EASTERN CARRIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2016/0021

BETWEEN:

STEPHEN MCBURNIE

Appellant

and

IRMA MARRYSHOW
(IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF SHEBAH MARRYSHOW, DECEASED)

Respondent

Before:

The Hon. Mde. Louise Esther Blenman . Justice of Appeal
The Hon. Mde. Gertel Thom Justice of Appeal
The Hon. Mr. Paul Webster Justice of Appeal [Ag.]

Appearances:

Mr. James Bristol and Ms. Kimber Guy-Renwick for the Appellant
Mr. Ruggles Ferguson for the Respondent

2016: December 7;
2018: March 12.

Civil appeal — Interlocutory proceedings — Application to strike out claim following entry of default judgment against one of two defendants — Applicability of principles of merger and election — Whether on a claim against more than one tortfeasor, entry of judgment in default against one tortfeasor amounts to a merger of the cause of action against the other tortfeasor(s) and/or an unequivocal election which prevents the claimant from continuing the action against the other defendant

This appeal has its origin in a claim in negligence instituted by the respondent, Irma Marryshow ("Ms. Marryshow"), against the appellant, Stephen McBurnie ("Mr. McBurnie") and the Estate of Ronald McBurnie ("the Estate"). Ms. Marryshow's claim arises from a motor vehicle collision which resulted in the death of her daughter, Ms. Shebah Marryshow. The motor vehicle involved in the collision was

owned by Mr. McBurnie and was driven by Mr. Ronald McBurnie, who also died as a result of the collision.

The Estate failed to file a defence to the claim. On the application of Ms. Marryshow, judgment in default of defence was entered against the Estate.

Subsequently, Mr. McBurnie applied to strike out Ms. Marryshow's claim on the ground that it constituted an abuse of process, in that, Ms. Marryshow pleaded that Mr. Ronald McBurnie was the agent of Mr. McBurnie; Ms. Marryshow had obtained default judgment against the Estate; and Ms. Marryshow's election to obtain judgment against the Estate bars a subsequent finding of liability against Mr. McBurnie.

In dismissing the application, the learned master found that: (i) Mr. McBurnie had not satisfied all the elements of merger, in particular, he failed to meet the requirement that the judgment must be for an ascertained sum or be a final judgment, and in the circumstances, the default judgment was not a final judgment since general damages were still to be assessed; (ii) the doctrine of election was not applicable to the circumstances of the case as the issue of alternative and inconsistent remedies did not arise; and (iii) the present case was not an appropriate case for the court to exercise its power to strike out the claim as the issues raised a substantial point of law which does not admit a plain and obvious answer, that is, in what circumstances would an entry of judgment in default against one of many tortfeasors amount to an election when only one remedy is being sought.

Dissatisfied with the learned master's findings, Mr. McBurnie appealed against the dismissal of his application to strike out Ms. Marryshow's claim against him on the basis that the default judgment entered against his co-defendant, the Estate, was a bar against the claim continuing against him.

The grounds pursued raised a single issue, that is, whether on a claim against more than one tortfeasor, entry of judgment in default against one tortfeasor amounts to a merger of the cause of action against the other tortfeasor(s) and/or an unequivocal election which prevents the claimant from continuing the action against the other defendant.

The appellant submitted, inter alia, that there being a single cause of action against both defendants in the lower court, the judgment in default resulted in a merger of the cause of action and precluded any further proceedings from the same cause of action. Further, it was submitted that the respondent, in deciding to enter judgment against only one defendant, the Estate, thereby elected to hold the Estate exclusively liable in negligence. As a result, the respondent is precluded from continuing her claim against the appellant.

In turn, the respondent submitted that the doctrine of merger does not apply to cases of vicarious liability such as the instant case. It was argued that, in such

cases, the issues relating to liability of the driver and the owner of the vehicle are not the same, and as a result, the defendants in such cases are jointly and severally liable. The respondent further contended that the doctrine of election did not apply as there were no alternative remedies, that is, there was no election to proceed with one remedy instead of another. Additionally, it was submitted that the default judgment was merely a cost saving measure in establishing the liability of Mr. McBurnie.

Held: allowing the appeal; setting aside the order of the learned master; dismissing the respondent's claim and awarding the appellant fifty percent of its costs, such costs to be assessed, if not agreed within twenty-one days, that:

1. Where a right of action or a cause of action was determined to exist and judgment was given on it by a court, the right or cause of action becomes 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.

