IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS **16/2012**

BETWEEN

THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

PLAINTIFF

AND

(1) PROGRESSIVE NATIONAL PARTY

(2) TREVOR COOKE sued on behalf of the PROGRESSIVE NATIONAL PARTY (an unincorporated association)

DEFENDANTS

BEFORE RAMSAY-HALE J

Mr David Phillips QC with Mr Patrick Patterson and Ms Khalila Astwood for the Attorney General
Mr. Carlos Simons QC for the Defendants

Heard on the 20th, 20 and 22" of March, 2013

JUDGMENT

1. This is the decision on the Plaintiff's action commenced by Writ dated therjd'OlotrJune 2012 which alleges a trespass by the PNP and /or its members represented by Trevor Cooke on land known as parcel 60602/79 in Providenciales ("the Land") and seeks recovery of the Land and mesne profits for the period of wrongful occupation and further and other consequential relief.

BACKGROUND

2. On or about November 2004, the First Defendant ("the PNP") applied to the Turks and Caicos Island Government ("TCIG") for a Commercial Conditional Purchase Lease over the Land ("CPL").

3. On the 30 November 2004, Leroy Charles, the Director of Lands and Surveys prepared a memorandum that concluded that a previous lease over the land, held by Mr DeOwen Higgs had expired on the 28 November 2004 and, as Mr Higgs had failed to construct any development on the land and was no longer in occupation, the land could be leased to the PNP for the construction of its Party headquarters. Mr Charles advised the Government that the land comprised 0.75 of an acre

and had an open market valuation of $50,000 and that it could be leased to the PNP at $,1250 per annum and would incur a discounted freehold purchase price of $25,000.

4. On 6 January 2005, the Executive Council approved the grant of a CPL over the land to the PNP to build its Party headquarters. The approval was conveyed to the Chairman of the PNP by letter dated 18 February 2005 which stated,

> *"Executive Council at its meeting held on 6th January 2005 considered your application and it recommended approval as follows:-*
>
> > *To grant approval of a Commercial CPL over 6060$^{2}/_{7}$9 to the Progressive Natural (sic) Party to build a Party Headquarters in accordance with the terms of the Crown Land Policy."*

It is accepted that no lease was ever executed nor was any rent paid in consideration of the grant of a lease.

5. On the 22 March 2006, Williams Drafting applied for Development Permission over the said land on behalf of the Defendant. The application was approved on the 23 March 2006 and PNP thereafter commenced construction of its headquarters. On 9 June 2006 the Department of Planning received and granted an application for temporary electrical connection during the construction of the headquarters on the land.

6. On the 9 July 2007, the PNP entered into a property management agreement with Provident Management Services Ltd. By that agreement, Provident agreed to manage operate control and rent Progress House as the party headquarters was named in exchange for an initial payment of $4,020 and monthly payments thereafter totalling $3,420. The TCIG made agreements with Provident to rent premises in Progress House as constituency offices for six members of Parliament at a rent of $2,350 per month for each.

7. In or around April of 2011, a review of Crown leases led to the discovery that the PNP had not in fact ever obtained a lease of the Land nor paid any monies to the Crown in respect of the Land. Subsequent to that discovery, the Plaintiff in correspondence and by these proceedings claimed possession of the land and damages for trespass.

THE CASE

8. The Plaintiff's case is that the PNP is a trespasser and the Crown is entitled to an order of possession for the Land and to damages for trespass and mesne profits.

9. The PNP accepts that it is a trespasser, but seeks to raise an estoppel on the ground that it would be unconscionable for the TCIG to assert its title in the circumstances where the PNP had built their headquarters on the Land in consequence of the mistaken belief, held by both the TCIG and the PNP from 2006 to 2011, that the PNP had title to the land.

DISCUSSION

10. The primary evidence in support of the plea of estoppel was given by Mr Hall, then Deputy Leader and Treasurer of the Party and the Deputy Premier of the PNP-led government of the day. It was his evidence was that *"no-one had conscious awareness that the PNP had no title to the land"* and

that he believed *"there was a genuine mistake"* on the part of both the PNP and the Crown that the PNP had a lease.

11. In his *viva voce* evidence Mr Hall accepted that as Treasurer he had not made any payments on behalf of the PNP for the rent under a CPL nor paid any monies with respect to the purchase of the freehold nor was any payment in respect of the Land reflected in the PNP's accounts.

