



JUDGMENT

Cyril Archibold Capron

v

(1) Government of Turks & Caicos Islands
(2) The Crown

**From the Court of Appeal of the Turks and Caicos
Islands**

before

Lord Saville
Lord Collins
Lord Kerr
Lord Clarke
Sir Henry Brooke

JUDGMENT DELIVERED BY
LORD KERR
ON

21 January 2010

Heard on 5 October 2009

Appellant
David Matthias QC

(Instructed by Sharpe
Pritchard)

Respondent
Timothy Morshead

(Instructed by Eversheds)

LORD KERR :

1. This is an appeal from the decision of the Court of Appeal in the Turks and Caicos Islands, dismissing the appellant's appeal from the judgment of Martin J, Acting Chief Justice of the Supreme Court. The appellant had claimed that he and other partners in a proposed company (to be called North West Projects Ltd) had concluded an agreement with the government of the Turks and Caicos Islands for the development of lands at North West Point, Providenciales. Martin J dismissed the claim.

2. It appears that the appellant had also advanced a claim in proprietary estoppel but this was not mentioned in the judgment of the Acting Chief Justice. It was dealt with by the Court of Appeal, however. That court dismissed the appellant's appeal on this second ground also. Martin J had awarded costs to the appellant, notwithstanding the dismissal of his claim. That order was reversed by the Court of Appeal and it decided that there should be no order as to costs between the parties.

Factual background

3. In 2008, of the some 36,000 people who lived in the Turks and Caicos Islands, there were approximately 11,750 so-called "belongers". This term was used to describe persons who were locally born or who were descended from locally born persons. It also included others on whom, exceptionally, this status had been conferred. Only adult belongers had the right to vote, and they enjoyed certain benefits including the opportunity to acquire Crown Land at a very substantial discount for private housing and commercial development.

4. The appellant's partners in the project were Mr Carlos Simons QC and Mr Bruce Kitsch. Both the appellant and Mr Simons are belongers. Exchanges between the consortium or partnership (it was never made clear whether there was an actual partnership agreement) and the government began with the submission by Mr Simons of an initial project proposal on 28 August 2000. This involved 124.25 acres of land at Northwest Point. The proposal was made to the Minister for Natural Resources. As was customary, it was referred to a government department called TCInvest. It was that department's practice to circulate development proposals to other relevant government departments for their comments. When these had been obtained, TCInvest would make a submission to the relevant Minister to take to cabinet. At the relevant time the cabinet was known as the Executive Council, usually abbreviated to 'Ex Co'.

5. When Ex Co had approved a project, TCInvest would advise the developer and instruct the Attorney General's chambers (with details of the approved development) to prepare a draft development agreement. While this was taking place TCInvest would request the Land Valuation Officer to value the parcel of land in question.

6. Consideration of the application made by Mr Simons was deferred while a master plan for the Northwest Point region was being prepared. After this had been completed, TCInvest, on 25 May 2001, circulated the proposal for departmental comments. In the meantime further negotiations between the consortium and the government continued. Over the following two years, the amount of land to be included in the project was progressively reduced from 124.25 to 80 to 50 and eventually to 35 acres.

7. In 2002 the Chief Minister of the Turks and Caicos Islands was Derek Taylor OBE. He was also Minister for Development and was therefore responsible for all development projects. On 10 May 2002 Mr Taylor sent what the trial judge called a letter of comfort to Mr Simons. The letter contained the following statement: -

“... a parcel of Crown land in the area will be allocated to your group for your project and ... it will be deemed a ‘development enterprise’ thereby allowing it to benefit from the investment concessions usually associated with this type of project.”

8. Following further discussions between the consortium, the Chief Minister and TCInvest, the partners submitted a revised development proposal on 15 August 2002. This claimed to take account of “all points raised in correspondence and at meetings in relation to this matter over the past many months since the initial proposal was made”. This was sent directly to the Chief Minister. A copy of the proposal was sent to TCInvest, which circulated it to departments on 13 September 2002. After comments from the circulated departments were received, the application was referred to and considered by Ex Co.