   King v Hoare (1844) 13 M&W 494 applied; **Rukhmin Balgobin v South West Regional Health Authority** [2012] UKPC 11 applied; **Halstead (Donald) v Attorney General of Antigua and Barbuda** (1995) 50 WIR 98 applied.

2. The learned master erred in finding that an element of the principle of merger is that damages must have been ascertained. If that element were necessary to establish merger, the principle would only be applicable in cases where the remedy is damages. The application of the principle of merger is not so limited as illustrated by the decisions in **Halstead (Donald) v Attorney General of Antigua and Barbuda** and **Rukhmin Balgobin v South West Regional Health Authority**. The learned master also erred in finding that the default judgment entered against the Estate was not a final judgment. The Privy Council decision in **Stratchan v Gleaner Company Ltd.** establishes that a default judgment is a final determination of liability once it has not been set aside. Further, in the principle of merger, what is merged with the judgment is the right of action or cause of action which ceases to exist. The quantum of damages obtainable is not part of the cause of action.

   Rukhmin Balgobin v South West Regional Health Authority [2012] UKPC 11 applied; **Halstead (Donald) v Attorney General of Antigua and Barbuda** (1995) 50 WIR 98 applied; **Stratchan v Gleaner Company Ltd.** [2005] UKPC 33 applied.

3. The principle of merger is applicable to the instant case as the respondent had a single cause of action against both the appellant and the Estate, and having entered judgment in default against the Estate, her cause of action merged

with the judgment and ceased to exist. Therefore, the respondent is barred from continuing her claim against the appellant.

4. Where the issue of unequivocal election is raised, the court is required to consider firstly whether the case is one to which the doctrine of election is applicable and if applicable, whether the claimant made an unequivocal election. In order to make an unequivocal election, the person making the election must have determined that he would follow one remedy from among two or more remedies, although not necessarily stating that is what was being done; the choice of remedy must be communicated to the other party and the communication must be pellucid so as to make the other party believe that the remedy chosen was preferred over all other remedies. The consequence of making an unequivocal election is that the election would operate as a bar to institution or continuation of proceedings against another party.

   Scarf v Jardine (1882) 7 App Cas 345 applied; **Rukhmin Balgobin v South West Regional Health Authority** [2012] UKPC 11 applied; **Morel Brothers & Co. Ltd. v Earl of Westmorland** [1904] AC 11 applied; **Development Bank of St. Kitts and Nevis v Browne** SKBHCV2012/0084 (delivered on 8th April 2014, unreported) considered.

5. The mere entry of judgment in default did not amount to an unequivocal election by the respondent. From the pleadings, the appellant's defence was that he was not vicariously liable for the actions of Mr. Ronald McBurnie. He did not deny that Mr. Ronald McBurnie's negligence was responsible for the collision which caused the death of Ms. Shebah Marryshow. In light of those factors, the entry of judgment in default was merely a convenient way for the respondent to deal with the aspect of the claim relating to Mr. Ronald McBurnie's negligence, which was not challenged and which was essential in establishing the liability of the appellant. Additionally, the respondent took no steps to enforce the judgment in default, but continued to pursue her claim against the appellant. Considering the circumstances cumulatively, it cannot be said that the respondent by entering judgment in default against the Estate made an unequivocal election to pursue her claim exclusively against the Estate.

JUDGMENT

[1] **THOM JA**: This is an appeal against the decision of the learned master in which she dismissed the application of the appellant ("Mr. McBurnie") to strike out the respondent's ("Ms. Marryshow") claim against him on the basis that the default judgment entered against his co-defendant, the Estate of Ronald McBurnie, was a bar against the claim continuing against him.

Background

[2] The background to this appeal is that a motor vehicle owned by Mr. McBurnie and driven by Mr. Ronald McBurnie was involved in a motor vehicle accident in which Ms. Shebah Marryshow (the daughter of Ms. Marryshow) was killed. Mr. Ronald McBurnie also died as a result of the accident.

[3] Ms. Marryshow instituted proceedings in negligence for damages against Mr. McBurnie and the Estate of Ronald McBurnie. The Estate of Ronald McBurnie having failed to file a defence, on the application of Ms. Marryshow, judgment in default of defence was entered against the Estate of Ronald McBurnie for special damages in the sum of $19,280.00 with fees, costs and general damages to be assessed.

