THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2013

CLAIM NO. SKBHCV 2012/0084

BETWEEN:

DEVELOPMENT BANK OF ST KITTS AND NEVIS
Respondent/Claimant

And

BRIAN BROWNE
1ST DEFENANT

LENORA WALWYN-BOWRIN
2ND DEFENDANT

EDWIN MORRIS
3RD DEFENDANT/APPLICANT

Appearances

Mr. Arudranauth Gossai for the Applicant/3rd Defendant
Ms. Deidre Williams for the Respondent/Claimant

2013: October 25
2014: February 18, April 8

Cause of Action - Joint and Several Liability – Default Judgment Against One of Several Defendants – Whether Doctrine of Election Applies – Merger of Cause of Action in Default Judgment – Whether applicable to Case of Joint and Several Liability

Notice of Discontinuance – Discontinuance Against One Defendant – Whether Accord and Satisfaction - Effect on the Remaining Defendant – Whether Operating as a Discharge as Against Remaining Defendant.

JUDGMENT

[1] **RAMDHANI J. (Ag.)** This is an application dated 25 July 2013 by the 3rd defendant/applicant (the '3rd defendant') seeking to strike out the claim against him and for costs on several grounds. First, the 3rd defendant contends that the claimant, having sought and obtained a default judgment against the 2nd defendant, has effectively made a conclusive election in law, the consequences of which is that the cause of action against him has merged into the judgment. Second, he argues that in addition, and in the alternative, the claimant, having filed a notice of discontinuance and withdrawal against the 2nd defendant, the claimant has thereby given him a release, the effect of which also discharged the 3rd defendant from any liability as a co-surety.

The Parties, the Underlying Claim and Brief Events Following

[2] The claim in this matter was filed on the 28 February 2012 against the three defendants, seeking to recover, *inter alia,* the sum of $97,950.99 as monies due and owing jointly and severally, on a loan extended to the 1st defendant, which the claimant stated was guaranteed by the 2nd and the 3rd defendants.

[3] On the 18 May 2012, the 3rd defendant filed a Defence, disputing the claim on several grounds.

[4] On the 30 May 2012 the claimant requested and obtained default judgment under Part 12 of the **Civil Procedure Rules 2000** against the 2nd defendant for the entire sum claimed plus interest and costs.

[5] On the 13 June 2012, the claimant filed a Judgment Summons under Part 52 against the 2nd defendant seeking to enforce payment of the judgment sum.

[6] Between December 2012 and May 2013, Counsel for the 3rd defendant wrote a number of letters to Counsel for the claimant in an effort to have the matter withdrawn and costs paid.

Apart from a single response from Counsel in January 2013, there was no other communication from that side.

[7] On the 9 April 2013, the 2nd defendant paid part of the judgment debt to the claimant.

[8] The present application to dismiss the claim against the 3rd defendant was filed on the 25 July 2013.

[9] The matter continued against the 2nd defendant until the 31 July 2013, when the claimant filed a Notice of Discontinuance against her.

The Issues on the Application

[10] The first issue raised by the application, is whether the principle of conclusive election applies to the circumstances of this case, and if it does whether there was in fact this election with the resulting consequence that the cause of action existing against the 3rd defendant has been extinguished as having been merged into the default judgment against the 2nd defendant?

[11] On his application, the 3rd defendant did say that he reserved the right to rely on other grounds. An application should contain all the grounds on which an applicant seeks to rely. He may, however, raise other legal issues that have not strictly arisen from the grounds. In this case the 3rd defendant did just that; in his submissions filed on the 9 October 2013, he raised additional legal matters.

[12] The second issue which he raised by his submissions and at the hearing for the court's determination is whether the privileged communications between the parties should be examined by the court, on the basis that there has been a concluded agreement between the parties that the claimant would withdraw the matter? He added for good measure that this discussion and agreement also amounted to an undertaking given to withdraw the matter which the claimant should not be allowed to resile from.

[13] The third issue raised is whether the Notice of Discontinuance filed by the claimant with regards to the 2nd defendant amounted to a release of the 2nd defendant and thereby discharged the 3rd defendant?

Analysis and Findings

Issue No. 1 - Election and Merger of Cause of Action

[14] The 3rd defendant contends that when the claimant sought and obtained default judgment against the 2nd defendant, this was a conclusive election and as such there was a merger of the cause of action against him into the judgment obtained against the 2nd defendant. He also appears to be relying on the separate doctrine of merger of cause of action, his argument being on the same facts when the claimant obtained default judgment against the 2nd defendant, the single cause of action was merged in the judgment. He states that on either the doctrine of election or the merger of the cause of action,[1] the result is that the claimant may not continue any claim against him for the same debt. He has relied on a number of cases to support his position, namely **John Hopkin v Robinson Lumber Co. Ltd.**[2]; **Hammond v Scholfield**[3]; **Morel Brothers Co. Westmoreland (Earl of)**[4].

[15] Does this principle help the 3rd defendant in the circumstances of this case?

[16] The doctrine of election was recently revisited by the Privy Council in **Rukhmin Balgobin v South West Regional Authority**,[5] where the Board held that "where a claim against more than one defendant could not be pursued either because the factual basis of the suit against one was incompatible with that necessary to establish liability against the other or

[1] Whilst an election will result in a merger, the doctrine of merger is not in all cases dependent on there being an election. Note Halsbury Laws Volume 9 at paragraph 624 states: "As a general rule, a judgment recovered against one of more of a number of joint debtors bars an action against the others, even if the creditor did not know of their existence at the time when the first action was brought, and even if the judgment is not satisfied. This principle is said to depend upon the doctrine of merger or upon the rule that joint debtors have the right to be sued together."
[2] Civil Appeal No. 8 of 1998 (Grenada)
[3] [1891] 1 QB 453
[4] (1903) 1 KB 64
[5] [2012] UKPC 11

the legal bases of both claims could not be consistently advanced, an unequivocal election to pursue one basis of the claim would preclude reliance on the other".

[17] The Board went on to explain that 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.

[18] The principle of election of course is only applicable where it is genuinely feasible. It is properly applicable where there is a genuinely alternative liability situation.[6] It is also relevant in cases of joint liability between two or more debtors and cases in which the cause of action against one is inconsistent with the cause of action against the other.

[19] It is in these cases that the question of an unequivocal election will have significant consequences and will have the effect that a claimant will be barred from proceeding against any other person with regards to the same cause of action which was the subject of the election.

[20] In **Balgobin**, Lord Kerr delivering the judgment of the Board relied on the decision in **King and Another v Koare**[7] to explain the consequences of election. In particular His Lordship pointed to the judgment of Parke B. where he stated:

> *""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*

[6] Morel Brothers; Scarf v Jardine (1881-82) L.R. 7 App. Cas. 345
[7] (1844) 13 M & W 494

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."[8]

[21] Is the principle genuinely feasible in this case?

