IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2006 HCV 02057

BETWEEN	ELM HARDWARE DISTRIBUTORS LTD	CLAIMANT
AND	ELSIE TAYLOR	FIRST DEFENDANT
AND	UNICE SNAPE	SECOND DEFENDANT
AND	CSR PROPERTIES LTD	THIRD DEFENDANT

IN CHAMBERS

Mr. Anthony Pearson for the claimant

Miss Carol Vassal instructed by C. M. Vassal and Company for the first and second defendants

Mr. David Batts and Miss Daniella Gentles instructed by Livingston, Alexander and Levy for third defendant

November 17, 2006, January 11, 16, February 20, 26, May 7, 8, 9, and May 18, 2007

INJUNCTION, APPLICATION TO STRIKE OUT, RES JUDICATA, ABUSE OF PROCESS, PRIORITY OF EQUITABLE INTERESTS AND LOSS OF PRIORITY

SYKES J.

1. Ms Elsie Taylor and Ms Unice Snape were appointed executrices under the will of Muriel Maud Oddman to pay debts and dispose of property according to the terms of the will. The two ladies, as part of their duties, contracted to sell property located on Constant Spring Road. On June 13, 2000, they signed a contract with E.L.M. Hardware Distributor Limited ("E.L.M."). Problems arose and eventually E.L.M. sued the ladies. The first was not pursued while the second was struck out on November 29, 2005. After the claim was struck, some seven months later, the ladies signed a sale agreement with C.S.R. Properties Limited ("C.S.R."). E.L.M. filed another claim after this and the ladies now say that this claim should also be struck out. Are they correct? C.S.R. wishes the injunction to be discharged on the ground that they have done all that a prudent purchaser could have done in the circumstances. It submits that it is being prejudiced by the injunction.

The details of the application

2. By notice of application for court orders dated November 15, 2006, the executrices of the Estate of Muriel Maud Oddman have applied to strike out the present claim. It is a preliminary objection which was raised when the injunction granted to E.L.M. came back for review. The executrices say that the current claim

was wrongly brought and should be struck out either on the basis that (i) the matter is res judicata or (ii) the current claim is an abuse of the process of the court.

3. On October 30, 2006, the claimant E.L.M. applied, without notice, for an injunction restraining the Registrar of Titles from any dealing in land registered at volume 570 folio 21 of the Register Book of Title ("the disputed land"). King J. granted the injunction. His Lordship set the matter for further consideration on November 16, 2007. Let me give some further context to the dispute.

4. There are two sale agreements. The first is between E.L.M. and the executrices. The second is between C.S.R. and the executrices. Both agreements are in respect of the disputed property. How did this come about?

The E.L.M. sale agreement (the first sale agreement)

5. The sale agreement between E.L.M. and the executrices was signed on June 13, 2000. The purchase price was $6,000,000.00. E.L.M. paid a deposit of $900,000.00 when the agreement was signed and paid a further $721,543.84. According to the contract the date for completion was ninety from signing by all the parties. The balance of the purchase price was not paid. E.L.M. has said that it did not pay the balance because the executrices were not able to transfer the property by the date of completion because they were not the registered proprietors and so were not able to deliver a registrable transfer. There was even a dispute as to whether E.L.M. was given possession. There was a flurry of correspondence between the parties but the issues were not resolved. This led E.L.M. to issue a writ claiming specific performance and damages or in the alternative damages. This first writ was never served. A second writ was issued, served but was struck out on November 29, 2005. The saga of this second writ will be told shortly.

The C.S.R. sale agreement (the second sale agreement)

6. The second sale agreement was signed on May 3, 2006. C.S.R. paid part of the purchase price and has entered into possession. There is no suggestion that C.S.R. acted fraudulently or improperly in contracting to purchase the disputed land. The current claim was filed and served after this contract was signed by the parties.

No. C.L. 2002/E019 (the struck out claim)

7. E.L.M having not served the first writ took out a second writ, Claim No. C.L. 2002/E 019, on April 22, 2002 which it served on the executrices. As it was known then, an appearance was entered for both executrices on October 24, 2002. No statement of claim was filed with this second claim and until it was struck out on November 29, 2005, by Norma McIntosh J., no statement of claim was filed. The endorsement on that writ was that the claimant claims specific performance of the agreement executed on June 4, 2000. The endorsement also claimed damages for breach of contract and loss of bargain.

8. Not only did the executrices enter an appearance in response to Claim No. C.L. 2002/E 019 but they also filed a summons seeking an order striking out the writ of summons on the basis that it disclosed no cause of action at law or in equity. The summons also asked that the matter be struck out because the writ was frivolous and vexatious. The executrices filed an affidavit, also on October 24, 2002, setting out the evidence in support of their application. The claimant responded by filing its affidavit on November 25, 2002. The stage was now set for the hearing of the executrices' application.

9. From the record of the court, it appears that the first hearing date was November 28, 2002. On that date, the matter was adjourned sine die. The minute of order does not disclose the reason although both sides were represented by counsel. The executrices took advantage of the adjournment by filing another affidavit on August 13, 2003 in response to E.L.M.'s November 25, 2002 affidavit.

