

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 89/90

COR: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	ADMINISTRATOR GENERAL FOR JAMAICA	APPELLANT
AND	RUDYARD STEPHENS FEDERAL INVESTORS LIMITED KRIAS LIMITED EXLEY HO	RESPONDENTS

Dr. Lloyd Barnett instructed by Afeef Lazarus
of Livingston, Alexander & Levy for Respondent Ho

Burnham J. Scott Q.C. and Norman Harrison for Appellant

February 27, 28 & May 8, 1991

ROWE P.:

Gilbert Baron Jobson, died intestate, leaving behind a legacy of litigation. The Administrator General of Jamaica, obtained Letters of Administration on December 30, 1982 in this estate as to which there were a widow and some eighteen children and numerous claimants seeking benefit therefrom.

On December 30, 1982 an Action C.L.H. 220/82 was brought by Exley Ho, as plaintiff, against Rudyard Stephens, defendant, claiming inter alia Specific Performance of a contract for the sale of premises No. 10 Red Hills Road in St. Andrew. During the pendency of that action another action C.L.S. 056/84 was filed by Rudyard Stephens against the Administrator General of Jamaica, The Attorney General of Jamaica, Federal Investors Ltd. and Krias Ltd. whereby the

plaintiff claimed against the Administrator General as Administrator of the estate of Gilbert Baron Jobson; deceased, inter alia, Specific Performance of the Agreement for the sale by the deceased to the plaintiff of premises No. 10 Red Hills Road, St. Andrew.

A Statement of Claim dated January 25, 1984 was filed in Suit C.L.S. 056/84. It contained a claim against the Administrator General and the Attorney General for Specific Performance of the contract for the sale of 10 Red Hills Road. In paragraph 6 of the Statement of Claim the plaintiff averred that:

"The said Gilbert Baron Jobson was the owner of premises No. 10 Red Hills Road, Saint Andrew prior to his death. On or about the 11th day of September 1978 the said Gilbert Baron Jobson (deceased) entered into an agreement in writing with the Plaintiff to sell premises No. 10 Red Hills Road aforesaid to the Plaintiff for the sum of Sixty-five Thousand Dollars (\$65,000.00)."

Actions C.L.H. 220/82 and C.L.S. 056/84 were consolidated by Order of the Court dated October 20, 1988.

This appeal would have been considerably less complex if the Court had been handed a chronology of events. Be that as it may, Dr. Barnett in his submissions assisted us to pick our way through the multiplicity of approaches to the Court over the past nine years in these matters. The saga began with an Agreement in writing for the sale of premises known as 10 Red Hills Road.

The Vendors were named as:

"Federal Investors Limited
and Gilbert Baron Jobson";

the Purchaser/s:

"Rudyard Stephens and/or his nominee."

and the property to be sold was described as:

"All those parcels of lands with dwelling house and out buildings thereon known as 10 Red Hills Road, St. Andrew and registered at Volumes 877, 215 and 236 Folios 12, 79 and 29 respectively in the Register Book of Titles,"

and the purchase price was fixed at Sixty Five Thousand Dollars.

It appears that G.B. Jobson signed on his own behalf and as Managing Director of Federal Investors Limited, as Vendors. The extant copies of the Agreement are undated but the Agreement proceeded through the Courts on the basis that it was signed on September 11, 1973.

No. 10 Red Hills Road is comprised of three parcels of registered land of which the registered proprietor in respect of each parcel is:

(a)	Volume	236	Folio	29,	Gilbert Baron Jobson;
(b)	"	215	"	79,	" " " " ;
(c)	"	877	"	2,	Federal Investors Limited.

It may be readily inferred that there are no boundaries separating these parcels of land which are used and enjoyed as a single tract of land.

Federal Investors Limited was incorporated under the Companies Act. In the last Annual Return filed by the Company in 1969 it listed its major shareholders as G. B. Jobson 7,996 shares, Rupert C. Jobson 1,000 shares and A. A. Redwood with 1,000 shares. Four other shareholders each held one share. Federal Investors Limited was removed from the Register of Companies on August 13, 1975.

