[2012] UKPC 11
Privy Council Appeal No 0013 of 2011

JUDGMENT

Rukhmin Balgobin *v* South West Regional Health Authority

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hope
Lady Hale
Lord Brown
Lord Kerr
Lord Wilson

JUDGMENT DELIVERED BY LORD KERR ON

10 May 2012

Heard on 12 January 2012

Appellant	*Respondent*
Thomas Grant Jonathan Allcock	Alan Newman QC
(Instructed by Forsters)	(Instructed by Simons Muirhead & Burton)

LORD KERR:

INTRODUCTION

1. This is an appeal from a decision of the Court of Appeal of the Republic of Trinidad and Tobago. It concerns the effect of a default judgment entered at an early stage of proceedings against one of two defendants to a personal injury claim. The Court of Appeal concluded that the entry of the default judgment against one defendant operated as a bar to a subsequent finding of liability against the other defendant.

The facts

2. Ms Rukhmin Balgobin was an emergency medical technician and ambulance driver. On 19 June 2001 she was injured when she lifted (with a fellow employee) a heavy patient on a stretcher. She injured her neck and her arm was also affected. On 4 April 2005 she issued proceedings against the South West Regional Health Authority, the respondent in the present appeal. Her statement of claim averred that the respondent was her employer. Her claim was based on breach of contract and negligence. Among other allegations the statement of claim asserted that the respondent had failed to take adequate precautions for her safety, and failed to warn her of the dangers of lifting heavy persons. It was also claimed that she had not been trained in proper lifting techniques.

3. On 6 May 2005 the respondent filed a document referred to as a defence and counterclaim. In fact it did not contain a counterclaim but it pleaded that the appellant had been guilty of contributory negligence. The defence denied liability and claimed that the respondent was not the appellant's employer. It averred that her employer was TriStar Latin America Ltd.

4. On 19 May 2005 the appellant sought leave to join TriStar as a defendant and to make certain consequential amendments to her pleadings. This was granted on 27 May 2005 and on 2 June 2005 the appellant served an amended writ and statement of claim with TriStar as a second defendant.

5. TriStar did not enter an appearance to the writ. On 25 July 2005, the appellant applied for, and was granted, judgment in default of appearance, with damages to be assessed. An application was made on the same day for a date for the assessment of

such damages to be fixed but this has not taken place nor has a date for an assessment of damages ever been scheduled.

The proceedings

6. Trial of the appellant's claim against the respondent took place in April 2008. The respondent chose not to call evidence. It relied on the submissions of its counsel to the effect that the default judgment entered against Tri Star amounted to an election by the appellant and that this precluded her from pursuing a claim against the respondent. This point had been raised for the first time in the respondent's skeleton argument for trial, which had been filed on 17 April 2008. The point had not been pleaded.

7. Jamadar J gave judgment on 20 May 2008. He held that the respondent was the appellant's employer. He found that the respondent had failed to instruct her properly and to train her in methods and techniques for moving patients on stretchers. This, the judge decided, amounted to breach of the contract of employment and of the respondent's duty of care to take all reasonable precautions for the appellant's safety. He found that she had contributed to the occurrence of her injuries, however, to the extent of 20%.

8. The judge characterised the respondent's principal argument as a submission that the evidence could not support a finding of joint employment and that the default judgment already entered was therefore conclusive on the issue of liability. This was the basis on which he considered the respondent's claim that the appellant was not entitled to continue with her claim against the South West Regional Health Authority.

9. The appellant's counsel had applied for leave to withdraw the judgment against TriStar. Jamadar J decided that this amounted to an application to discontinue. Since the judgment obtained was, in the judge's estimation, an interlocutory judgment, it was not a judgment "on the merits". He also considered that the circumstances in which the appellant had been prompted to apply to join TriStar were relevant. The respondent had positively asserted that TriStar had been the appellant's employer. It had submitted two written statements to that effect. In these circumstances the judge gave permission to the appellant to withdraw the default judgment and to discontinue her claim against TriStar. Judgment was entered for the appellant against the respondent for 80% of her damages which were to be assessed.

