THE EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2011/0189

BETWEEN:

IRMA MARRYSHOW
(In her capacity as Administratrix of the Estate of Shebah Marryshow, deceased)

Claimant

and

STEPHEN MC BURNIE
RAWLINS MC BURNIE
(In his capacity as Administratrix of the Estate of Ronald McBurnie, deceased)

Defendants

Before:

Master Fidela Corbin Lincoln

Appearances:

Mr. Ruggles Ferguson with Ms. Sabina Gibbs for the Claimant
Ms. Kimber Guy-Renwick for the 1st Defendant

2015: October, 13
December, 2
2016: February,

Application to Strike Out Claim Following Entry of Judgment in Default Against One of Two Defendants – CPR 12.9 – Entry of Judgment in Default in Claims Against More Than One Defendant - Doctrines of Merger and Election

JUDGMENT

[1] Corbin Lincoln M: The issue before the court is whether the claim against the 1st defendant should be struck out on the ground that it is an abuse of process because the claimant obtained judgment in default against the 2nd defendant.

Summary of Facts

[2] The claimant commenced a claim against the defendants for damages for negligence arising from a motor vehicle accident, which resulted in the death of Shebah Marryshow. The statement of claim avers that the accident was caused by the negligence of Ronald McBurnie (deceased) who was the servant and/or agent of the 1st defendant.

[3] On 27th May 2013 the claimant filed a request for entry of judgment in default of defence against the 2nd defendant for special damages of $9,280.00, fees and costs with general damages to be assessed. Judgment in default of defence was entered on the same date for the sum of $10,457.50 with general damages to be assessed. Efforts to settle the claim were unsuccessful.

The 1st Defendant's Application and Submissions

[4] On 2nd July 2015 the 1st defendant filed an application to strike out the claim on the ground that that the claim against the 1st defendant is an abuse of process in that:

(1) The claimant pleaded that the 2nd defendant is the agent of the 1st defendant.
(2) The claimant obtained default judgment against the 2nd defendant.
(3) The claimant's election to obtain judgment against the 2nd defendant operates as a bar to a subsequent finding of liability against the 1st defendant.

[5] Counsel for the 1st defendant submits, in summary, that:

(1) The claimant pleaded that a relationship of principal and agent existed between the 1st defendant and Ronald McBurnie (hereinafter referred to as "the 2nd defendant") and this illustrates an allegation of joint liability between the 1st and 2nd defendant. Having

pleaded joint liability, the claimant obtained default judgment, which acted as an unequivocal election to adopt the liability of the 2nd defendant.[1]

(2) The default judgment is a bar to an action against the 1st defendant since upon obtaining default judgment against the 2nd defendant the cause of action merged into the default judgment and ceased to exist.[2] It is an abuse of the process of the court for the claimant to proceed with the claim against the 1st defendant as the cause of action has merged with the default judgment.

(3) It is an abuse of process for the claimant to continue with the claim against the 1st defendant having intimated to him that the claim may be discontinued when talks between the claimant and the 2nd defendant's insurer were ongoing but then continuing with the claim after the discussions broke down.

The Claimant's Submissions

[6] Counsel for the claimant submits, in summary, that:

(1) There was no merger of the cause of action upon the entry of judgment in default against the 2nd defendant. The issue with regard to the 2nd defendant is whether or not he was responsible for the accident that led to the death of the deceased. On the other hand, the issue against the 2nd defendant, as pleaded in the statement of claim, is different. It rests on whether at the material time the 1st defendant was the licensed owner of the motor vehicle and was the principal of the 2nd defendant. In all the circumstances both the issue of joint and several liability arises. The claimant cites Development Bank of St. Kitts & Nevis v Brian Browne et al [3] which dealt with the issue of joint and several liability in relation to a debt.

[1] Rukmin Balgobin v South West Regional Health Authority [2012] UKPC 11 para 16 and 29.
[2] Halstead (Donald) v AG of Antigua and Barbuda (1995) 50 WIR 98 at 109
[3] SKBHCV2012/0084

(2) The default judgment is against the driver of the motor vehicle. Issues related to the driver are limited to his full and partial liability for the accident. Valuable time and resources of the court have been saved by entry of the default judgment and liability is no longer in issue. The only issue for the court to determine is whether the 2nd defendant was the servant and /or agent of the 1st defendant. Once the 1st defendant is deemed to have been the principal of the 2nd defendant, the 1st defendant automatically becomes liable to satisfy whatever damages may be awarded to the claimant. They both become jointly and severally liable.