Rudyard Stephens entered into an Agreement in writing on September 29, 1981 to sell No. 10 Red Hills Road, described as registered at Volumes 877, 215, and 236 Folios 12, 79, and 29 of the Register Book of Titles, to Exley Ho for \$200,000.00. One-half the purchase price was to be paid on the signing of the

Agreement to the Vendors' Attorney as stake-holder. Stephens failed to complete on March 30, 1982 as agreed and Ho sued on December 30, 1982 for Specific Performance - Suit C.L.H. 220/82. By Summons of February 10, 1983, Ho sought Summary Judgment for Specific Performance. Stephens did not appear and on April 6, 1983 the Master made the Order for Specific Performance in terms of the Summons. On that same day an application by Stephens to file defence out of time was struck out.

And still Stephens did not comply. Ho applied by Summons on April 24, 1984 for Further Relief including the return of his deposit of \$100,000.00 so that that money could be put on an interest bearing account. An Order was made accordingly.

No defence had been filed in the action brought by Stephens against the Administrator General, as Administrator of Jobson's estate, and Stephens obtained judgment in default of defence on September 20, 1984. It appears that no formal judgment has ever been entered in compliance with this Order.

A further Summons, this time seeking Specific Performance of the Agreement of September 11, 1978 brought by Stephens against the Administrator General on February 7, 1985, came on for hearing on May 9, 1985 and was adjourned sine die. The reason therefor appears in an affidavit of Stephens sworn to on May 10, 1985 wherein he stated that Gilbert Jobson raised a mortgage on premises 10 Red Hills Road in 1965 the outstanding principal and interest of which then amounted to \$365,000.00. There was a balance due from Stephens to the estate of Jobson of \$55,000.00. Clearly, without more evidence of the state of the Jobson estate, the Court could not decree Specific Performance in the course of which the Administrator General would have been called upon to redeem a mortgage of \$365,000.00 with an asset base of less than \$55,000.00.

Attempts were made, firstly by Ho, and then by Stephens, to pay-off the mortgage debt. On February 3, 1986 Attorneys-at-law for Ho, wrote to the Administrator General making proposals for the release of the mortgage debt on various conditions, including an undertaking by the Administrator General to take all steps in his power to cause the sale of the lands which Jobson contracted to sell to be completed. The Administrator General in his reply on March 20, 1986 expressed his agreement with all the terms proposed in the letter under reference. But nothing was done to consummate this agreement. Rather on January 8, 1988 in conformity with an Order of the Court dated December 16, 1987 Stephens paid \$365,838.00 to Krias Limited in full settlement of the mortgage debt.

In 1988 the litigation continued. By Summons dated January 14, 1988 the Administrator General sought leave to file defence out of time in Suit C.L.S. 056/84 on two bases:

- "(a) That there is and was no agreement for sale of the premises known as 10 Red Hills Road, St. Andrew between the Plaintiff and the First Defendant in his capacity as Administrator of the estate of Gilbert Jobson (deceased) and alternatively;
- (b) That there is and was no valid enforceable agreement for sale of the premises known as 10 Red Hills Road, St. Andrew between the Plaintiff and the Administrator General."

The Affidavit grounding the Summons indicated that the Administrator General only became enabled to seek Counsel's opinion about December 1987 and on the basis of legal advice would contend in defence that:

- (a) The alleged Agreement for sale had not been executed by Gilbert Jobson in his own right;
- (b) All the property in question was not owned by Gilbert Jobson;
- (c) The alleged Agreement was neither stamped nor dated as required by law;
- (d) The consideration referred to in the Agreement was never passed to Gilbert Jobson;
- (e) The consent of the U.D.C. was never sought or obtained.

There was objection from Ho to the grant of leave to the Administrator General to file defence out of time in Suit C.L.S. 050/84. Dr. Barnett in his submissions said that Harrison J. struck out the defence of the Administrator General on May 12, 1988. This was supported by an Affidavit of Douglas Brandon sworn to on July 11, 1990 which stated in addition that Harrison J. at the same time granted leave to the Administrator General to file a counter-claim against Rudyard Stephens in that suit. Leave to appeal was granted to the Administrator General, who has, however, to date, not filed a formal Order.

There was further objection from Ho to the filing of defence by the Administrator General in the action C.L.H. 220/82 and on July 30, 1990 Patterson J. ordered that the defence of the Administrator General filed in that suit on July 17, 1989 be struck out with costs to Ho.