10. The application to strike out was next for September 27, 2004. On that date, counsel for E.L.M. was absent and the matter was adjourned to January 17, 2005. Despite the date that was set the matter came back before the court on November 9, 2004, when the matter was adjourned to December 6, 2004. The minute of order suggests that the claimant was not notified of the November 9, 2004, date. On December 6, 2004, at the request of the court, the matter was adjourned to January 18, 2005. Both parties were to see if the matter could be settled. The additional note on the minute of order records that both sides agreed that the property should be revalued. On January 18, 2005, the minute of order confirmations that the matter was adjourned to a date to be fixed by the Registrar. I take this to be an indication that the matter was not settled and that the executrices would be pursuing their application to strike out the claim.

11. The next date is March 21, 2005. The minute of order says that the matter was adjourned to July 14, 2005 "pending the outcome of talks continuing between parties with a view to settlement". On July 14, 2005, the minute of order shows that counsel for the executrices was absent because she was delayed on her way from Ocho Rios. Counsel for the claimant was present. The matter was adjourned to a date to be fixed by the Registrar.

12. The executrices' application was reissued on July 26, 2005, for hearing on August 8, 2005. It is not clear what happened but a note in red on the reissued application has the date November 29, 2005, as the hearing date. On November 29, 2005, Norma McIntosh J. struck out the matter. The note on the minute of order records some reasons for striking out the matter. The note reads: (a) writ of summons filed 22/4/02; (b) no statement of claim filed; (c) pleadings not closed and (d) no application for orders under new rules by claimant. On November 29, 2005, counsel for the claimant was absent.

13. From this history, prior to November 29, 2005, counsel for the claimant and the defendant were absent on at least one occasion which necessitated an adjournment. It is true that the statement of claim was not filed but from December 6, 2004, to July 14, 2005, the parties, whether at the suggestion of the court or otherwise, were engaged in settlement discussions, if the minutes of order are accurate. This is a factor to be taken into account. It must be noted and repeated that the executrices did not abandon their application.

14. When the application came before Norma McIntosh J. on November 29, 2005, a bundle was placed before her Ladyship that contained all the affidavits filed in the application to strike out the matter. The bundle also had two affidavits of urgency, dated July 26, 2005 and October 13, 2005, sworn to by Miss Carol Vassal. The note on the bundle made by the learned Judge shows that attempts were made, without success, to locate the claimant's counsel. Claimant's counsel was engaged in the criminal court. Her Ladyship proceeded to hear the matter and dismissed the claim.

15. It is common ground that the order of her Ladyship was served on counsel for the claimant the same day. Nothing was done by the claimant until June 8, 2006, when E.L.M. filed a third claim. It is this third claim which has given rise to the preliminary objection raised by Miss Vassal. To that claim and its history I now turn.

Claim No 2006 HCV 02057 (the current claim)

16. I need to explain how C.S.R. became a party to this claim. On November 16, 2006, when King J.'s order came back for further consideration, C.S.R., filed a notice of application asking that it be allowed to intervene and to be added as a defendant under rule 19 of the Civil Procedure Rules. This application was not opposed by either the claimant or the defendants. It was granted.

17. C.S.R., through an affidavit, filed by Mr. James Parnell, a director of the company, states that on May 3, 2006, it entered into an agreement for sale with the executrices in respect of the same property that was the subject of the sale agreement between E.L.M. and the executrices.

18. The affidavit continues by stating that prior to the execution of the agreement, a search was conducted of the title and caveat number 1142759 lodged on April 19, 2001, claimed an interest under an agreement for sale. The search also showed that the caveat was supported by a statutory declaration; an agreement for sale dated June 4, 2000 and a writ of summons in Claim NO. C.L. E 021/2001 file April 22, 2001. Mr. Parnell swears that he was advised by his attorneys that the said Claim was dismissed by Norma McIntosh J. on November 29, 2005. Based on this, C.S.R. entered into the sale agreement with the executrices.

19. The affidavit is inaccurate in this particular: as a matter of record it was Suit No. C.L. 2002/E019 that was struck out and not Suit No. C.L. E021/2001. This claim

was the one that was never served. This inaccuracy was not deliberate and nothing turns on it. The substantive point is that the relief claimed on the struck out claim and the current claim is identical in every material particular.

20. Mr. Pearson swore an affidavit dated November 20, 2006, on behalf of the claimant, in response to the C.S.R.'s affidavit. He does not dispute what C.S.R. has alleged. However, at paragraph nine, he alleges C.S.R. "was aware of the interest claimed in the premises" because C.S.R., before signing the May 3, 2006, agreement with the executrices, had entered into a prior agreement with E.L.M. to purchase the said parcel of land. The affidavit does not say when C.S.R. became aware of E.L.M.'s interest but even so, the fact is that at the time C.S.R. entered the agreement with the executrices, E.L.M.'s claim against the executrices was struck out by a court of competent jurisdiction and in the absence of any appeal or attempts to have the striking out set aside, C.S.R. would have been entitled to believe that E.L.M. was not pursuing the claim against the executrices. This would have meant that the executrices were prima facie free to contract with other persons. There is no allegation of fraud or sharp practice against C.S.R.

