race Track", was an incorrect one as a matter of law.

[49] The appellant also submitted that the judge's finding of a proprietary estoppel was wrong in law because of the ATC's lack of capacity. According to the appellant, it was also wrong on the facts which do not support or give rise to a finding that such an equitable interest had been established. As to the elements of estoppel

formulated in **Taylor Fashions v Liverpool Victoria Trustees**,³³ the appellant submitted that the said case dealt with estoppel generally and did not concern or deal with the principles of proprietary estoppel.³⁴

Respondent's Submissions

- [50] In response to the appellant's case under grounds 3 and 4, the respondent submitted that it was not the pleaded case or the evidence led by the respondent at trial that the Government of Antigua and Barbuda had agreed to give the disputed property to the ATC, whether by disposition or otherwise. The respondent's case on proprietary estoppel was not based upon proof of a decision taken by the Cabinet to lease, sell or gift the disputed property to it or of a disposition of the said property by lease or otherwise to it by the Government. Indeed, as observed above, this accords with what the learned judge found at paragraph 34. Accordingly, the powers granted to the Cabinet under section 4 of the **Crown Lands (Regulation) Act** do not come into play.
- [51] As regards the judge's finding of a licence, it was submitted by the respondent that the evidence is uncontradicted that the ATC was in occupation of the disputed property since 1964 under an oral licence from the Government. This much has been conceded by the appellant. Accordingly, it follows that the learned judge was correct to find that the ATC was in possession of the property from about 1964 with the knowledge and encouragement of the Government of Antigua and Barbuda; and that there was ample evidence of the existence of a licence.
- [52] With regard to whether the evidence adduced was sufficient to establish a proprietary estoppel in the disputed property, it was submitted on behalf of the respondent that, based on the evidence led from both Mr. Cochrane and Mr. Francis in particular, which evidence was accepted, the learned judge was correct to find

³³ *Supra*, note 12.

³⁴ See *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256 as per the appellant's oral submissions.

that the respondent had acquired more than just a bare licence, but a licence coupled with an equity to occupy the property and to carry on horse racing therefrom. This evidence included the initial permission granted by the Government to the Turf Club in 1964, the very substantial sums expended by the members of the Turf Club and its successor the ATC, in carrying out various improvements to the disputed property. These include improvements to the track and buildings, the monies and materials provided by the Government to the ATC to carry out various improvements to the premises including supplying wire fencing formerly part of the perimeter fence of the US naval facility for use by the ATC to enclose an area for patrons and stables, and the Government waiving certain fees and taxes.

- [53] These acts also included the stoppage and relocation of an industrial estate which had developed around the race track in or around 1969/1970 to a different area so as to accommodate the continuation of the Cassada Gardens Rack Track, resulting in the relocation of Mr. Walter George (Cons Mechanic Shop) and Mr. Sonny Benjamin (Central Tyre Service), who had been allocated lands on the disputed property. Mr. Francis saw this, coupled with Government's acceptance of the ATC's decision not to be relocated to another venue, as confirming the "Government's acceptance of the use of Cassada Garden facilities for the continuation of horse racing."³⁵ Reference was made to the evidence of Mr. Francis as to other ways in which the Government continued to support the Turf Club and the ATC. These included support through the Public Works Department (no specifics given); the donation to the ATC of a breeding stallion purchased by the Government and imported in 1971 or 1972 from Barbados; and the support and encouragement received by the ATC from the various Governments and ruling political parties and executive over the period of 1964 to 2014 to facilitate horse racing, and the development of racing at the said property.³⁶ Reference was also made to the evidence of both Mr. Cochrane and Mr. Francis as to the support and financial assistance received by the ATC from the private sector in Antigua and Barbuda from

³⁵ Witness Statement of Ralph Francis, paragraph 11.

³⁶ Ibid at paragraphs 8-13.

such entities as Dews, and West Indies Oil Company, both of which have been corporate sponsors for over 40 years.³⁷

[54] The respondent submits that, on the totality of the evidence, the judge was correct to conclude at paragraph 40 that –

“The Court is satisfied, based on the evidence, that the ATC has established that it has been in occupation with the knowledge and encouragement of the Government during the past forty years; that it was given an assurance that as long as they developed horse racing at the disputed land. The ATC could remain in occupation; that over the years the Club expended substantial sums in building and maintaining the track and buildings on the premises in reliance on the Government’s assurances. It would be unconscionable after all these years for the land owner to escape its promise and for lack of formality to defeat the ATC’s rights. The [ATC] has established that it has more than a bare license but a license coupled with an equitable interest which is protected under section 28(g) of the Registered Land Act.”