On July 12, 1989 Orr J. dismissed the Summons filed by Stephens for leave to set aside the Order for Summary Judgment for Specific Performance made against him on April 6, 1983 and for leave to file defence out of time. Stephens appealed against this Order. At that time too, he appealed against an Order made against him at the instance of Ho for further Relief.

In that Order for Further Relief Stephens had been ordered to give possession of 10 Red Hills Road to Ho and inter alia to prosecute with diligence his suit against the Administrator General through which Stephens could be put in a position to fulfil his legal obligation to give title to Ho. Those appeals were dismissed on May 16, 1990.

One of the Orders made by Orr J. on July 12, 1989 was that Ho should pay to Stephens the balance of the purchase price. Ho attempted to do this but the cheque was returned on the ground that Stephens could not get permission from Federal Investors Limited to accept the payment and that the Administrator General had revoked the permission of Stephens to occupy 10 Red Hills Road. Ho filed still another Summons for Further Relief. Theobalds J. made an Order in terms of the Summons on October 5, 1990 which Order is now the subject of this appeal. Its terms are extensive and detailed and are reproduced below:

- "1. That Rudyard Stephens do forthwith pay to the Administrator General for Jamaica, the balance of purchase money; half costs transfer; outgoings and other sums properly due to her in respect of the Agreement for Sale entered into on the 11th day of September, 1978 between the said Rudyard Stephens and Gilbert Baron Jobson and Federal Investors Limited;
2. (i) That the Administrator General for Jamaica, as Administrator of the Estate of Gilbert Baron Jobson, deceased and Federal Investors Limited, do specifically perform the Agreement for Sale made between Gilbert Baron Jobson, as Vendor, on or about the 11th day of September, 1978 in respect of the lands known as 10 Red Hills Road, Saint Andrew registered at Volume 877 Folio 12; Volume 215 Folio 79 and Volume 236 Folio 29 of the Register Book of Titles and Rudyard Stephens as Purchaser by way of executing a transfer to be tendered to her by Exley Ho of the interests of

Gilbert Baron Jobson and Federal Investors Limited in the said lands to Rudyard Stephens and deliver same to Exley Ho who shall pay the following on same out of the funds referred to in Paragraph 2 (iii) hereof:

- (a) the Stamp Duty on the Transfer or Certificate of Sale;
 - (b) the Transfer Tax on the Transfer or Certificate of Sale;
 - (c) the Penalty, if any;
 - (d) the Registration fees on the Transfer or Certificate of Sale;
 - (e) the Land Taxes to the date of possession.
- (ii) That the Registrar of the Supreme Court do execute the Transfer or Certificate of Sale referred to in Paragraph 2 (i) abovementioned on behalf of Rudyard Stephens.
- (iii) The sums referred to in paragraph 2 (i) hereof to be paid out of the amount of \$207,087.25 due by Exley Ho to his Vendor, Rudyard Stephens, for purchase money and half costs of sale and the balance remaining be paid into Court to be disposed of as the Court deems fit as between the Administrator General for Jamaica and Rudyard Stephens
- (iv) That the Administrator General for Jamaica as part of the Order for specific performance do comply with the Order made under paragraph 4 hereof in order to give effect to the Order referred to in paragraph 2 (i) hereof.
3. That Exley Ho do present a Certificate of Sale of the interest of Rudyard Stephens in the aforementioned property, 10 Red Hills Road, Saint Andrew registered at Volume 215 Folio 79; Volume 236 Folio 29 and Volume 877 Folio 12 in favour of Exley Ho to the Registrar of the Supreme Court who shall execute same and re-deliver it thereafter to Exley Ho pursuant to Section 134 of the Registration of Titles Act and Form C in the Twelfth Schedule of the said Act.