[22] All of the cases relied on by the 3rd defendant fall within the category of cases in which the doctrine of election applies. In John Hopkin the causes of action were in the alternative. In Hammond v Scholfield the issue related to a judgment obtained against one of two joint contractors. In Morel Brothers[9] the claimants had made out a case in joint liability and then had sought to argue that it was an alternative liability. None of these cases dealt with a situation where the claim was grounded in a cause of action of joint and several liability.

[8] See also United Australia Company v. Barclays Bank (1941 Appeal Cases, page 1) as being instructive, where Lord Atkin said at page 29 of the report: *"On the other hand, 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. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal; the right of a landlord, where forfeiture of a lease has been committed, to exact the forfeiture or to treat the former tenant as still tenant, and the like. To those cases the statement of Lord Blackburn in Scarf v. Jardine applies 'where a man has an option to choose one or other of two inconsistent things when once he has made his election it cannot be retracted'".* Referred to with approval in Clarkson Booker v Andjel [1964] 2 QB 775

[9] In Balgobin, Lord Kerr delivering the judgment of the Board gave useful synopsis of the Morel Bros case. He said: "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 the *Morel* case 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* (1882) 7 App Cas 345"

[23] Joint and several liability for a debt arises when two or more persons join in making a promise that they will pay that debt, and at the same time each of them also separately promise that each will be fully responsible for the whole debt. "Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors.[10]

[24] The law has recognized that there is an important distinction to be made between cases of joint liability and cases where the liability is joint and several. As is stated in Halsbury 4th edition Vol. 9 at para 621:

> *"Where two or more persons make joint and several promises to another, each of the promisors incurs both a joint and a several liability. All or any of the promisors may be sued, at the option of the promisee in respect of a joint and several liability and separate actions may be brought against each.*
> *King v Hoare (1844) 13 M&W 494 at 505 (co-sureties); Beecham v Smith (1858) EB & E 442; Owen v Wilkinson (1858) 5CBNS; Re Jeffrey, ex parte Honey (1871) 7 Ch App 178 (joint and several promissory notes)"*

[25] There is really no doubt that the above quoted passage represents the law. There continues to be however, some debate even in the case law relating to whether a single debt jointly and severally owed creates separate obligations and even separate causes of action.

[26] In King v Koare, Parke B. referred to the right to move against each debtor jointly and severally liable as pursuing 'different remedies'. He stated:

> *"The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee."*

[27] In fact, some cases have actually treated it as two separate causes of action. A vivid example of this is Isaacs & Sons v Salbstein[11] (a case referred to with approval by the

[10] Chitty on Contracts Volume 1, at paragraph 1201 page 651.
[11] [1916] 2 K.B. 139 Court of Appeal

Privy Council in Balgobin) where Lord Justice Banks giving a definition of a cause of action as being every fact which is material to be proved to entitle the plaintiff to succeed, quoted Lord Justice Bowen with approval when he said:[12]

> *"There is in the cases of joint contract and joint debt* ***as distinguished*** *from the cases of joint and several contract and joint and several debt, only one cause of action."* [emphasis supplied]

[28] To be contrasted is Watts v Aldington[13] a decision of the United Kingdom's Court of Appeal in which Lord Steyn stated: "In Victorian times judges of great distinction reasoned that in a case involving joint and several liability of joint tortfeasors there is only a single cause of action, and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action, or as it was usually put, releases the other joint tortfeasors."[14]

[29] His Lordship was treating with the effect of a creditor's release of one surety as against others who are jointly and severally liable. Subsequent Court of Appeal decisions from the United Kingdom has recognized and maintained the separateness of the obligations created by 'joint and several liability'. These included Johnson and Another v Davis and Another[15] in which Lord Chadwick analyzing Watts stated:

> *"In Watts v Aldington, Tolstoy v Aldington the liability of Mr. Watts and Count Tolstoy as judgment debtors was plainly several as well as joint. In such a case for the reasons explained in the judgments in this court, the relevant question is not whether the agreement between the creditor, A, and one of the co-debtors, B, releases the debt which B owes to A. Even if it did, that would, in logic, have no effect on the several debt owed to A by the other co debtor C."*

[30] There can be no doubt that where two or more persons have agreed to be jointly and severally liable for the same debt, a single performance by either of them will discharge the others. This is really the basis upon which the release and discharge rule operates, and this is entirely consistent with the separate obligations and contracts between the promisors to pay the debt. Each person who has agreed to pay the debt has effectively entered into a separate contract to pay the debt. The promisee has a joint and a separate

[12] *See also Hodgson, Re (1885) 31 Ch. D. 177 Court of Appeal*
[13] [1993] EWJ No. 3964 (Court of Appeal)
[14] Quoted with approval by our Court of Appeal in Stanley Charles and Another v Keith Mitchell and Others Civil Appeal No. 7 of 2004 (Grenada), in the course of dealing with the issue of the effect of a release given to one tortfeasors jointly and severally liable.
[15] [1998] 2 AER 649

remedy against each. It is in this context that the case law has to be understood. When there is release, it extinguishes the single performance. Where it is a question of recovering the debt, the promisee has the right to sue each and every promisor on the several and separate contract to pay.

[31] Thus in Halsbury 4th edn., Volume 9 at paragraph 616, there is a useful illustration, set out in the following terms:

> *"…for instance B and C joint promise to pay £100 to A, but both B and C also separately promise A that £100 will be paid to him either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulative liable, so that payment of £100 by B to A discharges C; but is free of most of the technical rules governing joint liability."*

[32] One of the technical rules that have no place in cases involving joint and several liability for a debt, is the doctrine of election or merger of cause of action in the judgment. The decision in King v Hoare itself is one of the earlier cases recognizing this distinction. The headnote of this decision states:

> *"A judgment without satisfaction recovered against one of two joint debtors is a bar to an action against the other: - Secus[16] where the debt is joint and several – and it is pleadable in bar not in abatement. – Such a Plea need not contain verification by the record or prayer of judgment"*

[33] The issue of joint and several liability for a debt was dealt with by Parke B. in the following dicta:

> *"Chief Justice Popham (Pro Jac. 74) states the true ground. He says, 'If one hath judgment in trespass to recover against one, and damages are certain' (that is converted into certainty by the judgment), although he be not satisfied, yet he shall not have a new cause of action for this trespass. By the same reason, e contra, if one hath cause of action against two and obtain judgment against one, he shall not have remedy against the other; and the difference between this case and the case of debt and obligation against two is, because there every of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction." And it is quite clear that the Chief Justice was referring to a case of joint and several obligation, both from the argument of counsel as reported in Pro Jac., and the statement of the case in Yelverton."*

[16] The Latin term 'Secus ' means, in a UK legal context: 'the legal position is different, it is otherwise'.