[55] Regarding the February 2008 letter and the reliance placed on it by the appellant in his submissions, the respondent argues that the essence of the said letter was to inform the ATC that the Government would be responsible or would undertake responsibility for the electricity and water charges at the Cassada Gardens Race Track. It did not in any way affect or purport to change the fact of the ATC’s licence to occupy, develop, improve and maintain the said property, and to conduct horse racing therefrom.

[56] The respondent also submits that the appellant took its lease of the property subject to and with full knowledge of the ATC’s occupation of the said property and its conduct of horse racing events therefrom going back over 36 years up to the commencement of the lease in 2000. Moreover, as the evidence disclosed, the appellant was a frequent attendee at horse racing events organized and staged by the ATC at the disputed property. He did not assert his leasehold rights thereto until some 12 years after the lease had been granted to him by the Government, and he

³⁷ Ibid at paragraph 17.

actually approached the ATC to promote and was granted permission to promote certain horse racing events from the disputed property.

Decision on Grounds 3 and 4

Licence coupled with an equity contrasted with tenancy at will

[57] As mentioned above, there has been no appeal against the learned judge's finding that the status of a tenancy at will could not be accorded to the ATC. During the conduct of this appeal, the appellant, through his counsel, accepted that the respondent's occupation and use of the disputed property was on the basis of a bare licence from the Government of Antigua and Barbuda. However, the appellant disputes, for the reasons and submissions summarized above, that the evidence of such occupation gives rise to an equitable interest in the property on the basis of the principles of proprietary estoppel. It is submitted that the learned judge erred in so concluding at paragraphs 40 and 41 of the judgment.

[58] In the **Stanford International Bank Limited** case, the evidence was to the effect that there was no express tenancy at will in favour of Mr. Lapps of a piece of land measuring 0.6 of an acre, over which the Bank held a registered lease executed between the Crown and the Bank and dated 19th July 1996. By then, Mr. Lapps had been in occupation and use of the disputed land (the subject of the Bank's lease) since 1970, a period of some 25 to 26 years. He used it for the purpose of parking vehicles which he used in his car rental business conducted from the adjacent land close to the then 'Coolidge International Airport' in Antigua, which adjacent land he had acquired from the Crown in 1966. There was nothing in writing evidencing permission being granted by the Government of Antigua and Barbuda for Mr. Lapps to occupy and use the disputed land, and no formal Cabinet decision granting such permission and authority was ever made. Mr. Lapps, in 1985, commenced construction of a hotel on the land which he had acquired in 1966 from the Crown. The hotel opened for business in 1987 with 12 rooms. No part of the hotel is on the disputed 0.6 of an acre of land. The trial judge found that the Bank was entitled to the disputed land as lessee and the Bank took possession thereof on 16th

September 2002. This finding was not challenged on appeal. However, the judge also found, on the basis of Mr. Lapps' long occupation of the disputed land, acquiesced in by the Government, that he had a tenancy at will over the disputed land entitling him to expect a proper notice bringing to an end his right to occupy the said land. The judge held that reasonable notice to terminate the tenancy at will would have been at least one year.

[59] It was apparent that the Court of Appeal, in dismissing the Bank's appeal, had accepted that Mr. Lapps had occupied the disputed land as a tenant at will, and referred to him as a 'tenant at will' in its judgment. This was not a 'live' issue in the appeal to Her Majesty in Council. This notwithstanding, the Board considered it necessary to a proper determination of the live issues before it, to consider the position of Mr. Lapps as a tenant at will. While not overturning the finding of the trial judge that Mr. Lapps was a tenant at will of Crown Lands in Antigua and Barbuda, their Lordships expressed some doubt as to whether there was sufficient justification for according to Mr. Lapps the status of a tenant at will. Their Lordships reviewed certain relevant authorities and principles as to when and how a tenancy at will arises, including the decision in *Doe d. Hull v Wood*³⁸ in which it was held that "an affirmative consent was necessary and not simply a mere negative or silent consent to establish a tenancy at will." At paragraph [34] the Board continued-

"The evidence of the Cabinet Secretary makes it tolerably clear that there was never any affirmative consent by the Cabinet to Mr. Lapps taking possession of the 0.6 of an acre. He went into and remained in occupation of the land to the knowledge and with the encouragement of the Prime Minister but nothing has been shown to their Lordships to indicate that the Prime Minister had any authority to create a tenancy at will over this small piece of Crown Land... But although Mr. Lapps regarded himself as in occupation pursuant to an oral agreement for a lease there is no evidence that there were ever any negotiations to settle the terms of the lease and no rent was ever paid. Accordingly their Lordships have some doubt whether there was sufficient justification for according Mr. Lapps the status of a tenant at will. However their Lordships are content to proceed on the footing that Mr. Lapps did enjoy that status."