4. That the Administrator General do forthwith take all necessary steps within her power both to ensure that Federal Investors Limited be restored to the Registrar of Companies and that she thereafter take steps to be registered on transmission as the holder of the shares of Gilbert Baron Jobson, deceased in the said Company as his Administrator and take such further steps to enable the said Company to execute a Transfer of the estate and interest in 10 Red Hills Road, Saint Andrew to Rudyard Stephens referred to in Paragraph 2 (i) of this Order.
5. That Exley Ho do retain the Certificates of Title for 10 Red Hills Road in his possession pending completion of the matters forming the subject of this Order.
6. That pending the completion of the matters referred to in paragraphs 1 to 4 of this Order, Rudyard Stephens and the Administrator General for Jamaica do forthwith deliver vacant possession of the said property, 10 Red Hills Road, Saint Andrew registered at Volume 215 Folio 79; Volume 236 Folio 29 and Volume 877 Folio 12 to Exley Ho.
7. That the Plaintiff, Exley Ho, do recover damages from Rudyard Stephens for damages for breach of the Agreement for Sale by him to Exley Ho of 10 Red Hills Road, Saint Andrew, such damages to be assessed by a Judge of the Supreme Court, Public Buildings, King Street, Kingston in Open Court at the Supreme Court, Public Buildings, Kingston, the estimated length of trial being 2 days.
8. Further or other relief.
9. Costs to the Applicant, Exley Ho, to be paid by the Administrator General for Jamaica and Rudyard Stephens.
10. Leave to Appeal granted to the Administrator General for Jamaica

Certificate for Counsel."

Mr. Scott for the appellant filed and argued three Grounds of Appeal seeking an Order to set aside the substantive Orders for Further Relief made in favour of Ho against the Administrator General. I set out the Grounds of Appeal below:

- "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.

N.B. The Orders referred to in this and the succeeding Ground 3 herein thereafter referred to as 'the orders' and where specific reference is made as 'Order') are:

- | | | | |
|---------------------|---|---|-------------------------|
| Order 1 | - | - | (page 51 of the Record) |
| Order 2 (i) - (iii) | - | - | (page 51 of the Record) |
| Order 2 (iv) | - | - | (page 52 of the Record) |
| Order 3 | - | - | (page 52 of the Record) |
| Order 4 | - | - | (page 52 of the Record) |
| Order 5 | - | - | (page 52 of the Record) |
| Order 6 | - | - | (page 52 of the Record) |
| Order 8 | - | - | (page 53 of the Record) |

2. Assuming that the 1978 Agreement (page 28 of the Record) is not void, but valid and of legal effect, the Orders made by the learned Judge were not justified in law being contrary to all principles of contract and judicial precedents; the Orders of the learned Judge were not only calculated

to be a total interference with the privacy of contractual rights, but to fashion anew what those rights should be and to proceed to order their enforcement, BECAUSE

(a) Order 1 wrongly provides that the balance of the purchase money which by the Agreement (page 28) is due to both the Appellant and Federal Investors Limited be paid to the Appellant only.

(b) Order 2 (i) wrongly refers to the Agreement (page 28) as being between Jobson as Vendor and Stephens as Purchaser when in fact the Agreement (page 28) is between Federal Investors Limited and Jobson as Vendors and Stephens as Purchaser. In making this particular Order the Learned Judge further overlooked the fact that Federal Investors Limited was a defunct company at the date of the Agreement - the 11th day of September, 1978 - paragraph 3 on page 14 --

The Order is further inconsistent with Order 4 for the same reasons in so far as performance by Federal Investors Limited was ordered therein. For the same reason a compliance with both Orders, assuming that to be possible, would result in the property being transferred twice.

(c) Order 2 (ii) purports impliedly to authorise the Registrar of the Supreme Court to execute a transfer by the purchaser under Section 88 of the Registration of Titles Act, in one or other of the statutory forms in the Fourth Schedule to the Act, the substance of the statutory forms being mandatory, and providing that the execution shall be by the Purchaser, the aforesaid Order is in violation of a statutory provision and therefore of no legal effect.

(d) Order 2 (iii) if complied with together with Order 1 (compliance with which shall be forthwith) would result in the Appellant receiving the purchase money according to Order 1 from Stephens forthwith and an additional sum of money representing part of the purchase money provided by the Respondent.

(e) Order 2(iv) is of no effect and is only confirmatory of the variation of the Agreement (page 28) by the Learned Judge. It refers to Order 2 (i) and to Order 4 and orders compliance with both Orders as if those orders were not to be complied with anyway.

(f) Order 3 purports to authorise the Registrar of the Supreme Court to execute a transfer by the Vendor under Section 68 of the Registration of Titles Act in one or other of the statutory forms, A, B or C in the Fourth Schedule to the Act the substance of the statutory forms being mandatory, and providing that the execution shall be by the Proprietor, the said order is in violation of a statutory provision and therefore is of no legal effect.