10. On appeal to the Court of Appeal, it was held by a majority (Kangaloo JA and Stollmeyer JA, Smith JA dissenting) that the default judgment obtained against TriStar was a bar to a finding of liability against the respondent. In his dissenting judgment, Smith JA held that the judgment entered against the second defendant did not amount to an election by the appellant to rely on the liability of TriStar to the

exclusion of the respondent. The appellant was therefore entitled to pursue her claim against the health authority. On this basis, there was no need to set aside the default judgment or to discontinue the claim against TriStar. He expressed no view on whether that course of action had been valid.

Merger and alternative liability

11. A classic exposition of the principle of merger is to be found in the judgment of Parke B in *King v Hoare* (1844) 13 M & W 494, 504-505:

> "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."

12. In the present case the respondent argued that the appellant had but one cause of action and that this lay against her employer. When she obtained judgment against the second defendant, she did so on the basis that TriStar was that employer and this operated as a bar to her continuing her action against the first defendant. Her cause of action had merged into the judgment and could not be revived for the purpose of the suit against the respondent.

13. The reasoning of the majority in the Court of Appeal was to the effect that when the appellant chose to seek and accept a default judgment against TriStar, she could no longer assert that the respondent was her employer because the foundation of the judgment against TriStar was that it was in fact the employer. The appellant could not be permitted to claim, in contradiction of that foundation of liability, that she had in fact been employed by another agency. In so holding the majority purported to apply the reasoning in *Morel Brothers & Co Ltd v Earl of Westmorland* [1904] AC 11 and *Moore v Flanagan* [1920] 1 KB 919.

14. In *Morel* the appellants had taken an action against the Earl and Countess of Westmorland for the price of goods supplied at the request of the Countess. In default of an appearance by her, they obtained judgment against the Countess. This was worthless so they proceeded against the Earl, having alleged that this was a case in which both he and his wife were jointly liable. Although this was the basis on which the case against the Earl was presented, the question of his possible liability as principal for his wife's having ordered the goods became part of the Court of Appeal's consideration. An arrangement had been made in July 1899 that the Earl should make available £2000 for the payment of household expenses. Collins MR in the Court of Appeal [1903] 1 KB 64 considered that the effect of this arrangement was that the Countess should not have authority to pledge the Earl's credit. The presumption of actual authority having thus been negatived, the question of ostensible authority was considered. It was concluded that all the evidence pointed to there having been no such authority. If anything, the evidence suggested that there was "a separate liability on the part of the wife" (p 74).

15. The essence of the finding of the Court of Appeal was that the appellants, having made the case against the Earl and the Countess that they were jointly liable, could not be heard to say that he was liable as her principal. On that basis the Master of the Rolls said, at p 77, "we must look at the case in the light of general principle; and it seems clear, so regarding it, that, if there has been a conclusive election by the plaintiffs to adopt the liability of one of two persons alternatively liable, they cannot afterwards make the other liable: see *Scarf v Jardine* (1882) 7 App Cas 345."

16. In this context, the "adoption" of liability by a claimant means the decision to choose one possible defendant over another as the one against whom the case is to be made. This presupposes that an election is genuinely feasible, in other words, that a case against either defendant could properly be made and that a decision as to which is to be selected has been consciously taken. As 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.

17. In the present case the appellant contends that this principle should only operate where there is *in fact* a basis for liability against both possible defendants. Thus, in light of the judge's finding that the respondent was actually the appellant's employer, it is now clear that she did not enjoy a cause of action against TriStar and her decision to obtain default judgment against that agency should not signify. In truth, the argument goes, she only had a cause of action against the respondent. Her decision to mark judgment against TriStar is irrelevant.

18. That argument cannot, in my opinion, prevail in light of what was decided by the Court of Appeal (and affirmed by the House of Lords) in *Morel.* In that case, the findings of the court confirmed that the claimants did not have a cause of action against the Earl. But that was not the only basis on which they were considered not to be entitled to pursue their claim against him. It was also held that because the claimants had made a case that the Earl and the Countess were jointly liable, they could not thereafter be heard to allege that, in direct conflict with that case, the Earl was liable as principal who had given the Countess authority to order the goods. The two cases that the claimants had sought to make were mutually contradictory. Either the Earl was liable as a joint contractor or he was liable as principal. He could not be liable in both capacities.