[4] Mr. McBurnie subsequently filed an application to strike out the claim against him on the grounds that to continue the claim would be an abuse of process in that:

(1) the claimant pleaded that Mr. Ronald McBurnie was the agent of Mr. McBurnie;

(2) the claimant obtained default judgment against the Estate of Ronald McBurnie; and

(3) The claimant's election to obtain judgment against the Estate of Ronald McBurnie operates as a bar to a subsequent finding of liability against Mr. McBurnie.

[5] The learned master having reviewed several authorities including **Halstead (Donald) v Attorney General of Antigua and Barbuda**;[1] **Brinsmead v Harrison**;[2] and **Bryanston Finance Ltd. and Others v De Vries and Another**,[3] dismissed the application. Her reasons for doing so being, firstly, she found that

[1] (1995) 50 WIR 98.
[2] (1872) L.R. 7 C.P. 547.
[3] [1975] QB 703.

the elements of merger were: (a) the claim must arise from the same cause of action; (b) the claim must be against the same party or against joint tortfeasors; and (c) judgment for an ascertained sum or a final judgment has been obtained against that party or against one of the joint tortfeasors.

[6] Having reviewed the pleadings, the learned master found that Mr. McBurnie did not satisfy all of the elements of merger, in particular he failed to meet the requirement that the judgment must be for an ascertained sum or be a final judgment. The learned master was of the view that the default judgment was not a final judgment since general damages were still to be assessed. She relied on the case of **Strachan v The Gleaner Company Limited et al**.[4]

[7] Secondly, in relation to the doctrine of election, the learned master found that in order for the doctrine to operate against a party, the remedies sought by the party must have been alternative and inconsistent and the party elected to pursue one of the remedies. The learned master was of the view that in this case there was only one remedy against both defendants, therefore the issue of alternative and inconsistent remedies did not arise. Thus, there was no election by Ms. Marryshow.

[8] The learned master was also of the view that the present case raised a substantial point of law which does not admit of a plain and obvious answer, being, in what circumstances would an entry of judgment in default against one of many tortfeasors amount to an election when only one remedy is being sought. She therefore found that this was not an appropriate case for the court to exercise its power to strike out the claim.

[9] Mr. McBurnie, being dissatisfied with the findings of the learned master, outlined two grounds of appeal in his notice of appeal. These grounds raise a single issue being whether on a claim against more than one tortfeasor, entry of judgment in

[4] [2005] UKPC 33.

default against one tortfeasor amounts to: (a) merger of the cause of action against the other tortfeasor(s); and/or (b) an unequivocal election which prevents the claimant from continuing the action against the other defendant.

[10] Mr. Bristol, counsel for the appellant, submitted that the learned master having found correctly that the claim as pleaded was one of vicariously liability and that Mr. McBurnie and Mr. Ronald McBurnie were joint tortfeasors, and having correctly stated the applicable principles as outlined in the cases **of Brinsmead v Harrison** and **Bryanston Finance Ltd. and Others v De Vries and Another**, the learned master fell into error when she identified the elements of merger to be (a) the claim must arise from the same cause of action; (b) the claim must be against the same party or against joint tortfeasors; and (c) judgment for an ascertained sum or a final judgment has been obtained against that party or against one of the joint tortfeasors.

[11] Mr. Bristol contended that there is no requirement that the judgment must be for an ascertained sum or be a final judgment for the principle of merger to apply. He also contended that the learned master fell into further error when she found that a default judgment was not a final judgment. In so finding, she misconstrued the decision of the Privy Council in **Stratchan v The Gleaner Company Ltd.** Mr. Bristol referred to the case of **Halstead (Donald) v Attorney General of Antigua and Barbuda**; **King v Hoare**[5] and **Rukhmin Balgobin v South West Regional Health Authority**[6] and submitted that the issue is whether liability was determined. He submitted that what is being merged is the cause of action, thus mere entry of judgment in default is sufficient. The issue of liability is finally determined in a default judgment as long as it is not set aside. He referred to the following passage at paragraph 16 of **Stratchan:**

> "16. In their lordships' opinion these questions are easily answered if three points are borne in mind. The first is that once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment

[5] (1844) 13 M&W 494.
[6] [2012] UKPC 11.

> hearing; see Pugh v Cantor Fitzgerald International [2001] EWCA Civ 307 (unreported) citing Lunnon v Singh (1999) (unreported) 1 July. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands, the issue of liability is res judicata."[7]

[12] Mr. Bristol further submitted that, in this case there being a single cause of action against both defendants, the judgment in default resulted in a merger of the cause of action thus precluding any further proceedings from the same cause of action. He referred to the cases of **Rukhmin Balgobin** and **Kendall v Hamilton**[8] and **Clarkson Booker Ltd v Andjel**.[9]

[13] Mr. Ferguson, counsel for the respondent, submitted in response that the doctrine of merger does not apply to cases of vicarious liability such as the instant case. He contended that in cases of vicarious liability the issues relating to liability of the driver and the owner of the vehicle are not the same.

