THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: SVGHCV2014/190

BETWEEN:

MARCUS TRIMMINGHAM
SYLVIA TRIMMINGHAM

Claimants

and

CCA LIMITED
ADOLPHUS CORRIDON

Defendants

Appearances:

Mr. Duane Daniel with Ms. Jenelle Gibson for the Claimants
Mr. Grahame Bollers for the 1st Defendant

2018: July 11
September 19

JUDGMENT

[1] Moise, M.: The claimants are the parents of Chesley Trimmingham who, unfortunately, died as a result of an accident at work on 21st October, 2011. They have brought this action against the defendants for damages pursuant to the Compensation for Injuries Act[1]. As it relates to the liability of the defendants, the claimants assert the following at paragraphs 5 to 7 of their statement of claim:

> *(5) At all material times the Deceased, was employed by the 1st Defendant, absolutely, to work on a construction site at Godhal Bay, Canouan in the State of Saint Vincent and the Grenadines.*
>
> *(6) Alternatively, at all material times the Deceased, Chesley Trimmingham, was*

[1] CAP 122 of the Laws of Saint Vincent and the Grenadines

employed by the 1st Defendant through its agent the 2nd Defendant, to work on a construction site at Godhal Bay, Canouan in the state of Saint Vincent and the Grenadines.

(7) Further in the alternative, at all material times the Deceased, Chesley Trimmingham was employed by the 2nd Defendant, a subcontractor of the 1st Defendant.

[2] The defendants were duly served copies of the claim form and statement of claim and neither of them filed a defence within the time prescribed by the Civil Procedure Rules 2000 (CPR). As a result of this, the claimants requested and obtained judgment in default against both defendants. The default judgment was granted on 13th February, 2015. Both defendants subsequently filed applications to set the default judgment aside. In the preamble to her order dated 14th April, 2015 the master noted that there was no objection from the claimant to the application of the 1stdefendant.On that basis the default judgment entered against the 1st defendant was set aside. The application of the 2nd defendant was adjourned due to the absence of counsel for the 2nd defendant.

[3] The application of the 2nd defendant came up for hearing on 15th April, 2015 and was denied. In her preamble to that order, the master stated that the 2nd defendant had failed to satisfy the court that there was a good explanation for his failure to file a defence within the time prescribed by the CPR. Indeed, the 2nd defendant grounded his application on CPR13.3(1) and in so doing needed to satisfy the court that all of the requirements for setting aside a default judgment under that rule were satisfied. The effect of these 2 orders however, was that a claim which has been filed in the alternative is now to proceed to trial against the 1st defendant only, in circumstances where a judgment in default has already been obtained against the 2nd defendant.

[4] When this matter first appeared before me on 10th April, 2018 for case management, a number of issues were raised both from the bench and from counsel on behalf of the 1stdefendant. These issues now fall for consideration by the court. I have summarized them as follows:

(a) Given that the claim involves more than one defendant, should the court have considered the provisions of 12.9 of the CPR when determining the application of the 2nd defendant to set the judgment in default aside?

(b) Following on from (a), is the court now *functus officio* in giving consideration to this issue?

(c) Have the claimants made an election in securing judgment against the 2nd defendant, which now prevents them from proceeding to trial against the 1st defendant as submitted by counsel for the 1st defendant?

RULE 12.9 OF THE CPR

[5] The CPR makes specific provision for the factors which are to be considered in circumstances where a judgment in default is being entered against one defendant in a claim brought against multiple defendants. The rule states as follows:

> *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 claimant may continue the proceedings against the other defendants;*
>
> *(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 application at the same time as it disposes of the claim against the other defendants.*

[6] In this case the claimants made their request for judgment in default against both defendants. However, both defendants made separate applications to have this judgment set aside. Having then consented to setting aside the judgment in default against the 1st defendant, the provisions of Rule 12.9 ought to have been a consideration when the court came to address the question of whether the judgment in default ought to have been maintained against the 2nd defendant. Consideration had to be given to the question of whether the case could have been dealt with separately from the claim against the other defendants. In the case of *Development Bank of Saint Kitts v. Brian Browne et al*[2], Ramdhani J(ag) addressed the issue in this rule and stated that ***"****rule 12.9(2)(b) will also be relevant to cases where it would be inappropriate to grant default judgment against one defendant when the case against the remaining defendant could not be disposed of on the merits, without an examination of the case against the* ***defaulting defendant."*** His Lordship examined the facts in the case of *Crown Aluminium Ltd v. Western Insurance Company Ltd*[3] and drew from that case the proposition that ***"the court had*** *to deal with any application for default judgment against one defendant at the same time as* ***it disposed of the claim against the other defendant."***