³⁸ (1845) 14 M & W 682 at 687.

[60] The decision of the Board in the **Stanford International Bank Limited** case, is also instructive on the question of the effect in law of the grant by the landowner of a leasehold interest in the land then in the possession of another under a tenancy at will, which possession the Board opined, carries with it the right to maintain an action in trespass if his possession “were disturbed by someone with no better right to possession than he had.”³⁹ As to the determination of a tenancy at will, the Board cited with approval a passage from **Halsbury’s Laws of England**⁴⁰ which states that –

“The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy... and also when he does an act off the premises which is inconsistent with the tenancy, as, for example when he grants a lease of the tenancy to commence forthwith. An act done off the premises does not, however, determine the tenancy until the tenant has notice of it.”

[61] At paragraph 36, the Board concluded that the grant to the Bank of a 99-year lease of the disputed land “was an act inconsistent with the continuance of any tenancy at will of the 0.6 of an acre that Mr. Lapps may have enjoyed. The tenancy would not have been brought to an end until he had been given notice of the lease.” Their Lordships also make clear that the date of registration of the lease at the land registry and the date of registration of the Bank’s landholding licence were irrelevant to the question of when the determination of Mr. Lapps’ tenancy at will became effective. “What is important is the evidence of the intention of the Crown, acting by the Government of Antigua and Barbuda, to terminate the tenancy at will. The grant of the lease evidenced that intention.” Accordingly, the Board concluded that Mr. Lapps’ tenancy at will, if he had one, was terminated on receipt by him of a letter addressed to him dated 25th July 1996 from the Bank’s lawyers giving him notice of the Bank’s lease.⁴¹

³⁹ [2006] UKPC 50 at paragraph 34.

⁴⁰ 4th Edn Reissue, Volume 27(1) at paragraph 123.

⁴¹ *Standard International Bank*, *supra* note 10 at paragraph 37.

[62] The decision in **Stanford International Bank Limited** was concerned with a tenancy at will and what acts of the land owner would amount to a determination of such a tenancy. In the instant matter, the judge rejected the appellant's submission that the respondent occupied the disputed property as a tenant at will. From this determination, there has been no appeal. The judge having concluded that the respondent occupied the property under a licence, went on to conclude that the ATC occupied that property under a licence coupled with an equitable interest.

[63] A licence coupled with an equity is a horse of a different carriage in law to that of a tenancy at will. A licence may be contractual or gratuitous and may arise by operation of law in certain circumstances. It usually involves the obligation by the licensee to pay rent or to expend monies on or to carry out certain obligations in relation to the property. Likewise, a tenancy at will may be implied in circumstances where a person is in possession of property by the owner's consent. This includes cases of mere permissive occupation without payment of rent.⁴² Such a tenancy is determinable at the will of the landowner. This may be exercised or expressed by notice of termination being given to the tenant or by some act of the landowner on the property or without the property inconsistent with the continuation of the tenancy.⁴³ A licence coupled with an equity is different from a bare or contractual license. It gives rise to an equitable interest in the property itself, which may be accorded the status and protection of an overriding interest pursuant to section 28 of the **Registered Land Act**.

Effect of grant of lease on existing Licence coupled with an equity

[64] In my opinion, the grant of a lease to someone over the land or property does not, without more, have the effect of determining a licence coupled with an equitable interest in the said property already acquired or created by operation of the doctrine of proprietary estoppel. Accordingly, if the learned judge was correct in finding that the respondent held a licence coupled with an equitable interest in the property

⁴² Halsbury's, *supra* note 39 at paragraph 169.

⁴³ *Ibid*, at paragraph 123.

known as the Cassada Gardens Race Track, that interest was not determined when, in 2000, the Government of Antigua and Barbuda leased the said property to the appellant. The appellant, in such circumstances, took and holds his leasehold interest in the disputed property subject to the existing rights or proprietary interest of the respondent.

[65] This is the position in law for the important reason that such a right or interest of a person in actual occupation of the property, is an overriding interest protected by section 28(g) of the **Registered Land Act**, as an interest which does not require registration or noting on the land register for the property. Indeed, all registered land (which includes the registered fee simple and leasehold title) are expressly, by statute, subject to such overriding interests as may be applicable. By section 23 of the **Registered Land Act**, the registration of a person with absolute title to a parcel of land vests in that person all rights and privileges appurtenant thereto, free from all other interests and claims whatsoever, but subject, unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 of this Act not to require noting on the register.