[14] In relation to the driver, the issue is whether the driver's negligence caused the damage, while in relation to the owner, once the liability of the driver is established, the issue is whether he was the owner of the vehicle at the material time, and whether the driver was his servant or agent. He submits therefore that in cases of vicarious liability the defendants are jointly and severally liable.

[15] Mr. Ferguson relied on the case of **Bryanston Finance Ltd**.[10] He also relied on a passage in **Halsbury's Laws of England** where the learned authors stated that the principle of merger is not applicable where liability is several as well as joint.[11] In the footnote to paragraph 622, the learned authors referred to the judgment of Sterling J in **Blyth v Fledgate**[12] where he stated:

> "It would appear that an unsatisfied joint judgment against all the joint and several debtors does not bar a several action against all the others – **Re**

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[7] supra n.4, para.16.
[8] (1879) 4 AC 504.
[9] [1964] 3 WLR 466.
[10] supra, n. 3, pp. 624-625.
[11] Halsbury's Laws of England, (4th edn, 1998) vol. 9, para. 624.
[12] (1891) 1 Ch 337 p. 357.

Davidson (1884) QBD 50 at 53, nor does an unsatisfied several judgment against one bar a joint action against the others."[13]

Discussion
Merger

[16] As early as 1844, Parke B in **King v Hoare**,[14] explained the doctrine of merger in the following terms:

> "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, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other…"

[17] This statement of the law was affirmed by the Privy Council in **Rukhmin Balgobin** as a classic exposition of the principle of merger. The principle was applied by this Court in the case of **Halstead v Attorney General of Antigua and Barbuda** where the Court held that the appellants' cause of action was merged in a consent order obtained in previous proceedings and had therefore cease to exist. In so finding, Sir Vincent Floissac CJ who delivered the judgment of the court stated:

> "This kind of abuse of the process of the Court is also forbidden under another principle analogous to the principles 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 is whose favour the judgment was pronounced is precluded from recovering a

[13] Halsbury's Laws of England, (4th edn, 1998) vol. 9, paras. 622-624.
[14] supra, n. 5, pp. 504-505.

second judgment for the same civil relief or on the basis of the same right or cause of action. In The Indian Endurance at pg. 1003 Lord Goff said:

> 'The basis of the principle is that the cause of action, having become merged in the judgment ceases to exist as it is expressed in the Latin maxim "transit in rem judicatam" see **King v Hoare** per Parke B cited by Lord Penzence and Lord Blackburn in **Kendall v Hamilton** (1879) 4 App Cas.'"[15]

[18] Mr. Ferguson does not dispute that the above represents a correct statement of the law of the principle of merger, rather he contends that the principle of merger is not applicable in "running- down actions" as in the instant case. He relied on the following passage in the judgment of Lord Diplock in **Bryanston Finance Limited**:

> "Before the passing of the Law Reform (Married Women and Tortfeasors) Act 1935 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**. The reason for the rule given in that case by Popham CJ which was that which ultimately prevailed, was somewhat Delphic; but in **King v Hoare**, a case on a joint contract, Parke B explained it as being based on 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; see also **Brinsmead v Harrison**. The doctrine was not based on election it was not the mere commencement of proceedings against one joint tortfeasor without the other that brought the rule into operation it was only the entering of judgment against one joint tortfeasor without the other. Because their liability was several as well as joint the rule did not prevent separate actions being brought concurrently against the individual joint tortfeasor but a judgment against one of them gave rise to a plea in bar in favour of each of the others, whether the judgment was entered in separate proceedings in which one joint tortfeasor was sued alone or was entered in proceedings in which both joint tortfeasors were sued together.
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> In contrast to this, where the same damage was the result of separate and independent tortious acts of two or more tortfeasors, as frequently happens in "running - down" actions, a judgment recovered against one of the tortfeasors did not put an end to the cause of action against any other of the tortfeasors until it had been satisfied. It did so then because satisfaction of the judgment, the plaintiff had recovered full compensation for his loss. He could not recover it twice. But so long as the earlier

[15] supra, n.1.