Should the injunction be discharged as submitted by C.S.R.?

21. Mr. Batts submitted, on behalf of C.S.R., that the injunction of King J. should be discharged because third party rights have now arisen in circumstances where the third party did not contribute to the present state of affairs, that is to say, it did not contract with knowledge that there was still a dispute between the claimant and the executrices. When C.S.R. did what a diligent purchaser would have done and saw that a court of competent jurisdiction had struck out the claim for specific performance of the contract under which the interest in land was claimed which itself grounded the caveat, the purchaser ought not to be penalised for acting on what it discovered. I would only add that at the time of the sale agreement between C.S.R. and the executrices, E.L.M. had not appealed, had not applied to set aside the order of Norma McIntosh J. and had not filed the current claim. Thus on the face of it, C.S.R. would be entitled to conclude that the claim for specific performance was determined and E.L.M. had accepted the decision of the court. Mr. Batts concluded that it is extremely unlikely that E.L.M. could secure a decree of specific performance in its favour, if the effect of the decree would be to cause the executrices to breach a contract. I agree with all these submissions.

22. Miss Vassal submitted that the dismissal of the claim amounted to a dismissal on the merits and therefore the matter is res judicata. She continued by submitting that the current claim is barred as a matter of law. Her fall back position was that, if all else failed, the present claim was an abuse of process and the court should strike it out under its inherent power. I don't agree with Miss Vassal that the striking out of the claim amounted to a dismissal on the merits and therefore res judicata. I agree, however, that the current claim is an abuse of process and the

claim should be struck out. I now give the reasons for agreeing with Mr. Batts and partially agreeing with Miss Vassal.

Injunctions and priority of equitable interests

23. This hearing is at an interlocutory stage and while it is generally not prudent to make decisions at this early stage it is my view that where the evidence before the court is as good as it is going to get, the matter then becomes one of determining the legal consequences from the facts.

24. I fully appreciate that my decision to discharge the injunction is being taken at this stage well before any trial of the issues. I am aware of the principles of ***American Cynamid Company v Ethicon Ltd*** [1975] A.C. 396. These principles have been applied consistently in Jamaica. However, ***American Cynamid*** cannot be applied as if the Civil Procedure Rules ("C.P.R.") were not in force. Under these rules the court is given power and indeed required to identify the real issues in the case; decide which issues need full investigation and trial, and accordingly dispose summarily of the others (see rule 25.1 (b) and (c)). In order for the court to do this, rule 27.8 mandates that the parties are to be either present or be represented at case management conferences and pre-trial reviews. This is not the only time the parties may be required to attend. In its quest to deal with matters expeditiously and cost effectively, the court may require the attendance of the litigants at other stages, such as interlocutory or interim applications (see rule 26.1 (m)). The point I am making is that the court is now better placed to get more information about the case at an earlier stage of the proceedings than at the time ***American Cyanamid*** was decided. At that time, litigation was party driven. The C.P.R. has gone as far as giving the court the power to initiate a step in the proceedings (see rule 26.2 (1)). The only fetter being that any party who may be affected should be given time and opportunity to make submissions to the court (see rule 26.2 (2), (3) and (4)). The underlying theme of the C.P.R. is that hopeless cases or those aspects of a case that are very unlikely to succeed or to use the current language, have no real prospect of success, should be identified and dealt with appropriately. This is not doing away with a trial where it is necessary, but if on the facts available and such facts, barring exceptional developments, will remain the same at trial, why postpone the inevitable? In short, ***American Cyanamid*** principles need to take account of the new era of civil litigation in which the court may well be better placed to make a determination about the prospects of success and act accordingly at an early stage of the proceedings. With these principles in mind I examine the facts of the case.

25. C.S.R. has an equitable interest in the property. This interest arises, in this case, on the signing of the sale agreement. The interest was further strengthened by the payment of a deposit. E.L.M. also has an equitable interest in the property for the same reasons. E.L.M.'s interest was first in time and it was shored up by lodging a caveat. In the normal course of events, E.L.M.'s interest being first in time would prevail over C.S.R.'s interest. The rule is that where the equities are equal the first

in time prevails. This rule can be displaced if there is evidence of negligence or imprudence on the part of the person with the equitable interest which was first in time. The displacement of the normal rule, in this case, would mean that C.S.R.'s interest ranks before E.L.M.'s and therefore it would be extremely unlikely that if the matter continued to trial a court would grant E.L.M. a decree of specific performance and if this is so, then it follows that the injunction granted by King J. should be discharged and E.L.M. should be left to pursue their remedy, realising of course, that a decree of specific performance is out of the question, thus leaving the court to award damages in lieu of specific performance. This assumes that Miss Vassal fails on her submission that the claim of E.L.M. should be struck out. Let me refer to the law to justify these conclusions.