[34] The distinction was the subject of judicial comment in both the Court of Appeal and the House of Lords in **Kendall v Hamilton**[17], one of the significant decisions on the law relating to joint liability and the merger of cause of action. In this case, the defendant had argued that the contract on which the plaintiffs had brought the action, was the joint contract of the defendant and certain other partners, and that the judgments recovered against some of the joint contractors are a bar to an action against the other co-contractor, on the ground that the original cause of action is merged in the superior obligation of the judgments. The Court of Appeal examined a long line of cases including King v Hoare[18] and agreed that this was the principle in the case of joint liability. The Court of Appeal went on to also examine another line of cases showing that this rule did not apply to cases where the contract creates an obligation that is not simply a joint liability but is one which is <u>'joint and several'.</u> As Cotton L.J. of the English Court of Appeal stated:

> *"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.*

[35] The House of Lords in Kendall approved of the rule in King v Hoare as it related to joint liability, but almost all of the Law Lords were at pains to demonstrate that Equity did not transform a joint debt by a partnership into a debt owed jointly and severally. They all effectively approached the matter that, if a joint debt could in equity be considered a joint and several debt, it would not bar a second action against a third partner when the two previous ones had been sued to judgment. As Lord O'Hagan stated:

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[17] (1878) 3 C.P.D. 403

[18] The principle is, that a person who enters into a joint contract has a right to say he will not be sued but with his co-contractor, and the plaintiff by his act cannot deprive him of that right." Where, however, the obligation binds two or more persons severally, a judgment against one is no bar to an action against another. Isaacs & Sons v Salbstein [1916] 2 K.B. 139 referring to King v Koare.

Isaacs & Sons v Salbstein [1916] 2 K.B. 13 referring to "In Lechmere v. Fletcher 1 Cr. & M. 623, 635.the law is thus stated by Bayley B.: "There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied: but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other"; and that statement of the law was recognized by Parke B. in King v. Hoare. 13 M. & W. 494.

If, therefore, where the obligations are several, a judgment in an action against one person is no bar to an action against another, I see no ground upon which it can be maintained that an action brought in error against a fictitious person or against a person not under any liability is a bar to an action against the person alleged to be really liable. The cause of action is not the same.

> *"It is clear, however, that the doctrine of King v. Hoare is not applicable, if the debt sued for be joint and several;…"*

[36] Of relevance to this discussion is **J&H Davison Ex p. Chandler, Re**[19] in which Cave J explained that the object of taking a joint and several note was to have the separate liability of each promissor as well as the joint liability of all. He examined the case law, including **King v Hoare** and **Drake v Mtichell**[20] and concluded that there was no authority to conclude that when the separate liability of one promisor has merged in a separate judgment, it operated to bar an action on a joint note. He went on to say:

> *"This very point was decided as long ago as Drake v. Mitchell.*[21] *In that case one of three joint covenantors had given a bill of exchange for the debt secured by the covenant, on which bill judgment was recovered, and it was held that this judgment was no bar to an action of covenant against the three. Lord Ellenborough said:*[22] *"I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." No authorities to the contrary can be found, and it seems clear both on principle and authority that a joint judgment is not a bar to a separate cause of action.*
>
> *Neither is the separate cause of action gone by reason of the **doctrine** of **election** or waiver. This doctrine applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed: Curtis v. Williamson;*[23] *or the old and new partners in a firm where the old partners are liable only by estoppel, as in Scarf v. Jardine ;*[24] *or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other."*

[37] That the above principles represents the correct view of the law has also been generally recently reconfirmed in **Balgobin** by Lord Kerr when he said 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*

[19] (1884) 13 Q.B.D. 50 Queen's Bench Division
[20] [3 East, 251]
[21] [3 East, 251]
[22] [3 East, p. 258]
[23] [Law Rep. 10 Q. B. 57]
[24] [7 App. Cas. 345]

against another: Isaacs & Sons v Salbstein [1916] 2 KB 139, 152, per Swinfen Eady LJ…"[25]

[38] The line of authority has remained consistent, and is today accepted as continuing to be accurate.[26] In Halsbury Laws, 4th edn. Vol. 9 at paragraph 624, it is stated that the doctrine of merger of cause of action <u>'has no application in cases where the liability of the debtors is several as well as joint.</u>'[27]

[39] Thus, in cases where the several persons have agreed to be jointly and severally liable for a debt, a '*judgment against one promisor does not bar an action against the others*,'[28] since in these cases, the liability is several as well as joint. In fact the point has been made that *judgment without satisfaction against one is no bar to an action against the other, and this is so even if the plaintiff deliberately refrains from proceeding to execution on the first*

[25] A careful examination of the cases shows that several liability may or may not be cumulative. See Halsbury Laws Volume 9 paragraph 1079 and the cases referred to there: Mikeover Ltd. v Brady [1989] 3 All ER 618 CA and Deanplan Ltd. v Mahmoud [1993] Ch. 151

[26] I have examined the authorities out of Canada, Australia and Hong Kong treating with the relevant English Common Law principles, and they also are consistently making the point that the doctrine of merger of the cause of action in the judgment against one debtor does not apply to bar proceedings against any of the other debtors jointly and severally liable. See *M. Brennen & Sons v. Thompson (1915) 22 D.L.R. 375; Campbell Flour Mills Co. v. Bowes 32 O.L.R. 270;* Wright v. Ritchie 1925 Carswell Ont 183 Ontario Court of Appeal, 1925; see Birkdale Realty v. McLean 1984 CarswellNS 114 County Court, 1984 which held that default judgment against one of two tenants jointly and severally liable could not bar an action against the other. The court rejected *res judicata* and merger of cause of action, and stated: "While the plaintiff is entitled to two judgments, he is only entitled to payment once."See Walker v Bowry 35 CLR 48 where Isaacs A.C.J. of the Australian High Court spoke to the right to recover two judgments. He stated: "Bowry had contracted to pay "jointly and severally" and not "jointly." He had thereby consented to the Bank suing and recovering judgment against Walker severally or jointly, and, even if severally, he undertook to be liable to pay the creditor severally himself. Even if several judgments are obtained, all would be liable."

