IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2459 OF 2009

BETWEEN	**FLETCHER & COMPANY LIMITED**	**CLAIMANT**
AND	**BILLY CRAIG INVESTMENTS LIMITED**	**1ST DEFENDANT**
AND	**SCOTIA INVESTMENTS LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Carol Davis for the claimant/ respondent

Michael Hylton Q.C. and Sundiata Gibbs instructed by Duwayne Lawrence of Michael Hylton & Associates for the defendants/ applicants

Heard: February 27, March 26 & September 24, 2012

Civil Procedure - Application for summary judgment - Whether claim res judicata - Application of res judicata to default judgments - Cause of action estoppel - Issue estoppel - Henderson v Henderson estoppel - Abuse of process – The Civil Procedure Rules (CPR) r. 15.2 (a).

McDONALD-BISHOP, J.

[1] This concerns an application for summary judgment brought by Billy Craig Investments Limited, first defendant, and Scotia Investments Limited, second defendant, against Fletcher and Company Limited, the claimant, pursuant to rule 15.2 (a) of the Civil Procedure Rules, 2002 (the CPR).

[2] The sole ground on which the application for summary judgment is based is that the claim is res judicata by reason of the judgment of Sykes, J. entered on

12 July 2006 in claim number 2005HCV05018 (Billy Craig Investments Limited v. Fletcher & Company Limited). It is argued that on the basis of the doctrine of res judicata, the claimant has no real prospect of succeeding on the claim and, as such, it is appropriate for summary judgment to be entered in favour of the defendants. The application, of course, is strenuously contested by the claimant.

The background

[3] The claimant is a company duly incorporated under the laws of Jamaica with its registered office located in Montego Bay, St. James. It was, at all material times, the registered proprietor of lands that (for our purposes) include lots H25 and H26, Bay Road, Montego Bay, St. James, registered at Volume 1070 Folio 141 and Volume 1070 Folio 142, respectively, of the Register Book of Titles (hereinafter will be called the "mortgaged property"). David and Alice Fletcher were its shareholders.

[4] In or around October 1995, Robert Joseph, Clyve Lazarus and Constantine Nicholas entered into an agreement to purchase from David Fletcher and Alice Fletcher all the shares held by them in the claimant in the sum of US$1,500,000.00. The sum of US$750,000.00 was paid and the balance purchase price of US$750,000.00 was made payable upon completion.

[5] On 10 November 1995, the claimant entered into a mortgage numbered 908314 with Sportula, a company duly incorporated in the Cayman Islands, to secure a loan for the balance of the purchase price with interest. This loan was secured by mortgage by way of guarantee registered against the mortgaged property. The purchasers of the shares were the principal borrowers and the claimant was the guarantor.

[6] This mortgage was subsequently transferred from Sportula to the first defendant by transfer no. 966097 registered on 18 February 1997. The first defendant is an Industrial and Provident Society duly registered under the

Industrial and Provident Society Act with its registered office also located in Montego Bay. It has been in receivership since 2004.

[7] The first defendant was put in receivership by Scotia DBG Investments Limited (formerly operating as Dehring Bunting & Golding Limited) but now known as Scotia Investments Limited, the second defendant, which is a company also duly incorporated under the laws of Jamaica with its registered office located at Holborn Road, Kingston. The first defendant is a subsidiary of the second defendant.

[8] In or about 2003, when Dehring, Bunting & Golding Limited took over the management of the first defendant, it conducted the business with respect to the claimant's mortgage on behalf of the first defendant. The second defendant has continued to do the same even with the first defendant being in receivership.

[9] On 4 November 2005, following the default of the claimant in its repayment of the mortgage sum, the first defendant, in exercising its power as mortgagee, brought the claim No. 2005HCV05018 against the claimant by way of fixed date claim form for recovery of possession of the mortgaged property. The claim was supported by the affidavit evidence of Mr. Peter Bunting, who, at the time, was a member of the Committee of Management of the first defendant.

[10] Mr. Bunting deposed in his supporting affidavit that, among other things, the first defendant claimed as mortgagee and transferee of the benefit of the mortgage of 10 November 1995 made between the claimant and Sportula. He exhibited the mortgage, highlighted some of its relevant clauses and stated several grounds on which the first defendant was entitled to possession of the mortgaged property to include the default of the claimant in repaying the loan and the repeated demands of the first defendant for payment.

[11] On 12 July 2006, Sykes J. made the order upon the fixed date claim form which was stated then as an amended order to one issued previously on 26 June 2006. The order stated that the claimant (the defendant then) should within 60

days of the service of the order deliver up to the first defendant (the claimant then) possession of the mortgaged property. Costs were also awarded to the first defendant.

[12] This judgment was, from all indication on our records, in the nature of a default judgment, in that, the claimant had failed to file an acknowledgment of service and defence or affidavits in response to the claim and was absent at the hearing when the judgment was entered. However, there was no application made by the claimant to set aside that judgment as one given in its absence and neither did it file an appeal in respect of it.

[13] By an amended claim form filed on 18 June 2009, being three years or so after the order for recovery of possession was made, the claimant filed a claim against the first defendants. On 30 May 2011, a further amended claim form was filed naming the second defendant as a co-defendant following an order of the court, on application made, that the second defendant should be joined. It is this claim that is the subject matter of these proceedings for summary judgment.

[14] In this claim, the claimant claims against both defendants “for wrongfully collecting the claimant’s moneys pursuant to a mortgage which is illegal and /or void,” and/or for breach of trust and for conspiracy to injure. It seeks, among other things, by way of relief: (1) an injunction to prevent the sale of the mortgaged property; (2) a declaration that the mortgage endorsed in respect of the said property is “void, illegal and/or unenforceable”;(3) In the alternative, an order that an account be taken of what amount, if any, is due by the claimant to the defendants; (4) an order that the defendants cease managing or dealing with the assets of the claimant; and (5) damages for breach of trust/and or for conspiracy to injure.

[15] As can be discerned from the pleadings, the main thrust of the claimant’s contention that forms the foundation of its claim against the defendants is that the mortgage that was transferred to the first defendant, and on which it obtained judgment for recovery of possession in 2006, was void for illegality and, thus, unenforceable.

[16] The claimant's contention, in substantiating this point, is that the mortgage was granted for the purpose of assisting with the purchase of the claimant's share which is in contravention of section 54 of the Companies Act, 1965 which was the operative statute at the time of the transaction. The argument advanced is that any transaction which is in breach of section 54 of the Companies Act is illegal and void and is, as such, unenforceable against the original mortgagor and any subsequent purchaser.

The application

[17] It is against this background of the claimant's averments in its claim that the defendants are contending that given that the same mortgage had formed the basis of the previous claim on which judgment was entered by Sykes, J. in 2006 in the first defendant's favour for recovery of possession of the mortgaged property, the claim is res judicata and so without a real prospect of success. As such, summary judgment ought to be granted for the defendants on the claim.

[18] The defendants in the application, then, state:

> "The issues which the Defendant proposes the Court should deal with at the hearing are:
>
> 1. Whether the claim is *res judicata*.
> 2. Whether the Claimant is entitled to an account under the mortgage dated November 10, 2005.
> 3. Whether in all the circumstances, the Claimant has a real prospect of succeeding on the claim."

The court's power to grant summary judgment

[19] It is acknowledged that pursuant to the CPR, rule 15.2 (a), the court has the power to grant summary judgment on a claim on the basis that the claim has no real prospect of succeeding. The exercise of the court's power under this rule is, of course, subject to the overriding objective contained in part 1 to deal with the case justly which would be the same as doing justice between the parties.

[20] The court's treatment of applications for summary judgment under the CPR has been the subject of much judicial deliberation both within and outside this jurisdiction leading to what can now be accepted as well-defined and settled principles of law governing the issue. I will venture to say for present purposes that the principles of law governing the area are, by now, so well-established so much so that they can be said to be, practically, trite. For that reason, I am of the view that it would not be absolutely necessary for me to set out in any great detail the case law on the subject.