> judgment remained unsatisfied it was not a bar at common law to a subsequent action against any other of the tortfeasors nor did it affect the measure of damages that might be awarded in any subsequent action. So the person who sustained the damage could sue the independent tortfeasors seriatim in the hope of recovering a greater sum by way of damages than that awarded in the first action."[16]

[19] While Lord Diplock's judgment is a dissenting judgment, his dissent was in relation to the interpretation and application of section 6(1) of the UK **Law Reform (Married Women and Tortfeasors) Act 1935**. All three of the Law Lords agreed that the common law is as stated in **King v Hoare**. Mr Ferguson's contention based on the above passage is that running down actions were in a separate category and the doctrine of merger did not apply to those cases. I do not agree. A careful reading of the passage shows that Lord Diplock was dealing firstly with joint tortfeasors, where a judgment entered against one would be a bar to the claim against the other(s), even where the judgment is unsatisfied. Lord Diplock then contrasted this position of the joint tortfeasors with the position pertaining to several tortfeasors, where judgment obtained against one would not be a bar to proceedings against the other(s) until it had been satisfied. Lord Diplock gave running down actions as an example of where the defendants are frequently regarded as several tortfeasors, as quite often in running-down actions several vehicles are involved in the accident. Further, Lord Diplock was not here suggesting that all running down actions are actions of several liability.

[20] I also do not agree with Mr. Ferguson's submission that Mr. Stephen McBurnie and Mr. Ronald McBurnie were severally liable. In my view, the learned master correctly found that Mr Ronald McBurnie and Mr. Stephen McBurnie were joint tortfeasors. Where the tortfeasors are severally liable, there is a separate cause of action against each tortfeasor. In the case of vicarious liability, the employer or the vehicle owner commits no wrong. Their liability is not based on fault. They are liable because of their special relationship with the wrongdoer. It is a matter of

[16] supra n. 3.

public policy. There is no several liability. The driver is only liable if he is negligent, and the owner is only liable if the driver is negligent. In other words, liability of both is dependent on the negligence of the driver. In **Halsbury's Laws of England**,[17] the following are stated as joint tortfeasors: (1) employer and employee, where the employer is vicariously liable for the tort of the employee; (2) principal and agent, where the principal is liable for the tort of the agent; (3) employer and independent contractor, where the employer is liable for the tort of his independent contractor; (4) a person who instigates another to commit a tort and the person who then commits the tort; (5) persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort.[18]

[21] However, the learned master erred in finding that an element of the principle of merger is that damages must have been ascertained. A careful review of the decisions shows that it is not a requirement for the principle of merger to be applicable that damages must have been ascertained. If such were the correct position, the principle of merger would only be applicable to those situations where the remedy is damages. In my view, the application of the principle of merger is not so limited. Indeed, the principle of merger was applied in **Halstead (Donald) v Attorney General of Antigua and Barbuda** where there was no issue of damages in the judgment by consent. Also in **Rukhmin Balgobin** damages on the judgment against TriStar were not assessed but that was not the reason why the principle of merger was not applicable. Rather, the court found that the appellant had a separate cause of action against the respondent.

[22] The learned master fell into further error when she determined that the default judgment against the Estate of Ronald McBurnie was not a final judgment because although special damages was determined, general damages was still to be assessed. The Privy Council decision in **Stratchan v Gleaner Company Ltd.** makes it very clear that a default judgment is a final determination of liability, so long as it is not set aside. In the principle of merger, what is merged in the

[17] (4th edn, 1998) vol. 45, para. 1234.
[18] See Salmond on Torts, 14th edn. 1965, London: Sweet & Maxwell.

judgment is the right of action or cause of action. The cause of action ceases to exist, the quantum of damages obtainable is not a part of the cause of action.

[23] Ms. Marryshow had a single cause of action against both the Estate of Mr. Ronald McBurnie and Mr. Stephen McBurnie. Having entered judgment in default against the Estate of Ronald McBurnie, her cause of action merged with the judgment and ceased to exist. Therefore, she is barred from continuing her claim against Mr. Stephen McBurnie.

[24] This finding that the cause of action is merged determines the appeal. However, the learned master in her judgment indicated that whether the entry of judgment in default against one of several joint tortfeasors amounts to an election where only one remedy was sought was unclear. I will therefore deal with the issue of election.