[7] Whilst I generally appreciate the conclusion in the case of *Crown Aluminium Ltd*., I am of the view that the approach must give consideration to the peculiar facts of each case. In a circumstance where one defendant has not only failed to file a defence but does not participate in the proceedings at all, it may be entirely appropriate to consider the application for judgment in default at the end of the trial against the other defendant. However, in a case such as the present, where both defendants have approached the court to set aside the judgment in default, it may not be just and equitable in all circumstances to allow one defendant to defend the case and deny the other "*when the case against the remaining defendant could not be disposed of on the* ***merits, without an examination of the case against the defaulting defendant."***Rather than waiting to consider the issue at the end of the trial, the court should give consideration to the provisions of 12.9 prior to the commencement of the trial and in the appropriate circumstance, allow the defaulting party the opportunity to put things right and to participate in the proceedings.

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[2]SKBHCV 2012/0084
[3][2011] EWHC 277 (TCC) (18 February 2011)

[8] Here the claimants have filed their claim in the alternative. Essentially the claimants assert that the deceased was employed by the 1st defendant absolutely. Alternatively, it is claimed that the 1st defendant was the employer of the deceased as a result of an agency which existed between the 1st and 2nd defendants. Finally it is asserted, as an alternative to the first two propositions, that the deceased was the employee of the 2nd defendant as a subcontractor. It is difficult to see the circumstances under which the 1st defendant can be held liable for the death of the deceased, either as employer in its own right, or as principal within an agency, without examining the case against the 2nd defendant. If the 1st defendant is held to be liable as employer then it means that the 2nd defendant cannot be liable for the death of the deceased; and yet a judgment in default has already been entered against him.

[9] It would seem clear at this stage, that I am of the view that Rule 12.9 ought to have been addressed when considering the application of the 2nd defendant to set aside the judgment in default entered against him. No doubt, this issue was not raised before the master as the 2nd defendant premised his application on Rule 13.3(1) of the CPR. This was understandable as at that point judgment had been entered against both defendants. However, when the claimants consented to setting aside the judgment in default against the 1st defendant, the provisions of Rule 12.9 became relevant if they were to have proceeded to object to the 2nd defendant's application to set aside the judgment in default. It is unfortunate that neither party, nor the court, raised the issue at the time.

[10] After this issue was canvassed at the case management hearing I considered the statement of Ramdhani J in *Development Bank of Saint Kitts v. Brian Browne et al,* where he states the following at paragraph 51:

> ***"****I dare say that if default judgment has been granted in anysuch case where there has not been this exercise conducted by the court, the default judgment, if it has not* ***been acted upon, should be set aside on the court****'s own motion, as it would have been improperly entered, and such an omission by the court would be contrary to the express provisions of CPR 12.9 and defeat the overriding objective of doing justice to the case.****"***

[11] Indeed, as has been articulated by Pereira CJ in the case of *Deidre Pigot Edgecomb et al v. Antigua Flight Training Center*[4],the court retains an inherent jurisdiction*for the purpose of protecting its process.* This includes the court's capacity to set a judgment aside *ex debito justitiae* if it was irregularly entered. However, this is a power which must be exercised sparingly. The court must be careful not to operate as an appellate body against its own decisions. Unlike a circumstance where the registrar entered a default judgment which has been deemed to be irregular, the master brought to bear her own judicial discretion in circumstances where the issue of 12.9 of the CPR was never canvassed before her. This would have been understandable as there was nothing irregular about the default judgment which was originally granted. The issue only arose when the claimants consented to setting aside the default judgment against the first defendant only. In these circumstances I am of the view that the court is now *functus officio* and cannot go behind the decision as it relates to the entry of judgment against the 2nddefendant. The 1st defendant finds no objection to this but argues however, that in proceeding to maintain judgment against the 2nd defendant, the claimants have made a clear election and the case has now merged into one case against the 2nd defendant only. In these circumstances, it is argued that the claimants are barred from pursuing the claim against the 1st defendant. I now turn to this issue.