26. In the case of ***National Provincial Bank v Jackson*** (1866) LR 33 Ch. D. 1, the claimant bank sought to enforce their equitable mortgage against property held by two sisters and their brother. In summary form, the facts were that in order to grant a mortgage the brother submitted to the bank a number of deeds which included, (a) a conveyance of the property to their father; (b) a mortgage executed by the brother along with a transfer to one J. King the mortgagee (recalling that in those days a mortgage was done by actually conveying the property to the mortgagee), on which a reconveyance by King to Jackson was endorsed and in the recital reference was made to two deeds of conveyance by this two sisters to him; (c) an office copy of the father's will and two deeds of conveyance by the two sisters to him allegedly in consideration of each being released from the debt they owed him. It was common ground that the sisters executed some document relating to their properties but they were not sure of its true import and it turned out that the documents were conveyances to their brother. After the brother decamped, among his papers were found two deeds which purported to be a conveyance by the brother to the sisters of the mortgaged property. The sisters sought to rely on these deeds but failed because they were not executed properly. They were left to claim as equitable owners. There being no conveyance to the bank, the bank was an equitable mortgagee. The issue was which equitable interest should prevail. In respect of one sister, the mortgagee was successful but as against the other the mortgagee (the bank) failed because it was negligent in that it acted on what was told to it by the fraudulent brother which was inconsistent with the recitals in the deeds. Had the appropriate checks been done the disparity would have been discovered. To put it another way, the bank's negligence or imprudence meant that its equitable interest could not prevail over the sister's.

27. In ***Farrand v Yorkshire Banking Company*** (1889) LR 40 Ch. D. 182, the first mortgagee granted an equitable mortgagee to the mortgagor. He did not ask for the title deeds. He left them in possession of the mortgagor who granted a second mortgage to the bank. The bank did not know of the first mortgagee until the mortgagor defaulted. The court held that because the first mortgagee, by letting the mortgagor keep the title deeds, enabled him to secure another mortgage the

first mortgagee's equitable mortgage would be postponed to the second equitable mortgagee.

28. A modern application of this principle is found in the Australian case of ***Heid v Reliance Finance Corporation Pty Ltd*** 154 C.L.R. 326. In that case, the registered proprietor of land agreed to sell land to a firm of mortgage brokers. To finance the sale, the vendor provided a vendor's mortgage to the purchaser. The vendor authorised its bank to hand over the title deeds to an employee of the purchaser. The vendor also executed a transfer. The transfer was registered and it contained a declaration that the full purchase price had been paid. That was not the case. The vendor executed a mortgage document but did not register the mortgage. The purchasers then secured a mortgage from two other mortgagees who had no notice of the vendor's mortgage. In the event, none of the mortgages was registered with the result that both were equitable mortgages. The vendor lost his priority because of his negligent conduct. Chief Justice Gibbs at page 333 said:

> *"Each of those parties had an equitable interest in the land - the appellant because of his vendor's lien, and Reliance Finance as an equitable mortgagee. "In all cases where a claim to enforce an equitable interest in property is opposed on the ground that after the interest is said to have arisen a third party innocently acquired an equitable interest in the same property, the problem, if the facts relied upon as having given rise to the interests be established, is to determine where the better equity lies. If the merits are equal, priority in time of creation is considered to give the better equity. This is the true meaning of the maxim qui prior est tempore potior est jure: Rice v. Rice(17). But where the merits are unequal, as for instance where conduct on the part of the owner of the earlier interest has led the other to acquire his interest on the supposition that the earlier did not exist, the maxim may be displaced and priority accorded to the later interest": Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd. (In liq.)(18).*

29. The joint judgment of Mason and Deane JJ. at page 339 states the principle in this way:

> *Where the merits are equal, the general principle applicable to competing equitable interests is summed up in the maxim qui prior est tempore potior est jure - priority in time of creation gives the better equity. But where the merits are unequal and favour the later interest, as for instance where the owner of the later equitable interest is led by conduct on the part of the owner of the earlier interest to acquire the later interest in the*

belief or on the supposition that the earlier interest did not then exist, priority will be accorded to the later interest: Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd. (In liq.)(41); Abigail v. Lapin(42); I.A.C. (Finance) Pty. Ltd. v. Courtenay(43).
A common illustration of conduct on the part of the owner of an equity which postpones his interest is the arming of a third person with the indicia of title, such as the delivery of title deeds and an instrument of transfer of the property containing or accompanied by an acknowledgement that the third party has paid the consideration for it in full. Generally speaking in this situation a person who acquires an interest from the third party for value without notice of the prior interest takes in priority...

30. The principle is clear. The holder of the first or prior equitable interest may have that interest postponed if he behaves in such a manner that causes a second or subsequent holder of an equitable interest to acquire such an interest without knowledge of the prior equitable interest. Developing and extending this principle in the present case and stating the principle as narrowly as possible, I would say that where the holder of a prior equitable interest has embarked on litigation to enforce his prior equitable interest and that litigation has been determined, at an interim stage, against the holder of the first interest and the holder of the second equitable interest with that knowledge has acquired his equitable interest, then the second interest will gain priority. In the instant case, E.L.M. by not pursuing an appeal against the order of Norma McIntosh J. and by not seeking to have the order set aside led C.S.R. to believe that it safely contract with the vendor. C.S.R. having enquired about the basis of the caveat and was satisfied that the basis no longer existed because of a valid decision of a court clothed with the power to make the order was entitled to conclude that E.L.M. was no longer pursuing its equitable interest in the property. In these circumstances, the priority of E.L.M.'s equitable interest would be lost.