[21] I have felt it necessary, however, to briefly highlight some of the core principles that have been elicited from some of the leading authorities on the subject in an effort to indicate the legal framework within which the application is considered. These principles have been distilled, particularly, from the authorities cited on behalf of the parties and are summarized and re-stated as follows.

[22] In considering whether summary judgment ought to be granted on the claim, the court has to bear in mind that there must be a "real", as opposed to, a "fanciful", prospect of success of the claimant's case for the claim to stand. The test is not one of certainty and so the court is not required to form a view that the claim is bound to be dismissed at trial. The test requires that the court's attention is directed to the need to do an assessment of the claimant's case to determine its probable ultimate success or failure.

[23] In assessing whether the claim has a real prospect of success, it is, therefore, legitimate for me to form a provisional view of the outcome of the claim. However, I am not required, nor am I expected, to conduct a mini-trial on disputed facts which have not been tested and investigated on the merits. I am mindful that the object of the rule is not to permit a mini-trial of the issues but to enable cases which have no real prospect of success to be disposed of summarily. I have to look down the road, so to speak, to see what will happen at the trial and if the case is so weak that it has no real prospect of success, it should be stopped. It saves time and cost and would, in the end, prevent the

court's resources being used up unnecessarily in the trial of weak cases that have no real prospect of success. This would go a far way in promoting the overriding objective. See **Swain v. Hillman** [2001] 1 All ER 91; **Gordon Stewart v. Merrick Samuels** SCCA No. 2/2005 delivered November 18, 2005 (Unreported); **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All E.R. 513; **ED & F Man Liquid Products Ltd. v Patel and anor** TLR April 17, 2003 at page 224, [2003] EWCA Civ. 472.

[24] Having taken into account the applicable law on the grant of summary judgment, I have assessed the instant application and found that the issue raised for consideration does not involve any question of disputed facts that would lead to any substantial enquiry amounting to a mini-trial. The question as to whether the claim is res judicata, which is the sole basis argued, is, primarily, a question of law. As such, I consider the application one appropriate for consideration as to whether summary judgment should be granted on the claim.

[25] The ultimate question to be determined is whether the claim has no real prospect of success on the basis of res judicata. A brief examination of the law governing the doctrine will be first undertaken in an effort to, ultimately, determine whether the doctrine should be invoked to bar the claimant from proceeding on its claim.

Res judicata: the law

[26] In speaking of the meaning of the doctrine of res judicata, the learned writers of **Halsbury's Laws of England**, 4th edition, Volume 16, paragraph 1527, noted that the doctrine is not a technical one applicable only to records but that it is a fundamental doctrine of all courts that there must be an end to litigation. Ordinarily, it is conveniently treated as a branch of the law of estoppel. It is said by some legal practitioners, however, that res judicata is different from estoppel in the sense that res judicata is a matter of procedure while estoppel is a matter of evidence.

[27] Whatever difference there might be between the two concepts, however, it cannot be denied that they work with each other towards the attainment of the same results, which is, to put an end to litigation in the interest of justice. Usually res judicata is pleaded by way of estoppel and so the trend has been to treat res judicata as arising on the plea of three forms of estoppel: the two traditional ones being "cause of action estoppel", and "issue estoppel" and the third being an extension of the doctrine of estoppel as enunciated by Vice-Chancellor Sir James Wigram in **Henderson v Henderson** (1843) 3 Hare 100, 114, 115. (This third form I will call, for convenience, 'the **Henderson v Henderson** principle'.)

[28] While it may correctly be pointed out that there are marked distinctions between these forms of estoppel, the fundamental similarity between them lies in the fact that they operate to avoid re-litigation of a matter that would amount to an abuse of process. It is said that the underlying public interest is the same and that is that there must be an end to litigation. The courts seek to ensure this through the invocation of the estoppels. This has been recognized in numerous authorities on the subject leading up to the affirmation of the doctrine by our Court of Appeal in several cases, the most recent one being **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ. 2.

[29] In that case, the Court of Appeal in considering the doctrine of res judicata, noted:

> "The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties…"

See too the dicta of Buckley, J. in **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)** [1970] 1 Ch 506, 537 and of Lord Bingham in **Johnson v Gore Wood & Co. (a firm)** [2001] 1 All ER 481.

[30] What is clear on the authorities, therefore, is that whatever the differences that may exist between the doctrines, their purpose and effect in law are the same. They are grounded on the underlying principles of public policy and justice with the core principles being to do justice between the parties to litigation and to prevent the court's processes from being abused through the multiplicity of proceedings on the same subject matter.

[31] At this point in my deliberations, I consider it fitting to conduct a brief examination of each form of estoppel on which res judicata may be based in an effort to resolve the ultimate question as to whether res judicata applies to render the claimant's case one without a real prospect of success.

Cause of action estoppel

[32] In **Arnold v. National Westminster Bank Plc (No.1)** [1991] 2 AC 93, 104, Lord Keith of Kinkel helpfully explained the principle of cause of action estoppel. His Lordship noted that cause of action estoppel arises where the cause of action in a later proceeding is identical to that in an earlier proceeding, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, he said, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual material which could have been found out by reasonable diligence for use in the earlier proceedings does not permit the latter to be reopened.

[33] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 3)** (page 538), Buckley, J. noted that to establish cause of action estoppel, the party asserting the estoppel must establish the following criteria: (1) that there has already been a judicial decision by a competent court or tribunal; (2) that decision was of a final character; (3) the decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and (4) the decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue.

[34] So, in short, cause of action estoppel is confined to cases where the cause of action and the parties are the same in the second suit as they were in the first suit: **North West Water Ltd. v Binnie & Partners** [1990] 3 All ER 547, 551.

[35] In seeking to advance the defendants' case that the claim is res judicata, learned Queen's Counsel, Mr. Hylton (duly assisted in his written submissions by Mr. Gibbs), advanced as part of his submissions that the claim is "plainly res judicata" as there has already been a judicial decision between the parties by the court of a final character of the very same question in issue in this claim. According to him, the instant proceedings relate to the same land and the same mortgage as in the previous proceedings in which judgment was given. It is the same mortgage in respect of which judgment was entered in favour of the first defendant for recovery of possession that is now being challenged.

[36] He pointed out that the judgment having been entered, the decision was not appealed by the claimant but that, instead, four years later it sought to challenge the very issue which was fundamental to the decision in the 2005 claim. To reinforce this point that the claim ought not to be allowed in the circumstances where the claimant failed to utilize its right of appeal, Mr. Hylton cited from the dictum of Lord Macnaghten in **Badar Bee v Habib Merican Noordin and Others** [1909] AC 615, 623, in which his Lordship opined:

> "It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time."

[37] Learned Queen's Counsel further contended that the authorities are clear that parties are not permitted to begin fresh litigation because of new views they entertain of the law of the case, or new versions of the legal result of the construction of the documents. In the circumstances, the issue of the validity of the mortgage is res judicata and the claimant is barred from challenging it in these proceedings.

[38] Ms. Davis, in her response on behalf of the claimant, submitted that cause of action estoppel does not apply. She noted that in the first claim, the claim was for possession of premises at H25 and H26 Bay Road, Montego Freeport and costs. The evidence shows that the first defendant in that case claimed as mortgagee. However, in the current proceedings, the claimant is claiming for repayment of monies wrongfully collected pursuant to an illegal and void mortgage. None of the causes of action now before the court were considered, much less determined, in the earlier action before the court. That case, she said, was purely for recovery of possession. She submitted further that the claim is now against two defendants, one of whom was not a party to the previous proceedings. So, in all the circumstances, she argued, "res judicata as cause of action estoppel is entirely inapplicable."

