Privy Council Appeal 4 of 1992

The Administrator General for Jamaica *Appellant*

v.

(1) Rudyard Stephens
(2) Federal Investors Limited
(3) Krias Limited and
(4) Exley Ho *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1992

Present at the hearing:-

LORD GRIFFITHS
LORD LANE
LORD BRIDGE OF HARWICH
LORD BROWNE-WILKINSON
LORD MUSTILL

*[Delivered by **Lord Griffiths**]*

On 5th October 1990 Theobalds J. made an order designed to bring to an end litigation that has been dragging its way through the courts in Jamaica for the last ten years. The Administrator General, the appellant, appealed against that order. The Court of Appeal dismissed the appeal and upheld the order of Theobalds J. The appellant now appeals against the order of the Court of Appeal.

The litigation has arisen out of a written agreement made on 11th September 1978 ("the 1978 agreement") between Rudyard Stephens and Gilbert Baron Jobson, deceased, on his own behalf and as managing director of Federal Investors Limited in which he held a large majority shareholding. By this written agreement Jobson agreed to sell two parcels of land registered in his name and agreed as managing director of the company to sell one parcel of land registered in the name of the company. The three parcels of land comprised what was treated as a single plot known as 10 Red Hills Road, Saint Andrew. The purchase price was $65,000.

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Pursuant to this agreement Stephens was let into possession of the land but Jobson died intestate on 23rd May 1980 before the agreement was completed. The appellant obtained letters of administration to Jobson's estate on 30th December 1982.

By a written agreement dated 29th September 1981 Stephens agreed to sell the land to Exley Ho for $200,000. Stephens failed to complete the agreement and in a letter from his solicitor dated 31st May 1982 gave as his reason that he had "not yet obtained title from the Administrator General".

On 30th December 1982 Exley Ho commenced an action ("the 1982 action") against Stephens for specific performance of the 1981 agreement and on 6th April 1983 obtained an order for specific performance of the 1981 agreement and Stephens was refused leave to file a defence out of time.

On 25th January 1984 Stephens commenced an action ("the 1984 action") against the appellant and the Attorney General seeking specific performance of the 1978 agreement. The statement of claim in that action described the 1978 agreement as made between Stephens and Jobson and made no reference to the interest of Federal Investors Limited. The appellant failed to file a defence to the action and on 20th September 1984 Stephens obtained an order from Smith C.J. granting him leave to enter judgment in default of defence against the appellant. No judgment was entered by Stephens pursuant to this leave.

However, on 9th May 1985, McKain J. heard an application by Stephens for an order that the appellant specifically perform the 1978 agreement. By consent this application was adjourned *sine die* on the ground that the appellant was unable to give title to the plaintiff as a mortgage of the lands, obtained by Jobson in 1965, had outstanding principal and interest of $365,000 which exceeded the value of the estate.

In order to remove this obstacle to the appellant completing the 1978 agreement there was an exchange of letters in February and March 1986 between Exley Ho and the appellant in which Exley Ho offered to take over the mortgage and the appellant agreed to his proposal. Exley Ho took over the mortgage by a nominee company Krias Limited.

There were various other applications and orders made which it is not necessary to set out until on 14th January 1988 the appellant issued a summons in the 1984 action for leave to file a defence out of time. The draft defence challenged the existence of the 1978 agreement and raised as a defence that one parcel of the land was registered in the name of Federal Investors Limited. The draft defence did not, however, take the point that, as Federal Investors Limited was removed from the Register of Companies on 13th

August 1975 and was thereby dissolved, it ceased to have a legal existence and its property was vested in the Crown as *bona vacantia*, and consequently the 1978 agreement was void having been made with a non-existent person.

Harrison J. heard the application on 12th May 1988 and refused the appellant leave to file a defence out of time but gave leave to file a counterclaim against Stephens claiming a commercial rent of 10 Red Hills Road which Stephens had been occupying without payment.

The reasons why Harrison J. refused leave to file a defence are not available to their Lordships, nor do they know if any point was taken on the application that Federal Investors Limited had been dissolved before the 1978 agreement. An affidavit dated 12th May 1988 filed in the 1984 action revealed that Federal Investors Limited had been removed from the Register in 1975 but it is perhaps safer to assume that this affidavit did not come to the notice of Harrison J. at the time of the application. Their Lordships can only surmise that Harrison J. took the view that, in the light of the appellant's previous handling of the litigation, which included allowing an application for judgment to be made in default of defence, the failure to raise any substantive defence when Stephens applied for specific performance and the agreement with Exley Ho based on the premise that the appellant would actively cooperate in carrying out the 1978 agreement, it would be wrong to allow a public officer at the eleventh hour to put in a defence wholly inconsistent with the previous conduct of the litigation.

The appellant served notice of appeal against the decision of Harrison J. on 19th May. Bearing in mind that by this time the appellant had been handling the estate for $5^1/_2$ years it would seem to their Lordships very surprising if it had not already been discovered that Jobson had been the majority shareholder in Federal Investors Limited and that that company had been removed from the Register. But however that may be, the affidavit of 12th May 1988 recording these facts must have brought the matter to the attention of the appellant and the argument that the 1978 agreement was void could have been advanced in the appeal. But, instead of pursuing the appeal and taking this point if he wished to do so, the appellant gave notice of discontinuance of the appeal on 19th August 1988 and shortly thereafter on 4th October 1988 took out a summons seeking directions in relation to the specific performance of the 1978 agreement. This conduct could only be construed by the other parties to the litigation as the clearest indication that the appellant accepted the order of Harrison J., would no longer challenge the 1978 agreement and wished to complete it.

