REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 103 of 2009

BETWEEN

OKPE ADOGWA

Claimant/Appellant

AND

DHANRAJ BALKARAN

First Defendant/Respondent

AND

ABRAHAM BABWAH

Second defendant/Respondent

MOTOR AND GENERAL INSURANCE COMPANY LIMITED

First Co-Defendant Respondent

PATRICK JOSEPH

Third Defendant/First Ancillary Claimant/Respondent

MOTOR ONE INSURANCE COMPANY LIMITED

Second Co-Defendant/Respondent

JASON JOSEPH

Fourth Defendant/Second Ancillary Claimant/Respondent

JOHN NOREIGA

(Joined pursuant to the Order of the Honourable Justice Stollmeyer Dated 14th March 2008)

Fifth Defendant

JERRY MANNETTE

(Joined pursuant to the Order of the Honourable Justice Stollmeyer Dated 16th January 2008)

Sixth Defendant

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
N. Bereaux, J.A.

APPEARANCES: **Mrs. P. Hadad-Maraj appeared on behalf of the Appellant and Mr. R. Ramoutar appeared on behalf of Patricia Joseph, Jason Joseph and Motor One Insurance Company Limited.**

DATE DELIVERED: June 22nd, 2012

I agree with the judgment of Mendonca J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the decision of the Judge made at a case management conference striking out the Appellant's claim against the Respondents on the basis that the default judgment obtained against the fifth and sixth defendants (John Noreiga and Jerry Manette) in default of appearance precluded the Appellant from proceeding against the Respondents.

2. The Appellant's claim was for damages for personal injuries suffered by him as a result of a motor vehicular collision. In the statement of case as originally filed, the Appellant claimed that at all material times he was a passenger in motor vehicle registration number TAO 2292 when it was involved in a collision with motor vehicle registration number HBE 6212 at the intersection of the Mausica Road and the Priority Bus Route as a consequence of which he suffered serious personal injuries. He claimed that the collision was caused either by the negligence of the driver of HBE 6212 "or alternatively" the driver of TAO 2292. Consequently the Appellant joined as defendants in the claim the owner and driver of each of the vehicles and their insurers. They are the Respondents to this appeal.

3. The claim was defended. The driver and the owner of HBE 6212 filed and served a joint defence. In it they denied liability and claimed that the collision occurred as a result of the negligence of the driver of TAO 2292. The insurer of HBE 6212 served a separate defence in which it denied any allegation of negligence in the statement of case and averred, inter alia, that its liability as insurer was limited to "the statutory minimum" as provided for in the Motor Vehicles Insurance (Third-Party Risks) Act.

4. The owner, driver and insurer of TAO 2292 delivered a joint defence. They admitted the collision but denied any negligence. They further averred that there was another vehicle involved in the accident namely, HBU 2096, which at the time was driven by Jerry Manette. They alleged that the collision was caused wholly or in part by Jerry Manette as the driver of that vehicle.

5. Subsequent to service of the defence of the owner, driver and insurer TAO 2292, the Appellant obtained leave to add Jerry Mannette as a defendant. By a later application the Appellant applied for and obtained permission to add as another defendant John Noreiga, who he alleged to be the owner of the vehicle driven by Jerry Mannette, and to amend his statement of case (I shall hereafter refer to John Noreiga and Jerry Mannette together as the added defendants). In the amended statement of case the vehicle driven by Jerry Manette was inadvertently referred to as PBT 9390. For convenience, however, I shall refer to the vehicle by its correct registration number, HBU 2096.

6. By the amended claim form and statement of case the Appellant alleged that the collision was caused by the negligence of the driver of TAO 2292, "or alternatively" the negligence of the driver of HBE 6212 "or alternatively" by the negligence of the driver of HBU 2096. The Appellant therefore claimed damages for personal injuries against the owners and drivers of the said vehicles and in the case of the insurers of TAO 2292 and HBE 6212 the Appellant sought a declaration that they were liable to indemnify their insured in respect of any judgment obtained against them. In the case of the added defendants, it appears that they were uninsured.