[39] In seeking to resolve these conflicting views between the parties, I have reminded myself of the words stated in **Halsbury's Laws of England,** 4th edition, Vol.16, paragraph 1528. The passage reads, in part:

> "In order for the defence of res judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he seeks to recover in the second action… It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed."

[40] The same authors also pointed out, that which I have taken into account, that the doctrine applies and the plea succeeds where the cause of action is really the same and had been determined on the merits.

[41] Having examined all the evidence before me as to what matters constituted the prior claim, the terms of the order made by Sykes, J., and the claim now being pursued, against the background of the law on cause of action

estoppel, I am minded to agree with Ms. Davis that cause of action estoppel does not apply to the circumstances of this case.

[42] The defendants have failed, in my view, to fulfill the criteria established on the authorities that are to be satisfied for the invocation of this estoppel. I find, essentially, that the causes of action are different, the parties are different, the issues raised on the current claim were not actually claimed or put in issue in the earlier claim, those issues did not form part of any hearing on the merits and so did not form part of the decision or final judgment of the court on the earlier claim. I find that as a matter of law, cause of action estoppel does not arise.

Issue estoppel

[43] The next stage of my enquiry is to determine whether issue estoppel arises. Issue estoppel is distinct from cause of action estoppel, as already noted, and may arise where a plea of res judicata cannot be established because the causes of action are different. It is established on some authorities that this form of estoppel arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to reopen it in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant: **Arnold v National Westminster Bank Plc. (No.1)** [1991] 2 A.C. 93, 105.

[44] A very illuminating explanation of the doctrine was given by Lord Diplock in **Thoday v Thoday** [1964] P. 181, 198 in the following terms:

> "The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action

> any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

[45] The estoppel as formulated in **Halsbury's Laws of England,** 4th edition, Vol. 16, paragraph 1530 (based on the authorities cited therein) is this: a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision, that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.

[46] What is seen from the foregoing authorities, as a point of interest, is that the principle is explained as requiring, among other things, that the issue in question must have been decided between the same parties or their privies before the estoppel can arise. In **North West Water Ltd v Binnie & Partners**, however, in which the question as to whether a claim was res judicata on the basis of issue estoppel was considered, it was noted by Drake, J. that the authorities on the subject have revealed two schools of thought as to the limit which should be put on the application of this form of estoppel.

[47] His Lordship noted that one school of thought (the broader approach) holds that the true test of an issue is whether for all practical purposes the party seeking to put forward the issue has already had the issue determined against him by a court of competent jurisdiction even if the parties are different. The other conflicting approach, he explained, is to confine issue estoppel to those species

of estoppel per rem judicatum that may arise in civil actions between the same parties or their privies.

[48] For the latter approach, the dictum of Lord Diplock in **Hunter v Chief Constable of West Midlands** [1981] 3 All ER 727 was cited as indicating support for this narrower view. It follows from this that issue estoppel may be said to operate or not operate in cases involving a new party to the proceedings depending on which approach is adopted.

[49] In this case, Mr. Hylton, Q.C., in embracing the broader approach, did make the point that the fact that the parties are different does not preclude the operation of issue estoppel. He uses as his support the decision of the Privy Council in **Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd.** [1975] AC 581 in which it was held that res judicata applied even though one of the parties in the second action was not a party in the earlier action.

[50] I do share that view (as I have accepted as a better view the broader approach endorsed by Drake, J.) that issue estoppel should apply in situations where the parties are different provided the person against whom the estoppel is being sought to be invoked in the subsequent proceedings was a party to the earlier proceedings in which the point in issue was determined against him. It would follow from this line of thinking that the fact that in this case the second defendant was not a party in the earlier proceedings should not, of itself, preclude the invocation of the doctrine.

[51] The material question, instead, would be whether the claimant in the current proceedings is seeking to put forward an issue that was determined against it in the earlier proceedings even if the parties to the two actions are different.

[52] I understand Mr. Hylton, Q.C. to be saying, within this context, that the validity and hence the enforceability of the mortgage was fundamental to the court's decision in the earlier claim when it granted the first defendant possession of the property. The gravamen of his argument, as I see it, is that for the court to

have made an order as it did in the earlier judgment, giving the first defendant the right to possession of the property as mortgagee, it must have been satisfied that the mortgage was valid. In other words the validity of the mortgage would have been a necessary and, therefore, fundamental pre-requisite for the order for recovery of possession to be granted. The court, therefore, would have acknowledged the validity of the mortgage by its order giving the first defendant possession.

[53] Learned Queen's Counsel drew support for this aspect of his argument from the reasoning and decision of the Privy Council in the Australian case of **Hoystead v Commissioner of Taxation** [1925] AC 155, one of the leading cases on this subject. In that case, trustees under a will objected to an assessment under the Land Tax Assessment Act for the financial year 1918-1919. The trustees claimed under section 38 (7) of the Act that a deduction of 5000*l* in respect of the share of each daughter, who were beneficiaries of the trust, should be made.

[54] In a case stated to the Full Court of the High Court of Australia, two questions were posed for consideration:(1) whether the shares of the joint owners, or of any and which of them, in the land were original shares within s. 38 of the Land Tax Assessment Act; and (2) how many deductions of 5000*l* should be made by the Commissioner. The court responded that in relation to question 1, the shares of the six children surviving at the date of assessment and that in relation to question 2, six deductions should be made.

[55] Upon an assessment for land tax for the next financial year, the Commissioner allowed only one deduction of 5000*l*, contending that the beneficiaries were not joint owners within the meaning of the Act. In a case stated, the Full Court upheld that view and held that the Commissioner was not estopped by the previous decision.

[56] On appeal to the Privy Council, it was held that the Commissioner was estopped from contending that the beneficiaries under the will were not joint

owners within the meaning of the Act. Their Lordships found that even though in the previous litigation, no express declaration had been made whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision given.

[57] Learned Queen's Counsel highlighted, in particular, the dictum of Lord Shaw that:

> "In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

[58] Mr. Hylton, Q.C. maintained that the dicta in that case, when applied to the present case, show that the claim is plainly res judicata as there has been a judicial decision between the parties on the issue now being raised in this claim.

[59] Of course, Ms. Davis does not agree that **Hoystead v Commissioner of Taxation** is applicable to the facts of this case to estop the claimant. According to learned counsel, "issue estoppel in its original form is also inapplicable." According to her, the only issue raised in the first claim was the first defendant's claim for possession. The issue of the validity of the mortgage, and/or any of the issues now raised, was not before the court in those proceedings. The issue of the validity of the mortgage was not a "necessary" part of the earlier proceedings. It was never raised at all.

[60] Ms. Davis pointed out too that issue estoppel arises when an issue that was a necessary ingredient to a previous action had been litigated or could have been litigated and had been judicially determined based on evidence or admission and so the same issue cannot be re-litigated in a subsequent action. See **Arnold v National Westminster Bank Plc.** She made the point that In **Hoystead v Commissioner of Taxation**, the Commissioner had admitted the issue in question in the previous action and so he was estopped from reopening the issue in the subsequent action. This, she said, is not the case here as there had been no admission by the claimant in the earlier action; **Hoystead v Commissioner of Taxation** is, thus, distinguishable.

[61] In seeking to ascertain wherein the merit lies in the arguments advanced by the parties, I am guided by the principle contained **in Halsbury's Laws of England**, 4th edition, Vol. 16, paragraph 1527 that to decide what questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of evidence and is not restricted to the records. It went further to state that the parties are estopped by the findings of fact involved in the judgment and the facts must appear from the judgment as delivered to be the ground on which it was based.

[62] Guided by these principles, I have conducted an examination of the records of the earlier action. There are no notes of evidence and no written reasons for the learned judge's decision. All there is on record from the learned

judge is the formal order signed by him. This order simply states that the claimant was to deliver up possession of the property within 60 days of the service of the order and costs with GCT. I must say that nothing in that order would suggest any finding of fact on the issue of validity of the mortgage. There are no facts appearing from the judgment indicating that the issue that the mortgage was valid was determined and had formed the basis on which the final order was made.

[63] In the absence of notes of evidence and written reasons for the decision, I have also looked at the claim and the evidence filed in support of it. It is seen that the circumstances surrounding, and/or attendant on, the creation of the mortgage were never in evidence before the court. The first defendant had raised nothing on either its claim, its pleadings or on its evidence about the validity of the mortgage in question.

[64] I have also gone further to take into account that the claimant, having filed no defence or affidavit in response to the claim in those proceedings, had not admitted any aspect of the claim that would amount to an admission of the validity of the mortgage. Neither did it traverse any aspect of the claim thereby raising an issue as to the validity of the mortgage as a separate and distinct issue for the court's determination. Therefore, the validity of the mortgage, as a separate and distinct issue, was not expressly, directly, collaterally, or by, necessary implication, raised in the earlier claim for the court's deliberation.

[65] The principle as I have accepted from the **Halsbury's Laws of England**, 4th edition, Vol. 16, paragraph 1530, and which I apply to this matter, is that for issue estoppel to arise to sustain a plea of res judicata, it must be shown that the party to be estopped is seeking to re-litigate a precise point which had '*once been distinctly put in issue* in an earlier proceeding and which has *been solemnly and with certainty determined against him*'. It must be shown that the matter on which the decision was alleged to have been made in the earlier action was one that had come directly (not collaterally or incidentally) in issue in the first action

and embodied in a judicial decision that is final. When this principle is applied to the facts before me, I find that it is incorrect to say that issue estoppel arises to bar the claimant's claim.

[66] To go even further, I have also looked closely at the facts and the passage relied on by the defendants in **Hoystead v Commissioner of Taxation** and it is seen that what Lord Shaw did, in fact, say on this point is that estoppel on the issue will apply where there had been an admission of a fact fundamental to the decision arrived at in the earlier proceedings which is being sought to be re-litigated or there was an erroneous admission of that fact or an erroneous assumption as to the legal quality of the fact in the earlier action. Lord Shaw also said that a defendant will be bound by a decision given on a fundamental issue that was traversable by the defendant but was not traversed.

[67] Similarly, in **Thoday v Thoday** in a passage cited in **Arnold v National Bank of Westminster**, Lord Diplock said that the issue on which the party is to be estopped must have been determined by a court of competent jurisdiction either upon evidence or upon admission by a party to the litigation.

[68] Having taken into account the various views expressed on the subject in the authorities under consideration, I conclude that there has not been issue estoppel, as the term is used in the classic sense, that can act as a bar to the present claim. The issue as to the validity of the mortgage was never distinctly put in issue or had directly come into issue on the earlier claim. I dare say that even if the question was implicitly raised as a fundamental one, it was not directly raised as a precise point and it was never "solemnly and with certainty" determined by Sykes, J. against the claimant or its privies and ultimately embodied in the learned judge's final decision.

[69] As the law says, the point must not come collaterally or accidentally in issue but that it must be directly put in issue. So I find that even if the validity of the mortgage is a fundamental pre-requisite for an order for recovery of possession, there was no evidence of that fundamental fact or any admission by

the claimant that formed part of the decision arrived at so as to ground issue estoppel in the strict sense of the word. (When I use “strict sense” or “classic sense” with reference to issue estoppel, it is used in contra-distinction to the **Henderson v Henderson** principle which is said to have extended the estoppel.)

[70] I find it imperative for me to say at this juncture, that I am fortified in my view that issue estoppel is inapplicable by the reasoning of the Privy Council in **Administrator General v Stephens**, a case strongly relied on by the defendants. A brief insight into the facts of the case, relevant to this particular issue, may prove helpful.

[71] In that case, the appellant was the administrator of the estate of a deceased who had entered into a contract for sale of a parcel of land in 1978. The appellant was sued in an action brought in 1984 in respect of specific performance of that agreement. Leave to enter judgment in default was granted to the plaintiff in the action but no judgment was entered. In 1988, the appellant, after various other applications in the matter, sought leave to file his defence out of time which was dismissed. The appellant appealed that decision but later discontinued the appeal and sought directions as to the specific performance of the agreement.

[72] In a second action relating to the same land, the appellant was joined as defendant. In his defence in the second action, he sought to raise a point not raised in his defence to the earlier action. That second defence was struck out. He appealed that order and then withdrew the appeal. Following that, specific performance of the agreement, among other things, was ordered by the court.

[73] The appellant appealed to the Court of Appeal against that order, raising a point not raised on his earlier defences that had been struck out and not pursued on his earlier appeals of those orders. The point he sought to raise was that the 1978 agreement, in respect of which specific performance was granted, was void. His appeal was dismissed by the Court of Appeal on the basis that this

issue was determined against him upon the application of the principle of res judicata.

[74] On appeal to the Privy Council, their Lordships accepted that counsel for the appellant was correct in saying that res judicata based on cause of action estoppel and issue estoppel did not arise. Their Lordships said (in so far as it relates to issue estoppel for immediate purposes):

> "In a most able argument counsel on behalf of the appellant has criticized the reasoning of the Court of Appeal submitting they have confused res judicata based upon cause of action estoppel with res judicata based on issue estoppel. *Counsel rightly points out that no question of issue estoppel can arise in this case because the question whether the 1978 agreement was void is an issue that has never been investigated or determined by the court..."* (Emphasis mine.)

[75] Their Lordships then stated further:

> "The ground upon which their Lordships uphold the decision of the Court of Appeal is neither that which is technically known as cause of action estoppel or issue estoppel but it is founded upon the same principle that there must be an end to litigation."

[76] I have raised all this to say that the validity of the agreement in **Administrator-General v Stephens** and of the mortgage in this case could, of course, be said to be at the base of, or fundamental to, the decision (or an issue) in the earlier proceedings in which there was a grant of specific performance (in one case) and recovery of possession (in the other). Yet despite that, the Privy Council did not find that issue estoppel arose on the basis that the fundamental fact as to the validity of the agreement was determined. The Privy Council, instead, agreed with the argument of counsel for the appellant that the 'validity/ enforceability' issue of the 1978 agreement had never been investigated or determined by a court thereby precluding the operation of issue estoppel.

[77] I would adopt that argument which was endorsed by the Privy Council and apply it to the circumstances of this case and say that no question of issue estoppel could arise because the question whether the mortgage was void was not an issue that had been investigated or determined by Sykes, J. The same may be said, by way of extension, that the issues as to breach of trust, conspiracy to injure and wrongful collection of money, now raised on the claim, have never been investigated and determined in the earlier proceedings.

[78] In the circumstances of this case, I would hold in the light of the law, as I understand it to be, that like cause of action estoppel, issue estoppel does not arise as a basis to hold that the claim is res judicata.

Henderson v Henderson estoppel

[79] The next phase in my enquiry is to investigate whether estoppel on a broader ground arises on the basis of the principle enunciated in **Henderson v Henderson.**

[80] In **Henderson v Henderson** (1843) 3 Hare 100, 114-115, Sir James Wigram V-C stated:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where 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."

[81] The principle, succinctly stated, is that a party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one**: Halsbury's Laws of England,** 4th edition, Vol. 16, paragraph 1533. This principle has now been treated as settled law both within and outside of our jurisdiction. See **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581, 591, in which the Privy Council stated:

> "But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V-C in **Henderson v Henderson…**"

[82] It is against the background of this principle that the defendants have advanced the argument that if the claimant had wished to challenge the validity of the mortgage, then, it should have done so in the earlier proceedings and that by failing to do so, it should now be estopped on the authority of **Henderson v Henderson** from raising the issue on the claim. Learned Queen's Counsel also contended that the amendments done to the claim raise issues that ought to have been placed before the court in the previous claim brought by the first defendant and so the claimant cannot now seek to litigate these matters which were relevant to the previous proceedings and could have been litigated then.

[83] He submitted further that the claimant would be estopped under issue estoppel and the **Henderson v Henderson** principle even though there is a new party in these proceedings. This, he said, is because the issue had been resolved against the claimant, or the claimant ought to have raised it, in the earlier proceedings, and as such the estoppel would operate. He said it is the same subject matter that is being reopened and so for that purpose it is the same party that is doing so.

[84] Reliance was placed on several cases which, for expediency, I will not now set out but I will say that all have been duly considered in coming to my decision. However, for now, I will seek to highlight some aspects of the Privy Council's decision in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.** In that case, as the head notes correctly convey, the appellant bought property from the respondent bank and borrowed money from it on security of a mortgage of the property. The appellant defaulted on the payments due under the mortgage and the bank exercised its power of sale and sold the property to the second respondent. The appellant brought an action against the bank (the first action) claiming that the sale of the property to it was a sham, that the property was conveyed to it as trustee for the bank and that the mortgage was, accordingly, a nullity.

[85] The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The court dismissed the appellant's claim and upheld the bank's counterclaim.

[86] One month after that judgment, the appellant brought an action against the bank and the second respondent (a new party) claiming that the sale by the bank to the second respondent was void or voidable as fraudulent. The bank and the second respondent applied for an order that the statement of claim be struck out as being, inter alia, an abuse of the process of the court. The learned trial judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in the first action. He struck out the statement of claim. This was affirmed by the Full Court.

[87] On appeal to the Privy Council, their Lordships, in dismissing the appeal, held that there was no reason why a defence impugning the *bona fides* of the sale by the bank to the second respondent could not have been pleaded in response to the counterclaim in the first action that was brought and that, accordingly, the doctrine of res judicata in its wider sense applied.

[88] The Board upheld the principle that it would have been an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings.

[89] Similarly, in **Hoystead v Commissioner of Taxation,** Lord Shaw in recognizing the **Henderson v Henderson** principle, stated:

> "It is seen from this citation of authority 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. The rule on this case was set forth in the leading case of *Henderson v. Henderson* by Wigram V-C…"

[90] The **Henderson v Henderson** principle was thus applied with full vigour by the Privy Council in those two authorities. Those authorities have provided Mr. Hylton with even greater confidence to argue that the principle applies in the instant case to establish res judicata.

[91] Ms. Davis, in her response on behalf of the claimant, rejected the argument that **Henderson v Henderson** should be applied and pointed out that the test has been amplified by the House of Lords in **Johnson v Gore Wood.** She submitted that in cases of re-litigation, the crucial question is to determine whether a party is seeking to raise before the court an issue which could and should have been raised before. The court, on the principle of **Johnson v Gore Wood,** should take a broad approach and determine whether in all the circumstances the party's conduct is an abuse. She noted that the principles set out in **Johnson v Gore Wood** had been affirmed and applied by our Court of Appeal in **S &T Distributors Ltd et al v CIBC Jamaica Limited** SCCA 112/2004 delivered 31 July 2007.

[92] According to learned counsel, the question of whether the claimant should or could have raised a defence and/or counterclaim must be considered in the context of whether the

new action should be considered an abuse of process. She went on to point out, among other things, that the first proceedings were in effect default proceedings and so the instant proceedings would be the first opportunity for the claimant to put its case before the court. For that reason, it should not be driven from the seat of justice.

[93] She agued that the claimant has given a good explanation as to the reason the defence in that claim did not proceed. The claimant was unaware of the proceedings until it was too late. She reminded that estoppels based on a default judgment must be very carefully limited and that a defendant is only estopped from setting up in a subsequent action a defence which was "necessarily and with complete precision, decided by the previous judgment". She cited in support of this aspect of her argument, **Halsbury's Laws of England,** 4th edn. Vol. 16 paragraph 1533; **New Brunswick Rly Co. v British & French Trust Corp** [939] AC 1; **Kok Hoong v Leong Cheong Kweng Mines Ltd** [1964] AC 993 and **Mullen v Conoco Ltd** [1997] 3 WLR 1032.

[94] The court, she said, should take a broad approach and determine whether, in all the circumstances, the claimant's conduct is an abuse. She argued that the court, in adopting the "broad merit–based approach" as proposed by Lord Bingham in **Johnson v Gore Wood**, should not consider the claim an abuse of process because the issues in this case were not decided by the previous judgment. She also pointed out that where the first and second claims are different, the court should be slow to strike out the second claim. Furthermore, the second claim should not be struck out where it is not just a "tactical manoeuvre". See **Specialist Group International Ltd v Deakin** [2001] EWCA Civ 777. So, for all the reasons contended on behalf of the claimant, res judicata does not apply and the application should also fail on this ground.

[95] In looking at the applicability of **Henderson v Henderson** to the claim, I have noted as a starting point that in the earlier claim, the issue as to the validity of the mortgage is one that, conveniently, and in the ordinary course of things, could have been properly raised as a defence to the recovery of possession

claim or by way of a counterclaim. The same may be said of the other issues raised in the claim since at the foundation of them all is the mortgage.

[96] I accept too that based on **Henderson v Henderson**, it would not matter for the operation of the principle that there is a new party in the later proceedings in which the point is being raised. I would apply the broad approach to this principle as I have accepted it in relation to issue estoppel. So, in the context of this case, the fact that the second defendant is added as a new party would not, in itself, preclude the operation of the principle to ground res judicata.

[97] The kernel of the claimant's contention is that the mortgage is void for illegality and is thus unenforceable. The basis for this argument is derived from a statute that was in force at the material time. This fact, with reasonable diligence, could have been ascertained and raised at the time the first defendant had brought the claim. I do accept that the claimant's assertion that it was later advised by an attorney-at-law about the breach of the Companies Act is not enough, by itself, to excuse it for not coming forward at the time of the earlier action and putting forward its claim.

[98] If fresh advice is allowed to reopen a matter that had been judicially determined, then litigation would not end. This could surely lead to abuse of process and that cannot, at all, be sanctioned by the court. That is what the doctrine of res judicata is geared at preventing. So whether the claimant knew of section 54 or not at the time of the first claim would not be sufficient to assist it in advancing the argument that the claim is not res judicata.

[99] Having examined the authorities on the point, I must admit that the principles extracted from them on the applicability of the **Henderson v Henderson** principle do make good sense and ought not to be readily departed from in appropriate cases. What I have found as an important matter, enough to detain my attention at this juncture, however, is the extent to which the principle may be applicable in the circumstances of this case, in which the judgment obtained in the earlier proceeding was, for all intents and purposes, in the nature

of a default judgment (albeit not in the technical sense the term is used under Part 12 of the CPR).

[100] I have raised this issue as to the applicability of the principle to default judgments in the light of the submissions of Ms. Davis and the plethora of authorities dealing with the question. As can be seen from the authorities, the issue has been the subject of much judicial discourse. In the Privy Council decision in **New Brunswick Rly Co. v British and French Trust Corpn. Ltd**. [1939] AC 1, for example, the arguments advanced before the court, in support of the estoppel, was that it was open to the appellants to defend the action in an earlier action in which default judgment was entered and that in omitting to do so, they should be estopped from raising argument in the second action that they could have raised in the first action.

[101] In speaking of the **Henderson v Henderson** principle, within the context of a default judgment, Lord Chancellor Maugham made this authoritative statement (pages 20-21):

> "My Lords, I desire to make it plain that I am not desirous of questioning the general rule on the subject of res judicata laid down by Wigram V-C in *Henderson v. Henderson*…It is, however, to be noted that the learned Vice- Chancellor was stating the rule in general terms and he qualified the rule by the exception of special circumstances or special cases… I think there is much to urge in favour of the observation made by Willes J. in the case of *Howlett v. Tarte,* though it may have been a little too widely expressed... In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment."