(g) Order 4 is based on three assumptions:

- (1) that the Federal Investors Limited at the time of being struck off the Register was carrying on business.
- (2) that the Registrar of Companies was wrong in acting pursuant to Section 320 of the Companies Act in striking Federal Investors Limited from the Register.
- (3) that an order for Restoration of Federal Investors Limited to the Register will be made.

The order being based on assumptions is wrong in law.

(h) Order 5 is based on the assumption that the Respondent either has the legal estate in the land or holds a legal mortgage over the land (paragraph 6 - pages 23 - 24).

(i) Order 6 is another variation of the Agreement (page 28) contrary and in breach of the said Agreement (page 28).

(j) Order 8 is wrong in law in that any subsequent order based on the orders mentioned at (a) to (h) of this ground would equally not be justified

3. Firstly, assuming that the 1978 Agreement (page 28) is not void, but valid and of legal effect, and secondly assuming

" that the Orders made by the learned Judge and referred to in ground 2 are justified in law, the incidental consequence is the making of Orders which are incapable of execution BECAUSE

(a) Order 4 (page 52) is a mandatory order which requires the appellant to register shares on transmission and execute a transfer to Stephens whether or not the steps within her power to ensure that Federal Investors Limited is restored to the Register are successful.

(b) Order 6 requires the Appellant to give possession of lands belonging to the Crown to the Respondent."

In support of Ground 1 Mr. Scott argued that the Agreement of September 11, 1978 for the sale of 10 Red Hills Road was void and of no legal effect as on that date Federal Investors Limited did not have legal capacity to enter into an Agreement to sell real property which by law then vested in the Crown. An uncontested fact is that Federal Investors Limited was removed from the Register of Companies on August 13, 1975. No evidence was led as to the circumstances in which Federal Investors Limited was removed from the Register but the case proceeded on the assumption that the Registrar of Companies exercised the power conferred by Section 320 (1) - (3) to strike the Company off the Register because it was neither carrying on business nor in operation and thereby the Company was dissolved - see Section 320 (3) of the Act. The Company or any member or creditor thereof who feels aggrieved on the Company being struck off may apply to have the Company restored to the Register and the Court may grant that application if the Court considers it just that the Company be so restored - see Section 320 (6). In the meantime, however, all property held by the Company immediately before its dissolution is deemed to be bona vacantia and to belong to and vest in the Crown - see Section 321 of the Companies Act.

Mr. Scott relied upon the decision of the House of Lords in Lazard Bros. & Co. v. Midland Bank Ltd (1932) All E.R. Rep. 571 and especially to a passage in the judgment of Lord Wright at page 576 with which all the other Law Lords agreed. Lord Wright in dealing with the question whether the Order nisi granted in that case should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant, since the judgment debtor by law has to exist as a juristic person before the date of the writ, said:

"..... it is clear law, scarcely needing any express authority that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently, non-existent; such a case is a fortiori than the case which Lord Parker referred to in Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd. There the directors being all alien enemies could not give a retainer."

The House of Lords stressed the point that a foreign Company which was created by statute as a juristic person in a foreign State could be dissolved by statute in that State, and the English Court would look at and abide by the fact of such dissolution. The English Court of Appeal in the recent case of Owners of Sardinia Sulcis v. Owners of Al Tawwab - 21-11-90, Times Law Reports 735 re-stated the principle that a non-existent party could neither sue nor be sued.

In Adelaide Company of Jehovah's Witnesses Incorporated vs. The Commonwealth (1943) 67 C.L.R. 116, one of the questions which the Court had to answer was whether an incorporated Company could be dissolved under the authority of an Order in Council without the intervention of judicial proceedings. Latham C.J. dealt with this question at page 138 of the Report. He said:

"The final argument against the validity of reg. 4 is that the dissolution of a corporate body such as a company is an exercise of judicial power, that under the Commonwealth Constitution such a power must be exercised by a court, and that under these Regulations dissolution is brought about by the order of the Governor General and the direct operation of reg. 4 without any curial proceedings.