For reasons that have not been explained no action was taken on the summons of 4th October which was

eventually adjourned *sine die* on 12th October 1989. Meanwhile on 20th October 1988 an order was made to consolidate the two actions. On 12th July 1989 Orr J. refused an application by Stephens to set aside the order of specific performance which had been made against him in the 1982 action and further ordered Stephens to give up possession of the lands to Exley Ho and to prosecute with diligence his claim for specific performance of the 1978 agreement against the appellant in the 1984 action. Orr J. also ordered that the appellant be joined as a defendant to the 1982 action and gave leave to Exley Ho to amend the statement in the 1982 action to plead an agreement between Exley Ho and the appellant arising out of the exchange of letters in February and March 1986. The appellant served a defence to the amended statement of claim, denying that the letters had given rise to an enforceable agreement and alleging that Exley Ho had repudiated the 1981 agreement, and pleading that Federal Investors Limited was removed from the Register of Companies on 13th August 1975.

On 16th May 1990 the Court of Appeal dismissed an appeal by Stephens against this decision of Orr J.

On 30th July 1990 Patterson J. made an order striking out the appellant's defence in the 1982 action. The appellant served notice of appeal against this order but discontinued the appeal.

On 5th October 1990 Theobalds J. made an extensive order which is set out in full in the judgment of the Court of Appeal. For the purposes of this appeal it is sufficient to say that he ordered the appellant to specifically perform the 1978 agreement and to take all steps in the appellant's power to restore Federal Investors Limited to the Register of Companies and to execute the transfer of its interests in the land the subject of the 1978 agreement to Stephens.

The appellant entered numerous grounds of appeal against the order of Theobalds J. which again are fully set out in the judgment of the Court of Appeal. The only ground pursued in the Court of Appeal appears to have been ground one which read:-

> "1. The sub-stratum of and basic to the proceedings below and the Orders made on the 5th day of October, 1990 (pages 50-53 of the Record) was the implied acceptance by the Learned Judge that the 1978 Agreement (page 28 of the Record) was not void, and was valid and of legal effect. The said Agreement was in law void because one of the joint contracting parties, Federal Investors Limited was a defunct company which in law lacked capacity to enter into a contract for sale of land and which lands at the date of the agreement were vested in the Crown by virtue of Section 321 of the Companies Act."

The Court of Appeal rejected this ground holding that this issue was determined against the appellant upon the application of the principle *res judicata*. The Court of Appeal recognised that ground one of the notice of appeal would have provided an arguable defence to the action but nevertheless held that failure to raise this defence in the 1984 action and the failure to appeal the order in the 1982 action, striking out their defence which did raise the defence, now estopped the appellant upon principles of *res judicata* from pursuing the matter further.

In a most able argument counsel on behalf of the appellant has criticised the reasoning of the Court of Appeal submitting that they have confused *res judicata* based upon cause of action estoppel with *res judicata* based upon issue estoppel. Counsel rightly points out that no question of issue estoppel can arise in this case because the question whether the 1978 agreement was void is an issue that has never been investigated or determined by the court and he submits that no question of cause of action estoppel can arise because the *lis* between the parties has not yet been finally determined.

Their Lordships do not consider this is an appropriate case to consider in depth the doctrines of issue and cause of action estoppel for they perceive a broader ground upon which it is right to uphold the decision of the Court of Appeal.

If the appellant had diligently pursued the duty to administer the estate, one might have expected the appellant to have been able to raise this defence in the 1984 action long before the date upon which leave was sought to serve the defence out of time on 14th January 1988. But even if the appellant was not aware of this line of defence at that time it was certainly made aware of it by the affidavit filed in those proceedings. Yet instead of taking the point on appeal the appellant discontinued the appeal and applied to the court for directions as to the implementation of the 1978 agreement. When the appellant tried to revive this defence in the 1982 action which had apparently been abandoned in the 1984 action the defence was struck out. The appellant again apparently accepted this decision by discontinuing an appeal against that order.

Now for a third time the appellant has attempted to erect the same defence which has twice been disallowed by the courts below and which the appellant has not challenged by way of appeal on either occasion. There must be an end to litigation; it cannot be allowed to drag on indefinitely. The appellant has had ample opportunity to raise this defence and to challenge decisions at first instance which have gone against it. The appellant has chosen not to take advantage of those opportunities and it is now far too late to raise this defence yet again.

The refusals in both actions to allow the appellant to plead this defence were interlocutory decisions and if it could be shown that circumstances had radically altered since those decisions had been made it would be open to a court to review them even if they had not been appealed at that time. But in the absence of such altered circumstances it would be most oppressive to the other parties to the litigation to allow the appellant to blow hot and cold.

The ground upon which their Lordships uphold the decision of the Court of Appeal is neither that which is technically known as cause of action estoppel nor issue estoppel but it is founded upon the same principle, namely that there must be an end to litigation. There comes a time when it is oppressive to allow a party to litigation to re-open a matter that has been judicially determined against him at an interlocutory stage of the proceedings. That time has been reached in these proceedings, they have occupied the time of the courts in Jamaica over the last ten years and must now be brought to an end in accordance with the judgment of the Court of Appeal.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed and the judgment of the Court of Appeal of Jamaica, upholding the judgment of Theobalds J. of 5th October 1990, affirmed. The appellant must pay the fourth respondent's costs before their Lordships' Board.