19. Of course, the principle in *Morel* will also apply where there is a genuine alternative liability situation. This much is clear from its reliance on and derivation from *Scarf v Jardine*. In that case there were three defendants all potentially liable to the claimant. He could have pursued A and B in equity (estoppel) *or* B and C as ordinary debtors. Either claim was viable but they could not have been pursued in tandem. Of this situation, Lord Selborne LC said, at p 350:

> "The two principles are not capable of being brought into play together: you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A, B, and C all liable jointly."

20. *Scarf* was therefore an example of there being a genuine alternative liability choice. The claimant could have opted for either of two possible causes of action. Each was independently feasible but they could not have been pursued concurrently because the legal basis for each was antithetical to the other.

21. It appears, therefore, that where a claim against more than one defendant cannot be pursued either because the factual basis of the suit against one is incompatible with the factual foundation necessary to establish liability against the other *or* the legal bases of both claims cannot be consistently advanced, an election to pursue one basis of claim will preclude reliance on the other. By contrast, 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: *Isaacs & Sons v Salbstein* [1916] 2 KB 139, 152, per Swinfen Eady LJ. Furthermore, as Lush J, sitting in the Divisional Court in that case, said at p 143, there is no foundation for the contention that because A obtains a judgment against B (who in fact was never a party to the contract at all) he cannot afterwards obtain judgment on that contract against C, who was the real contracting party.

Did the obtaining of the default judgment amount to an election?

22. In *Pendleton v Westwater and Swingware Ltd* [2001] EWCA Civ 1841 the claimants sued the first defendant for loans which they claimed they had advanced by way of payment of cheques to the first defendant or to another company on his behalf. He was in the words of Laws LJ, at para 2, "effectively the sole owner or certainly in control of the second defendant company". The claimants asserted that the moneys which they had advanced were personal loans to the first defendant. He claimed that the sums had been paid to or for the benefit of the second defendant company and not himself. That claim was rejected by the trial judge and on 1 March 2000 he found in the claimants' favour. The claimants had obtained a default judgment against the second defendant company on 28 January 1998 and this included the sums claimed in respect of the money advanced by the cheques. The first defendant submitted that the claimants were thereby fixed with an irrevocable election made by them to proceed against the second defendant in relation to those sums and that the election barred the pursuit of any claim against him.

23. The trial judge rejected the second defendant's submission. He appealed and, in dismissing his appeal, Laws LJ said, at para 17, that the fact that the case had been pleaded in a number of alternative ways; the circumstance that the judgment obtained was a default judgment, not involving consideration of the merits; that the second defendant was merely a "vehicle for the first defendant's activities"; and the fact that the judgment remained unsatisfied were all relevant circumstances which bore on the question whether there had been an election which barred the claim against the first defendant. At para 18 Laws LJ observed:

> "In the context of this case the first defendant's reliance on an election by the claimants is the barest technicality. 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."

24. In the Court of Appeal in the present case, Kangaloo JA said this about the decision in *Pendleton*:

> "19. The ratio of *Pendleton* is that on the facts of that case when the application for the default judgment was made against the backdrop of

> the features of the case, it could not be said that there was an unequivocal election. *Pendleton* must be taken as saying that a court faced with the instant problem must look at the default judgment against the backdrop of the features of the case including the way the case was advanced evidentially, to see whether the entry of the judgment was a conclusive, unequivocal election."

25. Because the basis of liability was "clearly alternative", in the sense that either TriStar or the respondent was the appellant's employer, Kangaloo JA expressed great difficulty in treating the decision to obtain a default judgment against TriStar as other than an unequivocal election. But this does not appear to me to be a point of distinction with *Pendleton*. In that case the liability was also "clearly alternative".

26. 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.