9. On 22 January 2003 Mr Taylor wrote to Mr Simons in the following terms:

“Re: NORTHWEST PROJECTS LTD

I write to inform you that Executive Council has approved in principle the proposal submitted by the above company to undertake a Mixed-Use Development at Northwest Point, Providenciales.

The Attorney General's chambers will be requested to prepare a Development Agreement for your review. Executive Council has agreed that your project should be deemed a 'Development Enterprise' under our Encouragement of Development Ordinance, thereby permitting it to benefit from the usual concession granted to development projects in these islands.

Your project will be charged a flat 10% import duty on the construction materials, tools, fixtures, matters (*sic*) and other items required to implement the development.

Executive Council has also agreed that your group be offered a Conditional Purchase Lease on 35 acres of Crown land north of Caicos Resort as previously communicated at a full price to be determined by Executive Council after the land has been valued by the Land Valuation Officer, or a land freeze agreement on the same acreage for twenty four (24) months on payment of the relevant offer fee.

Executive Council has also agreed that your group prepare a detailed project proposal and submit to TCInvest for review.

I wish your development much success and pledge our continued support.

Please feel free to contact us should you have any queries or concerns."

10. On 14 March 2003 the partners paid a survey fee of \$7,100.00 and on 16 April 2003 the Director of Lands and Surveys informed TCInvest that the survey and registration of the development land had been successfully completed and that a registered number had been assigned to it. On 12 May 2003 the Chief Valuation Officer submitted a valuation to the Director of Lands and Surveys. The value placed on the land was \$3,500,000 if it was to be used for commercial purposes. The trial judge found that the partners had not been formally notified of this valuation but that "somehow" Mr Kitsch had obtained a copy of the

interdepartmental memorandum in which the information was contained and that he had passed this on to Mr Simons.

11. TCInvest wrote to the partners on 12 June 2003 informing them that it was preparing the Development Agreement. The letter sought details of construction plans for the first part of the project and a programme for the remainder of the work. A standard checklist of information required for the Development Agreement was enclosed with the letter. The partners' reply was contained in a letter of 30 June 2003 from OBM Limited, architects acting on their behalf. This letter gave detailed information about the development and enclosed a diagrammatic plan and a written description of it. Information about the phasing of the work, the costs of each phase, and the time limits for the construction of each phase was also provided. In due course the partners paid OBM Ltd \$4,100 for the work they had undertaken.

12. An election was held in the Turks and Caicos Islands in August 2003. The Progressive National Party came to power. The Hon Michael Misick replaced Mr Taylor as Chief Minister.

13. On 10 September 2003 Robert N d'Arceuil (general counsel engaged by the government to draft the formal written Development Agreement and Conditional Purchase Lease of the Development Land) wrote to Mr Simons and sent by email drafts of a development agreement and development order. In the letter Mr d'Arceuil raised what the trial judge described, at paragraph 14, as "a few procedural inquiries" regarding those documents. Mr Simons had already provided the information on 30 June. Nevertheless on 15 October 2003 in a communication that he sent directly to TCInvest (and which he copied to the Attorney General's Chambers) he answered the queries that Mr d'Arceuil had raised.

14. On 22 October 2003 Marsha Cummings, who was Senior Crown Counsel (Commercial) in the Attorney General's Chambers, wrote to Mr Simons. In her letter she said that she was waiting for instructions from TCInvest about the development agreement. She stated that the draft agreement which had been sent by Mr d'Arceuil had not been prepared in chambers and was "not correct". She undertook to send a fresh draft when her instructions were complete. Unsurprisingly, the trial judge found that the first draft was indeed incorrect. It referred to 50 acres when the proposal was for 35 acres. Also, it purported to exempt the group from all customs import duties on materials and equipment, when the letter of 22 January 2003 (set out at [9] above) proposed that these be paid at the rate of 10%. In fairness to Mr Simons, he had pointed out these errors in his letter of 15 October 2003.