12. He said, inter alia,

> " *I remember after the lease was issued, the company that Arlington Musgrove controlled - JACA Construction Ltd — they would have been advised that government had granted a lease to the PNP. He took control of the design and dealt with Planning.*
> *From my standpoint, Arlington Musgrove dealt with the administrative issues and I was under the impression that all the costs for leasehold and freehold would have been handled by Mr. Musgrove....*
> *...He was able to get planning permission and a PR number and in my experience you had to present to Planning proof of title or proof of lease. Once he said to me that Planning had approved the plans, I thought PNP had a lease.'*

13. Of course the assertion *`after the lease was issued"* is entirely wrong, as no lease was ever issued, and when one peruses the planning application, it would appear that Mr Williams of Williams Drafting, who was in fact tasked with getting planning permission, avoided producing a lease to the planning authorities by asserting that the PNP was the owner of the land. Mr Simons rejects that analysis and submits that from the other boxes checked on the planning application form it would have been clear that the applicant was not the owner but was asserting it had the owner's permission to build. Notwithstanding his submission, the inference to be drawn from the grant of planning permission is that Planning mistakenly concluded that the PNP was entitled to build on the Land.

14. Mr. Hall said further that he believed that,

> *"Arlington Musgrove being a card-carrying member had taken on the responsibility to ensure that he could get planning permit which would have meant paying all the fees to get planning permissions including the lease. I believed all those fees were wrapped up in his progress payments...." and said further that "it was conceivable that Mr Musgrove could have co-ordinated with another member of the party to get it executed."*

15. At its highest, Mr Hall's evidence goes to show that he and perhaps other members of the PNP believed that the Party had a CPL, not because of any representation or assurance given to them by the Crown, but because Mr Musgrove was able to acquire planning permission. It seems to me plain that a defence advanced on these facts must fail, as the authorities establish that for a proprietary estoppel to be made out there must be,

> ***a representation or assurance made to the claimant;*** *reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance:"* per Walker LJ *Thorner v Major* [2009] 1 WLR 776 at para 29

16. Mr Simons submits, however, that for the plea to succeed it is not necessary for the PNP to show that there was an express representation by the Crown to the effect that the PNP had been granted a regular title. He contends that all that the PNP need to show is that it is unconscionable in the circumstances for the Crown to assert its title to the land.

17. In support of this submission he relies on the decision of the Privy Council *in Blue Haven Enterprises v Tully* [2006] UKPC 1, an appeal from the Court of Appeal of Jamaica in which Lord Scott delivering the decision of the Board set out the development of the doctrine of proprietary estoppel. Mr Simons placed particular reliance on the following passages from the judgment:

> *"22. The foundation stones of the principle espoused by Blue Haven were laid by Ramsden v Dyson (1866) LR 1 HL 129 and Willmott v Barber (1880) 15 Ch D 96. Both were cases in which a claimant sought to establish a proprietary interest in someone else's property on the ground that he (the claimant) had spent money on the property in the belief that it was his and that belief had been encouraged by the true owner passively standing by without intervening. In Ramsden v Dyson, Lord Cranworth said at pp 140-141:*
>
>> *'If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he has expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion , in order to afterwards profit by the mistake which I might have prevented '*
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> *And in Willmott v Barber, Fry J famously stated the five so-called probanda that a claimant should endeavour to establish. He said at pp105-106,*
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>> *"A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What then are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of is mistaken belief Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the Plaintiff and the doctrine of acquiescence is founded upon conduct with knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the Plaintiff's mistaken belief of his rights. If he does both, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right must have encouraged the plaintiff in the expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment nothing short of this will do."*

In both the passage, cited from Lord Carnworth's speech and the passage cited from Fry's judgment, the necessity for showing the defendant to be guilty of unconscionable behaviour clearly appears. Lord Carnworth uses the word "dishonest" Fry speaks of fraud". Subsequent case law has reduced the rigidity of Fry's apparent insistence that each of the five probanda be established to the letter. In Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) [1982] QB 133, 151-152, Oliver J (as he then was) said

> ***"the more recent cases indicate in my judgment that the application of the Ramsden v Dyson principle - whether you call it proprietary estoppel , estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a much broader approach which is directed as ascertaining whether , in particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."***

"23 Oliver J's concentration on unconscionable behaviour on the part of the defendant rather than on the Willmott v Barber five probanda was implicitly approved by Lord Templeman in giving the judgment of the Privy Council in Attorney General of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd [19871 AC 114, 123 and is referred to in Snell's Equity 31"ed (2005) para 10.16 as 'the most important authoritative modern statement of the doctrine.' Their Lordships are of the same opinion. Fry J's five probanda remain a highly convenient and authoritative yardstick for identifring the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative.