[102] In **Howlett v Tarte** 10 C.B. (N.S.) 813 Willes, J. is reported to have said:

> "It is quite right that a defendant should be estopped from setting up in the same action a defence which he

> might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

[103] Lord Wright, in his part of the discussion, made the observation that in **Hoystead v Commissioner of Taxation**, the parties were the same in both proceedings and that the party to be estopped had appeared and had contested the issue. He then made the relevant point that the decision did not refer to default judgment and said (page 37):

> "No authority had been produced in which a party has been held to be estopped from raising in litigation an issue which he might have raised in previous litigation in which he allowed judgment to go by default and omitted to raise the issue. The nearest analogy is *Howlett v Tarte*... that decision has been explained as depending on the old system of pleadings. But I think it depends on wider principles. I think it implies that default judgment is not to be treated as an admission.

[104] His Lordship then continued, after restating the dicta of Willes, J. (pages 37-38):

> ''It is enough for present purposes to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I should accept these observations of Willes J one of the greatest common law judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept. But in the present case it is not necessary to go so far, because there is an even stronger reason against admitting the estoppel."

[105] Lord Russell of Killowen, in referring to the words of Lord Shaw in **Hoystead v Commissioner of Taxation** that the principle of estoppel extends to any point *"whether of assumption or admission which was in substance the ratio of and fundamental to the decision"*, opined that those are wide words that relate to a case of estoppel by a judgment in *contested* proceedings. (Emphasis added.)

[106] Later, In **Kok Hoong v Leong Cheong Kweng Mines Ltd** [1964] AC 993, the Privy Council again considered the application of the doctrine of res judicata to default judgments. The Board considered and reviewed the earlier authorities on the subject, in particular, for our present purposes, **Hoystead v Commissioner of Taxation** and **New Brunswick Rly**. in which the principle in **Howlett v Tarte** was re-interpreted.

[107] In **Kok Hoong**, the appellant brought an action against the defendant for arrears of rent with respect to machinery that was hired to the respondent pursuant to an agreement entered into between the parties. The appellant sued for arrears of rent and interest pursuant to the agreement. Particulars showing the manner in which these sums were computed were annexed to the plaint. Judgment was entered by default against the respondent on the ground that he had not obtained leave to appear or defend.

[108] The appellant then filed subsequent suit against the respondent (the same parties as before) but with some amendments. He claimed, inter alia, unpaid rent pursuant to the agreement and return of the machinery and equipment that were hired. The respondent in an amended defence raised the invalidity of the agreement stating that it was unenforceable based on certain statutory provisions. The appellant raised the plea that the respondent was estopped from raising the invalidity and unenforceability of the agreement as a defence by virtue of the earlier judgment entered in default.

[109] The question for the Privy Council was whether the respondent should have been estopped by virtue of the earlier judgment from raising in the second

proceedings the validity of the agreement on which the first judgment was based. The Board found that the respondent was not estopped.

[110] Viscount Radcliffe, in delivering the opinion on behalf of their Lordships, affirmed the same principle of Lord Chancellor Maugham in **New Brunswick Rly.** that default judgments "must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they could estop only for what must necessarily and with complete precision have been thereby determined."

[111] But even more relevant to our consideration of **Henderson v Henderson** within the context of a default judgment, their Lordships stated (page 1010):

> "Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatum. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For while from one point of view a default judgment can be looked upon as only another form of judgment by consent *(see In re South American & Mexican Co)* and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."

[112] Their Lordships then opined (page 1011):

> "Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to

> apply the full rigour of any principle as widely formulated as that of *Henderson v Henderson***.** It may well be doubted whether the Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of "special cases." In any event it is clear from what has been said in other authorities more immediately directed to the point that a much restricted operation must be given to any estoppel arising from a default judgment."

[113] There is, indeed, strong and highly persuasive judicial authority, from which I take guidance, that estoppel based on a default judgment warrants special consideration. According to the cases, it must be very carefully limited and that a party should only be estopped from setting up in a subsequent action what must "necessarily, and with complete precision" have been decided by the previous judgment. See also **Halsbury's Law of England**, 4th edition, Vol. 16, paragraph 1533.

[114] The authorities have pointed out in clear and unequivocal terms that the cases in which the **Henderson v Henderson** principle is applied are not cases dealing with default judgment. They hold that even in the wake of **Henderson v Henderson**, which has extended the principles of res judicata, there must be caution in extending the principle to cases in which there had been judgment in default. Of course, I am mindful that the cases do differ on their facts but I find the principles extracted from them to be useful in determining the applicability of res judicata to default judgments as would be a relevant consideration in this case.

[115] Having set the legal framework within which my analysis of the subject matter should be engaged in resolving the question whether there is estoppel on the **Henderson v Henderson** principle, I have examined the facts of this case. I have chosen to use as my starting point in determining whether the claimant should be estopped from proceeding with its claim, its conduct in the earlier proceedings. The record shows it took no part in those proceedings.

[116] The explanation from Mr. Robert Joseph, a director of the claimant, is that the claimant was unaware of the claim against it as it was never served with copies of the claim form and supporting documents. According to him, it was not until the bailiff had come to enforce the judgment that it was first made aware of the claim.

[117] He said that the claimant consulted a lawyer (whose name he gave but I will leave out for present purposes) but that the lawyer advised that since the judgment was already obtained, there was nothing that could be done. It was not until 2010, when efforts were being made by the defendants to exercise the power of sale under the mortgage, that the claimant was advised by counsel, now acting on its behalf, that the validity of the mortgage could be challenged as being in breach of the Companies Act, hence the claim now being pursued.

[118] The claimant is, therefore, asserting that its excuse for failing to present the case now being put forward in the earlier proceedings is that it was unaware of those proceedings at the time due to non-service of the claim. Further, that due to what could be termed bad legal advice, it took no steps to rectify the matter by appealing or taking steps to have the judgment set aside.

[119] The defendants have not responded to this factual assertion of the claimant that it was never served. I suspect it might have been an oversight. So, there is nothing put in evidence to show me that, indeed, the claimant was properly served according to law in those proceedings. The only thing that could point to service would be the fact that judgment was entered and it is expected that the learned judge would have been satisfied as to proper service before proceeding to grant judgment on the claim.

[120] In the face of the assertion of the claimant and the absence of direct evidence to the contrary from the defendants, I am only left to assume that given that judgment was entered against the claimant that it must have been properly served. I do feel an appreciable degree of discomfort to conclude on the fact of judgment alone that the claimant was served in the absence of proof. Experience

has shown that judgments that seem on the face of them to have been properly granted, are often times set aside for non-service of notice of proceedings. It is customary that when this arises as an issue, evidence is led to resolve the issue one way or the other. There was no attempt to do so in this case.

[121] I believe that in light of the factual contention of the claimant in its affidavit that it was never served, the appropriate course would have been for the defendants to put forward evidence of their own challenging and seeking to rebut that assertion made by the claimant. Also, there is nothing from the records of the previous proceedings put in evidence before me on the hearing of this application evidencing service of the claim in those proceedings. Furthermore, the order of Sykes, J. is silent on the issue of service or even appearance or non-appearance of the claimant.

[122] I must hasten to say, of course, that it is very difficult to conceive Sykes, J. (given his meticulousness) not first satisfying himself as to service of the claim before granting judgment. When, however, abuse of process is alleged as a ground for striking out a party's case, nothing can be left to chance or mere assumption of facts. Stopping a party's case, without a trial, on the grounds of abuse of process is a draconian measure and so all bases must be covered by the party seeking to do so.

[123] It is my humble view that if a party seeks to rely on an earlier proceeding to ground res judicata or abuse of process, then all material relevant to that proceeding should be placed before the court because in the end, the question is what justice demands. One can only be satisfied that a party should be estopped in subsequent proceedings for things he failed to do in earlier proceedings upon proper proof that he had knowledge of the earlier proceedings.