7. The added defendants were served with the amended claim form and statement of case but failed to enter an appearance and on December 4th 2008 the Appellant obtained judgment against them in default of appearance with damages to be assessed and costs.

8. On January 30th, 2009 a case management conference was held. At the conference attorney-at-law appearing for the Appellant was asked what course he proposed to adopt given that a default judgment was obtained against the added defendants. He indicated that he wished to keep all other defendants (the Respondents to this appeal) in the proceedings while he considered his client's position. The case management conference was adjourned to March 27th, 2009.

9. On the adjourned date attorney-at-law for the Appellant indicated that he wished to proceed against the other defendants. Counsel for the owner, driver and insurer of TAO 2292 however submitted that it was not necessary to have his clients remain in the matter because the default judgment obtained against the added defendants made them fully liable to the Appellant. On that basis, he submitted, the claim should be struck out against his clients. The Judge accepted this submission. In his written reasons the Judge stated simply that he was "persuaded" by the submission and struck out the claim against the owner, driver and insurer of TAO 2292 and on the same basis also struck out the claim against the owner, driver and insurer of HBE 6212.

10. The Appellant now appeals. Counsel for the Appellant submitted that the Judge was wrong to strike out the claim against the Respondents. She argued that the Appellant's claim against the Respondents and the added defendants constituted, as against the owner and driver of each vehicle, separate acts of negligence. There were therefore three separate torts, each actionable and a judgment in respect of one could not be an answer to the other. Therefore the entry of the judgment against the driver and the owner of one of the vehicles involved in the collision could not be a bar to a claim against the other parties. Further, Counsel submitted that where a claim could only be in the alternative against one or the other two defendants, the entry of a judgment of one defendant would be a bar to proceedings against the other since the liability of one defendant would be inconsistent or incompatible with the liability of the other. That was however not this case as this is not a case where the liability could only be in the alternative. Alternatively, Counsel submitted that the default judgment would only be a bar to the Appellant proceeding with the claim against the other parties if the Appellant had unequivocally elected to proceed against the added defendants to the exclusion of the other parties. In this case however there was no such election.

11. The driver, owner and insurer of HBE 6212, namely the First Defendant/Respondent, the Second Defendant/Respondent and the First Co-Defendant/Respondent, were not represented on

the appeal. The other Respondents being the driver, owner and insurer of TAO 2292 were represented by Counsel. He submitted that the case management Judge was correct to strike out claim against the Respondents. He agreed that the Appellant's pleaded case was one of alternative liability of the Respondents or the added defendants. It was not concurrent, or joint or contributory. The default judgment obtained against the added defendants was final as to the issue of liability. The Appellant therefore chose to and obtained final and unequivocal judgment on the issue of liability against the added defendants. Accordingly the Appellant cannot now seek to pursue any claim as to liability for the accident against the other parties.

12. The issue in this appeal, therefore, is whether in the circumstances of this case, the Appellant having obtained judgment against the added defendants can proceed against the Respondents.

13. The Appellant's claim, as I have mentioned above, is based in the tort of negligence. The Appellant has alleged that the collision was caused either by the negligence of the driver of TAO 2292 or alternatively by the negligence of the driver of HBE 6212 or alternatively by the negligence of the driver of HBU 2096. The Appellant has therefore claimed against the Respondents in the alternative and not as he might have done, that the collision occurred by reason of the negligence of all of them.

14. In **Rukhmin Balgobin v South West Regional Health Authority** [2012] UKPC11 a similar question arose. In that case the Claimant, who was a medical technician and ambulance driver, was injured when she lifted a heavy patient on a stretcher. She sued the South West Regional Health Authority (SWRHA) contending that the SWRHA was her employer. Her claim was based in breach of contract and negligence. The SWRHA served a defence denying liability in which it alleged that the Claimant's employer was TriStar Latin America Limited (TriStar). As a consequence the Claimant sought and obtained leave to join TriStar as a defendant. TriStar did not enter an appearance to the writ, and the Claimant obtained judgment against it in default of appearance with damages to be assessed.