31. These facts were not before King J. and indeed could not be placed before King J. until C.S.R. became a party to the claim and placed its affidavit before the court. If I am correct in my understanding of the law, then the injunction granted by King J. should be discharged and also the caveat should be removed.

32. The matter does not end here. It is extremely unlikely that the trial court would grant specific performance to E.L.M. since that would necessitate the executrices ejecting C.S.R. from the property. In ***Wroth v Tyler*** [1974] Ch. 30, the claimant and defendant exchanged contracts on May 27, 1971, with completion set for October 31, 1971. During the negotiations, the defendant's wife gave no indication that she opposed the sale. On May 28, 1971, she entered notice of her interest under the relevant legislation. She could not be persuaded to remove her notice. The defendant gave told the claimant and offered to pay damages. Megarry

J. declined to grant the order for specific performance on the basis that the court would be slow to require a vendor to undertake difficult litigation not knowing where it would end.

33. All this points in the direction of discharging the injunction granted by King J. It may be said, with some justification, that what I am doing is somewhat unusual since under our system of litigation, such conclusions as I have made ought to await a full ventilation of the facts, analysis and submission by counsel and finally a judgment of the trial court. However, where the circumstances as alleged by C.S.R. have not been controverted by any of the other litigants and there was no indication during the hearing that there was any intention to take issue with what C.S.R. has alleged then the matter can be decided in a summary way. If effect, what we have are agreed facts and the only question is the legal consequence of those facts. Therefore, on the basis of what I have said so far the injunction should be discharged and the caveat be removed. I now go to the question of res judicata.

Res Judicata

34. Miss Vassal submitted that the current claim is an abuse of process because the issue was already determined on the merits. I do not agree. Usually, the expression a "hearing on the merits" is used when a court hears evidence, evaluates the evidence and the submissions of the litigants and then delivers a judgment. From this come doctrines such as issue estoppel and res judicata. Res judicata arises where parties to a previous litigation or their privies wish to raise a claim that was decided in earlier proceedings where there was a hearing on the merits. As Dixon J. in ***Blair v Curran*** 62 C.L.R. 464 observed at page 531 - 532:

> *A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.*
> *Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue*

estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. ... Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

35. This passage shows how technical the doctrine of res judicata is. It is always necessary to examine the nature of the decision made and its effect. It is not accurate to say that res judicata can never arise if the previous decision was made on an interim application. If the previous decision was an interim one, that would tend to suggest that the decision was unlikely to be on the merits but that is not necessarily the case. Debelle J. of the South Australian Supreme Court highlighted the importance of examining the nature of the decision in this passage found in ***Thorpe v Charles Sturt City Corporation*** 103 L.G.E.R.A. 395 at paragraph 9:

The rule of estoppel by res judicata is that where a decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits: see Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 at 933 per Lord Guest. His Lordship was quoting par 3 of Spencer Bower on Res Judicata (1st ed). See also par 1 of Spencer Bower Turner & Handley, Res Judicata (3rd ed, 1996). As Gibbs J pointed out in Administration of Papua and New Guinea v Daera Guba (1973) 130 CLR 353 at 453, the expression "judicial tribunal" in this context is used for convenience to indicate that an estoppel of this kind, that is to say res judicata or issue estoppel, does not result from a mere administrative decision, but the question of whether such an estoppel is raised is not answered by enquiring to what extent the tribunal exercised judicial functions or whether its status is judicial or administrative. Thus, the true enquiry is as to the nature of the decision.

36. In order for res judicata to succeed, Miss Vassal would need to show an issue of fact or law, which was indispensable to the conclusion reached in the striking out

application is being reopened in this current claim. The order of Norma McIntosh J. on November 29, 2005, did not declare any rights regarding the property. It did not say that E.L.M. was not entitled to the decree of specific performance and neither did the order decide it was entitled to the decree. No facts regarding the merits of the claim were found. It is important to note that the brief reasons stated on the minute of order did not say that E.L.M.'s claim (i) disclosed no cause of action at law or equity; or (ii) the claim was frivolous and vexatious; (iii) and an abuse of process, as alleged by the executrices. There is no evidence that any explicit findings on these issues were made by her Ladyship. The absence of any particulars of claim would have made it difficult for any court to decide that claim disclosed no cause of action in law or equity. Likewise, it would be difficult to say that Norma McIntosh J. decided that the claim was frivolous or vexatious. I would go as far as saying that the striking out was not a decision from which the executrices could conclude that the court decided that they were not liable on the claim. It seems to me, based on the notes on the minute of order, that the striking out was on the basis that the claimant had not pursued his claim with the requisite degree of urgency, that is to say, file and serve his particulars of claim so that the defendants would know the exact nature of the case that they would have to meet. In all the circumstances, a fair reading of Norma McIntosh J.'s decision is that the claimant's action was for want of prosecution. I, therefore, do not accept the submission that this current claim is barred on the basis of res judicata. This leads directly to the question of whether this second claim amounts to an abuse of process