No authority was quoted for the proposition that the dissolution of a company is a judicial act. It was said in a general way that the dissolution of a company affected the rights of the company. It is true that dissolution terminates the rights of a company, but it is a common provision in Companies Acts to provide for the dissolution of a company, not only by a court, but also by the direction of an official: See, for example, the English Companies Act 1929, s 295, by which it is provided that, after certain notices have been given by the Registrar of Companies, a company may be struck off the register, with the result that the company is dissolved - Thus it is well recognized that a registered company may be dissolved without any judicial proceedings."

It is true to say that there was no challenge by the respondent to the validity of Sections 320 and 321 of the Companies Act similar to that raised in the Jehovah's Witnesses case cited above. What Dr. Barnett contended was that even if Mr. Scott's arguments were correct in law, he was estopped from raising them at this stage as all those questions were res judicata. He submitted that when the Administrator General made his application on January 14, 1988 for leave to file defence out of time, the Administrator General raised the issue of the validity and enforceability of the contract as between Jobson and Federal Investors Limited of the one part and Rudyard Stephens of the other part, and that this application was dismissed by Harrison J. on May 12, 1988. It is to be

recalled that paragraphs 5 and 7 of the projected defence to Suit C.L.S. 056/84 expressly denied that there was an agreement for sale. At the hearing of the Summons by the Administrator General, Stephens did not seek to defend his judgment but Ho who was allowed to intervene, successfully objected to any challenge by the Administrator General to the validity of the Agreement of September 11, 1978.

Dr. Barnett pointed to the fact that on July 30, 1990 Patterson J. struck out the defence filed by the Administrator General dated July 17, 1989 in Suit C.L.H. 220/82 which sought to question the validity and enforceability of the Agreement to sell premises 10 Red Hills Road to Stephens. Mr. Scott in reply urged upon the Court the fact that in Suit C.L.S. 056/84 no mention whatever was made of Federal Investors Limited and the action proceeded on the basis that Jobson was the sole owner of No. 10 Red Hills Road. In two Affidavits filed by Ho, he expressly stated that Jobson entered into an Agreement with Stephens and Ho made no mention of Federal Investors Limited - see paragraph 8 of Ho's Affidavit sworn to on April 22, 1988 and paragraph 3 of his Affidavit sworn to on May 30, 1990. Mr. Scott submitted further that the Administrator General never had a copy of the Agreement of September 11, 1978 and first learnt of Federal Investors Limited on January 14, 1988.

In support of his submissions on the principle of res judicata, Dr. Barnett cited and adopted a passage from paragraph 183 of Vol. 42 of the 4th Edition of Halsbury's Laws of England which provides that an Agreement for Sale of land of which Specific Performance can be granted, transfers the beneficial ownership in the land to the purchaser and makes the vendor a constructive trustee for the purchaser. It was

on that basis that Ho was permitted to oppose the Summons by the Administrator General to file a defence in the action brought by Stephens against the Administrator General.

It appears that the issues which were discussed in the Court of Appeal in C.A. 66 and 67/89 were narrowly circumscribed having regard to the grounds of appeal filed. Carey J.A. mentioned that there was an Order for Specific Performance, which not having been set aside by a Court, remained good and ought to be performed. When Mr. Macaulay sought to argue that the Order for Specific Performance was granted against a person who could not honour that Order, the Court pointed out that he had no ground of appeal on which to mount such a submission - per Carey J.A. page 7 of the judgment. Gordon J.A. (Ag.) accepted that the contract could be performed notwithstanding certain difficulties - page 11 of the judgment.

Henderson v. Henderson (1843) 3 Hare 100; 12 E.R. 313 is the classical exposition of the doctrine of res judicata, per Sir James Wigram V.C. He said:

"In trying this question I believe I state the rule of the Court correctly when I say that, when a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

In Hoystead and Others v. Commissioner of Taxation (1926)

A.C. 155, the Privy Council treated the passage quoted above from Henderson v. Henderson as settled law and itself stated that:

"..... if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision."

Somervell L.J. stated the principle of res judicata in somewhat different language in Greenhalgh v. Mallard (1947) 2 All E.R. 255 at 257:

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

A late pronouncement of the Privy Council on the principle of res judicata is to be found in the decision of Endell Thomas v. The Attorney General of Trinidad and Tobago - Privy Council Appeal 20/89 in which judgment was delivered on November 13, 1990. Lord Jauncey of Tullichettle in delivering the opinion of the Board referred with approval to the classic statement in Henderson v. Henderson (supra) but said of this principle of res judicata:

"It is in the public interest that there should be finality to litigation and that no person should be subjected to an action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action."