[27] Cases cited by Halsbury are: Blumfield's Case (1596) 5 Co Rep 86b; Higgin's Case (1605) 6 Co Rep 44b; Ayrey v Davenport (1807) 2 Bos & PBR 474; Lechmere v Fletcher (1833) 1 Cr & M623; King v Haore (1844) 13 M & W 494; Re Davison, ex parte Chandler (1884) 13 QBD 50; Blyth v Fladgate [1891] 1 Ch 337. See also Bovell v J. N. Goddard & Sons Ltd. [1958 - 60] Barb. L.R. 3 [COURT OF ERROR - APPEAL FROM THE ASSISTANT COURT OF APPEAL (Field, J.) January 10, 1958] a decision from Barbados. The court discussed the matter in the following terms: "The second point taken by Mr. Brancker is that judgment having gone against the other defendant, viz. Walker, the right of the plaintiff to proceed to recover judgment against Bovell is lost. As authority for this proposition he has referred me to the well known cases of King v. Hoare (1844) 13 M & W 494 and Kendall v. Hamilton (1879) 4 App. Cas 4. Now these cases establish without any doubt that when persons are liable on a joint contract judgment recovery against one puts an end to the right to proceed to recover judgment against the other. It matters not whether the persons jointly liable are sued at one and the same time or at different times. The basis for this rule rests on two principles: (1) one contract, one judgment; (2) joint contractors have the right to be made parties and not have liability to future action hanging over their heads. Rules of the Supreme Court of the U.K. as well as our local Common Pleas Rules give relief to a plaintiff in such cases. Unhappily there is no equivalent rule affecting such matters in actions in the Assistant Court of Appeal. It would therefore seem that the general rule of law as laid down in the two aforesaid cases remains the law applicable to cases tried in the Assistant Court of Appeal (Legal) jurisdiction. This rule however has no application when the persons to be sued are jointly and severally liable."

[28] Halsbury Laws of England Volume 9 paragraph 622

judgment."[29] What bars the claimant from proceeding against the remaining debtors or defendants is a full satisfaction of the debt,[30] or some form of full release or discharge.[31]

[40] Arguments were made on behalf of the 3rd defendant that to allow two separate judgments relating to the same debt would give the claimant the facility to recover twice for the same debt. Whilst this might prima facie, appear objectionable for a claimant to recover two judgments for the same sum, this point has also been addressed by the common law and equity. Bankes, L.J. dealt with this objection in Isaacs & Sons v. Salbstein at p. 155, as follows:

> *"It is said that, if this is the rule of law, a person may recover a number of judgments against different persons for the same sum of money. I see no great objection to this, having regard to the fact that a plaintiff cannot receive the amount claimed more than once..."*

[41] In B.O. Morris, Lord Goddard made the point that equity would intervene to ensure that there is no double recovery. In Tang Man Sit v Capacious Investments Ltd,[32] Lord Nicholls of Birkenhead, delivering the judgment of the Privy Council, addressed the issue of double satisfaction:

> *"… a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."*

[42] On a practical note, it might be appropriate, especially in a case such as the present, that if a second judgment is to be granted, that judgment should recite the fact of the first judgment and limit the claimant to being able to collect no more than the full sum which the

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[29] Per Lord Goddard in B. O. Morris, Ltd. v. Perrott and Bolton *[1945] All E.R. 567*

[30] Halsbury Laws of England Volume 9 paragraph 622; King and Another v Koare 13 M. & W. 494, 505

[31] See also J&H Davison Ex p. Chandler, Re (1884) 13 Q.B.D. 50 Queen's Bench Division which held "Where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for and obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates."

[32] [1996] A.C. 514

subject matter of the entire claim. An example of this approach is found in B.O Morris where the court ordered that the judgment granted should contain the words "so however that the plaintiff is not to recover more than £5,379 in all', that being the full sum which was the subject matter of all the claims.[33]

[43] In the present case, by the statement of claim, the claimant sought to recover a debt from the defendants 'jointly and severally'. In his 'Amended Defence,' the 3rd defendant did not specifically address this issue of joint and several liability though he contended that the 'bond' that he signed was not enforceable and further he did not owe any debt. There is some persuasive Canadian authority for the view that the allegation on the pleadings that the liability is 'joint and several', is not significant in the determination of the issue as to whether the matter is one of joint liability or joint or several liability.[34] In such cases it is necessary for the court to examine the 'contract and the affidavit evidence surrounding the contract' to make a determination as to whether the liability is actually joint and several.[35]

[44] I am content to say that this would be a proper approach. Even so, however, this is not a matter that the court can resolve on this application. The court has not been presented with the agreement, and all the court has to rely on is the bare statements on the claim and the statement of claim. I am unable to go past these statements, because it raises claims

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[33] See also Rosenberg v Simons 1978 CarswellBC 1173; Midland Montagu Australia Ltd v Harkness 119 FLR 375 – Supreme Court of New South Wales; Baxter v Obacelo Pty Ltd (2001) 205 CLR 635

[34] Kohn v. Devon Mortgage Ltd., 1983 CanLII 1105 (AB QB)

[35] T.f. Speciality Sawmill Inc. v. Obal, 1999 CanLII 5548 (BC SC) "The form of the statement of claim cannot be determinative. By simply submitting that the form of the pleading is either joint or alternative does not make it such. The contract is what it is, not what it is said to be. I concur with the remarks of Stratton J. in *Kohn and Kohn v. Devon Mortgage Ltd. and Glass*, 1983 CanLII 1105 (AB QB), [1984] 1 W.W.R. 544 (Alta. Q.B.) wherein he said at page 550: "I have concluded that the allegation of the joint and several liability of the defendants as contained in the pleadings is not significant in determining the issue of whether the default judgment is a bar to further proceedings against Glass."

[5] However, the framing of the writ and statement of claim might limit the claim of the plaintiff to an alternative claim. In the case at bar the writ names each of the defendants with separate and distinct addresses. This is not in keeping with the invoice that gives but one address which is neither of those shown in the writ. The statement of claim alleges that "the Plaintiff sold to the Defendants .... " and that "the Plaintiff invoiced Defendants".

[6] Neither the writ nor the statement of claim use words such as "joint", "several" or "alternative". The wording in the statement of claim leaves it open, in my opinion, for the plaintiff's claim to be argued as any one or a combination of these.

[7] To make the determination as to the form of liability it is necessary to look to the contract of sale and to the affidavit evidence surrounding the contract.

of 'joint and several' liability against the defendants. The court is compelled to treat it as such until trial, when this matter may be factually examined.

[45] For the reasons given, when the claimant sought and obtained judgment against the 2nd defendant, and even sought to enforce that judgment against that defendant, it did not mean he was barred against continuing against the 3rd defendant. The principles relating to election and merger of cause of action in judgment cannot be held to apply. This issue will have to be determined when the agreement and the evidence is considered. Where the claim involves 'several' liability, the claimant's right to continue the case against the remaining defendant will not expire when default judgment is obtained against one of the other defendants for the full sum, and this is even in cases where there has been enforcement of the judgment against that defendant and the payment of some portion of the judgment debt.