27. There were, moreover, several features about the present appeal which pointed unmistakably away from this having been a deliberate decision on the part of the appellant to opt exclusively for the identification of the second defendant as her employer. Before turning to those, however, it is appropriate to say something about the nature of an unequivocal election.

28. In *Scarf* at pp 360-361 Lord Blackburn described the concept of unequivocal election in these terms:

> "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 knowledge of the persons concerned is an election."

29. A number of essential features can be derived from this passage, each of them pertinent to the question whether an unequivocal election has been made. 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.

30. In an analogous context, that of waiver in tort, Lord Atkin in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 30, said:

> "if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose."

31. Full knowledge in this context (or, indeed, in the context of unequivocal election) does not necessarily connote a full appreciation of the possible legal consequences of one's decision. But 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.

32. While 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 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 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. At p 1010, Viscount Radcliffe said:

> "a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *In re South American & Mexican Co* [1895] 1 Ch 37) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained

> reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."

33. In this case the appellant would not have joined TriStar as a defendant, much less obtained judgment against it, had not the respondent asserted trenchantly that it was not her employer and that TriStar was. It maintained that position throughout the trial and it may safely be assumed that the decision to call no evidence on the question was prompted by the judge's indication that, unless the default judgment was set aside, it would operate as a bar to the appellant's pursuit of her claim against her true employer.

34. Obtaining a default judgment against a defendant who had not entered an appearance in these circumstances was no doubt considered to be a sensible litigation strategy, whether or not it was capable of subsequent enforcement. Of course, before it was enforced, TriStar could have applied to have the judgment set aside. In light of the judge's ultimate finding that the South West Regional Health Authority, and not TriStar, was the appellant's employer, there is every reason to believe that such an application would be successful. It could surely not be the case that the appellant, because her legal advisers had considered that the default judgment was a neat way of tying up that particular part of the proceedings would be regarded as having made an unequivocal election to concentrate her exclusive fire on a defendant which might well have the judgment set aside and, in so doing, confirm her primary case, namely, that the first defendant was in fact her employer.

35. The situation in the present case is mirrored by the circumstances in *Westminster City Council v Reema Construction Ltd (No 1)* (1990) 24 Con LR 16. In that case the claimant had engaged contractors to complete building works. It alleged the works had been defective. The contractor was at one time Douglas & Gavin. They had subsequently been taken over by a firm called Gustmast. In the proceedings Douglas & Gavin were named as fourth defendants and Gustmast as the seventh defendant. The claimant secured default judgment against Gustmast in default of defence. The fourth defendants applied to be removed as a party on the basis that by securing default judgment against the seventh defendant the claimant had elected to seek its remedy from Gustmast and not Douglas & Gavin. The claimant applied to have the judgment set aside.

36. In an affidavit filed on behalf of the claimant, its solicitor explained the reasons for obtaining the default judgment in this passage:

> "No defence having been served on behalf of the seventh defendant, a judgment in default was entered on 22 August 1989. By then I had reached the conclusion that there was little if any prospect of the seventh defendant satisfying any judgment, and that it would not take part in the proceedings. Accordingly I obtained the judgment not with a view to executing it but for convenience and to save the costs which would be involved in having to continue to serve it with all relevant summonses, etc. No steps have been taken to assess damages pursuant to the judgment and to enforce the same."

37. Having referred to the cases of *Scarf* and *United Australia Ltd*, Fox LJ said, at p 21, that it was clear that "election was concerned with choice". Of the explanation for obtaining the default judgment he said this, at p 22:

> "It is evident, therefore, that the judgment, which was for damages to be assessed, was taken, in effect, merely to simplify the conduct of the proceedings. There was no intention of pursuing the inquiry to final judgment. Thus Westminster were not seeking remedies at all."

38. 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.

Conclusions

39. In these circumstances, the Board concludes that it was unnecessary to set aside the default judgment. Since it did not amount to an unequivocal election on the part of the appellant, its existence was not a bar to her proceeding against the respondent. The appeal will be allowed and the order of Jamadar J restored.

40. Parties to submit applications in writing for costs within 28 days.