Abuse of process

37. Miss Vassal submitted that if she failed on the ground of res judicata she should succeed on the ground of abuse of process. The difference between Miss Vassal and Mr. Pearson was that Mr. Pearson submitted that so long as there had not been an adjudication on the merits and the claim was not statute barred, the claimant is at liberty to file the claim as many times as necessary until he receives a hearing on the merits. The width of Mr. Pearson's proposition is breath taking. I do not agree with it and I have derived assistance from the decisions of the House of Lords and Court of Appeal of England and Wales.

38. Miss Vassal and Mr. Pearson accepted the correctness of the House of Lords decision in ***Johnson v Gore Wood and Company (A Firm)*** [2002] 2 A.C. 1 and in particular the leading judgment of Lord Bingham. His Lordship indicated at page 22 that great care should be exercised before a litigant is barred from the courts. The rule of law requires that litigants should be able to pursue their civil rights and private disputes in the courts should the parties not resolve the dispute themselves. Lord Bingham noted two principles. The first is that litigants should not, without the most scrupulous care, be barred from bringing genuine subjects of litigation before the courts. The second is that the first principle does not mean that a court must necessarily hear in full and rule on the merits of any claim or defence the parties may choose to put forward. A manifestation of the application of the second

principle is found, according to the Law Lord, in the power of the courts to strike out a claim or defence on the grounds that it has no reasonable prospect of success or is frivolous and vexatious.

39. Lord Bingham correctly appreciated that ***Henderson v Henderson*** [1843-60] All ER Rep 378 has been much abused and misused and extended far beyond the Vice Chancellor originally intended. At page 31 Lord Bingham said:

> *But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... [I]it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special*

circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

40. As helpful as Lord Bingham's judgment is, it is indeed remarkable that the Civil Procedure Rules and their underlying premise played such an insignificant rule, if it played any role at all, in the resolution of the issue before the House. While the broad outlines of Lord Bingham's judgments are unobjectionable, it seems to me that their value has been reduced by the omission to integrate the principles adumbrated in the overriding objective into the decision. That integration has been done by the Court of Appeal, which has been able to allow for the authority of the House while accommodating the new rules. It is to those decisions I now turn.

41. I begin my analysis by citing a pre-Civil Procedure Rules case. The case is significant because it was delivered at a time when the new rules were all but implemented and the leading judgment was delivered by none other than Lord Woolf M.R., the moving spirit behind the rules. The case is ***Arbuthnot Latham Bank Ltd. and Others v. Trafalgar Holdings Ltd.*** [1998] 1 W.L.R. 1426. I should point out that there were two appeals that were heard together because of the common issue. I shall focus on the claim between the bank and the guarantors of a loan. In that case, the claimant bank issued process against the guarantors of a loan. The bank sued on the personal covenant to repay the borrowed sum and not on the charge granted by the guarantors over their property. The bank delayed in prosecuting the claim with the result that an application was made by the guarantors for the matter to be struck out for inordinate delay. The judge agreed that there was inordinate delay but dismissed the application on the grounds that the bank could sue on the charge which had a 12 year limitation period. The guarantors appealed successfully to the Court of Appeal. In the course of judgment Lord Woolf said at page 1436 - 1437:

In his speech in the Chris Smaller case [1989] A.C. 1197, Lord Griffiths identified the advantages which could accrue from a civil procedural process which was subject to "court controlled case management techniques." This process is now being introduced. The new unified rules are intended to come into force in April 1999. However, many aspects of the process can be introduced while the existing Supreme Court and County Court Rules are in force. Most of the powers which the court requires for the purposes of case management are already contained in the existing rules

The gradual change to a managed system which is taking place does impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure. It is therefore in the interests of

litigants as a whole, that the court's time is not unnecessarily absorbed in dealing with the satellite litigation which non-compliance with the timetables laid down in the rules creates. The substantial argument which was advanced before Sir Ronald Waterhouse and this court in relation to the bank case is just one instance of a phenomenon which is regularly taking up the time of the courts. ***In Birkett v. James [1978] A.C. 297 the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.***

It is already recognised by Grovit v. Doctor [1997] 1 W.L.R. 640 that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker L.J. in Culbert v. Stephen G. Westwell & Co. Ltd. [1993] P.I.Q.R. P54.