(3) Halsburys Laws 4th Edition Volume 9, paragraph 624 states that the doctrine of merger of cause of action "has no application cases where liability of the debtor is several as well as joint" and states that in this case there could have been no merger.

CPR.26.3- The Principles Governing Striking Out of a Statement of Case

[7] The Civil Procedure Rules ("CPR") Part 26.3 (1) (c) states that:

> *"In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that …the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct a just disposal of the proceedings"*

[8] Some of the circumstances identified [4] as providing reasons for not striking out a statement of case are where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated.

[9] It is well established that the power to strike out should be used sparingly. In Baldwin Spencer v The Attorney General of Antigua and Barbuda et al[5] Sir Byron J put it this way:

[4] Blackstone's Civil Practice 2009 at page 431 cited in Citco Global Custody NV v Y2K Finance Inc BVIHCVAP2009/0022

[5] Civil Appeal No 20A of 1997

"This summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."

Issues

[10] The 1st defendant contends that the claim against him should be struck out as abuse of process since, either by virtue of the doctrine of merger or the doctrine of election, the entry of judgment in default against the 2nd defendant is a bar to the claimant continuing the action against him. Alternatively, or in addition, the claimant submits that the continuation of the claim is an abuse of process since the claimant intimated that it "may" discontinue the claim while engaged in discussions with insurers.

[11] The issues arising for consideration are:

(1) Whether the entry of judgment in default with general damages to be assessed against the 2nd defendant amounts to:

a) A merger of the cause of action and a bar to the claimant continuing the action against the 1st defendant; and/or

b) An election, which prevents the claimant from continuing the action against the 1st defendant.

(2) Whether the claimant's intimation to the 1st defendant that the claim may be discontinued while discussions were ongoing with the insurer and thereafter deciding to continue with the claim after talks broke down with the insurer amounts to an abuse of process.

ISSUE 1 - DID THE OBTAINING OF JUDGMENT IN DEFAULT AGAINST THE 2ND DEFENDANT AMOUNT TO A MERGER?

[12] A good starting point is the Civil Procedure Rules 2000 (**"**CPR") Part 12 which deals with default judgments.

[13] CPR 12.3 sets out the cases where permission is required to enter judgment in default. It states:

> *Cases in which permission required*
>
> *12.3 (1) A claimant who wishes to obtain a default judgment on any claim which is a claim against a –*
>
> *(a) minor or patient as defined in rule 2.4; or*
>
> *(b) State as defined in any relevant enactment relating to state immunity;*
>
> *must obtain the court's permission.*
>
> - *Part 59 deals with proceedings against the Crown.*
> - *Part 23 deals with proceedings involving a minor or patient.*
>
> *(2) A claimant who wishes to obtain judgment in default of acknowledgment of service against a diplomatic agent who enjoys immunity from civil jurisdiction by virtue of any relevant enactment relating to diplomatic privileges must obtain the court's permission.*
>
> *(3) An application under paragraph (1) or (2) must be supported by evidence on affidavit.*
>
> *• Rule 12.9(2) contains restrictions on a default judgment where it is sought against some but not all defendants*

[14] It is not stated that permission of the court is required to obtain judgment in default when there is more than one defendant. However, at the end of the section it is stated "Rule 12.9(2) contains restrictions on a default judgment where it is sought against some but not all defendants."

[15] CPR 12.9 states:

> *Claim against more than one defendant*
> *12.9 (1) A claimant may apply for default judgment on a claim for money or a claim*

for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants, then if the claim –

(a) can be dealt with separately from the claim against the other defendants – (i) the court may enter judgment against that defendant; and (ii) the claim against any other defendant may continue as if the proceedings against the defendant had not been commenced;

(b) cannot be dealt with separately from the claim against the other defendants, the court – (i) may not enter judgment against that defendant; and (ii) must deal with the claim against the other defendants.

[16] It appears to me from the wording of CPR 12.9 that at least one of the restrictions contemplated is that an application for judgment in default where there is more than one defendant should be made to the court rather than the court office. I say this because the rule states that if a claimant applies for a default judgment, "*then if the claim (a) can be dealt with separately from the claim against the other defendants – (i) the court may enter judgment … (b) cannot be dealt with separately... the court – (i) may not enter judgment…"* The section thus contemplates that "the court" as distinct from the "court office" may enter judgment.