"24 Oliver J's reference to "proprietary estoppel, estoppel by acquiescence, estoppel by encouragement" might appear to suggest that in every case the claim must be based on some species of misrepresentation made by the defendant. But Oliver J's key that unlocks the door to the equitable remedy is unconscionable behaviour and although it might be difficult to fashion the key without a representation by the defendant it would not, in principle , necessarily be impossible to do so. ***Enrichment of A brought about by improvements to A's property made by B otherwise than pursuant to some representation , express or implied by acquiescence or by encouragement, for which A is responsible would not usually entitle B to an equitable remedy. But the reason would be that A's behaviour in refusing to pay for improvements that he had not asked for or encouraged could not,*** *without more* ***be described as unconscionable."***

18. It is difficult to see how it can be said that the Crown behaved unconscionably in permitting the development of the Land by the PNP in the circumstances where it was, as Mr Hall asserts, mistaken as to the state of the title to the Land.

19. While it is correct, as Mr Simons has also submitted, that it is not necessary to establish an estoppel for the PNP to show that the Crown knew of the PNP's mistake - one of Fry J's probanda - the Crown's knowledge of its own rights remains relevant to the inquiry the Court must make.

As the learned editors of Snell's Equity note with respect to what they refer to as the `improvement cases," such as the case at Bar:

> *"It is now clear that it is unnecessary for the C to satisfy all five tests although the extent of D's knowledge is likely to be a highly material factor in giving rise to the equity. Normally the claimant must prove* ***that the defendant knew that the property was his, or that his property was being improved or that he was entitled to interfere. In these improvement cases, it is this knowledge which creates the conditions for recovery, rather than any promise, representation or assurance by the defendant or detrimental reliance:"*** *para 12-018.* [emphasis supplied]

20. It is the knowledge of the landowner of his rights in the land and his failure to act in a manner consistent with those rights, but instead passively standing by, that makes it dishonest for him to later assert his title. Without that knowledge an estoppel cannot arise.

21. The operation of the principle is perhaps best illustrated by the decision in *Taylor Fashions* (supra) which concerned a common assumption by both parties as to the legally binding nature of an option to renew a lease. In that case, unlike this, there was a concluded agreement between the parties under which Taylors had an option to renew a lease of premises owned by the defendants. Taylors undertook significant expenditures on the leasehold in the mistaken belief, shared by the defendants, that they had a valid and enforceable option. It transpired, however, that to be binding on the defendants who had purchased the reversion, the option had to be- and was not - registered. Taylors sued for a determination that the defendants were estopped from denying that they were entitled to exercise the option.

22. Oliver J found on the facts that Taylors' belief that the option was valid was neither created nor encouraged by the defendants, but arose because Taylors had been assured of the option's validity by their solicitors and held that it was not unconscionable in the circumstances for the defendants to assert their legal rights. He said at pages 155-156:

> *"...so far as acquiescence pure and simple is concerned, the defendants could not lawfully object to the work and could be under no duty to Taylors to communicate that which they did not know themselves, namely that the non-registration of the option rendered it unenforceable."*

23. He concluded at p 157,

> *"Whilst therefore it may not seem very admirable for the defendants to avail themselves of a technicality which runs counter to the common assumptions entertained by all parties to the transaction that is what the law permits them to do; and I cannot find in the circumstances of this case, and even given the flexibility of the equitable principle, that the Taylors have discharged the burden of showing that it is dishonest or for them to do so."*

24. On the facts posited by Mr Hall, the Crown was unaware that it had the right to interfere or stop the construction as it also believed mistakenly that the PNP had title. Its standing by in the circumstances was not dishonest and cannot give rise to an estoppel.

25. No assistance can be had from the case of *Lim Teng Huan v Ang See Chuan* [1992] 1 WLR 113 to which Mr Simons has referred the Court. There the Court was considering an agreement for the transfer of an interest in co-owned land which was void but on the strength of which the defendant built a house. The Privy Council upheld the finding of the Court of Appeal that it was unconscionable for the plaintiff who was asserting his legal right to a one half undivided share of the land to go back on an assumption which he had permitted the defendant to make, that on payment of compensation he would become owner of the plaintiffs share.

