Neutral Citation Number: [2018] EWHC 672 (Ch)

Claim No: HC-2017-001072

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Fetter Lane,
LONDON EC4A 1NL
Date: 23rd April 2018

Before:

MR JEREMY COUSINS QC, SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

BETWEEN

(1) TWINSECTRA LIMITED
(2) HAYSPORT PROPERTIES LIMITED

Claimants/Defendants to Counterclaim

- and -

LLOYDS BANK PLC

Defendant/Counterclaimant

APPROVED JUDGMENT

Mr Stephen Midwinter QC (instructed by **Messrs Reynolds Porter Chamberlain**, of Tower Bridge House, St. Katharine's Way, LONDON E1W 1AA) for the Claimants/Defendants to Counterclaim

Mr Jonathan Davies-Jones QC (instructed by **Messrs Hogan Lovells International LLP**, of Atlantic House, Holborn Viaduct, LONDON EC1A 2FG) for the Defendant/Counterclaimant

Hearing date: 29th November 2017

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JEREMY COUSINS QC:

1. This claim concerns the validity of charges ("the Charges") held by Lloyds Bank Plc ("the Bank"). The Claimants that respectively granted the security concerned maintain that it was executed without their authority. The matter comes before the court on the Bank's application for summary judgment, to which the Bank says it is entitled because, in previous proceedings against one

of the Claimants' former directors (Mr Joseph Ackerman, "Mr Ackerman"), following a trial in the Chancery Division in 2016, before Peter Smith J, the Claimants obtained judgment in terms that now preclude them from asserting the alleged invalidity of the Charges. In short, the Bank maintains that (i) the obtaining of the earlier judgment constituted a binding and irrevocable election as to both remedies and rights that are inconsistent with those that they now seek to pursue, (ii) the continuation of these current proceedings would offend against the rule that a party may not approbate and reprobate, and (iii) the current proceedings are an abuse of the process of the court. As a further instance of election, the Bank relies upon the Claimants' payment of interest to the Bank, in circumstances that I shall describe later.

BACKGROUND

2. There are two witness statements in evidence before me; one from Mr John Tillman, dated 4th August 2017, and the other from Mr Robin Johnson, dated 22nd September 2017. Mr Tillman is a partner in Hogan Lovells International LLP ("HL"), the solicitors for the Bank. He has no personal knowledge of the circumstances of the case, other than that acquired from his study of the documents which are exhibited to his witness statement, which include the documents relating to the grant of security to the Bank, material documents (including pleadings, judgment, and final order) relating to the trial before Peter Smith J, and correspondence between the present parties' respective solicitors. Mr Tillman's evidence consists mostly of a convenient summary of the history of the case, and a brief explanation of the basis of the application. Mr Johnson is a director of both of the claimant companies and has held that office since April 2011. He describes their corporate history, the circumstances of his appointment, the basis of the Claimants' dispute with the Bank as to the validity of the Charges, and the history of the communication between the parties concerning that dispute. He says that he had never thought that, in pursuing the proceedings against Mr Ackerman, the Claimants were giving up their claims against the Bank, and that was "certainly not" his intention.

3. On the 8th of June 2005, New Liberty Property Holdings Limited ("NLPH") entered into a standby letter of credit facility ("the Facility Letter") with Lloyds TSB Bank (now the Bank) in an amount of up to £10 million. It was a condition precedent to the release of funds under the Facility Letter that security be provided to the Bank. This was to include security from both of Twinsectra Ltd ("Twinsectra") and Haysport Properties Limited ("Haysport") (collectively, "the Claimants"). On 10th June 2005, both the Claimants executed the Charges over various properties by way of legal mortgage; in one instance, this was by way of a sub-charge. Save in the case of the sub-charge, all the Charges were in the same form, *mutatis mutandis*, in relation to the property to which each related. In August 2006, the limit under the Facility Letter was reduced from £10m to £5m, and the Bank released three of the properties subject to the Charges from its security, whilst the remaining Charges continued to be held to secure NLPH's obligations. The extent of this continuing security ("the Security") is identified in Parts 1 and 2 of the schedule to the Particulars of Claim dated 11th April 2017.

4. In December 2009, NHPL went into provisional liquidation. At that time the amount outstanding under the Facility Letter was £5m, and no part of that capital sum has since been repaid, although the Claimants have, in the meantime, paid such interest as has accrued from time to time.

5. There is no dispute between the parties as to the extent of the facility that has been provided, or as to the balance outstanding thereunder in favour of the Bank, or as to the payment of interest to which I have referred. However, the Claimants dispute the validity of the Security, on the basis that the Charges were entered into without authority, so that they are not binding on whichever Claimant purportedly executed them, whilst the Bank maintains that the same is entirely valid and effective, so that the Bank is entitled to look to that Security for repayment in full of the sums due to it. In light of the issues between the Claimants and the Bank, the parties reached agreement in correspondence in January 2015 as to the basis upon which various of the properties concerned could be released from their respective Charges in order

to enable them to be sold, with the proceeds of sale being held in an Escrow Account in the meantime. The unresolved dispute led, however, to the commencement of these proceedings by the Claimants on 12th April 2017.

6. The Claimants are trading subsidiaries of Delapage Limited ("Delapage"), a charitable company. At all material times, Mr Ackerman was a director of the Claimants, and a trustee and secretary of Delapage. The Claimants hold various investment properties with a view to generating income and capital returns for Delapage's benefit. The Claimants do not dispute that Mr Ackerman signed the Charges. Their challenge to the validity and effectiveness of the Charges can be summarised as follows:

   (i) Two directors' signatures were required in each case for the Claimants to enter into the Charges, together with shareholder approval. Such signatures and approval were not obtained. Mr Ackerman, it is said, forged the signature of his co-director (Naomi Ackerman, his sister-in-law, "Mrs Ackerman") on each of the Charges, as well as on the board resolutions which purported to authorise entry into them, and falsely signed documents purporting to be minutes of company meetings attended by Mrs Ackerman authorising entry into the Charges, when no such meetings had taken place.

   (ii) Mr Ackerman's conduct infringed the self-dealing rule because he was affected by a manifest conflict of interest concerning the transaction. Causing the Claimants to enter into the Charges was, therefore a breach of fiduciary duty on his part. Mr Ackerman had no authority to behave in this manner.

   (iii) The Charges were contrary to the Claimants' interests in exposing them to a risk of forfeiture of the charged properties in exchange for a consideration of just 0.26% of the secured amount per annum. This was too small to represent a genuine commercial benefit. Further, it is said, the arrangement was "fictional", being arranged after the Claimants had already

supposedly "agreed" to provide security, and moreover, it was never intended to be paid, and was not in fact paid. Again, Mr Ackerman had no authority to enter into transactions of this nature on behalf of the Claimants.

7. The Claimants maintain that the Bank is not entitled to rely upon the statutory provision applicable at the time, namely s36A(6) of the Companies Act 1985 (now section 44(5) of the Companies Act 2006). This provided that "in favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company...". A "purchaser" was defined in the section to mean "a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property." The Claimants assert that this provision does not avail the Bank because it did not act in good faith, being "at least" recklessly indifferent as to whether Mr Ackerman was (i) acting in accordance with his fiduciary duties, (ii) affected by an unresolved conflict of interest, (iii) properly authorised to enter the Charges on behalf of the Claimants, or as to whether a combination of some or all of these shortcomings applied. The allegations made against Mr Ackerman, and the Bank, are pleaded extensively in the Particulars of Claim, but for present purposes it is not necessary to describe them more fully.

8. For its part, the Bank disputes that Mr or Mrs Ackerman lacked authority, actual or apparent, it denies that it did not act in good faith, it relies upon contemporaneous documents to substantiate the validity of the Charges, and approval, at Extraordinary General Meetings and Board meetings, by the Claimants of their entry into the Charges. Proper disclosure, it is said, as to conflicts of interests, was made. Further, the Bank maintains that the Claimants had appropriate professional advice from solicitors and financial advisers, in relation to any relevant issues of commercial benefit. Any indifference, reckless or otherwise, on the Bank's part is denied.

9. The issues as to alleged misconduct, or lack of authority, on the part of Mr and Mrs Ackerman, and the Bank's response to the allegations made against it, do not, and could not properly, arise for consideration on the application which is now before me. Counsel for the Bank and the Claimants, respectively Mr Davies-Jones QC, and Mr Midwinter QC, have very correctly focussed their submissions upon the much narrower issues of (i) election, (ii) approbation and reprobation, and (iii) abuse of process. Before I consider those issues individually, it is necessary, first, to say more about the course of the litigation in the Chancery Division under Claim number HC-2014-0000850 ("the Ackerman Proceedings") which the Bank suggests has engaged the principles relevant to each of those bases upon which the Bank submits that summary disposal of the Claimants' case is justified and appropriate. I must also describe the somewhat unusual developments which occurred in the presentation of relevant material to me following the conclusion of the hearing on the 29th November 2017.

THE ACKERMAN PROCEEDINGS

10. Before the commencement of the Ackerman Proceedings, and in May 2014, solicitors then acting for the Claimants (Messrs Pinsent Masons LLP, "PM") sent a draft letter to HL, in which it was asserted that the Charges were not valid security. Reliance was placed, amongst other things, upon allegations of lack of commercial benefit to the Claimants, and their non-execution by Mrs Ackerman. HL responded to this draft letter on 23rd July 2014. The case raised by PM was disputed on grounds set out by HL. Thereafter further correspondence followed, to which I need not refer, save to say that it did not contain reference to the fact that in June 2014, the Claimants had commenced proceedings against Mr Ackerman in the Chancery Division.

The Claimants' case presented against Mr Ackerman

11. In the Ackerman proceedings, allegations were made against Mr Ackerman in connection with the creation of the Charges. The Particulars of Claim alleged that Mr Ackerman had owed fiduciary duties to the Claimants, and that he had breached such duties by causing them to grant the Charges with no adequate

reward for the Claimants, who had not received separate advice, and that he had failed to give adequate notice of his alleged interests in the transaction. Deliberate and dishonest breaches of fiduciary duty were alleged. These were not confined to the dealings with the Bank; it was asserted that they extended to causing Twinsectra to enter into a Loan Note ("the Loan Note") with NLPH. It was pleaded that by reason of such breaches the Claimants had suffered "loss and damage". Relief was sought against Mr Ackerman to include repayment of the £4m under the Loan Note, all interest (at that point £420,952.22) that had been paid to the Bank "in order to prevent the Bank from enforcing its security", and a declaration that Mr Ackerman was liable to indemnify the Claimants in full against all losses and liabilities which might be suffered "in relation to the granting of the first legal charges over the properties … and the sub-charge as security for NLPH's liabilities to the Bank under the Facility". Orders were also sought for payment to the Claimants pursuant to such entitlement to declaratory relief, then calculated (as pleaded at para 30(4), and in the prayer for relief) in the sum of £5m, and compensation for breaches of fiduciary duty for any other losses that might have been suffered by the Claimants.

12. Mr Ackerman denied that he had been dishonest and that he had acted in breach of fiduciary duty. He pleaded a limitation defence, and also sought relief under s1157 of the Companies Act 2006, on the basis that he had acted honestly, reasonably, and ought fairly to be excused from any liability that he might have.

13. The Ackerman Proceedings took their full course, coming on for trial ("the Ackerman Trial") before Peter Smith J on 12th, 13th, 14th and 19th January 2016; the judge delivered his reserved judgment in writing on 2nd March 2016. Copies of the judgment, the Claimants' written opening and closing submissions for trial, a transcript of the judge's judgment on consequential matters, and a copy of the order made on 8th March 2016 are exhibited to Mr Tillman's evidence. The Claimants' then counsel (it was not Mr Midwinter, who was not involved in that litigation) very clearly put the case on the basis that Mr Ackerman had caused the Claimants to grant the security concerned in

2005; see, for example, para 2 of the written openings; the submissions developed the case that Mr Ackerman was in breach of fiduciary duty in this regard. Reference was made to the fact that Mr Ackerman signed the documents concerned on behalf of Mrs Ackerman, a fact of which, he suggested, she was aware.

14. Throughout the hearing on 29th November 2017, there was no suggestion that when the trial took place before Peter Smith J any doubt had been cast upon the validity of the Bank's security. I specifically raised the point with Mr Midwinter in the course of his submissions, and as the transcript of the hearing before me reveals, his response was that "nothing at all appears to be have been said by any party or by the judge as to whether or not the charges were valid or invalid". That was the basis upon which matters remained at the conclusion of the hearing. There was no suggestion at that stage that any further evidence or submissions were intended to be submitted to me before I would deliver judgment at a later date in the usual way. However, on the following day, Mr Midwinter's clerk forwarded to me a letter, dated 30th November, from the Claimants' present solicitors, Messrs Reynolds Porter Chamberlain ("RPC"), which enclosed a transcript of proceedings on the first day of the Ackerman Trial. The letter explained that following the hearing on the previous day, RPC had reviewed that transcript with the result that RPC had concluded that Peter Smith J had indeed been made aware of the Claimants' challenge to the validity of the Charges. The letter also explained that the transcript had been provided to HL in May 2016.

15. Following receipt of RPC's letter and consideration of the transcript, I contacted both counsel involved in the present application, raising with them the manner in which it was appropriate to proceed with the present application in light of the letter and the transcript. Quite clearly, counsel on both sides had been completely unaware that it might be suggested that the conclusion advanced by RPC, based upon the transcripts, might be relied upon. I am, however, grateful to RPC for having alerted everyone to the material concerned. Following e-mail communication between counsel and me, I

directed that further written submissions should be exchanged between counsel. I was also helpfully provided with transcripts of (1) what was said during closing submissions at the trial, and (2) in the course of the hearing before Peter Smith J when he dealt with matters consequential upon the handing down of his judgment. I have considered counsels' supplemental written submissions, and the additional material that has been provided to me, for all of which I express my gratitude. I shall address matters raised in the supplemental submissions at an appropriate point later in this judgment; for now, it is sufficient for me to say that Mr Midwinter's submission was that the transcript for the 12th January 2016 completely undermined the Bank's application, which, in any event, as he had previously submitted, should fail, while Mr Davies-Jones submitted that the transcript had no such effect.

16. The part of the transcript (from pages 28 and 30) from the Ackerman Trial, taken from opening submissions made on 12th January 2016 by the Claimants' then counsel, upon which Mr Midwinter now places considerable reliance is as follows:

> "[COUNSEL FOR THE CLAIMANTS]: Yes, I do say that, in that, for example, interest was payable under the loan note, annually, so it is not enough, you could at any time, Mr. Ackerman could have at any time said to NLPH "You ought to be paying this". That was not done. There does not seem to have been any effort made to do that. Similarly, in relation to what my Lord has referred to as the guarantee, the third-party securities, that could have been chased. Again, the commission was due. There is no chasing. So I do say it is final, it is the fourth ----
> MR. JUSTICE SMITH: You do not want commission on transactions, because, what was it, 0.25% was it?
> [COUNSEL]: Yes, it is tiny. We will look at the figures, my Lord.
> MR. JUSTICE SMITH: You will get yourself in a pickle if you actually ratify the loan transactions, the 0.25%, because you want to get rid of them, don't you?
> [COUNSEL]: Yes.

MR. JUSTICE SMITH: Because there is £10million exposure on it.

[COUNSEL]: Yes, reduced to £5million in 2006.

MR. JUSTICE SMITH: Yes and there has been no movement; £5million it still is.

[COUNSEL]: We will look at that.

...

MR. JUSTICE SMITH: I take it the Claimants are solvent then, are they?

[COUNSEL]: Yes, I believe they are. Yes, everyone is nodding. Yes, they are.

MR. JUSTICE SMITH: They will be able to repay the bank lending if it is sought, is that right?

[COUNSEL]: Yes.

MR. JUSTICE SMITH: The £5million, they can cover the £5million capital if the bank does not agree?

[COUNSEL]: Yes, yes. It is also being pleaded, in terms of remedy, and we can explore this more, or I am happy to explore it now with your Lordship, we also say we want a declaration that Mr. Ackerman is liable to indemnify the companies, subject to whatever is ultimately paid over to Lloyds."

The judgment of Mr Justice Peter Smith

17. The judgment of Peter Smith J, at an early stage, recorded that the Claimants' case was that Mr Ackerman had caused the Claimants to grant security over various properties to support the NLPH facility (see para 2 of the judgment). The judge found (para 24) that the "result of the documentation was that the Claimants charged their properties as security for a £10m liability ...". He was referring to the documents which had been signed by Mr Ackerman, both in his own name and that of Mrs Ackerman. The judge's analysis throughout his judgment proceeded on the basis that the Claimants were liable to the Bank pursuant to the Charges. He referred (para 27 of his judgment) to the reduction of the liability to the Bank to £5m, and the release from charge of some of the properties. Having considered the case advanced by Mr Ackerman, the judge

found that it was "quite clear" that "Mr Ackerman drove this transaction through". He rejected Mr Ackerman's case that the Claimants received independent advice (para 101), and he concluded (at para 102) that Mr Ackerman failed properly to consider the interests of the Claimants and was therefore in breach of his fiduciary duty as a director. The judge rejected the limitation defence, holding, inter alia, that since the transactions concerned were carried out to confer benefits on a company controlled by Mr Ackerman, they fell within the provisions of s21(1)((b) of the Limitation Act 1980 such that there was no applicable period of limitation. In fairness to Mr Ackerman, I should also mention that the judge expressly found that he had not been dishonest.

18. On 8th March 2016, Peter Smith J dealt with consequential matters, including Mr Ackerman's application for relief from liability under s1157 of the Companies Act 2006. At the beginning of the hearing, counsel for the Claimants produced a draft order. There followed quite lengthy consideration of issues as to rates, and the basis of computation, of interest to be paid upon the sum of £4m (relating to the Loan Note), and costs. The payment of £5m sought by way of indemnity seems not to have been at all controversial. The judge gave short rulings as to matters in issue, and a fuller ruling in which he rejected Mr Ackerman's application for relief under s1157. The judge then requested the Claimants' counsel to draw up the order, and clearly this was done promptly, because it was sealed on 10th March 2016.

19. The sealed order declared that Mr Ackerman was "liable to indemnify and hold harmless the Claimant (*sic*) in full from and against any and all costs, losses and liabilities which are or may be suffered by the Claimants in relation to the granting of the first legal charges and the sub-charge over the properties set out in Schedule 1 attached [to the Order] provided as security for [NLPH's] liabilities to [the Bank] under the [Facility Letter]". He ordered that Mr Ackerman should pay to the Claimants £4m relating to the Loan Note together with interest. Materially for the present application, pursuant to the declaration to which I have referred, paragraph 3 of the Order required Mr

Ackerman to pay the Claimants the sum of £5m. Mr Ackerman was also ordered to pay interest on the interest payments that had been made to the Bank (quantified at £622,484.08), as well as interest upon the sum of £4m relating to the loan note, and costs.

Correspondence following the Ackerman Proceedings

20. Following the handing down of judgment in the Ackerman Proceedings, PM, under cover of an e-mail of 10th March 2016 to HL, provided copies of the judgment of Peter Smith J, and a copy of the related sealed order. This was the first intimation to the Bank that the proceedings had taken place. By a letter of 23rd June 2016 to PM, HL complained of the fact that the Bank had not previously been notified of the proceedings. The letter then set out in some considerable detail its case in response to the Claimants' assertions that the Security was not binding upon them. HL also raised what it said was a "complete answer" to the Claimants' case, which was that by pursuing the Ackerman Proceedings, the Claimants had made "an irrevocable election and are now precluded from arguing that the Security is invalid". In support of this proposition reference was made to authority, which I consider below, and to the rule against approbating and reprobating, and it was suggested that to deny the Bank's security would constitute an abuse of the process of the court.

21. On 23rd March 2016, the Claimants served a statutory demand upon Mr Ackerman for payment of £6,367,455.82 and £163,019.70 (the latter sum relating to costs). This demand did not include demand for the payment of the £5m awarded pursuant to the declaration. On Mr Ackerman's failure to make payment, a bankruptcy petition was presented against him, on 9th May 2016, relating to the sums comprised in the statutory demand, again not including the £5m mentioned; Mr Johnson says that this was because the £5m did not seem to him a debt that could be enforced in the bankruptcy. A bankruptcy order was made against Mr Ackerman on 1st September 2016. The Claimants did not include the £5m in their proof of debt. Mr Johnson's evidence is that so far nothing has been paid from the bankruptcy estate, which is believed to have assets of no more than about £360,000. Only a very modest recovery as a proportion of the sums for which a proof was submitted is anticipated.

THE PARTIES' SUBMISSIONS

For the Bank

22. Mr Davies-Jones relied on the history of the Ackerman Proceedings in support of each of the three bases of his application. He submitted that strategic decisions had been taken by the Claimants, with the benefit of legal advice, and that it is those decisions which have brought about the current situation. He emphasised that the Bank had been unaware of them whilst they were still current, so that it had had no opportunity to participate in them. He placed particular reliance upon the wording of paragraph 3 of the Order made on 8th March 2016, requiring, as it did that Mr Ackerman pay £5m pursuant to the declaration contained in the Order; it was clear, he submitted, that this amount must relate to the outstanding loan owing to the Bank; unless the Charges were enforceable, there would have been no sustained loss. The order could not, he submitted, be characterised, as the Claimants have sought to do in para 15 of their Reply, as security for the performance of the indemnity.

23. Addressing the relevant principles to be applied, and turning first to election, Mr Davies-Jones, began by referring me to the decision of the Court of Appeal in *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, CA, for the propositions that (i) a distinction was to be drawn between election as to rights and election as to remedies, though the two might coincide on particulars facts, and (ii) whilst election between remedies need not be made until judgment, it must be made by judgment which he submitted, by reference to *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, HL, and *Tang Man Sit v Capacious Investments Ltd* [1996] 2 WLR 192, PC, was the critical moment.

24. Dealing with election between inconsistent remedies, Mr Davies-Jones submitted that once an election had been made and communicated, the test being an objective one, it was irrevocable; for this he relied upon *Scarf v Jardine* (1882) 7 App Cas 345, HL and *Morel Bros v Earl of Westmoreland*

[1903] 1 KB 64, CA, affirmed [1904] AC 11, HL. Subjective intention or appreciation of the person making the election is irrelevant; *Central Estates (Belgravia) Ltd v Woolgar (No 2).* Relying on these cases, Mr Davies-Jones submitted that if there is a final enforceable judgment, as there was in the present case against Mr Ackerman, then there has been a conclusive election, and the inability to satisfy that judgment is irrelevant to the analysis. To like effect, he relied upon *Verschures Creameries v Hull and Netherlands Steamship Co* [1921] 2 KB 608, and in particular the judgment of Scrutton LJ, at pages 611-612, where he identified the principle that a person could not take advantage of a transaction on the basis of its validity, only to assert that the same was void in order to secure some other advantage. This approach was, it was submitted, at least implicitly approved by the House of Lords in *United Australia.*

25. Mr Davies-Jones submitted that a clear distinction was to be drawn between cases of alterative and inconsistent rights and remedies on the one hand, and cumulative remedies on the other. This was, he argued, demonstrated by the authorities at the highest level, including *United Australia* (a cumulative remedies case), and *Tang Man Sit*, a case concerned with election between remedies. The present case was, he maintained, not one concerned with cumulative, but alternative and inconsistent, remedies.

26. In respect of *Tang Man Sit*, a case upon which Mr Midwinter much relied, Mr Davies-Jones acknowledged Lord Nicholls' observation, at page 522, that the principle in relation to election was not rigid and unbending, but application of a general and overriding principle that proceedings be conducted in a manner striking a fair and reasonable balance between the interests of the parties on the one hand, and the wider public interest in the conduct of court proceedings. By this, it was argued, Lord Nicholls was not suggesting that election should be treated as a broad based discretionary remedy. Where, as here, the case falls within well-established principles as to election, those principles should be applied to the choice that the Claimants made when they pressed on and obtained a final money judgment. They chose not to defer in

respect of any remedy that they could have sought. The result of the election, Mr Davies-Jones submitted, could not be overcome by undertaking, as the Claimants suggest they would do, not to enforce a judgment against Mr Ackerman. Authority clearly indicates that entering judgment constitutes a conclusive and irrevocable election; *Morel.* Furthermore, there is, he contended, a well-recognised policy not only in this jurisdiction, but also in other jurisdictions including the United States, against allowing a party to play "fast and loose with justice", adopting inconsistent or contradictory positions at different stages in litigation. This policy serves to protect the integrity of the judicial process by prohibiting parties from deliberately changing position; he referred to *Gandy v Gandy* (1885) 30 Ch D 57, CA, especially Bowen LJ at page 82. He also relied upon a passage in Spencer Bower and Handley's *Res Judicata*, 4th edition at para 9.46, which discusses estoppel by conduct in judicial proceedings, where reference is made to the decision of the United States Supreme Court in *New Hampshire v Maine* 532 US 742 (2001). In that case, Ginsburg J, delivering the Opinion of the Court, said at page 749:

> " '[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' *Davis* v. *Wakelee,* 156 U. S. 680, 689 (1895). This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' *Pegram* v. *Herdrich,* 530 U. S. 211, 227, n. 8 (2000) ..."

27. As well as being a case of inconsistent remedies, the present is a case of election between inconsistent rights, submitted Mr Davies-Jones. The Claimants sought compensation from an agent for breach of fiduciary duty on the basis of their right to treat the Charges as enforceable, whilst now they seek to exercise the right to disclaim the Charges. For this he relied upon what was said, *obiter*, by Lord Diplock in *Kammins Ballrooms C Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, at pages 881-882, but adopted and applied in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation*

of India ("The Kanchenjunga") [1990] 1 Lloyds Rep 391, HL, (at page 398 by Lord Goff) and *Kosmar Villa Holidays v Trustees of Syndicate 1234* [2008] EWCA Civ 147, CA, (at paras 36-38 by Rix LJ).

28. Finally, as to election, and it is convenient to mention this point now, although it was developed very briefly at a later point in his argument, Mr Davies-Jones submitted that there was a further basis for finding that there had been an irrevocable election binding upon the Claimants, and which precluded their claim. He relied on the short point set out at the conclusion of his written submissions, namely that the Claimants' very payments of interest to the Bank, which were presented to the court in the Ackerman Proceedings as payments that they were bound to make, must have been on the basis of their capacity as Chargors, which is inconsistent with their present stance.

29. Mr Davies-Jones then turned to the second limb of his application, and to the principle against approbation and reprobation. He took me to *Lissenden v CAV Bosch Ltd* [1940] AC 412, HL, but relied in particular upon what was said by Robert Walker LJ, as he then was, in *Ashworth.* He submitted, particularly on the strength of the latter authority, that whilst the principle might be related to that of election, it was freestanding; but it would similarly prevent the Claimants from "blowing hot and cold", in the language of Robert Walker LJ.

30. As for the third limb of his application, abuse of process, Mr Davies-Jones, basing his submissions on *Bradford & Bingley BS v Seddon* [1999] 1 WLR 482, CA, contended that for the Claimants to be permitted to dispute the validity of the Charges, having already obtained a money judgment against Mr Ackerman, would bring the administration of justice into disrepute by (i) allowing them to play fast and loose, (ii) promoting inconsistency and incoherence in decisions, (iii) permitting a collateral attack on the basis of the decision of Peter Smith J, (iv) permitting the advancing of mutually antithetical cases to proceed to judgment, (v) facilitating the Claimants' achieving (should they succeed in the present action) in two sets of proceedings what they could not have achieved in one set in which the claims

against Mr Ackerman and the Bank had been tried together, and (vi) suffering these matters to be occasioned when no good reason has been advanced for failing to bring proceedings against both Mr Ackerman and the Bank together, and seeking proper directions for the resolution of the rival claims.

31. In his supplemental written submissions, made in December 2017, dealing with the exchanges between Peter Smith J and counsel for the Claimants in the course of the Ackerman Trial, Mr Davies-Jones maintained that nothing revealed in the transcripts in relation to the trial itself, or the subsequent hearing dealing with consequential matters, affected the thrust of his submissions made to me on 29th November. He argued that the suggestion made in RPC's Letter that Peter Smith J was aware that the Claimants were challenging the validity of the Charges is irreconcilable with the case advanced to the judge, with his judgment, and the Order that he made; further, the suggestion is not justified by the passages in the exchanges upon which RPC's Letter relied, and that there was nothing else that supported RPC's suggestion.

For the Claimants

32. Mr Midwinter encapsulated his formulation of the question that I have to answer as follows: whether the Claimants have inadvertently precluded themselves from running their case (to the effect that the Charges are not binding upon them) by suing Mr. Ackerman for his breach of duty first and obtaining an order against him, not only that he should indemnify the Claimants in respect of any sum they might become liable to pay under the Charges, but in particular obtaining an order that he should pay £5m in respect of that indemnity. The Bank's case, on that issue, he characterised as "a get-out-of-jail-free card".

33. Mr Midwinter then made several general observations:

    (i) The Bank's case had elided separate concepts as to election between inconsistent rights, and election between inconsistent remedies.

(ii) There is no question of Twinsectra or Haysport's actually obtaining the benefit of inconsistent relief. They have not sought to enforce payment against Mr Ackerman, and they will undertake not to try and enforce against him, if the Charges are held to be invalid. As a matter of practical justice this would mean that there is no scope whatsoever for the Claimants to benefit from the order for payment if the Charges are held to be invalid.

(iii) There is no question of any unfairness to the Bank, as it was not a party to the Ackerman Litigation. On the contrary, it is the Bank that seeks a "windfall benefit" as the result of a few words in Peter Smith J's Order, so that the Bank can enforce the Charges and recover £5m.

(iv) There is, and has been, no inconsistency on the part of the Claimants. Their case has always been that the Charges were entered into as a consequence of breaches of fiduciary duty by Mr Ackerman, and that the Claimants dispute the validity of the Charges. They have always reserved their rights and set out their objections. What they did was to pursue, first, the primary wrongdoer, Mr Ackerman, and then, secondly to challenge enforceability of the Charges. The Claimants' pleaded claim in the Ackerman Litigation can be read as asserting, as Mr Johnson said in his witness statement that the claim was intended to assert, that the Claimants "might" face liability under the Charges. If the Claimants' challenge to the Charges fails, they will be liable under them. The validity, or otherwise of the Charges, is not relevant to the question whether Mr Ackerman breached his fiduciary duties. As for the relief sought, it was a declaration as to Mr Ackerman's liability to indemnify against losses and liabilities that might be suffered in relation to the granting of the Charges. This was relief to which the Claimants were entitled irrespective of validity of the Charges. It remains the case that such liability might be £5m. No-one, he submitted, could have taken that to be a final and definite figure. All that the Claimants were asserting was a then current calculation for a liability of £5m.

(v) The Bank has not been prejudiced in any way. The only person who might have been prejudiced is Mr Ackerman, and that has been

addressed, or can be in future, by non-enforcement against him, or the undertaking described above. It is only the Claimants that stand to suffer prejudice if they are prevented from advancing an otherwise arguable defence to the enforceability of the Charges.

34. Mr Midwinter then powerfully developed these themes in his analysis of the principles engaged by the Bank's application. He began with the distinction between inconsistent rights and remedies, and took me, first to *Tang Man Sit*, which he described as the leading remedies case, amounting to a comprehensive statement of the law on the subject. In his careful analysis of the decision, and I will consider the decision itself later in this judgment, Mr Midwinter drew attention to the distinction highlighted by Lord Nicholls, delivering the Opinion of the Board, between alternative and inconsistent remedies on the one hand, and cumulative remedies on the other. Mr Midwinter submitted that the present case falls within the latter category. He submitted that the effect of the Board's opinion was that the principle of requiring election between remedies is actually about achieving justice in legal proceedings. This, he submitted, was not to be equated with an election between inconsistent rights, where there was a choice between differing substantive rights, only one of which could exist. Mr Midwinter placed great emphasis on a passage in the Board's Opinion at 521H-522C:

> "In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court

> proceedings. Thus in *Johnson v. Agnew* [1980] A.C. 367 the House of Lords held that when specific performance fails to be realised, an order for specific performance may subsequently be discharged and an inquiry as to damages ordered. Lord Wilberforce observed, at p. 398: 'Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity.' "

From this passage Mr Midwinter extracted this principle: in every case the question of whether a party has elected between remedies in a way that is to be treated as irrevocable, that question is to be decided according to the justice of the case. Thus, in a case against a single defendant, where the claimant does not know which remedy will be most advantageous to him, an election can be put off until a time when he will have such knowledge. That analogy should apply in this case, he submitted. Now that Mr Ackerman's impecuniosity has been established, the Claimants should be permitted to challenge the validity of the Charges. This is consistent with a policy of treating principles as a means to an end, rather than an end in themselves. The position can be "fixed" by the suggested undertaking, so that the conclusion should be that an election has not yet been made.

35. Mr Midwinter submitted that the right to rescind a transaction as void, and made without authority, is independent of and cumulative with a right to reparative relief against the fiduciary who improperly entered into the transaction; he referred to *Snell's* Equity, 33rd edition, at para 20-048 on this point.

36. As for para 3 of the Order having fixed the sum to be paid by Mr Ackerman at £5m, Mr Midwinter argued that the question as to whether the amount should be fixed at £5m was simply overlooked before Peter Smith J, but the Claimants had the liability to pay that sum unless and until the Charges were held to be invalid; the various remedies available to the Claimants were cumulative, so that they could pursue them until they received satisfaction.

37. Turning to election between inconsistent rights, Mr Midwinter submitted that the right to sue an agent for breach of fiduciary duty is complementary to a

right to rescind; there is no inconsistency. This analysis he submitted, disposed of the case founded upon election between inconsistent rights. If only an indemnity had been claimed, there would have been no inconsistency; he relied on a passage (which I set out below) in Robert Walker LJ's judgment in *Ashworth* where he spoke of "substantive rights" in this respect. Thus, he argued, the line of authority in *Scarf*, *Morel*, and *Verschures* is not in play in the present case.

38. With regard to the payments of interest by the Claimants, in respect of which an award was made against Mr Ackerman, Mr Midwinter submitted that there is no inconsistency because no claim for those payments is made in these proceedings; further, the payments were made in mitigation of loss, with the Claimants' trying to stave off enforcement.

39. In his supplemental written submissions, addressing the exchanges between Peter Smith J and counsel for the Claimants, which I have set out above, Mr Midwinter maintained that these demonstrated that the judge understood that the Claimants had not ratified the Charges, but rather were challenging them. He then proceeded on that basis. He relied upon this point not as going simply to the issues of election, approbation and reprobation; he submitted that it fatally undermined the abuse of process point relied upon by the Bank, because there had been no attempt to persuade the judge that the Charges were valid. However, Mr Midwinter submitted that the contents of the transcript had a further significance in that they demonstrated that Peter Smith J proceeded on the basis of an express understanding that the Claimants did not intend to ratify, with the result that the case as to election between inconsistent rights could not be maintained. This was because only ratification could constitute a choice between inconsistent substantive rights, but a necessary ingredient of the unpleaded case on ratification would be that there must be an unequivocal communication indication an intention to be bound.

40. Further still, as to election between remedies, Mr Midwinter suggested that the transcript exchanges more firmly put the present case closer to the case of

Tang Man Sit where Lord Nicholls had observed that the problem in that case lay in the judge's order in that the plaintiff had not been required to elect between an account of profits and damages. Factors that caused the Privy Council to hold that there had never been an election were that in the circumstances it would have been "extremely unfair" to the plaintiff, and there was no "rational basis" for saying that any election had been made. Similarly, said Mr Midwinter, the point as to directing a provisional award, or postponing quantification appears simply to have been overlooked in this case. The Claimants were never put to an election. It would be fundamentally unfair to leave them with an unwarranted £5m liability as a result of a procedural step that harmed no-one and which was ordered by the judge who knew what the Claimants actually wanted to achieve.

41. Mr Midwinter made very clear in his submissions that he objected to any attempt on the part of the Bank now to advance a case based upon ratification, since that was neither pleaded, nor the basis of the application. That is a fair point, but, in my judgment, it does not arise. Whilst the Bank's Defence did not use the word "ratification", it contained an express plea of an election between inconsistent rights, namely, the right to enter a money judgment for £5m against Mr Ackerman on the premise that the Charges were valid, and the right to contend as against the Bank that the Charges were invalid

42. Turning next to approbation and reprobation, Mr Midwinter's submission can be summarised shortly. It was that for all purposes relevant to this application, the principle, derived from Scots Law, is co-extensive with the principle of election; *Lissenden* at 418. He acknowledged a possible extension of the principle in *Express Newspapers*, but submitted that that case was actually one concerned with the doctrine of *res judicata*. Similarly, he argued, the American principle of judicial estoppel, demonstrated in *New Hampshire v Maine*, adds nothing. It has its English equivalent in issue estoppel and abuse of process. Therefore, either the Bank succeeds on its abuse of process argument, or it fails.

43. As for abuse of process, Mr Midwinter submitted that such a plea could only succeed if there were an element of collateral attack upon the judgment of Peter Smith J, and no want of mutuality; he referred me to the recent case of *Wilson & Partners Ltd v Sinclair and others* [2017] 1 WLR and especially to paragraphs 48 and 90 of the judgment of Simon LJ, where his lordship said that it would be a rare case where litigation of an issue which has not been decided between the same parties or their privies will amount to an abuse of process. There is no collateral attack, because Peter Smith J did not have to decide the issue of the validity of the Charges. There is no mutuality because the Bank would not have been bound by any finding that the Charges were invalid.

DISCUSSION

44. I begin by considering the principles to be applied in respect of each way in which the application is put.

Election

(i) Rights and remedies

45. It is appropriate, for obvious reasons, in this case, first, to be clear as to the distinction between election between inconsistent rights, and election between inconsistent remedies. For this reason, like counsel, in considering the authorities as far as possible I have done so on the basis of whether a particular case falls into the "rights" or "remedies" category; I have not always reached the same conclusion as counsel as to the category to which an authority should be assigned. That there is a crucial distinction was not in issue before me, but from the submissions that were advanced on behalf of both the Claimants and the Bank, it was manifest that there was no consensus as to whether this case was concerned with election (if there were an election at all) as to rights, or remedies, or both. Though the distinction has been considered in many authorities, including those at the highest level in the second group of cases referred to by Robert Walker LJ in *Ashworth* in the

passage cited below, I consider that the following passage from his judgment in that case, at pages 27H-28G, is an extremely helpful starting point for the consideration of the principles that emerge from the authorities:

> "Before the judge there was a preliminary difference between counsel, which the judge described as an equivocation, as to whether the relevant principle should be described as election between rights (which was Mr. Morgan's submission) or as election between courses of action (which was Mr. Brock's submission, framed, as I understand it, so as to bring election between rights and election between remedies under the umbrella of the same principle). This preliminary difference was soon overtaken by a more fundamental difference, that is whether a choice between what Mr. Morgan called "inconsistent assertions" can properly be characterised as a case of common law election at all. That was the principal ground on which the judge decided the first Order 14A summons. Nevertheless it is helpful to consider the preliminary point of difference because it provides a foundation for assessing some of the wide-ranging submissions in the written skeleton argument prepared by Mr. Brock and Mr. Rainey.
>
> Election between "courses of action" is an expression used in expositions of the principle by some very eminent judges, for instance Lord Scarman in *China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co. S.A. of Panama* [1979] 1 W.L.R. 1018, 1034, and Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India* [1990] 1 Lloyd's Rep. 391, 398. But there is a volume of binding authority showing that for many purposes, including determining the time at which an election must be made, it is necessary to distinguish election between remedies from election between rights: see especially Lord Atkin in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29-30; Lord Wilberforce in *Johnson v. Agnew* [1980] A.C. 367, 396 and Lord Nicholls of Birkenhead in *Personal Representatives of Tang Man Sit v. Capacious Investments Ltd.* [1996] A.C. 514, 521-522.
>
> The distinction can of course be obscured by terminology: every remedy is in one sense a right, even if its grant is discretionary, but not every right is a remedy. *The distinction is clear if "right" is used to indicate a substantive right such as entitlement to a leasehold interest or to the benefit of a contract.* If a would-be purchaser is induced by a misrepresentation to enter into a contract, he has a choice (exercisable subject to familiar constraints) whether to treat himself as no longer bound by the contract, or to affirm it. In either case he will usually also be entitled to claim damages for any loss caused by the misrepresentation. That is an election between rights. If he chooses to affirm the contract and the other party defaults, the purchaser may sue for specific performance or for damages. That is an election between remedies. Normally election between remedies need not be made until judgment, and even then the election need not be final if specific performance is not in the event feasible. Sometimes, however, election between substantive rights and between procedural remedies will necessarily coincide. The most obvious example is in the law of

> landlord and tenant when a landlord decides not to claim that a lease has been determined by forfeiture; by that decision he necessarily also elects not to seek an order for possession of the demised premises."
> (My emphasis)

46. I have also found to be very helpful the passage in Handley's Estoppel by Conduct and Election (2nd edition) at para 14-001 which contrasts the two kinds of election under consideration:

> "An election between rights occurs where the elector is said to have alternative and inconsistent rights against the same person, or against different persons. Although this doctrine is commonly described in this way it is not quite accurate.
> In truth such an election is not between two sets of existing rights, but between an existing set and a new set which the elector has the power to create by his election. …
> … Election between remedies occurs where the law provides inconsistent remedies for the one cause of action or claim. A successful claimant must elect, and if he takes a final remedy he abandons the other."

I remind myself of Handley's warning, also in para 14-001, that "Decisions on one of the doctrines should not be relied on for another."

(ii) Election between inconsistent rights

47. In *Scarf v Jardine*, following the dissolution of a partnership, one partner (the defendant, Mr Scarf) retired, and the other (Mr Rogers) carried on the business with a new partner (Mr Beech). The plaintiff (Mr Jardine), a customer of the old firm, sold goods to the new firm without notice of the change. After he learnt of the change, he sued the new firm for the price, but upon their bankruptcy, he sued the defendant. The House of Lords unanimously held that as the plaintiff had elected to sue the new firm, he could not later sue the defendant. Lord Blackburn said at pages 359-361:

> "It seems to me that he had his choice between the two: he had his choice whether he would hold Rogers and Beech liable as in fact they were, or Rogers and Scarf liable as he had supposed they were, though Scarf was not liable in fact; but he could not hold both sets of persons liable. And then comes the question which ought to have been decided, not whether there was a novation (upon which probably if I had

thought that that was the question I should have agreed with the majority of the Court of Appeal) but whether the Plaintiff had before the 30th of September, the date at which he for the first time made a claim against Scarf, made a final determination of the election by which he had to choose which of the two sets of parties he would hold liable.

Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case*[1], and they are uniform in this respect, that *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, it is final and cannot be altered.* "Quod semel placuit in electionibus, amplius displicere non potest." That is Coke upon Littleton[2], and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made.

But upon that comes the question which is the one that now arises, whether there was evidence here on which your Lordships should find as a fact that there was an election. In *Clough v. London and North Western Railway Co.*[3] the Exchequer Chamber had to consider that question a good deal in a case of some importance in which the judgment was carefully considered. I wrote it myself and I say nothing further about it than this, that it had the full assent of all the other Judges. The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons, and accordingly in that particular case it was held that he had not lost his right to elect by a reasonable waiting under rather peculiar circumstances; but when he has once fully elected it is final.

I may also refer to the case of *Jones v. Carter*[4] as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. …"

(My emphasis)

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[1] 1 Sm. L. C. 8th ed. 47, 54.

[2] 146a.

[3] Law Rep. 7 Ex. 34.

[4] 15 M. & W. 718.

I should add that at page 362, Lord Blackburn said of the issuing of the writ against Messrs Rogers and Beech that he was "unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beech I cannot imagine." The case was, as the opening words in the first passage from Lord Blackburn's speech cited above demonstrate, a case of alternative liability.

48. In subsequent cases at the highest level, *Scarf* has been treated as a case of election between inconsistent rights; see *per* Lord Atkin in *United Australia* at page 30, and *per* Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 396A-B.

49. In *Morel Brothers & Co Ltd v Earl of Westmorland*, the plaintiffs sued the Earl and Countess of Westmorland for the price of goods supplied. The writ claimed a joint liability upon them. The Countess did not defend the action, and the plaintiffs obtained leave to sign judgment against her. The Earl was found liable to the plaintiffs upon the trial of the claim against him. The Court of Appeal held that the claim failed on the basis of joint liability, but despite the manner in which the claim was pleaded, the Court considered whether the Earl would have been liable on the claim had it been pleaded on the basis of alternative liability. All three members of the Court (Collins MR, Romer and Mathew LJJ) held that he would not. At pages 76-77 Collins MR said:

> "... upon the plaintiffs' contention that for this purpose the action is to be treated as one against the defendants severally or in the alternative, we must deal with the claim against the Countess as made against her severally as being herself a principal in respect of the contract for the goods supplied. The plaintiffs, having obtained judgment against the Countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other. In such a case, if it is sought to render the agent liable, it must be by treating the agent as a

> principal, to the exclusion of the liability of the real principal. If it is sought to render the real principal liable, then the agent must be treated as such and not as principal. The plaintiffs cannot recover against both. *If they choose to take judgment against the wife, they cannot consistently with that have judgment for the same amount against the husband.* The result of the whole case is that the judgment against the husband cannot be sustained on the basis of the liability being joint; and, if it be sought to sustain it on the ground that the action must be treated as if brought in respect of a several liability of one or other of the defendants alternatively, then, judgment having been signed against the wife on the footing that she was liable for the price of the goods as a principal, the plaintiffs cannot afterwards obtain judgment for the same amount against the husband on the footing that the wife was his agent in ordering the goods.
>
> ... we must look at the case in the light of general principle; and it seems clear, so regarding it, that, if there has been a conclusive election by the plaintiffs to adopt the liability of one of two persons alternatively liable, they cannot afterwards make the other liable: see *Scarf v. Jardine*. Here, on the hypothesis that the writ covers an alternative claim against the husband or the wife, the issuing of the writ will not involve any election; but, if on the road to trial of the action the plaintiffs accept judgment against one of the two defendants, that may be called an interlocutory step, but it is a complete judgment upon which execution may be issued against that defendant and which alters her relation to the other defendant; and I think it is impossible to say that it is not a conclusive election to make the wife liable to the exclusion of the liability of the husband"
> (My emphasis)

Romer and Mathew LJJ delivered judgments concurring with Collins MR. On appeal to the House of Lords, [1904] AC 12, their lordships unanimously dismissed the appeal, for the reasons given by the Court of Appeal. Lord Halsbury LC (page 14), Lord Shand concurring (page 14), and Lord Davey (page 15), specifically referred to the application of election on the principle in *Scarf v Jardine.* Lord Robertson delivered a short concurring speech.

50. In *Verschures Creameries* goods were delivered to forwarding agents; the owners later instructed the agents not to deliver to the customer, but the agents nevertheless did so. The owners then invoiced the customer, sued him (notifying the agents of that action, but using words to suggest that rights against the agent were reserved) and recovered judgment against him. When they failed to obtain satisfaction, they sued the agents for negligence and

breach of duty. The Court of Appeal held that the claim against the agents had been rightly dismissed. Bankes LJ categorised it as "an attempt to blow hot and cold …or to approbate and reprobate". Bankes LJ said at page 611:

> "When the appellants discovered this they had a right to elect; they might refuse to recognize the action of the respondents in delivering the goods to Beilin [the customer] and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act."

51. Scrutton LJ said at pages 611-612:

> "It is not easy to see why this act of the owners should enure to the benefit of the agents, who were no parties to the action for goods sold and delivered, and who have in no way altered their position in consequence of any election involved in bringing that action, but the principle is well established. A plaintiff is not permitted to "approbate and reprobate." The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election—namely, that no party can accept and reject the same instrument … The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

52. Atkin LJ, as he then was, said at page 612:

> "The owners treated the goods as having rightly come to his hands; they sued him for the price of them, recovered judgment against him, and made him a bankrupt. Thereby they affirmed and ratified the act of the forwarding agents. Having done that they cannot afterwards sue the agents as having acted in breach of their mandate. Their attempted reservation of rights against the agents was ineffective. They were renouncing by their act the rights they were professing to reserve."

53. It is necessary approach the *Verschures* decision with some caution, however, because of what was said about the decision some twenty years after it was decided, in *United Australia*, to which I shall come later when considering election between remedies.

54. These three cases, *Scarf v Jardine*, *Morel*, and *Verschures* are instances of election between rights, but they were all cases in which there had been engagement in litigation. Instances given in many of the leading authorities, demonstrate, very clearly, that it is not necessary for there to be resort to litigation for a binding election between inconsistent rights to be exercised. I need mention nothing more than the example given by Robert Walker LJ in *Ashworth* as to the affirmation of a contract, and the examples given by Lord Goff in *The Kanchenjunga* of determination (or, indeed, affirmation) of a contract following repudiatory breach, or a buyer's acceptance of non-contractual goods in the circumstances described in s35 of the Sale of Goods Act 1979 (which will include retaining goods without intimation of rejection within a reasonable time).

(iii) Election between inconsistent remedies

55. In *United Australia* a cheque payable to United Australia Limited ("the appellants") was converted by M.F.G. Trust Limited ("MFG"), into whose account with Barclays Bank it was paid. The appellants brought a claim for the amount of the cheque against MFG either as money lent, or money had and received to the appellants' use. Although an interlocutory judgment was entered against MFG, it was later set aside; the action was discontinued, and no final judgment was obtained. The appellants proved in MFG's liquidation, but the proof was not admitted, at least by the time that the appellants commenced further proceedings against Barclays in conversion and negligence. At trial, Goddard J, as he then was, considered that he was bound by *Verschures* to find that since only contractual claims had been advanced by the appellants in the earlier litigation, and in their proof in the liquidation of MFG, they had waived their right to claim in tort. The Court of Appeal (Scott, Clauson, and du Parcq LJJ) held that by bringing the first action for breach of contract only, the appellants had elected to waive their right to bring the later claim against Barclays in tort, even though the first action had not proceeded to judgment, and Barclays were not parties to it. As Viscount Simon LC's analysis of the judgments both at trial and in the Court of Appeal (whose judgment was delivered by Clauson LJ) demonstrates (at page 10), it was the issue of the writ against MFG that had been regarded as sufficient to bar the

claim against Barclays. Early in his speech (at pages 10-11), the Lord Chancellor framed the issue for their Lordships' House as follows:

> "The House has now to decide whether the Courts below are right in holding that the appellants are barred from recovering judgment against the bank because they previously instituted proceedings, on the basis of "waiving the tort" against M. F. G., when those proceedings never produced any judgment or satisfaction in the plaintiff's favour. This question may be conveniently dissected by first asking whether there would be any such bar even if the present action was an action in tort against M. F. G. If a remedy in tort would remain open against the same defendant, then there certainly cannot have been any conclusive election which could prevent an action against a different defendant who had previously not been sued at all."

The last sentence of that passage is particularly relevant in understanding the much more recent decision of the Court of Appeal in *Côte à Côte Ltd v Mondial Forwarding Ltd* (unreported), 26th October 1999, to which I shall come a little later.

56. Viscount Simon went on to review the many centuries of authority concerning "waiving the tort"; he began (at page 13) by explaining that where this was possible "it was nothing more than a choice between possible remedies derived from a time when it was not permitted to combine them or to pursue them in the alternative, and when there were procedural advantages in selecting the form of assumpsit." Having concluded his review of the many cases, including *Buckland v Johnson* 15 C.B. 145, and *Smith v Baker* L.R. 8 C.P. 350, he held (at page 18):

> "The true proposition is well formulated in the Restatement of the Law of Restitution promulgated by the American Law Institute, p. 525, as follows: "A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to 'waive the tort.' The election to bring an action of assumpsit is not, however, a waiver of tort but is the choice of one of two alternative remedies." Contrast with this, instances of true waiver of rights, e.g., waiver of forfeiture by receiving rent."

Immediately after this passage, he continued (at pages 18-19):

> "If, under the old forms of procedure, the mere bringing of an action while waiving the tort did not constitute a bar to a further action based on the tort, still less could such a result be held to follow after the

Common Law Procedure Act, 1852, and the Judicature Act, 1875. For it is now possible to combine in a single writ a claim based on tort with a claim based on assumpsit, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. *No doubt, if the plaintiff proved the necessary facts, he could be required to elect on which of his alternative causes of action he would take judgment, but that has nothing to do with the unfounded contention that election arises when the writ is issued. There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend.* The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, i.e., damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. *At some stage of the proceedings the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment.*

So far, I have been discussing what is the true proposition of law when the second action is brought against the same defendant. In the present case, however, the action which is said to be barred by former proceedings against M. F. G. is not an action against M. F. G. at all, but an action against Barclays Bank. I am quite unable to see why this second action should be barred by the plaintiff's earlier proceedings against M. F. G. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by M. F. G. M. F. G.'s tort consisted in taking the cheque away from the appellants without the appellants' authority; that tort would have equally existed if M. F. G., instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. *M. F. G. and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage.*

But, apart from this, what ground is there for saying that proceedings in which M. F. G. were sued on the basis of waiving the tort, but which never resulted in satisfaction, should be regarded as a bar to suing the Bank for conversion? A case which comes near to the present is *Morris v. Robinson.*[5] There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict, but they did not enter up judgment and there had been no actual satisfaction of their claim. Instead, they brought another action against different defendants - namely, an action for conversion against the purchasers who had

[5] 3 B. & C. 196.

> bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second action were liable for their act in purchasing the plaintiff's goods. Bayley J., in giving judgment, observed[6]: "If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If indeed the plaintiffs were to recover the full value of the goods in each action, a court of equity would interfere to prevent them from having a double satisfaction, but there is nothing in the former action which can, in a court of law, prevent the recovery in this." Similar reasoning, as it seems to me, would apply in the present case, and it follows that the *earlier proceedings against M. F. G. could provide the present respondents with no defence, unless as a result of them the plaintiffs had received satisfaction for their loss.*"
> (My emphasis)

57. At this point in his speech, the Lord Chancellor went on to consider *Verschures*, but I find it more convenient to consider that part of his speech alongside how other members of the House also treated the case; so, I shall return to that a little later. At the conclusion of his speech, having cleared the way for being able to resolve the case in favour of the appellants, there is a colourful passage (at pages 21-23), in a case notable for containing several such passages, which I consider deserves to be set out in full, as it is highly relevant to Mr Midwinter's submission that it is the need to do justice that should inform the court's approach to the principles with which the present application is concerned:

> "My Lords, I am glad that it is possible to reach this result, for the alternative view, which is based upon a misreading of technical rules, now happily swept away, would have worked substantial injustice. The appellants have lost their money, and they have lost it owing to the tort of the respondent bank. Why should they not recover it in this action? Nothing that has previously happened in the proceedings against M. F. G., no earlier step taken by the appellants, have prejudiced the position of the bank in any way. All that the respondents have been deprived of is the fleeting prospect of avoiding responsibility if the appellants had succeeded in obtaining satisfaction from another party. The "general principles of right," to which the Court of Appeal referred in its judgment, would surely indicate that the respondent bank should not escape because the appellants have wasted time and money in pursuing another remedy which turned out to be illusory.

[6] At page 205.

> Lord Campbell, in his Life of Lord Ellenborough (ch. 46) permits himself the reflection that "in the exquisite logic of special pleading rightly understood, there is much to gratify an acute and vigorous understanding." Lord Campbell himself was one of three future Lord Chancellors who were pupils of Mr. William Tidd, and might be expected loyally to subscribe to the ecstatic comment "Oh, what a writer Mr. Tidd is, Master Copperfield!" But while admiring the subtlety of the old special pleaders, our Courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties."

58. Lord Atkin, like Viscount Simon, considered the many authorities concerning waiver of tort. He too explained, at page 27, the connection with assumpsit, namely that "if a man so wronged was to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract: for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other. The action of indebitatus assumpsit for money had and received to the use of the plaintiff in the cases I have enumerated was therefore supported by the imputation by the Court to the defendant of a promise to repay." But his conclusion on the issue of waiver of tort was contained in another memorable passage emphasising the importance of the requirement for justice to trump respect for historical relics; he said at page 29:

> "If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him: indeed he may be in prison upon my prosecution. Similarly with the blackmailer: in such a case I do not understand what can be said to be waived. The man has my money which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken: and I suggest that it can make no difference if he extorted a chattel which he afterwards sold. I protest that a man cannot waive a wrong unless he either has a real intention to waive it, or can fairly have imputed to him such an intention, and in the cases which we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred."

59. Lord Atkin then turned, at pages 29-30, to consider principles of election:

> "Concurrently with the decisions as to waiver of tort there is to be found a supposed application of election: and the allegation is sometimes to be found that the plaintiff elected to waive the tort. *It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights.* As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other. Real actions have long disappeared: and, subject to the difficulty of including two causes of action in one writ which has also now disappeared, there has not been and *there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ: or you may put one in first, and then amend and add or substitute another.* I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. "At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure" *per* Lord Esher in *Kelly v. Metropolitan Ry. Co.*[7] *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*[63] 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." In a later passage Lord Blackburn speaks of a man choosing between two remedies: but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above. The case was one where the plaintiff had a right of recourse against two former partners, or against two new partners: but obviously not against both. Lord Blackburn quotes *Dumpor's* case which was a plain case of inconsistent rights, the question of waiver of a forfeiture. *I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one.*
> (My emphasis)

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[7] [1895] 1 QB 944, 946.

60. It is now convenient to return to what was said of *Verschures* in *United Australia.* Viscount Simon LC, at page 21, expressly distinguished the case "on the ground that there the earlier of the two actions ended in the plaintiffs recovering judgment, whereas in the present case the appellants got no judgment against M.F.G. at all." Importantly, though, he continued:

> "To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment had been entered in the appellant company's earlier action against M. F. G. What would be necessary to constitute a bar, as Bayley J. pointed out in *Morris v. Robinson*[8] , would be that, as the result of such judgment or otherwise, the appellants should have received satisfaction."

This latter observation clearly suggests that Viscount Simon treated *Verschures* as a rights, as opposed to a remedies, case. Lord Atkin, who, it will be recalled was one of the lords justices who had decided that case, distinguished it on the basis that it was a case of ratification of an act done by the carriers on behalf of the plaintiffs; see page 31 in *United Australia.*

61. Lord Porter's conclusions as to waiver and election, which he developed fully between pages 40-54, was to very similar effect as those of Viscount Simon and Lord Atkin. His analysis specifically of *Verschures* (at pages 51-52) was the same as Lord Atkin's. Lord Thankerton, at page 33, concurred in the speeches of Viscount Simon and Lord Atkin, as did Lord Romer, at pages 33-35, whilst adding "a very few words of [his] own", which included the following passage:

> "A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrongdoer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages that he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. But, in

[8] 3 B. & C. 196, 205.

my opinion, this is not due to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies."

62. It was on the basis of the ratification point, and reliance on the analysis of *Verschures* by Lord Atkin and Lord Porter in *United Australia*, that Judge LJ, as he then was, distinguished *Verschures* when he considered that decision in *Côte à Côte*. It is convenient, for obvious reasons, to consider *Côte à Côte* at this point, even if though this takes it a little out of turn in the evolution of the authorities. That was a case, which factually had much in common with *Verschures*, being concerned with an unauthorised release of the plaintiff's goods by carriers to a prospective purchaser ("KIL"), who was not entitled to delivery because of non-confirmation of a promissory note by KIL's bankers. Not being paid, the plaintiff began by suing KIL for the price of the goods, or the sum due on the promissory note, and a little later sued the carrier for breach of bailment, breach of contract, and conversion. The claims against KIL and the carrier were later consolidated. Judgment was not entered against KIL until the same time that it was entered against the carrier so that the carrier's case as to ratification, election, and approbation, was founded upon the issue of proceedings, rather than the entry of judgment, against KIL. The carrier asserted that the plaintiff by its conduct elected to treat delivery to KIL as lawful, that there had been ratification of the delivery thereby, and approbation of the release of the goods to KIL. However, it was a feature of that case that the carrier was not an agent of the plaintiff, so that no question of ratification of an agent's conduct arose, as it had in *Verschures.* Judge LJ held that on the facts in *Côte*, authority, including *Tang Man Sit*, did not compel a conclusion in favour of the carrier as to waiver, election. (The fact that judgments against both KIL and the carrier were entered simultaneously, a point of distinction from *Verschures* was a point that Judge LJ expressly found it unnecessary to say more about because of his conclusion on ratification.) The only other member of the court, Hale LJ, as she then was, delivered a short judgment, agreeing in the result. She did not expressly rest her judgment on the distinction that *Verschures* was a case of ratification; she observed that the plaintiff could have claimed alternatively in contract or tort against KIL at

the outset, or "have added a claim in tort in the course of the proceedings once the difficulty had arisen. The choice would only have been confirmed at judgment". She added that since the measure of damages against both parties was the price of the goods, the carrier's "point is based on a pure technicality of pleading. It cannot be right." It smacked, she said, of "the ghosts ... clanking their medieval chains" identified by Lord Atkin in *United Australia.* The availability of claims in conversion against both defendants in that case (which has a resonance with what Viscount Simon said in *United Australia* at page 11) was something of which both Judge and Hale LJJ were expressly conscious.