Mr. Scott directed our attention to Beckford v. Williams (1976) 15 J.L.R. 14 where this Court permitted the appellant to take a point as to want of jurisdiction in the Resident Magistrate, notwithstanding that that point had not been taken in the Court below. The Court followed the decision of the Privy Council in Chief Kwame Asante v. Chief Kwame Tawia (1949) W.N. 40 where the Judicial Committee said that:

"If it appeared to an appellate court that an order against which an appeal had been brought had been made without jurisdiction it could never be too late to admit and give effect to the plea that the order was a nullity."

The real question for our determination is which of the two principles res judicata, or want of jurisdiction rendering the earliest proceedings a nullity have paramountcy of place in the instant case. I think we can derive some assistance from the decision of the Supreme Court of India, which was quoted and approved by the Privy Council in Thomas v. Attorney General of Trinidad and Tobago (supra). In a case of Daryao and Others v. The State of U.P. and Others (1961) 1 SCR 574 and from the judgment of Gajendragadkar J. at pages 582-3 of the Report where he said:

"But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals

"should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

And at page 585 he said:

"In our opinion, therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained."

Dr. Barnett has not charged the appellant with negligence in failing to call for and to inspect the Agreement of Sale of September 11, 1978 before doing any act prejudicial to its own interest. Of course if the Administrator General had called for a copy of the Agreement for Sale he would have observed the presence of Federal Investors Limited as a Co-Vendor and would be put on enquiries. The respondent Ho, however relies upon, inter alia, the Summons of the appellant filed on January 14, 1988 in the suit brought by Stephens against the appellant C.L.S. 056/84, seeking leave to file defence out of time in which the appellant specifically raised the issue of the validity and enforceability of the Agreement of September 11, 1978. That Summons was determined against the appellant. It seems to me that if the appellant is to maintain his contentions he must continue to prosecute his endeavours to defend Suit C.L.S. 056/84.

The appellant, cannot, in my view raise anew any question whether of law or of fact which has been judicially determined against him by a competent Court in former proceedings. And it does not matter that he could have taken the point in the earlier proceedings prior to their final determination that these proceedings were a nullity. It would indeed deprive the principle of res judicata of much of its effectiveness if a litigant could rest on his laurels during the currency of proceedings and

afterwards claim that because they amount to a nullity, that remiss litigant can move the Court at any time in any subsequent proceedings to have the proceedings set aside on that ground. I think that in the conflict of principles posed by Mr. Scott, the principle of res judicata is paramount.

It seems to me that the Administrator General has a duty to take the necessary steps to cause his name to be placed on the Title by transmission in respect of the two parcels of land registered in the name of Jobson (deceased). The Administrator General has a duty to apply to the Court under Section 320 (6) of the Companies Act to have Federal Investors Limited restored to the Register on the ground that it is just so to do. No one expects the Administrator General to guarantee the outcome of such an application to the Court but in the light of the equity acquired by Stephens and Ho in property registered in the name of the defunct Company, the Administrator General as administrator for the major shareholder in Federal Investors Limited would have little difficulty in satisfying the Statutory requirements for restoration of the Company to the Register.

Notwithstanding the submissions of Mr. Scott, I am not persuaded that if the Administrator General uses his best endeavours, it will be impossible for him to provide the further relief ordered by the Court. I would dismiss the appeal and order that the appellant do pay the costs of the respondent to be agreed or taxed.

FORTE J.A.

I have read in draft the judgment of Rowe P, which deals thoroughly with all the issues raised in this Appeal, and expresses an opinion with which I concur. In my view, the answer to the appellant's complaint resides in the principle of res judicata which puts the matter to rest. The learned President, having examined in detail, the relevant authorities in that regard, I need only emphasize that I agree specifically with his conclusions thereon and would for that reason, dismiss the appeal.



GORDON J.A. (AG.)

I have had the opportunity of reading and considering the judgment of Rowe P, and I agree with the reasoning and the conclusion that the appeal should be dismissed.