[17] In my view there is valid and important reason why an application should be made to the court where there are more than one defendant. Where there is a single defendant the court office is simply required to be satisfied that the conditions of CPR 12.4 or 12.5 are satisfied to enter judgment in default. Where there is more than one defendant, a determination has to be made whether the claim can be dealt with separately from the claim against the other defendants. This involves a more complex analysis than that required under CPR 12.4 and 12.5.

[18] In this case, the claimant made a request for judgment in default of defence against one of two defendants. Presumably both the claimant and the court office had regard to CPR 12.9 and it was determined by the court office that the claim against the defendants could be dealt with separately since the court office entered judgment in default of defence against

the 2nd defendant. This being the case, it must now be determined what is the effect of the entry of judgment in default against the 2nd defendant.

The Doctrine of Merger

[19] The doctrine of merger, in essence, prohibits the reassertion of already decided claims. The case of Halstead (Donald) v Attorney General of Antigua & Barbuda[6] involved a consent order made between the appellant and the respondents (the Director of Public Prosecution, the Attorney General, the Chief Magistrate and the Commissioner of Police) in consolidated motions brought by the appellant against the respondents. The consent order, inter alia, provided that no further proceedings in connection with or arising out of the proceedings and charges could be brought. The appellant thereafter brought a claim against the respondents. The respondents applied to dismiss the suit on the ground, *inter alia*, that the appellant was estopped *per rem judicatam* from carrying on the suit by virtue of the consent order. The Court held that the institution of the suit after obtaining judgment against the respondents on the basis of the common causes of action is an abuse of process of the court, even if arguably the appellant may not strictly have been estopped *per rem judicatam* from instituting the claim.

[20] Sir Vincent Floissac CJ stated:

> *"This kind of abuse of 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 ceases 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"*

[6] (1995) 50 WIR 98

[21] The court held that the consent order in effect determined the rights that existed and was, in effect, a judgment given on those rights of action and consequently those rights of action became merged in the consent order and ceased to exist.

[22] In Brinsmead v Harrison [7] the issue before the court was whether the claim of the plaintiff against two joint wrong-doers is put an end to by a judgment recovered in an action against one of them without showing that that judgment has been satisfied. It was held that a judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause although the judgment remains unsatisfied. Kelly CB stated:

> *"That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down: but it was doubted at one time whether judgment and execution, without satisfaction, was a bar also. It will be right, therefore, to consider whether this latter is not upon principle a good and valid defence. If it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions wherever there happened to be several joint wrong-doers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. **Judgment having been recovered against one or more of the wrong-doers, and damages assessed**, if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained…*
>
> *In the first place, we have the case of Brown v. Wootton, as reported in Cro. Jac. 73. There, as here, a joint wrong had been committed by two persons. An action was brought against one, and a judgment obtained, but no satisfaction. A second action was brought against the other wrong-doer for the same cause, and he pleaded, as here, the judgment recovered in the first action. The judgment of the Court is in these terms:- "All the Court held the plea to be good; for, the cause of action being against divers, **for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to a certainty.**" And Popham, C.J., adds: "If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. (Emphasis mine)*

[23] Parke, B, in King v Hoare [8] stated:

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[7] (1872) L.R. 7 C.P. 547
[8] (1) (18 M & W at p 504)

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result, Hence the legal maxim, transit in rem judicatam - the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit and the cause of action, being single, cannot afterwards be divided into two."

[24] Lord Denning in Bryanston Finance Ltd. And Others V. De Vries And Another [9] stated:

"When a joint wrong has been committed by two persons, there are two propositions which have come down the centuries.

(i) The effect of taking a judgment

The first proposition is in regard to the taking of judgment against one of two joint tortfeasors. Let us suppose that an action was brought against one only of the wrongdoers and a judgment was obtained against him for an ascertained sum. But he had no money. That judgment went unsatisfied. A second action was then brought against the other wrongdoer for the same cause. In that situation it was decided in Brown v. Wootton (1606) Cro.Jac. 73, in the year 1606 that the judgment in the first action was, of itself, without satisfaction, a sufficient bar to an action against the other for the same cause. That decision was endorsed as correct in the 19th century in two cases of the highest authority, namely, King v. Hoare (1844) 13 M. & W. 494 and Brinsmead v. Harrison (1872) L.R. 7 C.P. 547. The rule was justified in those days on the ground that it avoided multiplicity of actions. If it were otherwise (L.R. 7 C.P. 547, 551):