15. The Trial Judge found that the Claimant's employer was the SWRHA and that it had contributed to the occurrence of the injuries of the Claimant to the extent of 80%. The SWRHA however argued that the evidence could not support a finding of joint employment and that the

default judgment already entered was therefore conclusive on the issue and amounted to an election by the Claimant that precluded her from pursuing her claim against the SWRHA. In response Counsel for the Claimant applied to withdraw the judgment it had entered against Tri Star. The Judge decided that this amounted to an application to discontinue and gave permission to the Claimant to withdraw the default judgment and to discontinue the claim against TriStar. Judgment was entered in favour of the Claimant against SWRHA for 80% of the damages which were to be assessed.

16. The SWRHA appealed and the Court of Appeal by a majority held that the default judgment obtained against TriStar was a bar to a finding of liability against the SWRHA. Kangaloo, J.A. in his judgment, with which Stollmeyer, J.A, agreed, (Smith J.A. dissenting) noted that as far as the Claimant was concerned her employer was either the SWRHA or TriStar and it could not be both. He stated (at para. 10):

> *"Once it is agreed that the liability of the defendants is liable only in the alternative, the authorities show that the election of a claimant to enter a default judgment against one is a bar to the finding of liability of the other."*

The Court of Appeal therefore allowed the appeal, set aside the order of the trial judge and dismissed the claim against the SWRHA.

17. The Claimant appealed to the Privy Council. In a unanimous judgment delivered by Lord Kerr, the Privy Council stated (at para. 16):

> *"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."*

18. This principle applies where either the factual basis (see **Morel Brothers and Co. Ltd. v The Earl of Westmorland** [1904] AC 11) or the legal basis (see **Scarf v Jardine** (1882) 7 App Cas 345) of one claim is inconsistent with the other. In such circumstances both claims cannot be pursued and the unequivocal election to pursue one claim will be a bar to the other. As the Privy Council put it (at para. 21):

> *"...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."*

Where therefore a claim against one defendant is inconsistent or incompatible with a claim against another defendant an equivocal election to pursue one claim will preclude the other.

19. The Privy Council went on to consider what amounts to an unequivocal election and in so doing cited with approval a passage in Lord Blackburn's judgment (at pp 360-361) in **Scarf**, supra, (see para. 28 of **Rukhmin**) and noted the following essential features (at para. 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 has been made - in other words a deliberate preference of the chosen alternative over any other."*

20. With specific reference to whether the obtaining of a default judgment can ever amount to an unequivocal election, the Privy Council noted that it would be wrong to suggest that the obtaining of a default judgment can never amount to an unequivocal election. However, the fact that it is a default judgment and has been obtained without any consideration of the merits is "inescapably relevant to that question". It must be scrutinized with great care in order to determine "the bare essence" of what was the import of the judgment, for although from one point of view it may be looked upon as a judgment by consent:

> *"and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action 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."*

(per Viscount Radcliffe in **Kok Hoong v Leong Cheong Kweng Mines Ltd.** [1964] AC 993 at 1010 and quoted at para. 32 of **Rukhmin**).

21. The Privy Council found that on the facts in **Rukhmin** there was not an unequivocal election. The obtaining of a default judgment was a "sensible litigation strategy" and by doing so the Claimant was keeping "her options open" and was not declaring that she accepted TriStar as her employer. The Privy Council concluded (at para. 38):

> *"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."*

In the circumstances it was unnecessary for the Trial Judge to have set aside the default judgment against TriStar. The Privy Council allowed the appeal and reinstated the order of the Trial Judge.