26. The Privy Council held that the unenforceable agreement constituted evidence of the parties' intentions and it was to be inferred that the defendant completed construction of the house in reliance on that agreement and that though the plaintiff had not acted unconscionably in allowing the defendant to assume that he would have sole absolute interest on paying him compensation for relinquishing his half share in the land, it would be unconscionable for the Plaintiff to renege on that assumption and he was therefore estopped from denying the defendant's title.

27. In *Lim* 's case, there was no mistake on either side. Each knew the state of the title but had agreed that the defendant would acquire the whole of the estate in exchange for compensation and the defendant had built his house in reliance on that agreement.

28. As stated by Lord Denning M.R. in Moorgate Mercantile Co. Ltd. v. Twitchings [1976] Q.B. 225, 241:

    "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J. put it in these words: 'The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.'

29. Far from causing the PNP to believe it had title, it was the PNP through its agent that led Planning to believe it had the right to develop the land resulting in the mistaken grant of permission. It doesn't seem to me in those circumstances that it can be said to be unjust for the Crown to assert its title to the Land.

30. It is clear from the evidence that it was never intended that the PNP should take possession of the Land on the basis that the grant of a CPL had been recommended to the Governor. The advice from the Permanent Secretary for the Ministry of Natural Resources on which the PNP rely was that Exco had recommended that a CPL be granted ***in accordance with the terms of the Crown Land Policy*** and Mr Hall and the other members of the PNP Executive would have been well aware of the obligation under the Crown Land Policy for a person to whom a CPL had been offered to execute a lease - usually within a specific time frame [1]- and pay rent before taking

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[1] Crown Land Policy: General Provision 4:13 at p374 of the Bundle. The offer to lease the same land to Arthur Smith was limited for 6 months (see p159 of the Bundle) and the offer of a lease of the land to De-Owen Higgs was similarly limited (see p169 of the Bundle).

possession. It was never represented that the PNP were to acquire the lease on any other terms and nothing in the Crown's conduct or in the contemporaneous documents could have caused the PNP to believe that the Crown was not insisting on its strict legal rights. Indeed, Mr Hall does not say so. What he says is that the PNP believed that it had executed a lease in accordance with the Crown Land Policy.

31. As Mr. Phillips submits, someone who is acting in reliance on the representation that he has been granted a lease tenders rent and had the PNP done so, an estoppel would arise; but, in the circumstances where the PNP paid no rent and did not pay the freehold purchase price in exercise of the option to purchase the freehold when the building had reached belt-beam which is an ordinary feature of CPLs, the claim of proprietary estoppel cannot be made out.

32. In any event, I am not persuaded on the evidence that either Mr Hall or the executive of the PNP believed there was an executed lease in existence at any time.

33. The acquisition of land and the construction of Party headquarters was a substantial step forward for the PNP. The monies expended on the construction of what was later named Progress House were carefully noted in the assets column of the financial statements prepared by Mr. Hall, and it is impossible to accept that Mr Hall, an experienced accountant and a leader of the Party and the man responsible for preparing the Party's accounts, was unaware that no rent had been paid in respect of the Land. He would have known from the fact that no rent had been paid that no CPL had been granted. His evidence that he believed, because planning permission had been granted, that the PNP had a lease the execution of which Arlington Musgrove somehow co-ordinated and for which Musgrove, as a card carrying member of the Party, had elected to pay, frankly strains the credulity of this Court and I reject it.

34. Given the submission of the planning application without the requisite lease and the extraordinary haste with which the application was considered and approved by the Planning Department - one day later- it is little wonder that Mr. Phillips has suggested that the PNP as the party in power sought to, and did, exploit its relationship with TCIG to obtain the necessary permissions and take possession of the Land and build its headquarters on it without executing a lease and paying the rent due. It is unnecessary for me to make a finding in that regard but in my judgment, the only inference to be drawn from the evidence is that Mr Hall and the PNP knew that no lease had been agreed, executed or granted by the Governor and that it had no title to the land.

SUBMISSIONS *IN LIMINE*

35. Two very important submissions were made *in limine* by Mr. Simons on which I was not asked to rule as a preliminary matter, Mr Simons taking the view that the case raised serious issues which should be tried on the merits.

36. The first was that the PNP as an unincorporated association[2] has no legal personality and cannot sue or be sued. This is in my view entirely correct.

37. The second was that the joinder of Mr. Cooke, who is the present Chairman, did not resolve the difficulty facing the Plaintiff in advancing its claim, as the Plaintiff could not show that the interest of Mr. Cooke and the interest of the other members of the PNP are the same as is required in order for him to be sued in a representative capacity.