> *"An unprincipled attorney might be found willing enough to bring an action against each and every one of them, and so accumulate a vast amount of useless costs..."*

That rule was applied, not only to successive actions, but also to a single action. Let us suppose that one action was brought against two joint tortfeasors. One of them made default in delivering a defence and judgment was entered against him for a sum which was assessed and ascertained. That judgment was, of itself, without satisfaction, a barrier to the plaintiff going on against the other." (Emphasis mine)

[9] [1975] Q.B. 703 at 721-722

[25] In the same case Lord Diplock explained the rule in this way:

> *"A judgment recovered against one joint tortfeasor, even though it remained unsatisfied, was a good defence to an action against any other joint tortfeasor in respect of the same tort. This common law rule was of ancient origin. It was first laid down in Brown v. Wootton (1606) Cro.Jac. 73. The reason for the rule given in that case by Popham C.J. which was that which ultimately prevailed, was somewhat delphic; but in King v. Hoare (1844) 13 M. & W. 494, a case on a joint contract, Parke B. explained it as being based upon the doctrine that a joint tort gave rise to but a single cause of action, even though each tortfeasor was severally as well as jointly liable for it, and that this cause of action was merged in the judgment first given: see also Brinsmead v. Harrison (1872) L.R. 7 C.P. 547. The doctrine was not based on election."*

[26] I extract from the above cases that the key elements of the doctrine of merger are that:

(1) The claim must arise from the same cause of action;

(2) Against the same party or against joint tortfeasors; and

(3) Judgment for an ascertained sum or final judgment has been obtained against that party or against one of the joint tortfeasors.

Does the claim against the 1st and 2nd defendants arise from the same cause of action?

[27] The claimant's claim is for damages for negligence arising from a motor vehicle accident. In my view the accident created one cause of action and the claim against both defendants arises from the same cause of action.

Are the 1st and 2nd Defendants Joint Tortfeasors?

[28] In The Koursk [10] two vessels collided as a result of separate and independent acts of negligence. As a result, one vessel sank a third vessel. A judgment was obtained against the owners of one of the steamships. The Court was considering whether the rule

[10] [1924] All ER Rep 168

approved in King v Hoare and accepted in Brinsmead v Harrison [11] applied to the facts of that case. Scrutton LJ stated:

> *"The substantial question in the present case is : What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors." the agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree in common action, in the course of and to further which one of them commits a tort. Those seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of or in concert with another."*

[29] Sargant LJ cited the definition of joint tortfeasors in Clerk and Lindsell on Torts[12] as follows:

> *"Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. 'All persons in trespass who aid or counsel, direct, or join, are joint trespassers.' If one person employs another to commit a tort on his behalf, the principal and the agent are joint tortfeasors. and recovery of judgment against the principal is a bar to an action against the agent. But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end."*
>
> *The discussion in SALMOND ON TORTS (5th Edn) p 84, is to much the same effect. Stress is laid there on the feature that there must be responsibility for the same action, the imputation by the law of the commission of the same wrongful act to two or more persons at once. The examples given are under three heads - agency, vicarious liability, and common action."*

[30] The claimant's claim against the defendants is based on the tort of negligence. The claim asserts that the 2nd defendant is the servant and or agent of the 1st defendant and that the 1st defendant is vicariously liable for the negligence of the 2nd defendant. The claim therefore asserts a relationship of principal and agent between the defendants and consequently in my view this is a case where the defendants are alleged to be joint tortfeasors.

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[11] The rule shortly stated by Willes J is " If two commit a joint tort the judgment against one is of itself without execution a sufficient bar to an action against the other for the same cause."

[12] (7th Edn) pages 59-60

Has there been Judgment for an ascertained sum/final judgment?

[31] The nature of the judgment referred to in discussing the doctrine of merger has been described in various ways. In Brinsmead v Harrison the court referred to the case of Brown v Wootton where the court referred to "judgment ...for damages certain". In King v Hoare the court said "the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty." Lord Denning in Bryanston Finance Ltd. And Others v. De Vries And Another referred to "judgment ... entered ...for a sum which was assessed and ascertained."