15. Mr Simons replied to this letter on 20 November 2003 asking again for the draft agreement. Ms Cummings replied that she still had no instructions. Some six weeks after this Mr Simons discovered that TCInvest had provided further instructions and he therefore sent an email to Ms Cummings on 14 January 2004 asking for “an indication as to when an initial draft might be available”. The reply to this came from Ms Rhondalee Braithwaite who was then dealing with the matter in the Attorney General’s Chambers. She told Mr Simons that, although she had received incomplete instructions from TCInvest, she was enclosing another draft agreement for his comments. This draft agreement referred to a parcel of land no 60000/100, which was located to the south of Caicos Resorts. This was not the land that had been identified in the proposals made by the consortium, and they were not interested in developing it.

16. As a member of the legislative council, Mr Simons frequently met the Chief Minister and he took advantage of this circumstance to ask for a meeting to discuss the proposal. He and the Chief Minister met on 5 May 2004. Mr Higgs and Mr Been, both of TCInvest were also present. The trial judge noted the evidence that Mr Simons gave about that meeting in the following passage from paragraph 18 of his judgment:

“The question arose whether [the development] had to be north of Caicos Resorts. We kicked that around. Hon Misick indicated that the land to the north of Amanyara was the subject of other interests. He suggested that we could be located someplace else. One of the possibilities was land south of Amanyara.”

17. On the basis of this evidence the judge found that Mr Simons, although unenthusiastic about the suggested re-location for the development, was at least prepared to consult his partners about it. Having done so, he wrote to TC Invest on 11 May 2004. He enclosed with his letter copies of the correspondence of 22 January 2003 from the then Chief Minister, and of the survey of the lands and of the payment of the survey fee. In his letter Mr Simons stated:

“In the circumstances I regret that a move to the south of Caicos Resorts Ltd cannot be accommodated at this stage and we would prefer to remain where we are. I should be grateful if you would please take this matter up with the Chief Minister and confirm that the development agreement may proceed on the basis of the land currently allocated.”

18. The Chief Minister himself replied to this letter on 20 May 2004 stating:

“I refer to our meeting of May 5 regarding your interest in developing a mixed-use project on crown land at Northwest Point, Provo. As I indicated at the meeting, Government would be prepared to allocate to you land to the south of Aman Resort site for your project, as the property which you have expressed an interest is committed to another developer. I trust that the Development Agreement can now be finalized without further delay and wish this project every success.”

19. The exchanges between the consortium and the government continued in a somewhat desultory fashion in the succeeding months during which the offer of an alternative site was discussed. Some of these will be referred to below. Ultimately, some time about October 2005 the Chief Minister offered a 10 acre parcel of land to the north of Amanyara. The Court of Appeal considered that Mr Simons appeared to accept this offer for he wrote to the Minister for Natural Resources on 13 October 2005 asking for a meeting to discuss details of surveying, registration and lease terms. Delay, which appears to have become endemic by this stage, again set in. Prompt disposal of the matter was not assisted by a change of Minister and it proved necessary for Mr Simons to write again on 15 March 2006, trying, as the Court of Appeal put it at paragraph 7, “to tie down the details of the 10-acre proposal”.

20. There followed what the Court of Appeal described, at paragraph 8, as a curious episode. The Minister wrote to Mr Simons on 15 March 2006 informing him of the approval by Ex Co of the grant of a commercial conditional purchase lease for 10 acres of land south of Amanyara. It bore no relation to the original proposal. The consortium did not want it and no reply to the letter was sent. In an even more bizarre twist on 30 October 2006 an offer letter was sent in relation to ten acres and Mr Simons accepted it. The other partners were less than enamoured of this, however, because it was again entirely unrelated to the original proposal. Their position was that this had nothing whatever to do with the Northwest Projects proposal and they distanced themselves from it. Mr Simons, on the other hand, then regarded the offer as to have been made to him personally and he accepted it in his personal capacity. Although his entitlement to do so was disputed by the government, Martin J accepted that it was reasonable for Mr Simons to have treated the offer as having been made to him personally.

The proceedings

21. The trial before Martin J took place on 18, 19 and 22 October 2007 and on 24 October the judge dismissed the appellant's claim. The following day he gave judgment as to costs, ordering the respondents to pay the appellant's costs on an indemnity basis, despite the fact that the appellant had not succeeded in his claim.

22. On 9 November 2007 the appellant filed Notice of Appeal in the Court of Appeal of the TCI. On 11 December 2007 the respondents obtained leave to appeal the costs order, and to do so out of time. The appeals took place before the Court of Appeal in the TCI (a court comprising Edward Zacca P., Elliott Mottley J.A., and Richard Ground J.A.) on 12 and 13 February 2008 and on 10 April 2008, the Court of Appeal gave judgment dismissing the appellant's appeal, and allowing the respondent's appeal on costs and substituting no order as to costs in respect of the trial. On 29 January 2009 the Registrar of the Court of Appeal in the Turks and Caicos Islands granted the appellant conditional leave to appeal to the Privy Council.

The case for the appellant

23. The appellant made four principal submissions. These can be summarised in this way:

1. There was a concluded agreement between the consortium and the government in respect of which the appellant was entitled to specific performance (the enforceability issue).

2. Alternatively, the respondent was estopped from resiling from the promises to execute a formal written Development Agreement with the company, and to grant the company a Conditional Purchase Lease of the development land (the proprietary estoppel issue).

3. Although this was not pursued to any particular extent in oral argument, in his printed case the appellant contended that the Court of Appeal had erred in failing to deal with the appellant's application for further discovery of documents (the discovery issue). This submission was advanced in conjunction with the argument on proprietary estoppel. An application ancillary to the estoppel claim was made to receive in evidence affidavits of John E. Rutley Jr. and Frankie Narine Soman, both dated 7 September 2009, and the redacted version of the "Auld Report" (a report of 31 May 2009 by Sir Robin Auld as commissioner of an inquiry "into possible corruption or other serious dishonesty in relation to past and present elected members of the legislature [of TCI] in recent years").

4. The costs order of the Court of Appeal was wrongly made.

The enforceability issue

24. For the appellant Mr Matthias QC submitted that the letter of 22 January 2003 constituted an offer by Ex Co of a conditional purchase lease on 35 acres of Crown land or a land freeze agreement on the same acreage. It was not expressed to be “subject to contract”. It was, said Mr Matthias, undoubtedly written with the intention of creating legal relations between the parties. The letter, he claimed, did more than merely record Ex Co’s approval in principle of the partners’ proposal. It communicated Ex Co’s open offer of a conditional purchase lease or a land freeze agreement. The 35 acres of Crown land had been sufficiently identified in the letter (although the precise boundaries were still to be determined by survey). The letter also stated that the project would be deemed a “Development Enterprise” and as such would benefit from the usual concessions granted to development projects in the TCI. It stipulated how the price was to be fixed and stated that the Attorney General’s chambers would prepare the formal development agreement for the partners to review. It was suggested that the partners had by their subsequent conduct accepted the unconditional offer contained in the letter. Mr Matthias therefore contended that all the ingredients necessary for a concluded agreement were in place.

25. The first problem that this argument encounters is the comprehensive rejoinder given to it by the Court of Appeal in paragraph 18 of its judgment where it said:

“The terms of the eventual development agreement, including the terms of the CPL [conditional purchase lease], were not mere formalities and their agreement was not a foregone conclusion. They were, indeed, the heart of the matter. As noted above, after the Executive Council’s initial consideration and the letter of 22 January 2003, the proposal had to change radically because of the down-sizing of the proposed lot. The matters outstanding were not points of detail – they involved the fundamentals of the project, including what would actually be built on the lot, in what phases and over what time-scale. This meant that the most basic details of the project were at large until all of that had been worked out, approved by TCInvest and embodied in a Development Agreement. Moreover it is plain that any such agreement would have to come

back to Executive Council for final approval, not least because (as the drafts show) it was the Governor who would sign the agreement on behalf of the Crown and he could only do that on the advice of Executive Council.”

26. From this passage a number of simply insurmountable hurdles in the way of the appellant’s claim that there had been a concluded agreement are identified. There had been no settlement of the issue as to what was to be built on the land. That might have crucially affected the Executive Council’s decision on whether to approve the scheme. Secondly, the Executive Council was constitutionally required to give consideration to whether it should recommend the scheme to the governor for his approval. Finally, the governor himself had to consider whether to accept a recommendation to that effect. It has been suggested that it is highly improbable that the governor would have declined to follow any recommendation made by Executive Council. That may well be so, but his approval was, as a matter of law, required. In advance of that approval, it was not possible to conclude an agreement between the consortium and the government.

27. Quite apart from these considerations, as the Court of Appeal held in paragraph 19 of its judgment, there was no agreement as to the price that would be paid for the land. This was to “be determined by Executive Council after the land ha[d] been valued”. While the appellant may say, as he does, that the consortium was prepared to pay whatever price was fixed, the price was not agreed at the time of the dispatch of the letter of 22 January nor during the period after that when, the appellant claims, the offer had been accepted by the conduct of the consortium in reaction to the offer.

28. The behaviour of the partners after they received the letter of the Chief Minister in May 2004 is also strongly indicative of their view that the government was not contractually bound to them. This is amply illustrated by a selective examination of some of the exchanges that took place thereafter:

1. On 8 April 2005 Mr Simons wrote to the new Minister for Natural Resources, referring to Mr Misick's letter of 20 May 2004. The letter contained the statement, “you will see also from the exchange of correspondence between myself and [Mr Misick] we were to be assigned land in another area. That is that (*sic*) exercise which now needs to be completed.” He asked for a meeting with the survey department to sort out an alternative parcel of land.

2. On 23 May 2005 Mr Simons wrote to the lawyer in the office of the Attorney-General with whom he had corresponded in relation to the draft agreement of 14 January 2004. He said “I have not contacted you in relation to this matter for some consideration (*sic*) time as I understand that Government currently has other plans for the property in question.” No mention was made of any contractual entitlement. On the contrary, all indications were that the partners were entirely acquiescent in the change of plan. Further evidence of this can be found in a letter from Mr Kitsch to Mr Simons on 23 August 2005 in which he asked, “did the minister get back to you as promised on the 35 acres or where else they might want to put us?”

3. On 13 October 2005, Mr Simons wrote to the Minister of Natural Resources referring to a ‘decision’ communicated to him by Mr Misick “to allocate to my group ten acres of the original thirty-five acres of land”. In this letter he also said that he had “agreed to include one other believer in my group.” The fact that the identity of those involved in the proposed development had not been finally settled is as strongly suggestive of a lack of finality in the negotiations that were plainly still continuing.

4. On 3 March 2006 Mr Simons wrote to the new Minister relying on the letter of 13 October 2005 and suggested that the former Minister "was just about to have the matter finalized when the recent changes" took place. That letter was acknowledged on 7 March 2006. Mr Simons pressed for a fuller response on 15 March 2006 and in this letter he noted that although the application had been approved and instructions to prepare a Conditional Purchase Lease had been given, a number of points remained to be settled including (i) the valuation of the lands; (ii) their location; (iii) the shape of the development; and (iv) survey fees.

29. These exchanges point unmistakably to acceptance on the part of the partners that the government had not intended to bind itself contractually to convey to them their desired parcel of land.

30. This history is of particular importance in considering the appellant’s reliance on what he claimed were the applicable legal principles. It is, of course, true, as the appellant has contended, that an agreement to execute a document incorporating terms previously agreed can in itself constitute a binding and enforceable contract – see, for instance, *Morton v Morton* [1942] 1 All E.R. 273. It is equally the case that where some facts on which the operation of an agreement will depend are not known, this will not necessarily render the agreement unenforceable, if the parties clearly intended it to have legal effect - *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503. Likewise, an agreement will not be regarded as too uncertain to bind the parties solely because it requires further agreement between them and the resolution of certain points of detail, provided the court

concludes that the parties' intention at the time of entering the agreement was that it should be legally binding upon them - *Neilson v Stewart* (1991) S.L.T. 523.

31. The critical issue is the parties' intention. The trial judge and the Court of Appeal were emphatic in their conclusion that the parties in this case did not intend to enter an agreement that would be legally binding on them. From an examination of that evidence the members of the Board have decided that no other conclusion was possible. While Mr Taylor intended that there should be an agreement, we are entirely convinced that that was something that he had in contemplation for the future. There were simply too many matters to be further discussed and too many outstanding hurdles to be surmounted before even the broad framework of a binding agreement could be settled. The Board considers, therefore, that both the trial judge and the Court of Appeal were correct in their determination of the enforceability issue.

Proprietary estoppel

32. The foundation of the appellant's claim on proprietary estoppel rested on the claim that both sides intended that they would be bound by the agreement. In light of our conclusion that the intention – or more accurately, the aspiration - of the parties was that there would at some future time be a binding agreement, this is not a propitious basis on which to launch this aspect of the appellant's case.

33. The most recent leading authority in this field is *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55. In paragraph 14 of his speech, Lord Scott of Foscote provided a succinct summary of the principle:

“An ‘estoppel’ bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a “proprietary” estoppel – a sub-species of a “promissory” estoppel – if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.”

34. Those then are the broad contours of the principle. The real difficulty arises in its application to any given set of facts. In the *Yeoman's Row* case Lord Walker of Gestingthorpe sounded a salutary note of caution about undisciplined recourse

to the principle as a ready panacea for real or imagined grievances arising from negotiations between parties. At paragraph 46 he said:

“Equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583, 615-616:

‘Under the law of [Australia] – as, I venture to think, under the present law of England – proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party ‘ought to win’ and ‘the formless void of individual moral opinion’”

35. As the authors of Gray and Gray, Land Law 4th edition point out in paragraph 10.189, traditionally proprietary estoppel has been recognised as having three essential constituent elements: representation, reliance and unconscionable disadvantage. It was suggested that in recent case law a tendency could be detected which sought to synthesise the jurisprudence of proprietary estoppel in a more unified doctrine of ‘detrimental reliance’. Acknowledging the existence of that tendency, Lord Walker commented at paragraph 48 that synthesis and unification, however desirable as objectives, have their dangers. He then embarked on a scholarly review of recent – and not so recent - authorities in the area, one purpose of which was to reassert the need to consider carefully in any particular case whether each of the elements of proprietary estoppel was present.

36. In this appeal, the application of the doctrine of proprietary estoppel depends, as the respondent has put it in its printed case, on proof by the appellant that he has relied to his detriment upon a reasonable belief, arising from a clear representation by the defendant that he was entitled to acquire a certain interest in land. In this context, the requirement that the reasonable belief of the appellant be that he was entitled to acquire a *certain* interest in the land is of supreme importance. The need for clear evidence of this loomed large in the *Cobbe* case

also. Lord Scott dealt with the subject in paragraph 18 of his speech in the following passage:

“Oliver J (as he then was) stated the requirements of proprietary estoppel in a ‘common expectation’ class of case in a well-known and often cited passage in *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 144:

‘if A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.’

Note the reference to ‘a certain interest in land’. *Taylor’s Fashions* was a case where the ‘certain interest’ was an option to renew a lease. There was no lack of certainty; the terms of the new lease were spelled out in the option and the lessees’ expectation was that on the exercise of the option the new lease would be granted.”

37. Lord Scott contrasted the certain interest that was a feature of the *Taylor’s Fashions* case with the position in *Yeoman’s Row*. In the latter case the claimant’s expectation was “that upon the grant of planning permission there would be a successful negotiation of the outstanding terms of a contract for the sale of property to him, or to some company of his, and that a formal contract, which would include the already agreed core terms of the second agreement as well as the additional new terms agreed upon, would be prepared and entered into” – per Lord Scott in paragraph 18.