[66] I therefore conclude that if the respondent held a licence coupled with an equitable interest in the property known as the Cassada Gardena Race Track, as found by the learned judge, such interest could not be determined and was not determined by the grant by the Crown in 2000 of a 25 years lease to the appellant and the bringing of the said lease to the attention of the ATC. In such circumstances, the appellant would have taken his leasehold interest subject to the overriding interest then held by the ATC in the disputed property as a licensee with an equitable interest.

[67] Before moving on to another issue, it is noteworthy to say the least, that the evidence of Mr. Cochrane⁴⁴ was that in the late 1990's, before Mr. Lewis had been granted the lease by the Government in 2000, he approached the executive of the

⁴⁴ Witness Statement of Neil Cochrane, paragraph 7.

Turf Club seeking their permission to enter into a promoters arrangement whereby he (Mr. Lewis) would promote races at the Cassada Gardens Race Track and pay the Club certain monies for each race. This proposal was agreed to by the Club and the appellant promoted three or four races at the facility under this agreement or arrangement. As the learned judge observed, this evidence was not denied by the appellant. This is clear evidence of the appellant's knowledge, prior to being granted a leasehold interest, of ATC's occupation and use of the disputed property for the development and promotion of horse racing in Antigua and Barbuda. From the evidence adduced at the trial, this seem to be nothing short of a notorious fact in the said State. That being so, there is no evidence from the appellant, whether oral or documentary, of the Government being requested by the appellant, consequent upon the grant of the lease of the said property to him, to take steps to terminate an arrangement permitting the ATC to occupy and use the said property for horse racing, and to ensure that the appellant received vacant possession thereof. In fact, the evidence points to the appellant dealing with the executive of the ATC and not bringing his lease to their attention for several years after it had been granted to him. Moreover, the evidence also points to the Government continuing after the grant of the said lease to deal with the ATC in relation to its continued occupation and use of the disputed property and its promotion of horse racing therefrom.

The February 2008 Letter – Ground 4

- [68] I consider next the factual or legal significance of the February 2008 letter. Is this letter evidence of a decision by the Cabinet to determine the ATC's rights to occupy and to use the disputed property for horse racing? In my considered view, it is not, and the reliance placed by the appellant on this letter in grounds 3 and 4 and in ground 5 of his appeal and submissions is misplaced and misconceived. The full text of the letter is set out at paragraph 32 of the judgment in the court below and does not require repeating here. In material part, the letter informs Mr. Cochrane and the ATC that the Cabinet had taken a decision on 19th December 2007 that all sporting venues, including the Cassada Race Track, "are to fall within the management of the Ministry of Sports, and provision of all utilities (water &

electricity) is the responsibility of the Ministry.” The simple point is that this is not an exercise by the Cabinet of its powers to make ‘regulations’ under section 4 of the **Crown Lands (Regulation) Act** “with respect to the terms and conditions on which Crown Lands may be rented, leased, occupied, sold or otherwise dealt with”. The February 2008 letter is not a ‘regulation’, which has a specific meaning under the relevant Interpretation Act, and would, once made under the powers granted by the said statute, constitute subsidiary legislation. Furthermore, the letter does not speak to or inform of any regulation made by the Cabinet to the effect stated in the letter. It is therefore wholly incorrect to classify the said letter as indisputable evidence that the Cabinet had exercised its statutory powers under section 4 of the **Crown Lands (Regulation) Act** to retain control of the property, as the appellant contended.

- [69] In my opinion, The February 2008 letter is nothing more than a communication to the ATC of a policy decision taken by the Cabinet with regard to all sporting venues in Antigua and Barbuda, including the Cassada Gardens Rack Track facility. This policy covers the Government assuming responsibility for all utilities used at each sporting venue. It is not an expression of the exercise of the statutory power granted to the Cabinet under section 4 of the **Crown Lands (Regulation) Act**, leading to a conclusion or effect in law of determining or an intention to determine the ATC’s right to occupy and to conduct horseracing activities from the disputed property. At the time of the February 2008 letter, the ATC had been in occupation of the property for approximately 44 years and the appellant’s lease of the property had been in existence for some 7 to 8 years. The said letter does not convey, expressly or by implication, the termination of the ATC’s rights or interest in relation to its long occupation and use of the disputed property. Similarly, it cannot be said that the said letter in any way affects the rights of the appellant under his lease of the disputed property granted by the Cabinet, which lease was not mentioned in the said letter. Likewise, the said letter did not state that the decision of the Cabinet being conveyed therein was subject to the appellant’s said lease and rights thereunder, including his right to exclusive possession of the disputed property. Moreover, the said letter did not convey any decision of the Cabinet that henceforth

