GRENADA

IN THE EASTERN CARIBBEAN COURT OF APPEAL

HIGH COURT CIVIL
APPEAL NO. 8 OF 1998

BETWEEN

JOHN HOPKIN — APPELLANT

AND

ROBINSON LUMBER CO. LTD. — RESPONDENT

Before: The Honourable Mr. C.M. Dennis Byron — Chief Justice (Ag)
The Honourable Mr. Satrohan Singh — Justice of Appeal
The Honourable Mr. Albert Redhead — Justice of Appeal

Appearances: Mr. James Bristol for the appellant
Mr. Derek Knight, Q.C. for the respondent

[November 24; December 7: 1998]

JUDGMENT

SATROHAN SINGH JA:

Consequent upon an alleged contract of sale made between the appellant and the respondent, the respondent allegedly sold to the appellant, lumber to the value of $64,419.66. $15,000.00 was paid towards that purchase price leaving a balance of $49,419.66.

On March 19, 1991, the respondent issued a writ against the appellant and Bentley Mansions Co. Ltd for this sum plus interest totalling $54,352.48. The defendants to the writ did not enter an appearance and on April 8, 1991, judgment in default was entered against both defendants. The particulars of the contract given by the respondent were that "the goods were sold and delivered to both defendants.

The contract for sale was made with the first defendant, John Hopkin (the appellant) personally, and at his direction the goods were consigned to the second defendant, Bentley Mansions Co. Ltd."

On November 4, 1994, by Order of Moore J, and upon the application of the appellant, the default judgment entered against him was set aside and he filed a defence denying the contract and delivery of the goods to him. The default judgment against Bentley Mansions remained.

Having filed his defence, the appellant on February 9, 1998 moved the Court to strike out the action against him on the ground that it disclosed no reasonable cause of action, that it was frivolous and vexatious or was otherwise an abuse of the process of the Court. The ground to strike was that the respondent, having obtained the default judgment against Bentley Mansions, had made an election on an alternative claim and therefore could not proceed against the appellant.

Alleyne J. heard the submission and ruled as follows:

> "The plaintiff entered default judgment against both defendants. The first-named defendant sought and obtained the exercise of the court=s discretion in setting aside the judgment against him. This was not a consent order, and I presume that the plaintiff resisted the order. In any event there is no reason to presume or infer that, by the decision of the court on the application of the first-named defendant, the plaintiff has thereby made an unequivocal election to proceed against the second-named defendant, whether or not the cause of action against the first-named defendant is of a different character than that against the second-named defendant. At most, the plaintiff is the passive victim of the decision of the court on the application of the first-named defendant, and has done nothing to suggest that he has made an election, unequivocal or otherwise.
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> The first-named defendant's application is dismissed, with costs to the plaintiff in any event."

The appellant has appealed the decision. The sole issue before us is the allegation of the appellant that the respondent, by signing judgment against Bentley Mansions, had elected to proceed against Bentley Mansions alone and was therefore barred from recovering judgment against the appellant.

The general principle on this issue, is that if there was indeed a conclusive election by the respondent to adopt the liability of Bentley Mansions, the respondent cannot afterwards make the appellant liable. The judgment against Bentley Mansions would then be a complete judgment upon which execution may be issued against them and this would have altered the respondent"s relation against the other defendant (the appellant) **[See Morel Brothers and Co. v Westmoreland (Earl of) (1903) IKB 64].**

In Bonus Garment Co (a firm) - v - (1) Karl Rieker GMBH & Co KG and (2) Peh Poh client trading as Mandarin (Far East) Co, Privy Council Appeal N59 of 1996, their Lordships of Her Majesty=s Privy Council at page 4, referring to this principle in the Morel case, opined that such a principle may well have a different application where a plaintiff is seeking to rely on inconsistent facts by way of defence to a counter claim or set off. The instant matter is not such a case.

The issue also required consideration of the concept of "merger in judgment". I can do no better to explain this principle than by referring to a decision of this Court in **Halstead (Donald) - v - Attorney General of Antigua and Barbuda** (1995) 50 WIR 98 where **Chief Justice Sir Vincent Floissac** in dealing with the concept said at page 109.

> "This kind of abuse of the process of the court is also forbidden under another principle analogous to the principle of ***res judicata.*** That principle is known as "merger in judgment" expressed in the latin maxim "*transit in rem judicatam."* According to that principle, where a right of action or a cause of action was determined to exist and judgment was given on it by a local court, the right and cause of action become merged in or transmuted into the judgment and cease to exist. Thereafter, the person in whose favour the judgment was pronounced is precluded from recovering a second judgment for the same civil relief or on the basis of the same right or cause of action. In *The Indian Endurance* at page 1003, Lord Goff said:
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> "The basis of the principle is that the cause of action, having become merged in the judgment, cease to exist, as is expressed in the Latin maxim '*transit in rem judicatam*': see *King v Hoare* (1844) 13 M & W 494 at page 504, *per* Parke B, cited by Lord Penzance and Lord Blackburn in *Kendall v Hamilton (1879)* 4 App Cas 505 at pages 256, 542"

In the present appeal, the learned Trial Judge was of the view that the respondent was a passive victim of the Court's decision on the application of the appellant and that he did nothing to suggest that he had made an election unequivocal or otherwise. I do not agree.

In my considered opinion, when the respondent entered judgment against the appellant and Bentley Mansions, he then and there elected unequivocally at least to have a judgment against Bentley Mansions. That judgment has remained and, on that judgment, he can proceed to execution. To allow the right or opportunity for a second judgment, would be to afford the respondent the opportunity to recover twice for the same debt. There would then be two judgments in existence for the same debt or cause of action. His judgment against Bentley Mansions is a complete judgment and his right or cause of action became merged into the said judgment and has ceased to exist. There was no evidence that the default judgment against Bentley Mansions had been entered by accident. Nor, assuming it to be material to consider whether Bentley Mansions can pay, has it been shown that Bentley Mansions cannot pay. Accordingly, he was therefore precluded from recovering a second judgment for the same civil relief. He had already exhausted his cause of action, transit in *rem judicatam.*

For these reasons I would order that this appeal be allowed. The order of Alleyne J is set aside. I would also order that the suit against the appellant be struck out as being an abuse of the process of the Court. The appellant will have his costs in this Court and the Court below to be taxed if not agreed.

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Satrohan Singh
Justice of Appeal

I concur.

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Dennis Byron
Chief Justice (Ag.)

I concur.

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Albert Redhead
Justice of Appeal