IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E299 OF 1998

BETWEEN	**ILENE KELLY** **ERROL MELFORD, EXEECUTORS** **ESTATE EVELYN FRANCIS DECEASED**	**First Plaintiff**
AND	**PERCIVAL GAGER** **POLLY GAGER**	**Second Plaintiff**
AND	**FENTON DOWNER**	**Defendant**

Norman Samuels for the Plaintiffs

Dr. Adolph Edwards for the Defendant

Heard on the 29th day of June and the 16th day of September 1999.

IN CHAMBERS

CORAM: COURTENAY ORR J

Introduction

This is an Originating Summons in which the plaintiffs pray for the following remedies:

> "The determination of the following questions and the necessary orders arising therefrom;
>
> 1. Who is entitled to the premises known as 6 Willow Way Willowdene in the parish of Saint Catherine and registered at Volume 1059 Folio 245of the Register Book of Titles.
>
> 2. Whether the Plaintiffs or either of them should not have been a party or parties to the Originating Summons No. E357 of 1997 by which the defendant obtained an order against the Registrar of Tiles cancelling transfer No.474057 which made the deceased Evelyn Francis the sole Registered Proprietor up to the time of her death on the 23rd day of July, 1995 and thereby entitling her estate to the Registered Proprietorship of the said property.
>
> 3. What is the true position of the second plaintiffs who as third parties purchased the said property registered at Volume 1059 Folio 245 in good faith.
>
> 4. Whether the plaintiffs, the Executors of the estate of EVELYN FRANCIS deceased ought allowed (sic) to be allowed to proceed with having transfer NO. 867239 duly registered on the said Certificate of Title registered at Volume 1059 Folio 245 by virtue of the transfer to the second plaintiffs only Registered Proprietor (sic) on the said Certificate of Title volume

No. 1059 Folio 245 EVELYN FRANCIS now deceased and whose estate comprising the said land registered at volume 1059 Folio 245 the first Plaintiffs are the Executors."

When the summons came before me for hearing on the 29th June, Dr. Edwards took a preliminary objection. Counsel for the plaintiffs did not protest, as he was entitled to do having regard to the content of the "preliminary objection" but rather argued that the doctrine of **res judicata** did not apply.

Faced with the brevity of the submissions and especially the total lack of citation of authorities the court should have said:

"Oh no gentlemen! This is not good enough.
Go back and do some research, and then return
and make proper submissions."

Instead, the court merely reserved its ruling, and being involved in writing other judgments, it was not until the vacation that the court could turn its full attention to this matter, at which time it was felt that it would be better to proceed to judgment unaided by thorough arguments from counsel rather than delay the matter further by requesting proper submissions.

Dr. Edwards submitted that the court had "no jurisdiction" to hear the matter as the summons is in effect questioning a decision of the Supreme Court made in Suit E357 of 1997 in which the court ordered that a transfer registered on 25th August 1988 be cancelled and declared null and void.

He submitted that the first question for determination in this summons –

"Who is entitled to the premises known as 6 Willow
Way, Willowdene in the parish of Saint Catherine
and Registered at Volume 1059 Folio 245 of the
Register Book of Titles."

is the exact question, which was determined in suit E357 of 1997, mentioned above. No step had been taken to deal with the order in that particular case.

He further argued that the plaintiffs in the instant matter could not seek to question the earlier decision because the affidavit evidence would show that they were made aware of

the earlier proceedings as the defendant in the instant matter who was the plaintiff in Suit E357 of 1997, had informed Mr. Smart Bryan, attorney-at-law who was then acting on behalf of the plaintiffs, of the earlier proceedings.

Mr. Samuels submitted that **res judicata** could not apply as none of the plaintiffs were a party to the earlier proceedings- Suit E357 of 1997. He also said the affidavit of the plaintiffs revealed that they were the executors of the estate of Evelyn Francis, the late mother of the defendant.

Originally the property in question was registered in the names of mother and son as joint tenants. Later by a transfer recorded on the title the defendant transferred his interest to his mother thereby making her the sole proprietor of the land; and it is during her tenure as sole proprietor that she transferred the land to the second set of plaintiffs.

The documents evidencing this transfer were stamped and lodged at the Titles Office, the purchasers having paid $190,000.00 of a purchase price $1,250,000.00. The defendant Fenton Downer lodged a caveat against the land.

In the mean time the will of Evelyn Francis was probated. But the defendant brought the originating Summons E357 of 1997 and obtained an order cancelling the transfer by his mother, and declaring him to be the sole proprietor of the land.

THE COURT'S ANALYSIS AND CONCLUSION

The use of the phrase "no jurisdiction" by Dr. Edwards is a strange one and betrays a reluctance to categorize his objection. But I propose to consider it in relation to **res judicata** and abuse of process.

The Definition of the Doctrines Considered

Res judicata has been used in two senses. In its stricter sense it is called **res judicata** or "cause of action estoppel," and in its wider sense "issue estoppel."

Millett J stated in, Crown Estates Commissioners v Dorsett CC[1990] Ch 297 at 305,as follows:

> "Res judicata is a special form of estoppel. It gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. As between themselves, the parties are bound by the decision and may neither re-litigate the same cause of action nor re-open any issue which is an essential part of the decision. These two types of **res judicata** are now a days distinguished by calling them 'cause of action estoppel' and issue of 'estoppel' respectively."