ELECTION AND MERGER

[12] Ramdhani J at paragraph 51 of his judgment in *Development Bank of Saint Kitts v. Brian Browne et al* addressed the issue of election and merger as follows:

> *"If it is determined that the claims against each defendant are in the nature of alternativeclaims, or it relates to cases of joint liability, or the pursuit of the cause of action against one is inconsistent to the pursuit of the cause of action as against the other, then it will really be a finding that the claims cannot be dealt with separately, and that a default judgment against one will have the effect of extinguishing the claim against the other. A claimant who insists even in these cases, to obtain a default judgment is effectively electing to forego the other claims."*

[13] Ramdhani J came to this conclusion after assessing a number of authorities on the issues of election and merger. In particular he considered the more recent decision of the Privy Council in the case of *Rukhmin Balgobin v. South West Regional Authority*[5] where the doctrine was given

[4] ANUHCVAP2015/0005
[5][2012] UKPC11

careful consideration. In light of that, at paragraph 17 of his judgment, he described the doctrine of election in the following manner:

> ***"…****an unequivocal election meant the deliberate adoption of liability by a claimant to choose to pursue one defendant to judgment at the expense of pursuing the claim against the other. It also requires that the choice must be communicated to the other party, and this must be done in such a way that would lead the other party to believe that the claimant had made a deliberate preference of the chosen alternative over any other. Balgobin made the point that in an appropriate case if a claimant were to seek and obtain a default judgment, it may amount to an unequivocal election."*

[14] There was certainly no communication by the claimants to the 1st defendant of any intention not to pursue the case against it. However, as Ramdhani J notes, in obtaining a default judgment the claimants' actions may amount to an unequivocal election. It is therefore left to consider the circumstances under which this may be the case. In the case of *King v. Koare*[6] Parker B seeks to address this issue when he states as follows:

> ***"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. 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…***
>
> ***"We do not think that the case of a joint contract can, in this respect, be*** *distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tortfeasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action."*

[6] (1844 13 M & W494

[15] In *Balgobin v. South West Regional Health Authority*, the Privy Council addresses this issue where it states that "*[a]s a matter of principle, where a claim against two possible defendants can be made and the espousal of a case against one defendant is necessarily inconsistent with the maintenance of a claim against a second defendant, a deliberate choice of one should preclude the continuance of a claim against the other."*To some extent, the present case is a clear example of this; especially when one considers the first and last of the three alternatives put forward by the claimants. If indeed the 2nd defendant is the employer of the deceased as the subcontractor on the project, then it is not possible for the 1st defendant to also be liable as employer. In proceeding to trial on the first of the 3 alternatives, the claimant creates a potential absurdity that the court may very well find as a matter of fact that the 2nd defendant is not the employer and therefore not liable for the death of the deceased; and yet a judgment has already been entered against him.

[16] Despite the authorities above, Ms. Jenelle Gibson, acting on behalf of the claimants, argues that the claimants in the present case have not made an unequivocal election. She requests that the court gives consideration to the case of Pendelton v. Westwater & Swingware[7]. In that case the court held that an election had not been made in circumstances where the substantive claim brought by the claimant was against the 1st defendant. However, the judge in that case was at pains to note that he was not establishing a general principle, but was making a determination on the peculiar facts of the case. It was nonetheless a case filed in the alternative and some consideration must be given to the manner in which such issues were addressed by the Privy Council in *Balgobin*.

[17] Lord Kerr in *Balgobin* stated that ***"where there is no joint contract or relationship of principal*** *and agent and the obligations are several, a judgment in an action against one is no bar to an action against another."*In the circumstances of that case, the claimant brought an action expressly against the first defendant. It was the defendant at that point who raised the issue of the 2nd defendant being the employer of the claimant in its defense. The claimant then sought leave to amend her claim to include the 2nd defendant. After doing so, the 2nd defendant did not reply to the claim and a judgment in default was entered. At the trial against the 1st defendant the judge found that it was the 1st defendant who was the employer. The issue of election and merger was taken on

[7][2001] EWCA Civ 1841

appeal all the way to the privy council and Lord Kerr noted that ***"[w]hile it would not be correct to*** *suggest that obtaining a default judgment can never amount to an unequivocal election, the circumstance that such a judgment will almost certainly be obtained without any* ***consideration of the merits is inescapably relevant to that question."***In fact, in giving greater consideration to the general principles of election and merger his Lordship stated the following in relation to the actions of the claimant:

> ***"****where, as is unquestionably the case here, the decision to obtain the default* ***judgment could in no sense be regarded as an abandonment of the appellant's*** *primary basis of claim* ***–*** *that the respondent was her employer* ***–*** *one should be slow to regard that decision as an unequivocal election."*

[18] . Lord Kerr in his judgment in *Balgobin* went on to state as follows:

> ***"In this case the appellant's claims against the defendants were based on separate*** *causes of action. The premise on which the default judgment was obtained was that the second defendant, TriStar, was her employer. The subsequent claim against the first defendant was on the basis (as it was put by Lush J in Isaacs) that it was that defendant which was the real contracting party. On these facts, there can be no question of her cause of action against the first defendant merging into the judgment which she had obtained against the second defendant".*

[19] On That basis, the Privy Council determined that the claimant had not made an election and that she was entitled to pursue her claim against the 1st defendant. His Lordship considered that it was merely a matter of "litigation strategy" on the part of the claimant to obtain judgment against the 2nd defendant whilst pursuing her case against the 1st defendant. In coming to its conclusion the Privy Council would state the following in Balgobin:

> Precisely the same can be said of the decision to obtain default judgment in the present case. In truth, the appellant was not exercising a choice. She was not **declaring, "I** now accept that TriStar was my employer and I choose to pursue my

remedy against them". On the contrary, she was, to use a colloquialism, "keeping her options open". There was nothing about the decision which partook of an unequivocal election. If all the surrounding facts and circumstances are taken into account and if one focuses on the true nature of the decision to obtain the default judgment and the circumstance that, as the judge found, the appellant did not have a genuine claim against the second defendant in the first place, it becomes indisputably clear that this was not the type of unambiguous choice that must be present before proceedings against the respondent could be considered to be barred.

[20] In my view, the submissions of Ms. Gibson on behalf of the claimant, finds much support in the decision of the Privy Council in *Balgobin*. I agree with her when she argues that there has not been an unequivocal election and the claimants are at liberty to pursue the claim against the 1st defendant. As Ramdhani J himself states, if indeed a decision is made at trial that the 1st defendant was the employer, then the trial judge must make some reference to the default judgment and the question of whether it can be enforced in light to the findings of fact made at trial.[8] In short, I have found that the claimants have not made an unequivocal election and are entitled to pursue the claim against the 1st defendant.

[21] I wish to state however, that the situation which presents itself in this case is precisely what Rule 12.9 of the CPR was designed to prevent. Ramdhani J notes in his judgment in *Development Bank of Saint Kitts v. Brian Browne*, that the doctrine of election was known to create some measure of hardship. At times a claimant may have been confined to a default judgment against the more impecunious defendant which he was unable to enforce. Indeed, in the present case, the claimants are not in a position to know the nature of the relationship between the defendants and the deceased. They were not part and parcel of the employment relationship. They have simply cast their nets as wide as they can so as to obtain as just an outcome as possible in the circumstances. On the other hand, there may also be an injustice created when a defendant is not allowed to defend a case which is nonetheless to proceed to trial on facts which touch and concern his defence. In *Balgobin*, Lord Kerr indicated that had the 2nd defendant applied to have the

[8] See paragraph 42 of the decision in Development Bank of Saint Kitts and Nevis v. Brian Browne.

judgment in default set aside he would have succeeded in light of the clear findings of facts made by the trial judge that he was in fact not the employer and not liable for the claimant's losses. In this case the 2nd defendant made such an application and was denied an opportunity to participate in the proceedings.

[22] In my view, Rule 12.9 of the CPR is a provision which is too seldom brought to consideration in cases involving more than one defendant. Ramdhani J notes ***"a claimant who insists even in these cases, to obtain a default judgment is effectively electing to forego the other claims."*** Given the context of his Lordship's comments I would not take these words to be precedent and for the time being would consider this as a statement made obiter. I say so because there are circumstances in which such an outcome may not further the overriding objective. In the present case I am not inclined to deny the claimants the right to pursue their claim in full. However, in my view, further clarity is needed on the application of rule 12.9, especially given the peculiar circumstances of this case. An injustice may very well have been created in failing to allow the 2nd defendant to participate in the proceedings, given that judgment in default had initially been granted against both defendants. No doubt the trial judge will consider this default judgment if it is found at trial that the 1st defendant is in fact the employer.

[23] In the circumstances and despite my misgivings, I find that the claimant has not made an election and the matter against the 1st defendant is to proceed to trial. There will be no order as to costs.

Ermin Moise
Master

By the Court

Registrar