38. Ord. 15, r 12 deals with representative proceedings and states as follows:

"(1) Where numerous persons have the same interest in any proceedings . . . the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. . . . (3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom . . . the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the court. (4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order. (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability. . . . "

39. Before addressing the substantive question raised by Mr Simons, I would first observe that the title of this action does not comply with the Rules, as the Rules do not provide for the representative defendant, in this case Mr. Cooke, to be sued on behalf of the unincorporated association but rather on behalf of all its members: Order 15 r12 (1).

40. In respect of the objection made by Mr Simons to the joinder of Mr. Cooke, I turn to consider how the phrase "have the same interest in any proceedings "should be construed in the context of this action.

41. In *Roche v. Sherrington and Others* [1990] 2WLR 117, Purchas L.I stated,

"If a plaintiff wishes to invoke R.S.C., Ord. 15, r. 12, for the purpose of bringing an action against named defendants as representatives of a wider class, one essential condition is that the persons represented should have the same common interest in defending the proceedings in question. This is made clear by the opening words of the rule. ***In a case where separate defences may be open to some members of the class in question, there can be no common***

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[2] As defined by Lawton LJ in *Conservative Central Office v Burrell* [1982] 1 W.L.R. 522 (CA)., an unincorporated association in one where there are two or more members bound together for one or more common purpose, mutual rights and duties between the members, and rules governing who controls the association and how its funds are used; the members must be able to join and leave the association at will. These groups are not covered by the Companies Act 1996. Hence they have no legal personality, existing in their own right, and cannot own property.

interest within the rule: see London Association for Protection of Trade v. Greenlands Ltd [191612 A.C. 15, 39, per Lord Parker of Waddington. [emphasis supplied]

42. In *Prudential Assurance Co Ltd v Newman Industries Ltd,* Vinelott J allowed a representative action on behalf of shareholders of a company alleging conspiracy in relation to a misleading circular that was used to procure the passing of a resolution. Vinelott J held that a representative action seeking damages in tort could proceed subject to certain conditions the first of which was that

> *"(i) such an action would not confer a right on a member of the class which he would not have been able to exercise in separate proceedings* ***nor deprive a defendant of a defence on which he or she could rely in a separate action.***

43. The case of *Winder v Ward* (1957) February 26, 1957 CA (unrep) on which Mr Simons relies, was an action in trespass brought against members of a Hunt. The Plaintiff's application for a representative order was refused on the ground that the members of the Hunt might each have a separate defence and it would be wrong to make a Representation Order which would prevent such defences being put forward.

44. The trespass which the Crown alleges against all members of the PNP who Mr Cooke represents is not something of which it could be said all members were aware. Each member of the PNP could have a different defence not least that they hadn't been on the land or hadn't caused the building to be constructed. The mere fact of membership of an association cannot carry with it responsibility for the trespass committed by other members.

45. As Lord Parker of Waddington *in London Association for Protection of Trade v. Greenlands Ltd (supra)* said, at p 39:

> *"To use the words of the 8th edition of Lindley on Partnership, p. 14, 'if liabilities are to be fastened on' any members of such an Association 'it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and* ***the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."***

46. Mr Philips submits that it doesn't matter for the purposes of the suit if any member of the PNP has a separate defence, as rule 12(5) provides for persons to dispute their liability to judgment. With respect, the rule does not give the Plaintiff the right to sue and get judgment against a class of persons who do not all have a common defence. It simply permits someone against whom judgment is given to argue that he is exempt from liability, say perhaps because of an indemnity or some further defence not common to the rest of the class, which is not quite the same thing.

47. I turn to consider the submission which was not fully developed by Mr Simons and to which Mr. Phillips did not respond which was that the Plaintiff had not sought a Representation Order from the Court and could not pursue the action against Mr Cooke without one. It appears from the White Book note 15/12/27 at p255 that while the Plaintiff may commence proceedings without leave against one person as representing numerous persons having the same interest , he must thereafter seek a representation order from the Court. This is implicit in the statement that,

> *"The Court does not leave the ultimate selection of representative defendants to the mere will or choice of the plaintff ...and will only make a representation order as against proper persons to defend on behalf of others."*

48. Mr Phillips took the position that as Mr Cooke had entered an appearance and filed a defence, his continued objection to the proceedings could not stand, but the authorities indicate that the question of whether a defendant can be sued as representative of a class is not a mere technical matter that can be waived. As Lord Parker observed at p 38 of *Roche* (supra)

> *"The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It appears, however, that the officials of the Association were not anxious to raise what might be considered a technical point, and an appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and all other members of the Association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and all other members of the Association without an order of the Court authorizing him so to do. It may be said that this, too, was a technical matter. In my opinion, however, it was a matter of substance. Had Sir Samuel Scott applied to the Court for leave to defend on behalf of himself and all other members of the Association, the Court would have had to inquire whether the case was within Order XVI, r. 9, of the Rules of the Supreme Court; in other words, whether the members of the association have a common interest within the meaning of that rule."*

49. No application for such an Order was made but it is safe to say that as it cannot be shown that all the persons whom Mr. Cooke was to represent have the same interest in the action for damages for trespass, no such Order could have been granted.