[32] The cases suggest to me that for merger to take place the judgment must be for an ascertained sum. As put by the learned authors of Halsburys Laws of England, merger is not effected by a judgment, which is not final. [13]

[33] In this case the claimant has obtained default judgment against the 2nd defendant for special damages, interest and costs amounting to $10,457.50 with general damages to be assessed. *Is a judgment in default with general damages still to be assessed a final judgment?* This issue was addressed in Strachan v The Gleanor Company Limited et al [14] where the Privy Council noted that a judgment in default with damages to be assessed is an interlocutory rather than a final judgment.

[34] In the circumstance, while the default judgment was for an ascertained sum with respect to special damages, general damages are still to be assessed and there is therefore no final judgment - at least in relation to the issue of general damages.

[35] Thus while the claim against the defendants arises from the same cause of action and the defendants are joint tortfeasors, I am not of a view that there is a merger in judgment since there is no final judgment – at least in relation to the issue of general damages.

[13] 4th ed., Volume 11; para. 1594
[14] [2005] All ER (D) 358

ISSUE 2 – DID THE ENTRY OF JUDGMENT IN DEFAULT AMOUNT TO AN ELECTION?

[36] Determining the scope of the doctrine of election and the elements necessary for an election to take place presents some difficulty.

[37] In Tang Man Sit (decd) (personal representative) v Capacious Investments Ltd [15]Lord Nicholls of Birkenhead explained the nature of the doctrine of election, in these terms:

> *"Their Lordships will consider first whether the plaintiff did choose to take the remedy of an account of profits, with the consequence that it could no longer pursue a claim for damages so far as this would be inconsistent with an account of profits. This issue lies at the heart of this case. This issue calls for consideration of the principles governing election between remedies*
>
> *The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.*
>
> *Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss.*
>
> *Alternative remedies*
>
> *Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other.*

[15] [1996] 1 All ER 193

He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies.

In the ordinary course, by the time the trial is concluded a plaintiff will know which remedy is more advantageous to him. By then, if not before, he will know enough of the facts to assess where his best interests lie. There will be nothing unfair in requiring him to elect at that stage. Occasionally this may not be so. This is more likely to happen when the judgment is a default judgment or a summary judgment than at the conclusion of a trial. A plaintiff may not know how much money the defendant has made from the wrongful use of his property. It may be unreasonable to require the plaintiff to make his choice without further information. To meet this difficulty, the court may make discovery and other orders designed to give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy. A recent instance where this was done is the decision of Lightman J in [Island Records Ltd v Tring International plc [1995] 3 All ER 444, [1996] 1 WLR 1256]. The court will take care to ensure that such an order is not oppressive to a defendant.

In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings. Thus in Johnson v Agnew [1979] 1 All ER 883, [1980] AC 367 the House of Lords held that when specific performance fails to be realised, an order for specific performance may subsequently be discharged and an inquiry as to damages ordered. Lord Wilberforce observed ([1979] 1 All ER 883 at 894, [1980] AC 367 at 398): "Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity."

Cumulative remedies

The procedural principles applicable to cumulative remedies are necessarily different. Faced with alternative and inconsistent remedies a plaintiff must choose

between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so-called rule in [Henderson v Henderson (1843) 3 Hare 100, 67 ER 313]. In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."

[38] The concept of unequivocal election was also described by Lord Blackburn In Scarf v Jardine[16] in these words:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act--I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way--the fact of his having done that unequivocal act to the

[16] (1882) 7 App Cas 345 at 360-361, [1881-5] All ER Rep 651 at 658

knowledge of the persons concerned is an election."

[39] In Balgobin v South West Regional Health Authority [17] the Privy Council stated that a number of the essential features of an unequivocal election which could be derived from the case of Scarf v Jardine are that :[18]

> *"First the person making the election must have determined that he would follow one remedy out of a range of two or more. Although it is not expressly stated, this formulation implies that the decision has been made that the selected remedy will be pursued at the expense of the others that were available. Second the choice must be communicated to the other side. Third it must be communicated in a way that will lead the opposite party to believe that a choice of the nature required has been made--in other words, a deliberate preference of the chosen alternative over any other."*

[40] The court considered all the circumstances and held that the entering of default judgment by Ms. Balgobin against one of the defendants did not amount to a conclusive and unequivocal election.