[124] I find that the issue of service is important because if the claimant was not served, as it is contending, then it means it would not have known of the proceedings and so would not have been in a position to put forward a defence or counterclaim based on the issue of the validity of the mortgage, or anything

else, in response to the first defendant's claim. The operation of the doctrine of res judicata based on **Henderson v Henderson** would be ousted because a party who was not served could not have put forward an answer to a claim that he knew nothing about.

[125] To take the analysis even further, lack of knowledge of proceedings in which a decision has been made against one's interest, at minimum, raises questions as to a breach of natural justice. Also, any judgment entered in the absence of service of notice of the claim to which that judgment relates is, of course, amenable to be set aside as of right as a nullity. The basis to sustain a plea of res judicata*,* in such circumstances, would be non-existent. I do suppose that it is for reasons such as these that caution is required before a litigant is shut out on the basis of res judicata that is based on a default judgment.

[126] So, if it is indeed true and provable that the claimant had no knowledge of the proceedings, then it would mean that the issues now being raised could not have been raised then. In such situation, special circumstances, I believe, would exist to take the claim outside **Henderson v Henderson***.*

[127] This unresolved allegation of non-service of the claim, which is unanswered in these proceedings, would weigh heavily in the favour of the claimant because the onus of proving that the claim is res judicata or an abuse of process lies on the defendants. Therefore, knowledge of the earlier proceedings on the part of the claimant would be a fundamental pre-requisite to ground estoppel, res judicata or abuse of process. This is a case in which the exercise of great caution is required and so I have to scrutinize the default judgment and the circumstances attendant upon it with "extreme particularity."

[128] Out of an abundance of caution, however, and in the event it might be said that implicit in the judgment and the failure of the claimant to set it aside is the reasonable inference of proper service, I have also conducted my analysis on the contrary hypothesis. That is to say, that the claimant was duly served in

accordance with law and the learned judge was so satisfied before entering judgment.

[129] If the claimant was duly served with the claim form and had failed to enter its appearance into the matter and put forward its case, then the question now is whether it should now be estopped from so doing on the **Henderson v Henderson** principle.

[130] In considering this issue, I have looked thoroughly at all the authorities cited by both sides and the arguments for and in support of the principles distilled from them on this limb. I must say that I am deeply indebted to both sides for their display of scholarship and industry in these proceedings. My task has been made so much easier by their assistance for which I am grateful.

[131] Having considered all the submissions made and the authorities cited, I must state that I do accept that **Henderson v Henderson** stands as good law that ought not to be emasculated. It does have a valuable part to play in securing the interest of justice as Lord Bingham conceded in **Johnson v Gore Wood**.

[132] In pondering the issue, I have used as my starting point the fact that the claimant never took any active part in the earlier proceedings and the reasons advanced for that which amount to ignorance of the claim and bad legal advice as to how to proceed after judgment was obtained. These reasons have not been displaced by any evidence to the contrary but I have already indicated my views on those reasons. I am considering the application on the premise that the claimant was properly served and knew of the proceedings as the grant of the order by Sykes, J. would suggest.

[133] On this aspect of my enquiry, I am reminded by the authorities, by which I chose to be guided, that default judgments do not constitute admissions and that although capable of giving rise to estoppels, they must always “be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided.” The claimant can only be estopped

for what must “necessarily and with complete precision have been thereby determined.”

[134] Proceeding on the assumption of fact that the claimant was duly served, I have seen from the records that that the claimant did not admit or contest the matter by traversing the claim. The fact of the default judgment does not amount to the claimant’s admission of the claim against it.

[135] It is in the light of this that I have followed the lead afforded by their Lordships in **Kok Hoong v Leong Cheong Kweng Mines** and ask the two questions as they did: (1) what did the default judgment decide in the earlier action and (2) what can the judgment stand for taking account of the claim and the decree obtained upon it?

[136] I find that as a decree, the default judgment adjudges no more than in terms that the claimant was to give up possession of the property, the subject matter of the claim, to the first defendant with costs and GCT. That would not cover the instant claim or any aspect of it especially that the mortgage is void for breach of the Companies Act.

[137] On the second question as to what does the judgment stand for on account of the claim form and the decree obtained upon it, I conclude that it decreed that given the default of the claimant in making the mortgage repayments, the first defendant was entitled to recover possession of the property by virtue of the mortgage that was registered against the property in its name as well as costs and GCT.

[138] What the claimant is now saying is that the mortgage that had given the first defendant the right to recover possession is void as a matter of law on the basis that the claimant had given financial assistance for the purchase of its shares in respect of which the mortgage was obtained. This is not an issue that was raised on the fixed date claim form and on the evidence of the first defendant that was before Sykes, J. when recovery of possession was sought.

[139] Based on these conclusions, I find that the judgment did not distinctly, solemnly and with complete precision determine the issue whether the mortgage was valid or not. Neither was the claim as to wrongful collection of funds pursuant to the mortgage, breach of trust or conspiracy to injury directly and distinctly raised and decided with complete precision by the judgment of Sykes J.

[140] In sum, there is nothing at all on the earlier decision that can be said to have "necessarily and with complete precision" decided the issues in question in this claim against the claimant for the purpose of the operation of res judicata.

[141] I form the view, thus far, that in the light of the authorities dealing with the principle of res judicata in the context of default judgments that it would seem that **Henderson v Henderson**, for the reasons given, would be of no valuable assistance to the defendants in establishing or sustaining a plea of res judicata on the basis that the matters now being raised by the claimant on its claim could and should have been raised in the earlier proceedings.

Whether claim is an abuse of process

[142] I have, however, gone further to examine the application on the broader basis of abuse of process, albeit that the application stated only res judicata as a ground. I have done this because the end result must be aimed at doing justice between the parties. The doctrines of estoppel, res judicata and abuse of process, even if different, are all geared towards achieving the same goal, that is ensuring that there is an end to litigation.

[143] In **Johnson v Gore Wood**, Lord Bingham made the point, in speaking of the **Henderson v Henderson** principle and exalting its virtues, that:

> *"…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… While the result may often be the same, 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."* (Emphasis added).

[144] Our Court of Appeal has affirmed the dicta of Lord Bingham in **S & T Distributors Ltd et al v CIBC Jamaica Limited** and concluded that the re-litigation in that case was not an abuse of process so as to give rise to res judicata. Harris, J.A., speaking on behalf of the court, made several instructive points. Her ladyship noted, inter alia, that a later proceeding must be viewed by the court as abusive where a party seeks to pursue a claim already brought in a previous suit which clearly seeks to unjustly expose the defendant to litigation.

[145] There are also situations, her ladyship said, in which a matter that ought to have been raised in an earlier suit was not raised or a claim made in an earlier suit is advanced in later proceedings which the court may not regard as an unfair persecution of a defendant. She instructed that in such cases, "the court ought to adopt a broad based approach by engaging itself in a balancing exercise and conducting an enquiry into all the circumstances with due weight given to each circumstance and with a judgment being formed at the end of the exercise as to what justice requires overall."

[146] Mr. Hylton Q.C. had cited on behalf of the defendants the decision of the Privy Council in **Administrator - General v Stephens** as a case in which their

Lordships held that there was abuse of process even though there was no hearing on the merits. The facts have already been discussed in relation to issue estoppel (see paragraphs 72-75 above).

[147] In that case, as one would recall, the appellant's defence was disallowed twice on interlocutory proceedings and the appellant had not pursued the appeal he had filed twice against those rulings. On his third attempt to revive his defence at the Court of Appeal, following the grant of judgment against him, he sought to raise a point for the first time in defence of the action. The Court of Appeal did not allow it on the principle of res judicata.

[148] The following pertinent points were made by their Lordships at the Privy Council in that case that have guided these deliberations as to whether there is abuse of process. The appellant had ample opportunity to raise his defence and to challenge decisions at first instance which had gone against him and had chosen not to take advantage of those opportunities. Therefore, it was far too late to raise the defence yet again. In the absence of radically altered circumstances since the decisions on interlocutory proceedings, it would be most oppressive to the other parties to the litigation to allow the appellant to blow hot and cold and to revive the defence. There comes a time when it is oppressive to allow a party to litigation to reopen a matter that had been judicially determined against him in interlocutory proceedings. There must be an end to litigation. The time had come in those proceedings that had occupied the time of the courts in Jamaica for over a decade. It must now be brought to an end.