1. **Res judicata in the stricter sense**
   Following the example of Moir J.A. in the Alberta,

Court of appeal in R v Duhamel (No. 2) 131 DLR (3d) 352 of 356, I quote and respectfully adopt paragraph 19 of the 3rd edition of Spencer Bower, Turner and Handley: Doctrine of **Res Judicata**. It reads as follows:

> "The constituents of **res judicata** estoppel.
> 19. A party setting up **res judicata** by way of estoppel as a bar to his opponents claim or as a foundation of his own, must establish the constituent elements, namely:
>
> (i) the decision was judicial in the relevant sense;
> (ii) it was in fact pronounced;
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
> (iv) the decision was –
> (a) final, and
> (b) on the merits.
> (v) it determined the same question as that raised in the later litigation, and
> (vi) the parties to the later litigation were either parties to the earlier litigation or their privies or the earlier decision was in rem."

A judgment in rem is the judgment of " a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation)" Lazarus-Barlow V Regent Estates [1949] 2KB 465 at 475 per Evershed LJ, as he then was.

The term, " cause of action estoppel" was first used by Diplock LJ, as he then was in Thoday v Thoday [1964] P 181 at 197-8 where he said:

> "cause of action" estoppel ..... prevents a party from asserting or denying as against the other party, the existence or non-existence of that which has been determined by a court of competent jurisdiction in previous litigation between the same

parties. If the cause of action was determined to exist i.e. judgment was given upon it, it is said to be merged in the judgment. If it is determined not to exist the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam".

2. Issue Estoppel

The situation sometimes arises that the earlier decision relied on did not determine the cause of action sued on in the later proceedings. Nevertheless the decision in the earlier proceeding may be invoked as determining, as an essential step in its reasoning an issue or issues in the later proceedings. Thus, issue estoppel covers fundamental issues, determined in an earlier proceeding, which formed the basis of the judgment in that earlier proceeding.

Diplock LJ gave this definition of issue estoppel in Thoday v Thoday (supra) P 198:

> "....issue esstoppel" 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 their are conditions to be fulfilled by the plaintiff in order to establish his causes of action; and there may be cases where the fulfillment 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 on evidence or on 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."

This means therefore, that where a cause of action has been the subject of a final adjudication, then determination of issues which formed the essential foundation of the adjudication may give rise to issue estoppels if another cause of action is brought – see Blair v Curran [1939] 62 CLR 464, Re Koenigsberg [1949] Ch 348 Wilson v Matheson [1955] NZLR 927 at 930.

3. Abuse of Process

By section 238 of the Judicature (Civil procedure Code) Law, where an action or defence is shown by the pleadings to be frivolous or vexatious, a court or judge may order that the action be stayed or dismissed or judgment be entered accordingly. Moreover the Supreme Court has an inherent jurisdiction to prevent abuse of its process.

The principle of Abuse of process may be applied where a defence of **res judicata** is not available. In Montgomery v Russell [1894] 11 TLR 112, the plaintiff was unsuccessful in an action for libel in respect of comments on a book he wrote. The defendants republished articles from other newspapers commenting on the plaintiff's book. His action for libel on these republications was dismissed, as an abuse of process.

I have gone to some length to indicate the requirements of the doctrines discussed in order to indicate the paucity of material to support the objection.

I now wish to make some further points;

Firstly: There are procedural requisites, which must be fulfilled in order to raise a plea of **res judicata**, or of issue estoppel. Section 178 of the Civil Procedure Code stipulates that such pleas should be pleaded. It reads as follows:

> "Pleading to raise all grounds of defence or reply.
> 178. the defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.

Estoppel is a matter which clearly falls within this provision, hence pleading it is important. Edevain v Cohen [1889] 43 Ch.D. 187 At 189.

Secondly, in The Annie Johnson [1921] 126 LT 614, Lord Parmoor giving the judgment of the Privy Council laid down the following rule at 614:

> "The plea of **res judicata** cannot be entertained unless the record of the act of the court on which it is founded is forthcoming, or some valid reason is given why it cannot be produced."

This is obviously logical. How else can the court ascertain who are the parties to the earlier decision and whether they are the same as the parties in the later decision? Unless the court knows the reasoning of the earlier decision how may issue estoppel be confirmed in every case in which it is properly claimed?

For these two reasons therefore, the court has not been provided with the material to make a proper adjudication on the plea in bar; and even though in more modern times the courts have not always enforced strictly the requirement that estoppel should be pleaded promptly (see Winnan v Winnan [1949] P174), yet having regard to the nature of the case, I am of opinion that this is not a proper case in which to relax the rule.

In the light of the above and especially having regard to the ingredients which must be established to prove any of the three grounds considered above for dismissal of the plaintiff's claim, the objection is overruled. Of course there is nothing to prevent the defendant making the plea in the future if he provides proper evidence- Robinson v Williams [1965] 1QB 89 at 100, R v Sunderland JJ exp., Hodgkinson [1945]KB 502 at 506-509 Re F [1969] 2 Ch 261.

In the circumstances as I have said the preliminary objection is overruled, with costs to the plaintiffs' to be taxed if not agreed.