the disputed property and or the horse racing facilities thereon will be in the possession of the appellant or will be managed or run by the appellant as the lessee of the said property. To the extent that the said letter mentions management, it seems to convey a decision by the Cabinet to 'manage' all sporting venues, without detailing what that would entail. What is clear from the evidence before the court below, is that the Government did not seek or take steps to take over the effective management of the Cassada Gardens Race Track property or facilities from the ATC. Ground 4 therefore fails.

No disposition, gift, decision or assurance by the Cabinet – Ground 3

[70] By ground 3, the appellant contends that the lack of evidence of any disposition or gift of the disputed property or of any decision to that effect or any lease or agreement to lease the property by the Cabinet to the ATC, is fatal to its claim to a licence coupled with an equitable interest in the said property. As stated above, the respondent's case and counterclaim were not based on any such disposition or gift or lease or agreement to lease the disputed property by the Cabinet to the Turf Club in 1964. The respondent's case was based on an oral permission granted to it by the Government of Antigua and Barbuda in 1964 to occupy and to use the disputed property for the development of a horse racing and breeding industry in Antigua and Barbuda. This included a commitment of the Turf Club to carry out (at the expense of its members and donors) improvements to the facilities at the Cassada Gardens Race Track to accommodate or better accommodate and facilitate horse racing in Antigua and Barbuda. Further, the respondent's case for proprietary estoppel was that, in all the circumstances, as established by the evidence as to its occupation of the said property for over 45 years, its development and improvement of the facilities at great expense including building the racing track, bleachers, club house, area for concessions and stables,⁴⁵ it would be unconscionable for the Government to now go back on its promise. They submit that there is therefore no merit in the appellant's submission that the learned judge approached the issue of the ATC's status in

⁴⁵ Witness Statement of Neil Cochrane, paragraph 3.

relation to its occupation and use of the property for horse racing, on an incorrect basis.

[71] The critical question for determination in relation to ground 3, is whether the learned judge applied the principles of proprietary estoppel correctly and came to the correct conclusion in law that the evidence establishes that the ATC “has more than a bare licence but a licence coupled with an equitable interest which is protected by section 28(g) of the Registered Land Act.”⁴⁶

[72] In considering this issue, the learned judge first found that the evidence adduced by the respondent establishes that the Turf Club (later the ATC) has been in possession of the disputed property from about 1964 with the knowledge and encouragement of the Government of Antigua and Barbuda and “that the arrangement relied upon by the [ATC] was an oral one.”⁴⁷ In reaching this conclusion, the learned judge rejected Mr. Cochrane’s evidence, given for the first time during his cross-examination, that the arrangement between the Government and the ATC had been reduced into writing and signed by the Cabinet Secretary. This was not supported by any other evidence in the case, including the evidence of Mr. Ralph Francis whose association with the Turf Club predates that of Mr. Cochrane.

[73] However, the learned judge examined and referred at paragraph 31 to two additional items of evidence which she considered to be of ‘significance to this issue.’ These are:

(i) **the Report** dated 11th October 1972 of Mr. Berridge, the past President of the Turf Club (then known as ‘Cassada Gardens Turf Club’) recounting the Club’s receipt of a letter dated 30th June 1972 from the Accountant General requesting immediate payment of all outstanding **entertainment duty** in respect of race meetings held at the Club since Easter 1971; and

⁴⁶ Carlton Lewis, *supra* note 9 at paragraph 40.

⁴⁷ Carlton Lewis, *supra* note 9 at paragraph 30.

detailing the efforts made with respect to the Club's application to the Government for an exemption from the payment of the entertainment tax, including a promised interview with the then Premier, the Hon. George H. Walter. As the learned judge also recounts, the said report also stated that in the letter from the Accountant General it was stated that the Turf club was required to apply to Cabinet for a licence on each occasion that the Club wished to hold a race meeting at the Cassada Gardens Race Course; and that Mr. Berridge had submitted the said application requesting a licence to cover a full year, and provided the requested information to the Premier of Antigua and Barbuda. Also, Mr. Berridge was subsequently interviewed by officers of the CID and further information was provided.