Election

[25] Mr. Bristol submitted that Ms. Marryshow having instituted proceedings against both Mr. McBurnie and the Estate of Ronald McBurnie as principal and agent and having entered judgment against the Estate of Ronald McBurnie, she elected to hold the Estate of Ronald McBurnie exclusively liable in negligence for damages for the death of Ms. Shebah Marryshow. There was no evidence rebutting the doctrine of election, such as evidence showing that the entry of default judgment was a cost saving measure. Ms. Marryshow therefore cannot continue with her claim against Mr. McBurnie. Mr. Bristol relied on a number of cases including **Isaac & Sons v Salbastein and Anor**;[19] **Clarkson Booker Ltd v Andjel**; and **Rukhmin Balgobin v South West Regional Health Authority**.

[26] Mr. Bristol also submitted that an election is conclusive even where there is no satisfaction of the judgment. Thus, although there was no assessment of

[19] [1916] 2 KB 139.

damages, the election was complete. He relied on the cases of **Curtis v Williamson**[20] and **Kendall v Hamilton**.

[27] Mr. Ferguson in response submitted that, a default judgment in itself does not amount to an unequivocal election. The court is required to consider the import of the judgment. In doing so, the court was required to take into account that no steps were taken to assess damages pursuant to the judgment and to enforce such assessment. He relied on the following passage in **Rukhmin Balgobin** at paragraph 32:

> "While it would not be correct to suggest that obtaining a default judgment can never amount to an unequivocal election, the circumstances that such a judgment will almost certainly be obtained without any consideration of the merits is inescapably relevant to that question. In Kok Hoeng v Leong Cheong Kwang Mines Ltd it was held that a default judgment, although capable of giving rise to an estoppel, must always be scrutinised with great care in order to determine the bare essence of what was the import of the judgment."[21]

[28] Mr. Ferguson also submitted that the essential elements for the doctrine of election to apply did not exist, in particular there were no alternative remedies and therefore there was no election to proceed with one remedy rather than another. The default judgment was a cost saving measure in establishing the liability of Mr. McBurnie.

[29] Mr. Ferguson also submitted that the doctrine of election must be applied with great care bearing in mind that the principle behind the doctrine is that full satisfaction prevents double recovery. The doctrine should not be applied where it would result in injustice such as where the judgment debtor is without means to satisfy the judgment. He relied on the cases of **Tang Man Sit v Capacious Investments Ltd**[22] and **Pendleton v Westwater and Swingware Ltd**.[23]

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[20] (1874) LR 10 QB 57.
[21] supra, n.6, para. 32.
[22] [1996] AC 514.
[23] [2001] EWCA Civ 1841.

[30] The doctrine of election has been the subject of discussion in many authorities including **Scarf v Jardine**;[24] **Kosmar Villa Holidays Plc v Trustees of Syndicate 1234**;[25] **Isaac & Sons v Salbstein**; **Pendleton v Westwater and Swingware Ltd** and more recently in **Rukhmin Balgobin v South West Regional Health Authority**; and **Development Bank of St Kitts and Nevis v Brian Browne et al**.[26]

[31] In **Scarf v Jardine**, Lord Blackburn defined the doctrine of election in the following manner:

> "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 as 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 the other way – the fact of his having done that unequivocal act to the knowledge of the person concerned is an election."[27]

[32] The doctrine of election was more recently considered by the Privy Council in **Rukhmin Balgobin**, a case on which Mr. Bristol relied heavily. In **Rukhmin Balgobin**, Lord Kerr who delivered the judgment of the Board, having considered the above mentioned statement of Lord Blackburn, identified three essential features of the principle of unequivocal election, being: (a) the person making the election must have determined that he would follow one remedy from among two or more remedies, although not necessarily stating that is what was being done; (b) the choice of remedy must be communicated to the other party; and (c) the

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[24] (1882) 7 App Cas 345.
[25] [2008] EWCA Civ 147.
[26] SKBHCV2012/0084 (delivered on 8th April 2014, unreported).
[27] Supra, n. 24, pp. 360-361.

communication must be pellucid so as to make the other party believe that the remedy chosen was preferred over all other remedies.

[33] The consequence of making an unequivocal election is that the election would operate as a bar to institution or continuation of proceedings against another party.

[34] The Board also identified in paragraph 21, situations where the doctrine would be applicable and where it would be inapplicable. The Board opined that the doctrine would be applicable where a claim against more than one defendant cannot be pursued because the factual basis necessary to establish liability against each of them is incompatible or where the legal bases of the claims cannot consistently be advanced by the claimant, or where there is joint liability or principal and agent.