[149] I have thoroughly examined the circumstances that obtained in **Administrator - General v Stephens**, in which the Privy Council found abuse of process, and I do say that those circumstances were patently different from what obtain in the instant case. I cannot find any basis that would justify a finding that there has been an "unfair hounding" of the defendants, or any of them, by the claimant in relation to the issue in dispute.

[150] In looking at the facts, I do find that the defendants did not have to face any ongoing proceedings initiated by the claimant against them while the claimant was stopping and starting, and "blowing hot and cold" as in **Administrator- General v Stephens**. At the time of the issuance of the claim, that would have been the first time that the claimant would be confronting the defendant on any issue. So, there had been no repeat opportunities in which the issue could or should have been raised, even if the claimant was served, for me to say the time has now come for the litigation to end. I say this after taking into account the fact that the claimant could have applied to set aside the judgment on grounds of non-service (as it has alleged) or appealed the decision.

[151] Of course, I am not satisfied with the fact that proceedings are continuing almost six years after judgment was entered. The fact, though, is that at the time the claim was brought in 2009, the defendants had taken further steps in enforcing the first defendant's rights as mortgagees which the claimant started out to restrain. The enforceability of the mortgage involves the question of its validity. The question is still a live one. So the cause of action does not relate to matters long gone and buried and which are now being resurrected for no good or apparent reason. The critical question is whether bringing the claim, in all the circumstances, amounts to an abuse of process.

[152] In taking a broad merit based approach in my assessment of this case, I have borne in mind that the whole purpose of the court is to do justice and that shutting out a litigant, in the absence of clear and compelling reasons to do so, is inconsistent with such a responsibility. Legal history is replete with judicial warnings of the need for caution in striking out a party's case on the basis of estoppel or abuse of process. Drake, J. said in **North West Water v Binnie** (pages 552-553):

> "…I think it is clear that the power to strike out and, also, the finding of an issue estoppel are matters on which the court should proceed with very great caution before debarring a party, whether plaintiff or

> defendant, from putting forward his case in another action.
>
> In my judgment it is obvious that great caution is required because it is a drastic step for whatever reason to deprive a litigant of the opportunity to put forward either his claim or defence. But if authority is required of the need to exercise great caution, it is readily available…"
>
> (Several cases were then cited by his Lordship.)

[153] Within this context, I will side with the authorities that say caution is required when dealing with judgments entered in default of defence or appearance and that in such matters, the application of res judicata should be limited in its scope.

[154] I conclude, therefore, that the bringing of the claim now being challenged, does not amount to oppression even if the claimant may be accused of tardiness. I do not find misuse or abuse of the processes of the court. I find that circumstances do exist that would take the case out of the band of cases contemplated by Wigram V-C in **Henderson v Henderson** and by their Lordships in **Administrator-General v Stephens**.

[155] My ultimate finding is that the defendants have failed to convince me that res judicata should be invoked to estop the claimant from proceeding on its claim either on cause of action estoppel, issue estoppel or on the principle in **Henderson v Henderson.** Neither am I convinced that there is abuse of process of the court to be raised as a bar.

Whether summary judgment should be granted

[156] In finding that res judicata does not apply, then it means that the basis for the application for summary judgment has failed. The conclusion would be that the defendants have failed to satisfy the test laid down for the grant of such judgment. My finding as to the failure of the defendants to successfully establish res judicata is enough to dispose of this application for summary judgment since

that was the sole basis on which it was argued that the claim had no real prospect of success.

[157] There is one other point, however, that I would wish to address within this context. Ms. Davis had raised the point that the summary judgment ought not to be granted as it be cannot be said that the claimant's case "is fanciful" and has no prospect of success. She based this argument, in part, on the judgment of the Court of Appeal given in this matter in respect of an interim injunction in [2010] JMCA App. 22 in which the claimant appealed against the order of Brooks, J (as he then was).

[158] Harris, J.A., speaking on behalf of the court, opined at paragraph 25:

> "It is arguable that the contract between the applicant and the respondent may be grounded on an illegality by reason of the applicant's contravention of section 54, in such circumstance, this may render the mortgage deed null and void. It follows, therefore, that this is an issue which ought to be resolved by a trial."

[159] From this statement of the Court of Appeal, Ms. Davis finds support for the contention of the claimant that there is a triable issue recognized by the Court of Appeal that warrants investigation at a trial and so it cannot be said the claim has no real prospect of success.

[160] I must say that the fact that the Court of Appeal had found an arguable case or a serious issue to be tried is different from the considerations applicable to the grant of summary judgment. The court was then concerned with the grant of an interim injunction which would not have necessitated any assessment of the ultimate prospect of success of the claimant's claim or any consideration of res judicata.

[161] What was required for the grant of the interim injunction was for the claimant to show that it had an arguable case or that there was a serious issue to be tried. The court's attention would be directed at a different test which is one not applicable to summary judgment applications. This was clearly and

authoritatively explained by P. Harrison J.A. (as he then was) in **Gordon Stewart v Merrick Samuels.** In speaking of the test applicable to summary judgments, his Lordship stated:

> "The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or "a serious question to be tried" test, in the case of a grant of an injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result."

[162] I will declare, therefore, that in coming to my decision, I have not been influenced in any way by the conclusion of the Court of Appeal that the validity of the mortgage needs investigating at trial because this could not have precluded the operation of res judicata if it were successfully made out. So the views expressed by the Court of Appeal in treating with the interim injunction have been treated as being irrelevant on the question as to whether summary judgment should be granted on the basis of res judicata. I have adopted that approach because the test applicable to the grant of summary judgment is different from the test for the grant of an interim injunction with which the Court of Appeal was concerned.

Whether claimant entitled to an accounting under the mortgage

[163] There is now one outstanding matter that remains on the application that I will now address. The defendants in their application had proposed that as an issue the court should deal with the question whether the claimant is entitled to an account under the mortgage dated 10 November 2005. This was not framed as part of the application for summary judgment but instead was put forward as one of the issues which the defendants proposed that the court should deal with at the hearing. The rationale for raising this issue in that manner on the application is lost on me since the substantive application stated that the only

basis for summary judgment being applied for is res judicata. That is what I have determined and based on my findings, I will not accept the invitation extended to consider whether an accounting, as claimed, is appropriate.

[164] In the light of my decision on the substantive application, I have refrained from considering such issue as proposed. I think it is one that would be better and more conveniently dealt with by the trial judge within the context of the entire claim. It is claimed as an alternative relief and I believe the trial judge should be left to determine what the entitlements of the parties are, particularly, in light of the fact that the claimant has asked for "such further and/or other relief as the court deems fit." This issue as to whether an accounting is an appropriate remedy for the claimant is, therefore, to be argued in the context of the trial of the claim.

Conclusion

[165] I find that the defendants on whom the burden of proof rests to establish the doctrine of res judicata have failed to do so as a matter of law. I find that neither cause of action estoppel, issue estoppel nor estoppel based on the principle in **Henderson v Henderson** has been made out. On the ultimate and broader issue as to whether the claimant's claim amounts to an abuse of process, I find that not to be so. I form the view that the time has not yet come for me to say that there must be an end to litigation in this matter. The issues between the parties are still alive and have not yet been settled conclusively by the final decision of a court of competent jurisdiction. The application for summary judgment on the ground of res judicata is, therefore, denied.

Order

(1) The order sought on the defendants' Notice of Application for Summary Judgment filed on September 6, 2010 (and as amended by consent on February 27, 2012) IS DENIED.

(2) Costs of the Application to the claimant to be agreed or taxed.