38. The situation in *Yeoman’s Row* is mirrored, if not exactly, then certainly closely in the present appeal. Like Mr Cobbe, the height of the appellant’s expectation could only have been that a contract, the exact terms of which remained to be settled, would be entered into at some future unspecified date. As with Mr Cobbe, the appellant cannot identify what ‘certain interest’ in land he claims to have been entitled to receive. These shortcomings are fatal to the claim based on proprietary estoppel.

39. In advancing the claim under this head, the appellant made much of the alleged unconscionable behaviour of the government in “resiling from its promises” to him. As is clear from the decision in *Yeoman’s Row*, however, unconscionable behaviour cannot stand alone as the basis for a finding of proprietary estoppel. Where there is no ground for a belief that the claimant was entitled to acquire a certain interest in land, the fact that the behaviour of the person against whom proprietary estoppel is sought to be established was unconscionable cannot fill the gap that exists in the essential proofs required for the doctrine to come into play. Lord Walker explained the function of the unconscionability element in the proprietary estoppel equation in the following passage from paragraph 92 of his speech:

“Mr Dowding devoted a separate section of his printed case to arguing that even if the elements for an estoppel were in other respects present, it would not in any event be unconscionable for Mrs Lisle-Mainwaring to insist on her legal rights. That argument raises the question whether “unconscionability” is a separate element in making out a case of estoppel, or whether to regard it as a separate element would be what Professor Peter Birks once called “a fifth wheel on the coach” (Birks & Pretto (eds) *Breach of Trust* (2002) p 226). But Birks was there criticising the use of “unconscionable” to describe a state of mind (*Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455). Here it is being used (as in my opinion it should always be used) as an objective value judgment on *behaviour* (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again.”

40. It is only where the ‘other elements’ are present that the court’s conscience requires to be examined for the presence of shock. Absent those elements, however reprehensible the behaviour of the defendant and whatever the court’s reaction to it may be, the doctrine of proprietary estoppel will not avail the claimant.

The discovery issue

41. The frailties of the appellant’s appeal on the proprietary estoppel issue were both intrinsic and fundamental. They arose because of the absence of constituent features of the doctrine whose presence was vital to its invocation. In particular, the lack of basis for an expectation on the part of the appellant to be entitled to a certain interest in the lands condemned the case on proprietary estoppel to failure. Further discovery designed to show that the respondent had acted unconscionably could not cure that essential defect. Likewise, the further affidavits which the appellant sought to introduce (and which the Board has considered *de bene esse*) could not assist the appellant.

Costs

42. The award of costs is in the discretion of a trial judge, but the discretion should be exercised along well-settled lines. The general rule governing the award of costs to a successful defendant was laid down by Atkin LJ in *Ritter v Godfrey* [1920] 2 KB 47 60:

“In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.”

43. The trial judge in this case found certain aspects of the actions (and inaction) of TCInvest and the Department of Lands and Survey to be “disgraceful”. We make no comment on this finding beyond saying that none of the behaviour of which the judge complained comes within the categories adumbrated in *Ritter*. Significantly, Martin J accepted that the actions which he condemned were either deliberate or the result of gross incompetence. If, as the judge acknowledged, they might have been the result of ineptitude, that conclusion would be plainly incompatible with the view that the respondent had been in fact responsible for any of the species of cases referred to in *Ritter* which would justify an award of costs against it.

44. Martin J was also exercised by the fact that the parcels of land in the area where the development was initially to take place had “mutated” so that the

original lands were no longer available and that this information had not been disclosed to the appellant until a late stage of the trial. As the Court of Appeal pointed out, however, the respondent was under no legal obligation to retain the lands as a separate parcel pending the outcome of the litigation and there is no warrant for the view that, had it been disclosed earlier, this would have had any bearing on the stance of the appellant. Indeed his pursuit of this appeal is a strong indicator to the contrary. We consider that the Court of Appeal was therefore correct in its decision to reverse the trial judge's finding on the costs issue.

Disposal

45. The Board will humbly advise Her Majesty that the appeal should be dismissed and that the decision of the Court of Appeal should be affirmed.