[35] An example of joint liability where the doctrine was held to be applicable is the case of **Morel Brothers & Co. Ltd. v Earl of Westmorland**.[28] In **Morel**, the appellant instituted proceedings against the Earl and Countess of Westmorland for goods supplied to the Countess. The appellant's case was that the Earl and Countess were jointly liable. They obtained judgment in default of appearance against the Countess but the judgment proved to be worthless, so they tried to pursue their claim against the Earl. The English Court of Appeal found that the appellant having made out its case as being one of joint liability and they having elected to enter judgment in default against the Countess, they could not thereafter seek to make the Earl liable.

[36] The case of **Scarf v Jardine** is an example of alternative claims against more than one defendant. The claimant had alternative claims against three defendants for sums of money owed to him. He could have pursued his claim in equity relying upon estoppel or he could have pursued his claim against some defendants as ordinary debtors, but the claims could not be pursued concurrently since the legal bases for each claim was inconsistent with the other. Therefore, when judgment

[28] [1904] AC 11.

was obtained against one, he was held to have made an unequivocal election and was barred from pursuing his claim against the other.

[37] The Board identified the following as instances where the doctrine would be inapplicable and judgment obtained against one defendant would not serve as a bar against another defendant, being, where there is no joint liability or relationship of principal and agent or where there is several liability.

[38] The case of **Rukhmin Balgobin** is an example of separate causes of actions. Ms. Balgobin was a medical technician and an ambulance driver who was injured while lifting a patient on a stretcher. She brought proceedings in breach of contract and negligence against the respondent who she alleged was her employer. The respondent denied liability and claimed that they were not her employer and alleged that her employer was another entity TriStar Latin America Ltd. Ms. Balgobin then joined TriStar as a defendant. TriStar did not enter appearance and Ms. Balgobin sought and obtained judgment in default with damages to be assessed but no date was fixed for the assessment. At the trial of the claim against South West, they submitted that the default judgment entered against TriStar amounted to an unequivocal election by the appellant.

[39] Both the lower court and the Court of Appeal were of the view that the default judgment amounted to an unequivocal election. The judge at first instance therefore allowed Ms. Balgobin to discontinue her claim (against TriStar) and he entered judgment against South West. The Privy Council having reviewed several authorities found at paragraph 26 that Ms. Balgobin's claim against TriStar and South West were separate causes of action. Applying the decision in **Isaac & Sons v Salbstein** they reasoned that the default judgment obtained against TriStar was on the basis that they were her employer, while the claim against South West was on the basis that they were the real contracting party.

[40] The inapplicability of the doctrine of election to cases of joint and several liability was also stated by Cotton LJ in the case of **Kendall v Hamilton** as follows:

> "There is no doubt that the judgments referred to will not bar the present action if the contract entered into by Wilson, McLay & Co on behalf of themselves and the defendant is to be considered several as well as joint."

Lord O'Hogan stated: "[i]t is clear, however that the doctrine of King v Hoare is not applicable if the debt sued for be joint and several".[29]

[41] In **Development Bank of St Kitts and Nevis v Browne** a case on which Mr. Ferguson relied, the claim was brought against three defendants for money due and owing jointly and severally under a loan to the three defendants. Judgment in default having been entered against the second defendant who paid part of the judgment, the third defendant applied to have the claim struck out on the basis of unequivocal election and merger. Ramdhani J having reviewed several decisions from **King v Hoare** through to **Rukhmin Balgobin**, dismissed the application on the basis that the claim on the statement of case being pleaded as joint and several liability the doctrine of election or merger did not apply.

[42] The principles that emerge from these cases is that where the issue of unequivocal election is raised, the court is required to consider firstly whether the case is one to which the doctrine of election is applicable, and if the doctrine is applicable, whether the claimant made an unequivocal election. Whether the doctrine of election is applicable is a matter of law. In making this determination, the court is required to examine the pleadings. While whether the claimant made an unequivocal election is a question of fact, in determining whether the claimant made an unequivocal election, the court will consider all of the circumstances of the case.

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[29] supra, n. 8.

[43] I agree with Mr. Bristol that in a case where the doctrine of election is applicable such as in a case of joint liability, that the entry of judgment in default could amount to an unequivocal election even where there is no satisfaction of the judgment, indeed this was illustrated in the case of **Morel Brothers**.

[44] However, the entry of judgment in default would not automatically amount to an unequivocal election. Whether an entry of default judgment amounts to an unequivocal election is a question of fact to be determined having regard to all the circumstances of the case. The nature of a judgment in default and the fact that there has been no execution of the judgment are relevant factors in determining whether the claimant made an unequivocal election.