(ii) **the February 2008 letter:** It is notable, apart from the analysis above, that this letter is at least tacit recognition by the Cabinet of the ATC's occupation and use of the disputed property for horse racing. Nowhere in that letter does it assert that the ATC had no permission to occupy the said property over the years and to carry out the capital improvements thereto, including to the race track and buildings, which it and its members have done at substantial expense. Moreover, the evidence discloses that after the issuance of this letter, the Government continued to deal with the ATC in relation to the said property in its occupation and to assist them in the promotion of horse racing therefrom.

[74] In my considered view, the learned judge, faced with the evidence adduced by the respondent, including the evidence from Mr. Cochrane and Mr. Francis, buttressed by the Report of Mr. Berridge dated 11th October 1972 recounting what was in a letter dated 30th June 1972 from the Accountant General of the Government of Antigua and Barbuda, and the February 2008 letter conveying a policy decision made by the Cabinet, was correct in finding, and in coming to the conclusion, that the respondent had established that it has more than a bare licence in relation to the disputed property, but a licence coupled with an equitable interest constituting

an overriding interest in the said property protected by section 28(g) of the **Registered Land Act**. The learned judge correctly identified the principles of proprietary estoppel as set out in **Taylor Fashions v Liverpool Victoria Trustees**. She took account of the proper evidential matters and reasoned to the correct conclusion at paragraph 40 of the judgment that it would be unconscionable, in all the circumstances of this matter, for the Government to escape the consequences in law of its permission and promise, its recognition, participation, facilitation and contribution to the efforts and initiatives of the ATC and its predecessor in developing and promoting horse racing at the Cassada Gardens Horse Racing Track property.

[75] Unconscionability is the bedrock principle of proprietary estoppel. Its applicability is dependent upon the established facts and circumstances of each case. It involves the trial judge making an assessment and judgment based on the evidence adduced. Accordingly, unless there is no evidence to support the trial judge's conclusion on this issue, an appellate court ought to be slow to set it aside. In the instant matter, it cannot be said that there was no evidence upon which the learned judge could reach the conclusion which she did that it would be unconscionable for the Government to resile from its promise and that the ATC had established that it had a licence coupled with an equitable interest in the property. I so hold being mindful that the Government was not a party to these proceedings and may, therefore, not be bound by the judge's said finding which is made as between the competing claims and interests of the appellant and the respondent.

[76] While Cabinet is vested with the statutory authority as a constitutional body or arm of Government, to make decisions with regard to the rental, lease, occupation, sale or otherwise of Crown Lands, and there was no evidence before the learned judge, as she found, of any decision made by the Cabinet permitting the Turf Club in 1964 to occupy and to use these Crown Lands for the development and promotion of horse racing in Antigua and Barbuda, there was ample evidence of the Government, over the 45 plus year period, dealing with the Turf Club and the ATC in relation to

the said property as if it held such rights. This included, importantly, the Cabinet itself, as is evidenced by the February 2008 Letter, and the Berridge Report dated 11th October 1972, which included, among other important evidential facts, that the Turf Club was required to apply to the Cabinet for a licence to hold each race meetings and that such an application had been submitted by Mr. Berridge, on behalf of the Turf Club, to the then Premier as the head of the Cabinet. It therefore cannot be said that there was no involvement by the Cabinet with the ATC or its predecessor in name with respect to the said property. This evidence points to knowledge, acknowledgement, assurances or affirmative consent from the Cabinet at various stages in the 45 plus years of the ATC's (and its predecessor Turf Club's) occupation and use of the said Crown Lands. This documentary evidence, taken collectively, is confirmatory of not just the presence on the disputed property by the ATC but of its long occupation, expenditure on and improvement of the facilities on the disputed property, and its conduct of horse racing therefrom. In my view, they were not of the character of "mere negative or silent consent."

[77] For the reasons set out above, ground 3 also fails.

Ground 5 – Finding of proprietary estoppel gave rise to an interest in perpetuity and offends the principle of the free alienability of land

[78] The appellant submits that the judge's finding that the ATC had, on the evidence adduced, a licence coupled with an equitable interest in the property is unsustainable in law for two additional reasons: (i) that such a finding would give rise to the ATC having a right or interest to use the disputed property in perpetuity for horse racing and to do so without approval by the Cabinet pursuant to its powers under section 4 of the **Crown Lands (Regulations) Act**; and (ii) such finding impugns the fundamental principle of the free alienability of land. It is submitted that equity must not be used as a sword but as a shield and that the judgment –

"[C]reates a situation where as long as the [ATC] conducts horse racing on the premises, the Government of Antigua and Barbuda cannot step in and deal with those Crown Lands ... of which the Government has a freehold interest, unless it proceeds to acquire the lands under the Land Acquisition Act (Cap.233). Such a situation cannot be right as it effectually creates a

right in the [ATC] in perpetuity. To settle estates in land into perpetuity was abolished precisely because it would tie up land indefinitely and deny free alienability of land. A court of law and equity may not restrict or limit the Government of Antigua and Barbuda, a sovereign Government's, authority to deal with Crown Lands in such a manner (see, for example, Lord Wilberforce in **National Provincial Bank v Ainsworth** [1965] AC 1175).⁴⁸

[79] The appellant also relied on the statement of principle as to the alienability of land in **Elements of Land Law**.⁴⁹ It reads: "On the one hand it is quite clear that land must be allowed to be freely alienable or commerciable. Transactions in respect of legal estates in land (whether in the form of sale, lease or mortgage) must not be unduly restricted or hampered by law, for the uninhibited alienability of land is essential to the effective functioning of an exchange economy. Land is a highly marketable resource and it is vital that the market in land should not stagnate."

[80] Reliance was also placed by the appellant on the dicta from Lord Upjohn in **National Provincial Bank v Ainsworth**⁵⁰ that it has been the "policy of the law for over a hundred years to simplify and facilitate transactions in real property"; and on this extract from the **Property Law Commentary and Materials**⁵¹ on the 'Significance of alienability':

"A right or interest is alienable if it is capable of being transferred from its current holder to someone else, **so that the transferee steps into the shoes of the transferor**. In this sense, then, an alienable right or interest is not personal to the holder. Alienation might take the form of deliberate transfer, or transfer by operation of law, or the automatic passing of the property interest on the death of the holder. Economists and others who regard the creation of a free market in resources as the central rationale for the existence of property rights, regard alienability as the central feature of an efficient property system ... Indeed, it is often said that alienability is an essential characteristic of a property interest (see, for example, Lord Wilberforce in *National Provincial Bank v Ainsworth* ...) **(emphasis added)**

⁴⁸ Submissions on behalf of the Appellant, paragraph 22.

⁴⁹ Kelvin Gray. London Butterworths 1987 at page 96.

⁵⁰ [1965] 2 All ER 472.

⁵¹ Alison Clarke and Paul Kohler. Cambridge University Press, pages 157 and 158.

[81] In **Halsbury Laws of England**⁵² the ‘power of alienation’ is stated succinctly in this way -

“Save where his personal capacity is restricted as mentioned previously, the owner of a legal estate or an equitable interest has complete power to transfer it by assurances inter vivos, and any attempt to restrict his right of alienation is generally void...”

[82] The appellant also prayed in aid sections 16(1)(b) and 16(2) of the **Crown Proceedings Act**⁵³ in submitting that these provisions are “direct authority for the principle that recovery of possession or delivery of Crown Lands by suit against the Government, or even the making of an order against an officer of the Crown in any civil proceedings, which would have the effect of giving relief against the Crown which could not have been obtained in proceedings against the Crown, are not lawful.”⁵⁴ The appellant argues that these provisions are “persuasive authority for the proposition that the equity held to be found in favour of the respondent by the learned judge to possess Crown Lands *in perpetuity* was in violation of the Crown’s rights as intended by Parliament when section 16 of the Crown Proceedings Act was passed.”⁵⁵ Accordingly, it is the appellant’s case on ground 5, that the proprietary estoppel claimed by the appellant and found by the learned judge, “is abhorrent” at law and in equity, precisely because it impugns the principle of the free alienability of Crown Land.⁵⁶

[83] In response to ground 5, the respondent disputes that the effect of the judge’s finding was to grant the ATC a right in the property *in perpetuity* or that such a finding of proprietary estoppel offends against the principle of the free alienability of land. The said licence coupled with an equitable interest is an equitable interest in the disputed property which is subject to the ATC continuing to conduct horse racing from the said property, and to the continued existence of the ATC itself. Additionally, it does not offend against the powers of the Government and Cabinet pursuant to

⁵² Volume 32 at paragraph 561.

⁵³ Cap 121 of the Laws of Antigua and Barbuda.

⁵⁴ Submissions of behalf of the Appellant, paragraph 28.

⁵⁵ Ibid, paragraph 30.

⁵⁶ Submissions on behalf of the Appellant, paragraph 26.

sections 4 of the **Crown Lands (Regulation) Act**, by which the Cabinet may make regulations relating to the lease, sale, rental or otherwise of Crown Lands. Moreover, it is the respondent's submission, that the finding of a proprietary estoppel does not breach and is not contrary to sections 16(1)(b) and 16(2) of the **Crown Proceedings Act**.

- [84] The respondent submitted (a) that at no time did the court below hold that the Government of Antigua and Barbuda did not have the power to divest itself of the disputed property, and (b) the effect of the finding of proprietary estoppel does not offend against any such important right. What the learned judge held, in effect, was that any divestment by the Crown, including the lease of the property to the appellant, is made or would be made, by operation of law, subject to the licence and equitable interest held by the ATC. This does not offend the *in perpetuity* principle or the principle of the free alienability of land espoused in the case law and texts cited and relied upon by the appellant.⁵⁷ Similarly, the respondent submits, it is patently incorrect to term the principles of proprietary estoppel as 'abhorrent' in law and equity as the appellant submits, which principles of equity do not and cannot impugn the principle of the free alienability of land, or the ability of the Government to freely divest itself of its title to and interest in the disputed property.⁵⁸

Decision on Ground 5

- [85] In my view, this ground of appeal is entirely misplaced and wholly misconceived. The short answer is that the principles of proprietary estoppel are well-established. They apply equally to Crown Lands (as defined) and to lands which are owned by private individuals or corporate entities. The effect of a finding of a licence coupled with an equitable interest is neither to divest the Crown or any owner of land of their estate and title in the land, which estate and title, including as here, the fee simple ownership of land, remains vested in the registered proprietor of the land. The Government of Antigua and Barbuda is therefore free to divest itself of its fee simple

⁵⁷ Submissions on behalf of the Respondent, paragraph 18(a) and (b).

⁵⁸ Ibid, paragraph 18(c).

interest in the disputed property, whether by gift or sale or otherwise or to grant a lease of the said property, in the lawful exercise of the powers vested in Cabinet as the decision-making authority and/or in the Governor General who has the authority to execute, on behalf of the Crown, dispositions of Crown Lands or legal interest therein.

[86] It follows that the finding of proprietary estoppel in favour of the respondent does not offend against the principles of the free alienability of land as set out in the various authorities relied on by the appellant. This includes the statements of principle by Lord Wilberforce and Lord Upjohn in **National Provincial Bank v Ainsworth** and Volume 32 of **Halsbury's Laws of England**. The Government remains free to transfer the fee simple interest which it holds in the disputed property to another who will then step into the shoes of the Government. This would be the same were the registered proprietor of the property someone other than the Crown or the property was not Crown Lands.

[87] Sections 16(1)(b) and 16(2) of the **Crown Proceedings Act** do not assist the appellant. These provisions address a different scenario from the one in the instant matter. These provisions concern 'proceedings brought against the Crown for the recovery of land'. They do not pertain, nor do they apply, to a situation where there is a claim in equity to an interest in or over a Crown Land as a defence to a claim to possession of that land brought by another private individual. In the former set of proceedings against the Crown, the remedies which a court of law may grant to a successful claimant are limited in a fundamental way and for good reason. The court is restrained by the statutory provisions from making 'an order for recovery of the land or the delivery of the property' in issue against the Crown, or from granting an injunction in civil proceedings or making any order against an officer of the Crown. The court's powers in lieu of making a recovery order against the Crown, is making 'an order declaring that the [claimant] is entitled as against the Crown to the land or property or to the possession thereof.'⁵⁹ Accordingly, these provisions protect the

⁵⁹ Crown Proceedings Act, *supra* note 52, section 16(1)(b).

Crown against judgment which has been entered in civil proceedings, from steps being taken to enforce an order for recovery of land, as no such order can be competently made by a court against the Crown. The court may make an appropriate declaratory order against the Crown as to the claimant's entitlement to the land or property. Once such an order is made, subject to any right of appeal being exercised by the Crown, it would be expected that the Crown or the Government would accord the necessary and appropriate respect thereto and comply with the basic terms of the said order.

[88] For these reasons ground 5 also fails.

Disposition

[89] In the premises, the appellant having failed on all grounds of appeal, I would, accordingly, dismiss his appeal and affirm the judgment and orders of the learned judge in the court below.

[90] The respondent shall have its costs of the appeal to be assessed by a judge of the High Court or Master if not agreed within 21 days from the date of delivery of this judgment, such costs to not exceed two-thirds of the prescribed costs awarded in the court below.

[91] I take this opportunity to thank learned counsel for both parties for their helpful submissions.

I concur.

Louise Esther Blenman

Justice of Appeal

I concur.

Mario Michel

Justice of Appeal

By the Court

Chief Registrar