22. In this case, as I have mentioned, the claim was made against the Respondents in the alternative and there is no claim that they may all have contributed to the collision. The Appellant is therefore contending that one or the other of the drivers of the vehicles in this matter caused the collision. On the face of the statement of case, the collision was caused either by the driver of HBE 6212 in failing, inter alia, to keep a proper lookout and emerging onto the intersection when it was unsafe and dangerous so to do, or the driver of TAO 2292 in failing, inter alia, to pay heed to red light then showing to him or alternatively, the driver of HBU 2096 in failing to have any sufficient or proper lookout for the motor vehicles at the intersection. The manner in which the case was pleaded, an unequivocal election to pursue the claim against one driver should preclude the pursuit of the claim against the others, as the factual basis against one is incompatible with the factual basis against the others. It seems to me therefore that the question in this matter is whether on the facts of this case there can be said to be such an unequivocal election.

23. In answering that question it is necessary to have regard to all the circumstances. It is relevant in this context therefore to bear in mind that the original claim by the Appellant was not against the added defendants. They were added only after some of the other Respondents (the driver, owner and insurer of TAO 2292) claimed that the collision occurred "wholly or in part"

by the negligence of the driver of the added defendants' vehicle. The Appellant did not expressly abandon the claim against the Respondents and it would be remarkable in view of the plea by the said Respondents that the driver of the added defendants' vehicle may be liable in part for the collision that the Appellant would regard the added defendants as solely liable, not having initially considered them in any way liable for the accident. It is also relevant to note that the judgment against the added defendants is a default judgment. There has been no consideration of the merits and it is liable to be set aside. Moreover, the added defendants were the only parties who were not insured and according to the Appellant's attorney-at-law are men of straw. They present no chance of recovery of any damages that may be awarded to the Appellant for the severe injuries suffered by him as a consequence of the accident.

24. When those circumstances are considered I think it is not possible to say that there was an unequivocal election to pursue the added defendants to the exclusion of the others. The obtaining of the judgment against the added defendants appears to me, as in the **Rukhmin** case, to be nothing more than "sensible litigation strategy", a "neat way of tying up that particular part of the proceedings" and "to keep his options open". That this was intended was clearly stated at the case management conference by Counsel for the Appellant. He wished, notwithstanding the entry of the judgment against the added defendants, to proceed against the Respondents.

25. In the **Rukhmin** matter one of the circumstances the Privy Council considered in coming to the conclusion that there was not an unequivocal election by the Claimant to proceed against Tri Star to the exclusion of the SWRHA was that she did not have a genuine claim in the first place against TriStar. The Privy Council was able to say so because it was determined by the Trial Judge that the SWRHA and not TriStar was the Claimants' employer. One cannot in this case say that the Appellant does not have a genuine claim against the added defendants. However what is clear is that the Appellant has a bona fide claim against the Respondents and when the other circumstances surrounding the obtaining of the judgment against the added defendants are considered, it cannot be said that there was an unequivocal election to proceed against them to the exclusion of the others.

26. In the circumstances I would allow this appeal and set aside the order of the Judge below striking out the claim against the Respondents. The claim is reinstated against the Respondents and remitted to the High Court .

27. I will hear submissions on the costs of the appeal.

Allan Mendonça
Justice of Appeal

Delivered by Jamadar, J.A.

28. This appeal involves the narrow, but not necessarily simple, issue of election. The law dealing with this issue and the related concept of merger as it applies in Trinidad and Tobago was comprehensively reviewed and restated by the Privy Council very recently in **Balgobin v SWRHA.**[1]

29. In **Balgobin's case** the trial judge declined to hold that the Claimant had, by taking up a default judgment against one of the two defendants, conclusively and unequivocally elected to pursue her remedy against that defendant only, so as to constitute a bar to continuing her claims against the other defendant. The Court of Appeal, by a majority (Kangaloo and Stollmeyer, JJA), held that there was an unequivocal and conclusive election[2] which operated as a bar to pursuing the action against the other defendant.

30. Lord Kerr, in delivering the decision of the Privy Council, disagreed with the majority of the Court of Appeal. The Privy Council held that in the circumstances of the case, where the defendant against whom the default judgment had been taken up was only joined and added as such as a consequence of the original defendant asserting that that defendant (and not itself) was the employer of the claimant and so solely liable,[3] and where that defendant had never entered an

[1] [2012] UKPC 11.