[45] Applying the above mentioned principles to this case, the question that arises is whether this is a case in which the doctrine of election is applicable. In making this determination a brief review of the pleadings is necessary.

[46] In her statement of claim, Ms. Marryshow pleaded at pleaded at paragraphs 4, 5 and 9 as follows:

> "4. On or about the 1st day of May 2008, the deceased was walking along The Maurice Bishop Highway (also referred to as the Calliste Public Road) when she was suddenly knocked down from behind by a grey Toyota Hilux pick-up van bearing registration number TP 179, which at all material times was driven by Ronald McBurnie, deceased.
>
> 5. At all material times, the said grey Toyota Hilux pick up van TP 179 was owned by the First Defendant, and driven by Ronald McBurnie deceased, his servant and/or agent.
>
> 9. The said collision at all material times was caused by the negligence of the First Defendant's servant and/or agent that is the said Ronald McBurnie."

[47] Mr. McBurnie in his defence pleads at paragraph 3 and 4 as follows:

> "3. Paragraph 5 is denied. The defendant denies that he was at the material time the owner of vehicle TP 179 but states that he used to own the said vehicle but sold same to Ronald McBurnie for the sum of $30,000

and as a consequence cancelled his own insurance policy in respect of the said vehicle. The defendant states that at all material times the said vehicle was insured in the name of the said Ronald McBurnie. The defendant denies that the said Ronald McBurnie was his servant or agent. The defendant states further that the said Ronald McBurnie drove the said vehicle for his own personal or business use and not under the direction or control of the defendant or by the defendant's permission.

4. The defendant reiterates his denial that the said Ronald McBurnie was a servant or agent of the defendant at the date of the accident which resulted in the death of Sheba Marryshow. In the premises, it is denied that the defendant is vicariously liable as alleged or at all for the action of the said Ronald McBurnie."

[48] Ms. Marryshow having pleaded that Mr. Ronald McBurnie was the servant and or agent of Mr. McBurnie, Mr. Bristol submitted that as a consequence of the relationship of principal and agent, they would be regarded as joint tortfeasors and the doctrine of election would be applicable to the instant case. The entry of judgment in default was therefore a bar to the claim continuing against Mr. McBurnie.

[49] As stated earlier, in cases of vicarious liability, the parties are held to be jointly liable. The cases referred to above including **Rukhmin Balgobin** make it very clear that the doctrine applies in cases of joint liability. The main thrust of Mr. Ferguson's argument was that Ms. Marryshow did not make an unequivocal election. The mere entry of judgment in default did not amount to an unequivocal election. Rather, the entry of judgment in default was a cost saving measure.

[50] The issue is whether in the circumstances of this case the entry of default judgment amounted to an unequivocal election.

[51] The circumstances of the instant case were such that there was no denial of the claimant's (the respondent's) pleading that Mr. Ronald McBurnie's negligence was responsible for the motor vehicle collision which resulted in the death of Ms. Sheba Marryshow. The Estate of Ronald McBurnie did not file a defence to

the action and Mr. McBurnie's defence is that he was not the owner of the vehicle, but rather Mr. Ronald McBurnie was the owner of the vehicle, therefore he was not vicariously liable for the action of Ronald McBurnie. In those circumstances, the entry of judgment in default was both a cost and time saving measure. Indeed, it was the only reasonable and sensible action to take.

[52] In addition, Ms. Marryshow took no steps to enforce the judgment but rather continued to pursue her claims against Mr. McBurnie. In my view, in the circumstances of the instant case, it cannot be said that Ms. Marryshow by entering judgment in default against the Estate of Ronald McBurnie was making an unequivocal election to concentrate exclusively on the Estate of Ronald McBurnie. Ms. Marryshow could not be said to be exercising a choice to exclusively pursue her claim against the Estate of Ronald McBurnie. It was merely a convenient way of dealing with that aspect of the claim as it relates to the negligence of Mr. Ronald McBurnie which was not challenged and which was an essential element in establishing the liability of Mr. McBurnie. I therefore agree with the learned master albeit for different reasons that Ms. Marryshow did not make an unequivocal election.

Conclusion

[53] In conclusion, having found that the default judgment entered against the Estate of Ronald McBurnie amounted to a merger of the claim, the appeal is allowed, the order of the learned master is set aside and the claim against Mr. McBurnie is dismissed. In the court below, no order was made as to costs. The appellant being successful on the issue of merger only, is entitled to fifty percent of his costs, such costs to be assessed if not agreed within twenty-one days.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar