Avoiding unequivocal election

A recent case has prompted the Privy Council to provide updated guidance on how to apply the principles of election, says **Andrew Head**

The Privy Council has recently been asked to consider the legal doctrines of election and merger of causes of action in *Rukhmin Balgobin v South West Regional Health Authority (SWRHA)* [2012] UKPC 11, an appeal from the courts of the Republic of Trinidad and Tobago. The Privy Council upheld the leading House of Lords case in this area, *Morel Bros & Co. Ltd v Earl of Westmorland* [1904] AC. Given the somewhat anachronistic flavour of *Morel*, the recent decision is helpful in that it reviews the existing authorities and gives some useful guidance to practitioners as to how the principles of election are to be applied in the modern era.

Ms Balgobin, the appellant, was a paramedic who injured her neck and arm when lifting a heavy patient on a stretcher, leaving her unable to work. She obtained a default judgment on liability against the second defendant Tri Star (which she had joined as second defendant only because SWRHA had averred in its defence that Tri Star was her employer). Tri Star had no assets, no steps were taken to assess damages, and she pursued her action against SWRHA and obtained judgment against it following a trial. SWRHA appealed and the Court of Appeal of Trinidad and Tobago, relying on *Morel*, reversed the decision of the judge, concluding that, by entering default judgment against Tri Star, Ms Balgobin had made an unequivocal election which precluded her from proceeding against SWRHA.

The Privy Council allowed Ms Balgobin's appeal. In doing so, it considered the application of *Morel* and the underlying principle that if there has been a conclusive election by a claimant to adopt the liability of one of two persons alternatively liable, it cannot afterwards make the other liable.

Ms Balgobin argued that the principle should only operate when there is in fact a basis for liability against both defendants, whereas in the present case she did not in fact ever have a cause of action against Tri Star, as it was not her employer.

The Privy Council did not agree with this first argument, deciding instead to follow *Morel* which it held was wide enough to apply both to situations where there was genuine alternative liability but also where there was in fact no basis for liability against both parties.

> **"Practitioners should consider the decision in *Balgobin* carefully and make absolutely sure that the action against the other defendant will not be barred"**

However, the Privy Council did agree with Ms Balgobin that the entering of a default judgment against Tri Star did not of itself amount to a conclusive and unequivocal election. One of the factors the Privy Council took into account was the fact that default judgments are commonly obtained without considering the underlying merits of the various possible claims against one or more parties, and therefore would not, absent evidence of the positive exercise of a choice to pursue one party at the expense of pursuing the other, amount to an unequivocal election sufficient to satisfy the doctrine in *Morel*.

Deliberate choice and communication

The Privy Council, following *Morel* and the earlier Court of Appeal case of *Scarfe v Jardine* [1882] 7 App Cas 345, gave some helpful guidance as to essential features that would be necessary to establish whether or not an unequivocal election had been made:

1. The person making the election must determine that he would follow one remedy out of two or more.
2. The choice must be communicated to the other party.
3. The choice must be communicated in a way that will lead the opposite party to believe that there has been a deliberate choice of one alternative over (and at the expense of) any other.

Balgobin does leave open the possibility of a claimant being unable to pursue an alternative defendant even where it has initially pursued a party which turns out to have no liability. In practice, however, such circumstances are likely to be rare. This is because the principles set out in *Balgobin* make it difficult to envisage circumstances where a practitioner could by entering a default judgment make an unequivocal election in cases with more than one defendant, unless they have taken a positive decision to pursue one at the expense of the others and has communicated that decision to all the relevant parties.

The message to practitioners is, however, clear: where a claimant has alternative claims against one or more defendants, it should keep its options open wherever possible and ensure that its conduct does not amount to an unequivocal election. If default judgment is considered at an early stage against one of two defendants, practitioners should consider the decision in *Balgobin* carefully and make absolutely sure, by reference to the helpful guidance set out, that the action against the other defendant will not be barred.

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