[46] Before leaving this matter, I wish to say that the common law principle of election has been the subject of considerable criticism, as applied in its pure form it often leads to great hardship and commercial distress for the unwary. If, in a case like this, it is found at trial that the liability is actually joint and not joint and several, it could have the effect that the claimant would then be barred from recovering a judgment against the 3rd defendant. Where the other defendant is proven to be impecunious, it would mean that the claimant would have lost the opportunity to pursuing the one from whom he would be able to recover the debt.

[47] Many jurisdictions, including the United Kingdom[36] and Australia have passed legislation to alleviate the hardships occasioned by the common law rule.

[48] Here in the OECS, in the context of a default judgment, the Civil Practice and Procedure Rules 2000, by CPR 12.9, attempts to alleviate some of the harshness of the doctrine, but it seems that in St. Kitts and Nevis, it is a provision often disregarded, as the doctrine of election continues to be a labyrinth for the uninitiated.

[36] See the United Kingdom's Civil Liability (Contribution) Act 1978

[49] CPR 12.9 treats with the procedural rules relating to default judgments in claims against more than one defendant, and states as follows:

> *"12.9 (1) A claimant may apply for a default judgment on a claim for money or claim for delivery of goods against one 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.*
> *(3)…*

[50] There is no doubt that this rule seeks in part, to address the doctrine of election. It expects and requires that the court should make a determination in any case where there are two or more defendants, and an application is being made for default judgment or judgments against one or more but not against all. In this exercise it must be determined whether the claims against each of the defendants can be dealt with separately or whether a default judgment against one will effectively extinguish the claim against the other, or otherwise adversely affect the interests of the remaining defendant(s) on the trial.

[51] If it is determined that the claims against each defendant are in the nature of alternative claims, 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.[37] A claimant who insists even in these cases, to obtain a default judgment is effectively electing to forego the other claims. Where the claims cannot be dealt with separately it is

[37] Note Pedleton v Westwater – case pleaded on a number of different bases.

only on the claimant's deliberate and informed election that the court could be entitled to grant such default judgment. I dare say that if default judgment has been granted in any such 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.

[52] Quite apart from the doctrine of election, 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 on of the merits, without an examination of the case against the defaulting defendant. An example of this can be found in the case of Crown Aluminium Ltd v Northern & Western Insurance Company Ltd & Anor,[38] in which Crown (C) had made demands under a guarantee issued by an insurer, Northern and Western Insurance Company (NWI) who refused, alleging that the demands were not made in accordance with the guarantee. It was C's case that Credit Risk Management ('CRA') acting as an agent of NWI had varied those terms of the guarantee that related to the procedure for making demands. Being unable to get payment, C commenced a claim against both NWI and CRA. There was no acknowledgement or defence from NWI and an order of default was entered (not a judgment). CRA then moved for summary judgment, to strike out the claim against him, alleging that the claim against NWI had to succeed and so this would extinguish the claim against CRA. The court held that the application was an attempt to circumvent the principle in CPR Part 12.8(2)(b) (the equivalent to the OECS CPR 12.9(2)(b)) that where a claim could not be dealt with separately from a claim against another defendant, 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. It significantly held that there should be a trial at which CRA was present because it could not be assumed that C would succeed against NWI, and there were disputed issues between C and CRA that affected NWI's liability.

[38] [2011] EWHC 277 (TCC) (18 February 2011)

[53] Having regard to all the above, I am of the view that the doctrine of election does not apply to the case as pleaded. The 3rd defendant's application therefore fails on this ground.

Issue No. 2 - A Settlement?

[54] Though there were arguments that there was some agreement to settle this matter, the application brought by the 3rd defendant itself does not allege that there has been any agreement to settle this matter. This is not purely a legal issue, but required some amount of factual distillation. That being said, this point is a short one, as even the affidavit supporting the application does not set out any evidence which shows that there was any agreement to settle this matter by withdrawing it against the 3rd defendant. There is therefore no need for this court to examine any privileged communication, or even this issue any further. This disposes of this issue. This reasoning also disposes of the arguments relating to whether there was any undertaking.

Issue No. 3 - The Effect of the Discontinuance As Against the 2nd Defendant

[55] Mr. Gossai has asked the court to note that the claimant has discontinued the matter against the 2nd defendant after the present application was filed. He argues that as a matter of law this has the effect of releasing and or discharging the 3rd defendant from any further liability to pay the debt owed to the claimant.

He relies on **Mercantile Bank of Sydney v Taylor** [1893] AC 317, **Smith v Wood** [1929] 1 Ch. 14; **Bank of Montreal v Marogna** [1988] CanLii 2890; **John Anthony Jeans v John Richards Bruce** [2004] NCWSC 539; **Development Bank v Osbert Chapman et al** HC Claim No. 168 of 2012 (SKN)

[56] The affidavit sworn to by Mr. David Fox on the 20 September 2013, on behalf of the claimant, sheds some factual light on this matter. He is the Credit Risk Manager of the claimant, and he states that after judgment for the full debt was obtained against the 2nd defendant, 'she entered into negotiations with the claimant with a view of paying what she

considered to be her fair share of the debt.'[39] He states that the claimant gave instructions to its 'solicitors to collect at least half of the judgment sum of $102,558.71 from the 2nd defendant, since there are two defendants/guarantors involved in this lawsuit and it would only be fair that both defendants pay their equal share of the sum claimed'.

[57] Mr. Fox further deposes that 'on the 10th April, 2013, the 2nd defendant, Leonora Walwyn-Bowrin paid the sum of $51,537.80 representing her fifty percent (50%) share of the sums claimed in this lawsuit." He then adds that the balance remains outstanding, but that on or about the 29 July 2013 the matter was discontinued against the 2nd defendant who has 'paid her fair share of the judgment'.[40]

[58] This matter was prosecuted on the basis that the 2nd and the 3rd defendants are jointly and severally liable as guarantors to a debt. The question for the court is whether the discontinuance against the 2nd defendant released the 3rd defendant from any liability for the same debt.

[59] It has always been recognized at common law that when a man binds himself jointly and severally as a surety along with others, he was effectively entering into a contract by which he was only binding himself on the basis that it is 'joint', that all of the other sureties were also bound by the same contract. The position is different where the liability is <u>'several'</u> alone, so that a discharge of one of the '<u>severally liable'</u> sureties will not discharge the others.[41]

[60] Where the sureties are bound '<u>jointly and severally'</u>, the law has dictated that the 'joint suretyship is the essential condition of the liability of each and 'part of the consideration of the contract of each'. These contracts are to be construed strictly in favour of the surety.

[61] It made sense then and still makes sense that if a man is binding himself as a surety, jointly with another, to simply provide a guarantee for a debt to third party, the creditor is

[39] Paragraph 14 of Mr. Fox's affidavit.
[40] Paragraph 17 of Mr. Fox's affidavit.
[41] Ward v National Bank of New Zealand Limited [1883] 8 App Cas 755

not *'to make a particular and separate bargain with one of the other parties releasing the security put up by him from liability without the consent of the other parties to the deed, whose rights inter se and whose responsibility in respect of the sum for which they were making their properties liable was or might be altered by reason of that separate bargain."*[42]

[62] The effect of such a separate agreement, without the knowledge and consent of any co-surety, and varying the original bond given by that surety will in most cases have the effect of discharging the surety. As Cotton LJ stated:

> *"The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry into the effect of the alteration."*

See also Metropolitan Properties Co (Regis) Ltd v Bartholomew.[43]

[63] Speaking of this line of English cases, the courts in Australia held that the consequence of the rule, is that to hold the surety to his bargain '*the creditor must show that the nature of the alteration can be beneficial to the surety only or that by its nature it cannot in any circumstances increase the surety's risk, e.g., a reduction in the debtor's debt or in the interest payable by the surety. The mere possibility of detriment is enough to bring about the discharge of the surety.'*[44]

[64] Separate agreements which will operate to discharge a surety include agreements by which the creditor gives a full release to any of 'the sureties who have contracted jointly and severally the others are discharged, the joint suretyship of the others being part of the consideration for each."[45] It does not make a difference if the creditor has pursued one of

[42] Lord Hanworth, MR in Smith v Wood [1929] 1 Ch. 14

[43] (1996) 72 P. & C.R. 380 Court of Appeal (Civil Division)

[44] Mason LJ in Ankar Pty Ltd v National Westminster Finance (Australia) Ltd [1987] HCA 15; See National Bank of Nigeria Ltd v Oba M.S. Awolesi [1964] 1 WLR 1311, where the Privy Council found that the variation to increase the overdraft facility of the principal was to the surety's detriment and accordingly operated to release him.

[45] Ward v National Bank of New Zealand Limited

the sureties to judgment and then released him from the judgment debt. As the Privy Council stated in Ward:

> *"The judgment itself does not affect his right to indemnity from the principal, or to contribution from his co-sureties. The equities arising from the relationship of principal and surety still subsist. But in releasing the judgment debt, the creditors just as surely discharges the 'joint surety' and also the arrangement that both should be bound to the creditor as if he released all the claims upon the guarantee itself. The creditor has broken the essential condition of liability of the other sureties and thereby discharged them."*[46]

[65] This approach is seen vividly in the case of Walker v Bowry,[47] in which the appellant was seeking to recover against a co-sureties contribution with regard to a judgment sum he had been successfully sued for by a creditor. After judgment had been entered in favour of the creditor in the original action, the creditor had released the appellant from the judgment debt and all claims in respect of it. The respondent in that action for contribution argued successfully that, that release between the creditor and the appellant also operated to release him from any obligations to pay contribution to the appellant – 'the release of the appellant from the judgment debt has effectively discharged the other sureties as if the creditor had released him from his obligations under the guarantee.'[48]

[66] It is thus obvious, that a discharge will have serious consequences for any defendant who may have attempted to settle the matter and paid a part of the debt, to seek any form of contribution from any remaining joint and several debtors.[49] It is to be noted however, that

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[46] As was noted by Mr. Justice Christopher Clarke in ST Microelectronics NV v Condor Insurance Ltd 2006 WL 2629803 Queen's Bench Division (Commercial Court)"The basic principle underlying these cases — which is one of strict application — is that a guarantor will only be liable in respect of the obligation that he guaranteed. Thus if X guarantees a debt agreed to be payable within a specified time he is not liable in at least two cases: (a) if the creditor advances money or supplies goods on terms that the money is repayable or the price payable immediately; or (b) if the creditor and his debtor agree a variation of the contract whereby the debtor is bound to pay earlier, unless such an agreement is, on the facts, obviously incapable of prejudicing the surety."

[47] (1924) 35 CLR 48

[48] Per Einstein J. in John Anthony Jeans v John Richards Bruce and Ors. [2004] NSWSC 539 at para. 255 commenting on Walker v Bowry (1924) 35 CLR 48.

[49] See also *Cocke v Jennor* (1614) Hob 66; 80 ER 214 and *Duck v Mayeu* [1892] 2 QB 511 at 513. The latter case is an example when the court has examined the document closely to decide whether it was simply a release or a covenant not to sue. The former has serious consequences will bar any defendant from seeking contribution against the others. A L Smith LJ for the Court of Appeal outlined the principle: "It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released." The Court of Appeal, however went on to decide that the letter written by the plaintiff's solicitor acknowledging receipt of two guineas "in full discharge of your personal liability …

not all arrangements between a claimant and a defendant would amount to a full discharge. In **Stanley Charles and Another v Keith Mitchell and Others**, Justice of Appeal His Lordship, Gordon QC accepted that:[50]

> *"….a discharge of one joint debtor by a release under seal or by accord and satisfaction discharges all of the joint debtors whereas a covenant not to sue one of a number of joint debtors or execute a judgment against one judgment debtor does not discharge the others."*

[67] Did this notice of discontinuance operate as a discharge of the co-surety in the circumstances of this case?

[68] The effect of a notice of discontinuance is that a 'claim or the relevant part of a claim is brought to an end as against that defendant on that date'.[51] The rule goes on to say that it does not affect any proceedings relating to costs or the right of a defendant to apply to set it aside. There are no express rules relating to the effect on any judgment already granted. Does this then mean that the discontinuance invalidates everything that arose in the claim, including an unsatisfied judgment for a debt?[52]

[69] In this case, the claimant's notice of discontinuance was clearly not based on any admission that it had no right to the sum being claimed or to the judgment in its favour.[53] The claimant surely had this right against the 2nd defendant having regard to the stance

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without prejudice to my client's claim against Miss M Mayeu" was a covenant not to sue the joint debtor and not a release of the joint debt.

[50] Civil Appeal No. 7 of 2004 (Grenada)

[51] (CPR 37.5(2)

[52] In contrast to a situation where an order is made for continuing maintenance, and then a notice of discontinuance is filed. The effect of this would be preventing any future liability arising on such an order. Dutchak v. Dutchak, 1994 CanLII 4827 (SK QB)

[53] Note Passarini v. Martin et al (CPR 37.5(2)[53], decision of the Supreme Court of Nova Scotia, where the court held that in cases of discontinuance the action is not dead for all purposes, and that a Court can make such order as justice requires notwithstanding the discontinuance. According to Harris, C.J., at p. 915, the question to be decided in the case was:*"... whether a plaintiff having commenced an action and having therein obtained, under an order for replevin, the possession of the goods in question can thereupon without going to trial discontinue his action and retain the possession of the goods which he has so obtained."*

The court held that where a plaintiff voluntarily discontinues an action, he thereby admits that he has no rights in that suit to the goods, and that justice requires him to return them. Harris, C. J., continued at pp. 916-7:*"It is, I think, clear that the Court has power to order that a plaintiff in discontinuing an action shall restore the defendant to the same position as nearly as possible as when he began the action and it would I think be a gross abuse of the process of the Court to permit the plaintiff to retain the benefit of his order after discontinuance and the admission thereby made that he was not entitled to the possession of the goods."*

taken by that defendant. On the judgment being granted, the claimant now had an enforceable judgment; the claimant was no longer seeking to have its claim determined. Whether he himself had made a decision not to seek to enforce this judgment debt, was the effect in law of such a notice of discontinuance, that he lost this right to enforce the judgment?

[70] Even if the withdrawal of a 'claim' contemplates the withdrawal of everything that follows, including a regular judgment granted by default which I doubt, such a notice should clearly spell out that it is an agreement or undertaking to forego all rights which have now arisen from the judgment as well. A notice of discontinuance, in the form used by the claimant in this matter, if it is capable of bringing to an end even the enforcement of the judgment for the purposes of that claim, is not a bar to any subsequent proceedings being taken regarding that claim. The notice filed in the instant case, is not in the terms of a full accord and satisfaction. (More on this below).

[71] Of course a party can agree not to pursue enforcement of a judgment, and agree to release the judgment debtor from the judgment debt. However, the filing of a notice of discontinuance by itself is not conclusive of the fact that there is this agreement to give a full release. The words of this notice of discontinuance simply state that the claimant "wholly and totally discontinues the claim against the 2nd named defendant'.[54] I have again examined the affidavit of Mr. Fox, and I note that he is saying clearly that the claimant took a decision to only seek to recover half of the judgment debt against the 2nd defendant, and this is why the claimant filed the notice of discontinuance. Whilst this clearly arose from the discussions between the 2nd defendant and the claimant, and there is a legitimate inference to be drawn that the claimant took a conscious decision not to pursue the 2nd defendant for more than half of the debt, it does not follow at all that there was a binding agreement between the two and that the claimant was <u>thereby releasing</u> the 2nd defendant from any further liability. Here the claimant was taking an equitable approach to

[54] See a useful contrast in Hill v. The Queen, 2001 CanLII 611 (TCC) in which the court noted: "It is executed by both counsel, and not just the Appellant's counsel. By "consent" the document became an agreement."

recovering its debt. The law itself has recognized that between joint and several sureties there should be some equitable apportionment:

> *"It should be remembered that the doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation.*[55]

[72] In fact, PART 37 itself does not bar the claimant who has filed and served a notice of discontinuance from instituting fresh proceedings against a defendant. While it expressly states that it <u>"brings the claim to an end"</u> it equally expressly contemplates that subsequent proceedings may be commenced in relation to the same cause of action. There is no need to seek the leave of the court where the relevant defendant did not file any defence as is the case in this matter. This is surely not equivalent to a release that operates to expressly bar all future claims in relation to the same matter. Whilst a defendant to that subsequent proceeding may raise this notice of discontinuance by way of a defence, a court would have to examine its real effect, and in the face of the express words of the instant notice of discontinuance, go on to consider whether there may have been an underlying agreement not to pursue such a subsequent action before it may be entitled to stay those proceedings.[56]

[73] I find support for this approach in several cases, the first of which is Walters v Smith.[57] In this case A being owed a sum jointly by B and C, brought an action against B. Before trial, B entered into negotiations with A to pay part of the debt and the court costs for the withdrawal of the proceedings. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in that action. The receipt given was as follows: "Received, 10th May 1830, of the defendant, the sum of twenty pounds fourteen shillings and sixpence, being the amount to be taken for debt and costs in this action." A afterwards

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[55] Mahoney v McManus (1994) 180 CLR 370

[56] See an interesting discussion in Moon v. Sails at the Village on False Creek Developments Corp., 2012 BCSC 1999 (CanLII), re the effect of a notice of discontinuance on subsequent proceedings with regards the same or substantially the same cause of action. See also Silva-Douglas v. London School of Economics and Political Science [2007] UKEAT 0075_07_1804 where Reid J. said at para. 15"…if there is no dismissal it may be possible and desirable for a Claimant to seek to bring fresh proceedings on the same facts; whereas if there is a dismissal the matter will be res judicata. This case was quoted with approval in Eileen Papone and Another v James Anthony as Personal Representative of the Estates of Abraham, deceased and Anthony deceased Claim No. 113 of 2010 BVI

[57] (1831) 2 B. & Ad. 889 – This was usefully set out in Deanplan Ltd. v Mahmoud and Another [1993] 1 Ch. 151

sued C. It was held that the composition did not operate as a discharge of the whole debt, but only to relieve B, and, therefore, it was no defence for C. Parke B stated:

> *"It is not necessary to consider what would have been the effect of the payment of £20 if it had been made in full satisfaction of the demand against Hunter. If the case rested upon this, it might be a bar to the action on the authority of Longridge v Dorville (1821) 5 B. & Ald. 117. But I think that question does not arise here from the facts. Looking at the terms of the agreement as contained in the letter from Hunter's attorney, and the receipt, it is manifest that the payment was not made in discharge of the plaintiff's rights against all other parties; and the result of the whole is, that it does not operate as a release, or matter which could have been pleaded as an accord and satisfaction, but amounts merely to an engagement not to sue Hunter, which can only be pleaded by himself; if the action, therefore, had been brought against two parties, it would not have been a discharge to both. Or, it may be considered as a release to one, qualified by a reservation of the plaintiff's rights against the other, as in Solly v Forbes (1820) 2 Br. & B. 38."*

[74] In the same case, Thornton J also considered it important to distinguish between an accord and satisfaction and an agreement not to pursue the first defendant for more than his fair share of the debt. He stated:

> "*A release given to one of two joint contractors enures to the benefit of both: so a judgment and satisfaction as to one, is a stay of proceeding against the other. But here has been neither release nor judgment, nor is there any evidence of an accord and satisfaction of the debt either with reference to Hunter or the defendant. When the case was moved it was stated that the language of the receipt purported that the money was paid in discharge of the whole debt and costs and, therefore, that which was a discharge of Hunter in that action would operate as such for the defendant in this. But on looking at the words of the receipt itself, it is only an acknowledgement of money having been paid in the course of that suit, on the receipt of which the plaintiff agreed to rest satisfied, and not proceed farther against Hunter, It is no release; and Fitch v Sutton 5 East 230 decides that such a payment was not a satisfaction, especially of Smith's debt, whose name was never mentioned."*

[75] The second case is Re W.E.A. (A Debtor)[58] in which 'A. and B. became liable on a "joint and several" guarantee to a bank for a sum of 6000l. owing to the bank from a company. Subsequently, the bank obtained judgment for that sum against A. and B. "jointly and severally." The judgment not being satisfied, the bank presented a bankruptcy petition against B. alone for the whole judgment debt, but the petition was withdrawn upon terms arranged between B. and the bank and embodied in a receipt given to B. by the bank for

[58] [1901] 2 K.B. 642 Court of Appeal

3000l. partly in cash and partly in bills paid and given by B. "in full discharge of all claims by the bank against B. in connection with the company and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank." The bank then presented a bankruptcy petition against A. alone for 3000l., the alleged "balance" of the judgment debt of 6000l.'