50. The PNP's lack of legal personality cuts both ways. It undermines the entire basis on which the case was argued which assumed that the PNP was a legal entity capable of entering into negotiations with the Crown for the grant of a CPL and of acting in reliance on representations made by others and of contracting with persons for the construction of premises but, as an unincorporated association it lacks the characteristic of a company, essential for this analysis, of being able to act through third parties whose state of mind and whose conduct can be imputed to it.

51. As it is not a legal entity, it follows that it is not capable of acquiring or holding any interest in land nor is it capable of being in possession of land. The principle is illustrated in the Australian case of *Freeman v McManus* [1958] VR 15, an action for recovery of possession brought by a landlord against the Australian Labour Party to whom it had purported to grant a lease. On appeal to the Victorian Supreme Court the issue was whether an unincorporated political association was capable of taking a lease or tenancy of land. Authority suggested that it could not, but argument by counsel suggested *'that a disposition of property may be made to an aggregate of persons under the descriptive name of an association'.* This submission was rejected by the Court, O'Bryan J stating at p ,

> *"... the notion of a lease to members jointly is of a lease to a number of persons who will continue to hold the estate whether they continue to be members of the association or not, and new members of the association will not by the mere fact of membership acquire any*

rights in the leasehold estate. What I understand by the contention that an unincorporated body may become a lessee of property is this: that the grant will originally be to the then members of the association jointly, but that as a person ceases to be a member of the association he thereby ceases to have any interest in the tenancy or any obligation arising from the tenancy agreement or lease; and as each new member is elected to the body he will become ipso facto a joint lessee with the other then members and obliged by the covenants of the lease or the obligations of the tenancy agreement; so that, at any one time, the lessees are the then members of the association..."

a notion the learned Judge described later in the judgment as "fantastic."

52. O'Bryan J stated the rationale for the rule at p ,

"Neither the trustees nor the members of the managing committee, the steward, the secretary, nor any other officials of a members' club, ***have any authority, merely by reason of acting in that capacity, to pledge the credit of the members by contracting on their behalf...The*** *fact that the members of a society have entrusted its affairs and management to a committee does not give the committee authority to make contracts binding on the members, especially in a case where the members have no interest in the society's funds. "*

CONCLUSION

53. Mr Simons suggested that if the negotiations had proceeded to the grant of a lease, the question of who would hold the lease would have been resolved by attorneys and it is likely that the Land would have been held by a trust but no lease was ever executed and the PNP, as an unincorporated association, simply cannot acquire any interest in land whether by way of estoppel or otherwise. The only possible conclusion is that the beneficial and legal interest in the Land was always and remains in the Crown.

54. Even if the PNP had the requisite juristic personality, the plea of estoppel advanced on its behalf by Mr Hall would fail, as it would not be unconscionable for the Crown to assert its legal rights to the Land in the circumstances where it was unaware that the PNP had not caused a lease to be executed or paid rent and it had not, as the PNP was aware, consented to the PNP's possession of the Land on any other terms.

55. As the PNP is not a legal entity, the claim against it must be dismissed.

56. For the reasons I have given Mr Cooke cannot represent the members of the PNP in the action for trespass as it cannot be said that all the members of the PNP have the same defence. The claim against Mr Cooke personally in respect of the trespass to the Land is dismissed, there being no evidence before the Court that he is or has been a trespasser.

57. An action to recover possession can only be taken against the persons, real or legal, who are in possession of the property and the PNP is not a person. No evidence has been led as to who is in actual possession of the premises. Insofar as the Plaintiff purports to proceed against Mr Cooke personally to recover possession of the Land, that claim too is dismissed, there being no evidence that he is in possession of the Land or any part of it.

58. I invite submissions from Counsel in respect of costs.

DATED T12TH,,DAy;9F JULY, 2013

JUDGE OF THE SUPREME COURT