While an abuse of process can be within the first category identified in Birkett v. James [1978] A.C. 297 it is also a separate ground for striking out or staying an action (see Grovit v. Doctor at pp. 642-643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired. ***The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see Janov v. Morris [1981] 1 W.L.R. 1389. The position is the same as it is***

> ***under the first limb of Birkett v. James. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.*** (My emphasis)

42. The message for those who had ears to hear was unmistakable. The tardy litigant was going to be placed under a more stringent regime and the stringency increased if there had been a previous striking out. His Lordship was indicating that the days of leisurely litigation with attendant increase in costs to the opposing side, utilisation of the courts' finite resources and consequential deprivation of other litigants of their opportunity to have their matters heard within a reasonable time were over. This approach is a salutary one. No country can keep increasing expenditure on judicial services without a commensurate change in attitude of those who use those services. Litigants must understand that the administration of justice is costly and while litigants are not be lightly turned away, the sluggish litigant who has been presented with more than reasonable opportunity to take his case to finality should be ushered through the door. No one deprived him of justice. He got justice. The justice he got is of his own making. He had a fair share of the courts' resources allocated to him and he failed to make the best use of it. I shed no tear for him and the less of them the courts see the better the administration of justice will be.

43. The sequel to ***Arbuthnot Latham*** was ***Securum Finance Ltd v Ashton*** [2001] Ch. 291. Arbuthnot Latham had assigned the debt to the claimant (Securum) who brought a second action against the guarantors claiming payment of the debt and to enforce the charge. The guarantors argued that the second claim was relitigation of the first claim that was struck out. The judge rejected that submission on the basis that unless it could be shown that the conduct of the claimant was intentional and contumelious, the second claim would not be struck out for delay or abuse of process where the relevant limitation period had not expired. The defendants appealed and the Court of Appeal upheld part of the decision of the judge but on a different basis. The Court of Appeal held that, that part of the claim to repayment was raised in the previous proceedings but that part that related to the enforcement of the charge was not raised in the earlier proceedings and therefore could proceed. Although the case referred to a number of pre Civil Procedure Rules cases, the court held that new rules applied to the case. Lord Justice Chadwick conducted an exhaustive review of the pre Civil Procedure Rules jurisprudence on striking out and then addressed his mind to the new rules. His Lordship stated at page 309, paragraph 34:

> *For my part, I think that the time has come for this court to hold that the "change of culture" which has taken place in the*

last three years--and, in particular, the advent of the Civil Procedure Rules--has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. ***The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind--and must consider whether the claimant's wish to have "a second bite at the cherry" outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the Arbuthnot Latham case [1998] 1 WLR 1426, 1436- 1437*** (My emphasis)

44. I endorse these observations whole heartedly. The Lord Justice went on to examine the two claims made in the case, that is, the claim to payment and the claim to enforce the charge. This is how his Lordship dealt with them at page 315, paragraphs 52 and 53:

52 In my view, for the reasons which I have sought to give, it is open to this court to strike out the claim for payment made in the present action. That is a claim which, in substance, is indistinguishable from the claim for payment made in the first action. If that claim stood alone it could be said with force that to seek to pursue it in a second action when it could and should have been pursued, properly and in compliance with the rules of court, in the first action is an abuse of process. It is an abuse because it is a misuse of the court's limited resources. Resources which could be used for the resolution of disputes between other parties will (if the second action proceeds) have to be used to allow the bank "a second bite at the cherry". That is an unnecessary and wasteful use of those resources. The bank ought to have made proper use of the opportunity provided by the first action to resolve its dispute in relation to the claim for payment.

53 But the claim for payment does not stand alone. It is conjoined with claims to enforce the security under the legal charge. It is important to keep in mind that, by striking out the claim for payment, the court does not extinguish the underlying debt. Nor, of course, is the underlying debt extinguished by the expiry of a limitation period. The debt (if it exists) remains secured on the mortgaged property. I can see no basis on which the claims to enforce the security under the legal charge can be

struck out on the grounds of abuse of process. Those claims were not made in the first action; and, for the reasons which I have already given, there was no reason why they should have been.

45. I accept these passages unreservedly and shall apply them to the instant case. Lord Justice Chadwick emphasised at pages 307 - 308, that under the new rules the power of the court to strike out a claim has to be done with the overriding objective in view, namely, to deal with cases justly. In giving effect to this mandate the court must take into account the resources of the court and the need to allocate an appropriate share of the courts' resources to any particular case while being cognisant of the fact that other litigants wish to have their day in court.

46. Chadwick L.J. laid the foundation for these passages earlier in his judgment when he said at pages 306 - 307, paragraph 28:

> *The decision in Grovit v Doctor was handed down by the House of Lords in April 1997. Some nine months later this court had to consider the appeal in Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426. The court reminded itself, at p 1431g-h, of the principles in Birkett v James [1978] AC 297 to which I have already referred. It pointed out [1998] 1 WLR 1426, 1432c-d, that the reason why the question whether the limitation period had expired was of such significance was that, in the absence of some conduct which meant that a second action could be stayed, it would not benefit the defendant to have the first action struck out since this would only result in further proceedings which would inevitably cause more expense and delay. It observed, at p 1432g-h, that the fact that the limitation period had not expired was of less significance in a case where the proceedings which were being struck out constituted an abuse of process. "In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct." In a section of the judgment headed "The future" the court said, at p 1436* (see passages cited above from Arbuthnot Latham)*:*

47. The warning could hardly have been clearer. Tardy litigants, especially those claims were successfully struck out in earlier proceedings from which there was no appeal or a successful application to set aside the judgment, should beware. The courts were not going to lightly entertain them the second time around.