[41] It appears to me from the above cited cases that the doctrine of election operates where an injured person has more than one remedy for the wrong suffered, the remedies are alternative and inconsistent and he/she has elected to pursue one remedy at the expense of the other. In Balgobin the Privy Council also held that where a claimant makes a claim against two defendants and the factual basis of the suit against one was incompatible with the factual foundation necessary to establish liability against the other *or* the legal bases of both claims could not be consistently advanced, an election to pursue one basis of claim would preclude reliance on the other,

[42] In the present case, the claimant's claim is founded on the tort of negligence. A perusal of the statement of claim discloses that the only remedy being sought against the defendants is damages. The claim is not made against the defendants in the alternative. It therefore does not appear to me that this is a case where the claimant is seeking *more than one*

[17] [2012] 4 All ER 655
[18] ibid 663-664

remedy and consequently the issue of the remedies being alternative and inconsistent and the claimant choosing one remedy at the expense of another does not arise.

[43] Equally, it does not appear to me that the factual foundation necessary to establish liability against the 1st defendant is incompatible with the factual foundation necessary to establish liability against the 2nd defendant or that the legal bases of the claim against the defendants cannot be consistently advanced. The factual foundation of the claim against the 2nd defendant is that he was the driver of the motor vehicle at the material time and that he drove the motor vehicle negligently. The factual foundation of the claim against the 1st defendant is that he was the owner of the motor vehicle and principal of the 2nd defendant at the material time. These factual bases are not in my view incompatible or inconsistent.

[44] In the circumstance I am unable to find that the doctrine of election applies on the facts of this case.

[45] Even if I am wrong and the doctrine of election could apply to the facts of this case, I would still have declined to strike out the claim against the 1st defendant for the following reasons:

(1) In Pendleton v Westwater[19] Laws LJ, who delivered a judgment with which the other Lord Justices concurred, noted that a default judgment does not involve an examination of the facts and that if "*the doctrine of election threatens to work injustice it must be applied rigorously, with great care, and as narrowly as may be consistent with legal principle."* [20] He stated further that:[21]

> *"I would not accept the bare proposition advanced by Mr. Bloomfield that the entry of the judgment in every case, without more, necessarily amounts to an election. Indeed there is some material, with respect, in the judgments of their Lordships in the Court of Appeal in Morel [1903] 1 KB 64, showing that the court has to see the basis of the claim that was made leading to the judgment in order to determine*

[19] [2001] EWCA Civ 1841,
[20] ibid paragraph 18
[21] paragraphs 25-26

whether there was or was not a conclusive election.

It may be - and the question is an important one - that in principle a default judgment does not bar the continuance of a claim against other defendants under the rule in Morel's case. I do not distinctly so hold. I make it clear that for my part I conclude that there was no unequivocal election here by reference, as I have said, to the particular facts of the case. "

(2) It therefore appears to be from the Pendelton case that a determination of whether the entry of judgment in default in this case amounts to an unequivocal election requires a careful and thorough examination of the facts. In my view the facts require further examination before a determination can be made.

(3) The law on the issue of: (a) whether and in what circumstances the entry of judgment in default against one of many joint tortfeasors amounts to an election; and (b) specifically whether and in what circumstances the entry of judgment in default against one of many joint tortfeasors - where only one remedy is sought - amounts to an election, appears to me to be unclear and involves a substantial point of law which does not admit of a plain and obvious answer.

[46] In my view a consideration of the issues arising in this matter by the superior courts would aid in clarifying and developing the law regarding merger and election.

ISSUE 3 – DID THE CLAIMANT'S REPRESENTATIONS AMOUNT TO AN ABUSE OF PROCESS

[47] Counsel for the 1st defendant submits further that the claim against the 1st defendant should be struck because it is an abuse of process for the claimant to continue with the claim against the him, *"having intimated to him that the claim may be discontinued when talks between the claimant and the 2nd defendant's insurer were ongoing but then continue with the claim after the discussions broke down."* Firstly, I note that the 1st defendant asserts that the claimant stated that the claim "may" be discontinued and therefore it is not being asserted that the claimant stated that the claim will be discontinued. Secondly, it does not appear to me that the claimant's indication to the 1st defendant that the claim

"may" be discontinued amounts to an abuse of the process or procedure of the court. In the circumstance I do not find that this is a basis for striking out the claim against the 1st defendant.

[48] The application by the 1st defendant for an order striking out the claim against the 1st defendant is therefore dismissed.

Fidela Corbin Lincoln
Master