[2] See paragraph 20 of the judgment of Kangaloo, J.A.

[3] See paragraph 33 of the judgment of Lord Kerr.

appearance, that the decision to take up a default judgment was nothing more than 'a sensible litigation strategy' and 'a neat way of tying up that particular part of the proceedings'[4] and thus did not amount to an election.

31. Lord Kerr summed up the analysis of the Board in the following way[5]:

> 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.
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> 38. 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". 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.

32. From **Balgobin's case** the following core principles can be extracted, which are relevant to any analysis of whether there has been an election:

(i) An election must be genuinely feasible. It must be that a case against either defendant could properly be made.[6]

(ii) An election must have been consciously taken. It must be that a decision or choice has been consciously taken selecting which defendant to pursue.[7]

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[4] See paragraph 34 of the judgment of Lord Kerr.

[5] See paragraphs 27 and 38 of the judgment of Lord Kerr.

[6] See paragraph 16 of the judgment of Lord Kerr.

[7] See paragraph 16 of the judgment of Lord Kerr.

(iii) An election is more likely to be found in inconsistent claims. "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 prelude the continuance of a claim against the other."[8] That is, where the claims sought are mutually contradictory, it is more likely to conclude that an election has been made.

(iv) An election is also more likely to be found in claims where there exists "a genuine alternative liability choice". That is, where "each claim was independently feasible but they could not have been pursued concurrently because the legal basis for each was antithetical to the other".[9]

33. Lord Kerr summarized the position at paragraph 32 (iii) and (iv) above as follows:[10]

"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."

34. As to whether a choice has been consciously taken, or in the language of the cases, whether there has been an 'unequivocal election', it would appear that the following considerations are relevant, though not exclusively so:[11]

(i) Whether the person making the election had determined that he would pursue one remedy only out of a range of available ones.

(ii) Whether this choice has been clearly communicated to the other parties concerned.

(iii) Whether the communication is such as to lead those other parties to believe that a deliberate preference for the one choice had been made over all others.

(iv) Whether, in the case of default judgments, the choice to take up such a judgment was a 'sensible litigation strategy', and/or a means to 'simplify the conduct of litigation', and/or a means to 'keep all options open'; which is to be determined in

[8] See paragraph 16 of the judgment of Lord Kerr.

[9] See paragraphs 19 and 20 of the judgment of Lord Kerr.

[10] See paragraph 21 of the judgment of Lord Kerr.

[11] See paragraphs 28 to 31 of the judgment of Lord Kerr.

> a common sense and pragmatic way having regard to the particular circumstances of each case.

35. The facts in the instant matter clearly demonstrate that the taking up of the default judgment (against the 5th and 6th defendants), could not by any stretch of the imagination have amounted to an unequivocal election by the claimant to pursue his remedies against those defendants only, so as to constitute a bar against pursuing his claims against all of the other defendants. I therefore agree that this appeal must be allowed with the orders made by Mendonca, J.A. at paragraphs 26 and 27 of his judgment.

36. The relevant facts are recited at paragraphs 2 to 7 of the judgment of Mendonca, J.A. . What transpired procedurally before the trial judge is also recited at paragraphs 8 and 9 of the judgment of Mendonca, J.A. . There is nothing that I need to add to this narrative in order to dispose of this appeal, except for some aspects of the affidavit evidence of the claimant in support of his application to add John Noreiga (the 5th defendant) to the action. In his affidavit, filed on the 4th March, 2008, the claimant stated, inter alia, as follows:

> 2. I am informed by my Attorneys at law Messrs. Dipnarine Rampersad and Company (hereinafter referred to as "the said Attorneys") and verily believe that this action was commenced by Claim Form and statement of case filed herein on the 31st July, 2007 wherein a claim was made against the Defendants for damages for personal injuries and consequential loss suffered by me as a result of the collision which occurred between vehicles registered as numbers HBE 6212, TAO 2292 and PBT 9390.
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> 7. An Ancillary Claim was filed by the third and fourth Defendants and second Co-Defendant against Jerry Mannette on the 31st October, 2007, as driver and person responsible for the accident.
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> 8. I only became aware of the Third and Fourth Defendants' and Second Co-Defendant's Ancillary Claim on the 16th January, 2008 when a complimentary copy thereof was given to my Attorneys at law. By order of the Honourable Mr. Justice Stollmeyer dated the 16th January, 2008, the Ancillary Defendant was joined as a Defendant to the action.
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> 9. We have recently received information which indicates that John Noreiga of Mausica Road, Mausica was at all material times the owner of motor vehicle registration number PBT 9390 (sic) and I verily believe that if the issues of liability

are to be properly ventilated at the trial he ought to be joined as a Defendant to this action. A true copy of police accident report is now attached and marked "O.A.1".

10. I verily believe that all other parties are not objecting to the joinder of John Noreiga as Defendant. A true copy of letter of consent is now attached and marked "O.A.2".

37. Clearly the intention and purpose of joining the 5th defendant was to ensure that all the issues of liability in relation to the injury suffered by the claimant could be properly and effectively ventilated in one action. Indeed, this joinder was only as a consequence of the contention by the 3rd and 4th defendants and the second co-defendant in their defence (at paragraphs 3 and 4) that the collision was caused by motor vehicle HBU 2096, and by their ancillary claim against the driver of that vehicle (the 6th defendant), and because of his joinder to the proceedings as a consequence of a prior order of the trial judge made on the 16th January, 2008.

38. In these circumstances and where neither the 5th nor 6th defendants entered any appearance, it was clearly only 'sensible litigation strategy' and a means to 'simplify the conduct of litigation' and to keep 'all of his options open', that the claimant's attorney took up the default judgment against these defendants. For these reasons alone, this default judgment cannot be considered an unequivocal election as found by the trial judge (see paragraph 34 above).

39. Moreover, this is neither a case of inconsistent claims nor one of where the claims though alternative could not be pursued concurrently because of mutually exclusive legal bases (see paragraph 32 above). This is a simple case of alleged negligence against several tortfeasors causing the same damage. That this is so is manifest from the claimants amended claim form and statement of case (particularly at paragraphs 11, 12 and 13). In such circumstances, "where two or more tortfeasors cause damage to the same plaintiff, the causes of action against each tortfeasor is entirely distinct from one another and the plaintiff can recover from each tortfeasor…".[12] However, as the authors of Winfield and Jolowicz on Tort[13] point out: "Although a judgment against one of joint or several concurrent tortfeasors does not bar

[12] See Clerk and Lindsell on Torts, 15th Edition, paragraph 2-55; and **The Koursk** [1924] P. 140 at 156, 161 – 162.

[13] 15th Edition at page 732.

proceedings against the others, it is obviously desirable that a plaintiff should, if he reasonably can, sue in the same proceedings all the tortfeasors who are liable to him for the same damage".

40. Thus, even though in the case of several tortfeasors each one is responsible for a separate tort and successive actions can be brought against them even though the damage suffered by the claimant is one and indivisible, the courts have encouraged all causes to be litigated in one action.[14] Further, where there are claims against more than one defendant, the rules of court permit entering a default judgment against the defendant in default and continuing proceedings against the other defendants.[15] This is exactly what the claimant has done in this case. He has in one action included all possible tortfeasors that may have caused the damage that he suffered. And, in the face of no appearance being entered by two of these alleged tortfeasors, he has taken up a default judgment against them, even as he continues his claims against the others.

41. In my opinion therefore, on the facts and in law, this is not a case in which the default judgment entered by the claimant against the 5th and 6th defendants amounted to an unequivocal election, such as to bar continuing proceedings against all of the other defendants sued. The decision of the trial judge is therefore set aside and the matter is hereby ordered to be continued against the other defendants. The parties will be heard on the question of costs.

P. Jamadar
Justice of Appeal

Dated this 22nd day of June, 2012.

[14] See, for example, Part 8.4, CPR, 1998.

[15] See Part 12.12, CPR, 1998.