48. These principles are not inconsistent with the broad approach indicated by Lord Bingham in ***Johnson***. Broad, does not mean, "without boundaries". One of the remarkable things about the ***Johnson*** case is that the Civil Procedure Rules were not relied by the House of Lords or referred to by any of the Law Lords. In any event, the House was not dealing with a case in which the claim was already struck out the claimant was seeking to have it litigated again. In my view this broad approach must take account of the Civil Procedure Rules and their purpose. The rules are asking the courts to explicitly take into account the obvious but perhaps, obscured fact, that no country has unlimited judicial resources. Litigants and their legal advisors are expected to obey the rules and pursue their matter with the required rigour and swiftness. Claimants need to plead their case properly, in accordance with the rules so that the matter can proceed a pace to finality.

49. Lord Justice Chadwick in the later case of ***Linda Mary Heffernan v Grangewood Securities Limited*** [2001] EWCA Civ. 1082 expressly referred to ***Johnson*** as well as to his previous judgment in ***Securum*** and held at paragraph 25:

> ***25.*** *This court considered in Securum Finance Ltd v Ashton [2001] Ch 291the question whether a party whose earlier proceedings had been struck out for want of prosecution or delay could, within the limitation period, raise the same issues in a subsequent action. It reached the conclusion that where the claim in the second action was indistinguishable from the claim in the first action it could be said with force that to seek to pursue that claim in a second action -- when it could and should have been pursued properly and in compliance with the rules of court in the first action -- was an abuse of process. It was an abuse because it was a misuse of the court's limited resources -- resources which could be employed in the resolution of disputes between other parties. To allow a party a "second bite at the cherry" was an unnecessary and wasteful use of the court's limited resources -- see particularly at page 315 F. Securum Finance was a case where the earlier proceedings had been struck out; but the same principle must apply a fortiori where the earlier proceedings, or issues in those earlier proceedings, have been abandoned; and that abandonment recognised by an order for dismissal by consent.*

50. I adopt this statement. It accurately sums up what I have been trying to say.

51. From the history of the matter outlined earlier, the executrices, shortly after the writ of summons was served took steps to have the matter struck out. There is no evidence that they ever resiled from this position although they entertained the possibility of arriving at a settlement. It is evidence that either at the behest of

the Judge or on their own accord or both, E.L.M. and the executrices were engaged in negotiations that might have led to a resolution other than by litigation. When the matter was eventually set down for hearing on November 29, 2005, it must have been apparent to the claimant that the executrices were pursuing the summons filed in 2002. There is no evidence that the claimants and their attorney did not know of the hearing date. The explanation proffered for the absence of counsel on November 29, 2005, was that he was in another court. If I may be permitted an observation. That explanation is not acceptable since it is the responsibility of counsel to make proper arrangements for his client's representation before any court if he is unable to attend. Counsel for E.L.M. explained further in his affidavit that on November 29, 2005, he was engaged in the defence of three police officers in a trial that lasted from November 14, 2005, to December 2, 2005. According to counsel, he was unable to find other counsel to hold for him. He adds that on November 29, 2005, no court personnel spoke to him about appearing before Norma McIntosh J. It seems to me that if counsel was in a trial he ought properly to have informed his client that since he would not be able to appear at the November 29, 2005 hearing the client ought to seek other representation. To say that he could not find an attorney to hold for him is not an acceptable explanation. I would add that there is no duty on court personnel to go scouring the Supreme Court building to look for an attorney who has a duty and obligation to ensure that his client is properly represented before any court of law. It is significant to note that counsel for E.L.M. has not asserted that he was not served with adequate notice of the November 29, 2005 hearing.

52. It is now established that counsel for E.L.M. was served with the order made on November 29, 2005 the very same day. The CPR authorises an application to be made to set aside an order made in the absence of one of the parties to the claim. That option was not exercised. There is no evidence that any attempt was made to appeal the order. In other words, no attempt was made to utilise, in a timely manner, the remedies provided in the CPR. The claimant did nothing until June 8, 2006 when it filed the current claim. The executrices were justified in believing that the claim was at an end and that the claimant had accepted the decision of the court. The inactivity of the claimant for some six months before the second sale agreement was signed would have reinforced this belief.

53. In the case before me, no reason has been advanced why the first claim was not pursued in the way that it ought to have been. No reason has been given for the failure to take advantage of the rules permitting the setting aside of the order of November 29, 2005. Mr. Pearson's response was that so long as the matter was not adjudicated on the merits, the claimant is entitled to bring as many actions as it wishes. Lord Justice Chadwick has said that that is not the case under this new dispensation. I couldn't agree more.

Conclusion

54. The preliminary objection is upheld. The claim is dismissed as an abuse of process. The injunction is discharged. Costs to the first and second defendants. Operation of order stayed until May 25, 2007. Claimant permitted to apply for leave to appeal on May 21, 22, or 24, 2007.