[76] The issue of the withdrawal and discontinuance did not arise for discussion, but the court considered that the document, namely the receipt itself was what should be examined to determine whether there was in fact this full release. As Collins L.J. with whom Rigby L.J agreed, stated:[59]

> *"It is clear that, although a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find those two provisions you construe the document, not as a release, but merely as an undertaking not to sue a particular individual, and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the co-debtor. But it appears to me that, on the face of this document, there is no intention shewn so to limit its effect, and that it is framed in the widest possible terms so as to cover, not only this particular debt, but all other claims by the bank in connection with the Professional and Trades Papers, Limited, for it is admitted that the foundation of the judgment was the guarantee, and at the time this document was drawn up there was this joint liability on the judgment to the extent of 6000l. And there is this circumstance to be observed, that this document expressly states that the cash and bills are accepted "in full discharge of all claims by the Capital and Counties Bank, Limited, against Mr. B ÄÄÄ in connection with the Professional and Trades Papers, Limited." Now, having regard to the fact that the fundamental claim against B. was the judgment for 6000l., it is impossible to say that this judgment is not one of the "claims" within the words I have read."*

[77] The importance of examining the receipt in this case, namely, the notice of discontinuance becomes apparent as the cases have shown that a covenant not to sue one of several joint and several debtors, or a release with a reservation is not a discharge.[60] As Judge Paul Baker QC, speaking in Deanplan of such a covenant, stated:

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[59] Re W.E.A. (A Debtor) *ibid,* at pages 649 to 650. Incidentally Romer L.J. who dissented in this case, was prepared to find that even the receipt was not sufficient to ground a full release of the debt.
[60] Deanplan v Mahmoud [1993] 1 Ch 151; see Watts v Aldington [1999] L. & T.R. 578; The Times, December 16, 1993

> '*It is merely a contract between the creditor and the joint debtor which does not affect the liabilities of the other joint contractors or their rights of contribution or indemnity against their co-contractor.*

The point was made in Deanplan that the principle applied equally to joint and several debtors.[61]

[78] When the question is whether the parties have either agreed to a full release or a release with a reservation, the matter would have to be determined' *having regard to the surrounding circumstances and taking into account not only the express words used in the document but also any terms which can properly be implied."*[62]

[79] In the instant case, a reasonable inference can be drawn that the claimant took a conscious decision not to pursue the 2nd defendant for the full debt. But the notice of discontinuance <u>does not state that there was any agreement</u> to release the 2nd defendant, nor does it say that it was a full satisfaction of the judgment debt against the 2nd defendant; it simply stated that the matter was wholly withdrawn and discontinued. I cannot find that this was an accord and satisfaction with regard to the judgment debt. That the claimant appears to still have a right to maintain a subsequent action against the 2nd defendant even in light of this notice of discontinuance to my mind is the answer to the question as to whether it should be treated as a 'release' from the judgment debt. Nothing in the actual notice filed, states that it is 'release' from the judgment debt.[63] Accordingly, the 3rd defendant has not been discharged.[64]

CA (Civ Div) ; Chelsea Building Society v Nash 2010 WL 4039819 Court of Appeal (Civil Division)

[61] See also Watts v Aldington [1999] L. & T.R. 578; Stanley Charles and Another v Keith Mitchell and Others Civil Appeal No. 7 of 2004 (Grenada)

[62] Per Neill LJ in Watts v Aldington at page 12

[63] Hebert v. King, 2007 NBQB 282 (CanLII) – here the parties were at odds over the wording of a purported notice of discontinuance on the issue as to whether it would amount to a bar to future proceedings. The court captured the dispute between the parties in the following passage: *"7. In the meantime, counsel for Saulnier and Apex received the plaintiffs' Notice of Discontinuance but refused to execute it as he alleged it was not in the appropriate form. The particulars of the alleged inappropriateness of the form were not specifically conveyed to counsel for the plaintiffs although a new Notice of Discontinuance of the plaintiffs' action against Saulnier and Apex was prepared by counsel for King and forwarded to counsel for the plaintiffs. This form included a provision for the discontinuance of the cross-claim between the defendants as well as a clause barring any subsequent action by the plaintiffs against Saulnier and Apex. 8. Counsel for Saulnier and Apex conceded in argument that the real concern he had with the first Notice of Discontinuance was that it did not provide a bar to any subsequent action of the plaintiffs against his clients. He could not however, point to any evidence to establish that plaintiffs' counsel ever agreed to the discontinuance acting as a bar to any subsequent claims."* See also Walker v Bowry 35 CLR 48, where the receipt which was held to have given a

[80] The claimant having received payment from the 2nd defendant as to part of that debt, and has discontinued the proceedings against him, is only entitled to proceed against this defendant for the balance of that debt. As I have also noted above, if the claimant were to succeed in this claim the judgment shall be endorsed with the condition that the claimant shall not recover more than the sum, the subject matter of the claim.

Conclusion

[81] For the reasons given above, the application by the 3rd defendant is dismissed. Having regard to the fact that the issue as to whether the question of whether the issue of joint and several liability is ultimately dependent on an examination of the 'bond' and the evidence in this case on a trial, I will order that costs on this application be in the cause.

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Darshan Ramdhani
Resident Judge (Ag.)

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discharge read *inter alia* "…the Bank hereby acknowledges the Bank doth hereby for its successors and assigns release and for ever discharge the said James Walker his heirs executors and administrators from the said sum of two thousand eight hundred and eighty-five pounds three shillings and ninepence and every part thereof and all claims and demands in respect thereof." This operated to discharge to co-surety.

[64] For the reasons given I am unable to agree with the views expressed on the effect of a notice of discontinuance, by my Learned Brother, His Lordship Thomas J in Development Bank v Osborne Chapman et al HC Claim No. 168 of 2012.