63. In *Nurcombe v Nurcombe* [1985] 1 WLR 370, CA, was another case which Mr Davies-Jones relied upon as a remedies case, though for reasons that I mention below, it was not strictly an election case at all. Mr Nurcombe was the former husband of the plaintiff and was a director and the major shareholder in a company. The remaining shares were held by the plaintiff who brought proceedings ("the company proceedings"), as a minority shareholder, against both Mr Nurcombe and the company, respectively as first and second defendants. This followed earlier matrimonial financial provision proceedings brought by her against Mr Nurcombe, in which it had become apparent that he had diverted the benefit of a contract for the purchase of land from the company to another company effectively owned by him. In assessing a lump sum to be paid to the plaintiff by Mr Nurcombe, the judge in the matrimonial proceedings took into account that Mr Nurcombe had made a substantial profit out of his dealings in respect of the land. In the company proceedings, the plaintiff on behalf of the company sought payment by Mr Nurcombe to the company of the profit on the property transaction which she alleged he had diverted from the company in breach of his fiduciary duty as a director. Vinelott J dismissed the action on the ground that the plaintiff had abandoned her right to bring a minority shareholder's action by obtaining the benefit of a lump sum award based on the inclusion of the profit from the property transaction in the first defendant's assets. The plaintiff's appeal was dismissed. For reasons explained by Browne-Wilkinson LJ, as he then was, at pages 377H-378A, the case was not "strictly a case of election. A duty to elect only

arises where someone has two alternative rights both of which belong to him. In this case, although the right to claim a lump sum payment was the plaintiff's, the right to complain of the wrong done to [the company] belonged to [the company] not to her: in a minority shareholder's action the shareholder plaintiff is asserting not the shareholder's individual right but the right of the company." He then posed the question "whether this technical objection precludes the court from giving effect to the elementary concepts of justice on which the doctrine of election is founded." He concluded, following consideration of the authorities concerning actions by minority shareholders, that "a court of equity will not allow a minority shareholder to succeed in a minority shareholder's action where there are equitable defences which, as between the shareholder personally and the defendants, the defendants could properly rely on in equity, eg, the duty to elect between conflicting rights, acquiescence, or laches of the minority shareholders." For this reason, her claim failed. All members of the court reached the same conclusion. Thus, the principles of election informed the Court's decision.

64. I come now to the important decision of the Privy Council in *Tang Man Sit*, on appeal from Hong Kong. In that case Mr Tang, a landowner in the New Territories in Hong Kong, agreed on a joint venture with Mr Kung Yerk Man, which Mr Kung would carry out through his company, Capacious Investments Limited ("the plaintiff"), for the development of some of Mr Tang's land on which a number of houses would be built. The plaintiff was to provide the money. Mr Tang agreed by deed dated 20th March 1982 to assign 16 of the houses to the plaintiff. Mr Kung died, and Mr Tang executed no assignment. Instead he started to let the 16 houses. Shortly after Mr Tang died, the plaintiff issued a writ claiming against Mr Tang's personal representative ("the defendant") (1) an order that the defendant assign the 16 houses to the plaintiff free of incumbrances, (2) a declaration that the plaintiff was, from at least the date of the deed, the equitable owner of the 16 houses, (3) an account of all secret profits in respect of the use and letting of the 16 houses, and payment of all such secret profits, and (4) damages (*sic*) for breach of trust. The case came before Mayo J, at first instance, on the plaintiff's application for summary

judgment. Lord Nicholls, delivering the Opinion of the Board, described, at page 518G-H what happened next:

> "Mayo J. made orders as sought. He ordered the defendant to assign the 16 houses free of incumbrances. He made a declaration as asked. He ordered the defendant to furnish an account of all secret profits in respect of the use and letting of the 16 houses and payment of all such secret profits to the plaintiff. Finally, he made an order for 'damages for breach of trust to be assessed.' The judge considered the defendant would not be prejudiced by having to proceed separately with his counterclaim. His counterclaim included a claim for reimbursement of money spent by Mr. Tang on rates and property taxes and maintenance of the houses."

65. After judgment was entered, the defendant assigned the houses but not with vacant possession which were in a poor state of repair. The plaintiff sought to enforce payment from lettings of the properties, and was paid something in respect of the profits, together with further amounts in respect of current rental payments that were being received. The plaintiff pressed with the assessment of damages for loss of use and occupation, being loss of market rental for the period concerned, but gave credit for the amounts received from the defendant regarding the account of profits and current rental payments, and damages for the loss caused by the diminution in value of the houses due to their wrongful use and occupation, and their having been wrongfully incumbered by the tenants. The master awarded damages under both heads, but deducted the sums already received by the plaintiff. The Court of Appeal of Hong Kong allowed the defendant's appeal in part holding that, by receiving the payments on account of profits, the plaintiff had elected to take that remedy so that it could not recover damages for loss of use and occupation, because those two remedies were inconsistent; it held that the plaintiff was entitled to damages for diminution in value. Both parties appealed to the Privy Council. On the plaintiff's cross appeal, the Board expressly accepted (page 520B) that there was an inconsistency between an account of profits, and the award of damages; they were alternative, and not cumulative remedies, so that, provided that the plaintiff had all necessary information at the time of the summary judgment hearing, it should have been put to an election to the extent that the remedies claimed were inconsistent. It held, however, that since the judge's

order had permitted both an account of profits and damages, the plaintiff's acceptance of the account of profits did not amount to an election, and that the defendant had not made any payment under a misapprehension about whether an election had been made. The plaintiff had, therefore, been entitled to proceed with the assessment of damages, giving credit for the amounts that it had received.

66. Lord Nicholls began by considering the two distinct remedies. He said at pages 520H-521C:

> "Their Lordships will consider first whether the plaintiff did choose to take the remedy of an account of profits, with the consequence that it could no longer pursue a claim for damages so far as this would be inconsistent with an account of profits. This issue lies at the heart of this case. This issue calls for consideration of the principles governing election between remedies.
> The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.
> Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss."

He then turned to consider alternative remedies at pages 521D-522C:

> "Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of

things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies.
In the ordinary course, by the time the trial is concluded a plaintiff will know which remedy is more advantageous to him. By then, if not before, he will know enough of the facts to assess where his best interests lie. There will be nothing unfair in requiring him to elect at that stage. Occasionally this may not be so. This is more likely to happen when the judgment is a default judgment or a summary judgment than at the conclusion of a trial. A plaintiff may not know how much money the defendant has made from the wrongful use of his property. It may be unreasonable to require the plaintiff to make his choice without further information. To meet this difficulty, the court may make discovery and other orders designed to give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy. A recent instance where this was done is the decision of Lightman J. in *Island Records Ltd. v. Tring International Plc.* [1995] 3 All E.R. 444. The court will take care to ensure that such an order is not oppressive to a defendant.
In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings. Thus in *Johnson v. Agnew* [1980] A.C. 367 the House of Lords held that when specific performance fails to be realised, an order for specific performance may subsequently be discharged and an inquiry as to damages ordered. Lord Wilberforce observed, at p. 398: 'Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity.' "

67. Then, at page 522D-H, Lord Nicholls considered cumulative remedies:

"The procedural principles applicable to cumulative remedies are necessarily different. *Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes.* It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so

> concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so called rule in *Henderson v. Henderson* (1843) 3 Hare 100. In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that 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."

68. Lord Nicholls then went on (page 523G-H) to review the authorities, in the course of which he made extensive reference, amongst others, to *United Australia.* Immediately after referring to the passage, which I have cited above, in Lord Romer's speech in that case, Lord Nicholls made this important observation:

> "Obtaining judgment for one remedy against a wrongdoer precludes a plaintiff from thereafter claiming the alternative remedy.
> That was the position regarding the company's claims against M.F.G. But the remedies of United Australia against M.F.G. on the one hand and the bank on the other hand were cumulative, not alternative. Accordingly the earlier proceedings against M.F.G. could not bar the company subsequently bringing fresh proceedings against the bank unless the company had recouped the whole of its loss in the earlier proceedings. It was in this context that Viscount Simon L.C. stated, at p. 20: 'the earlier proceedings against M.F.G. could provide the [bank] with no defence, unless as a result of them the plaintiffs had received satisfaction for their loss.' "

69. As to the application of the principles that Lord Nicholls derived from the authorities to the case before the Board, he said, at page 525B-C, that the

plaintiff should have been required, so far as the two remedies were inconsistent, to choose which it would take:

> "If it chose an account of profits, it could have damages only so far as, on the facts of this case, an award of damages was not inconsistent. In the event, the plaintiff was not required to elect. Instead the order gave the plaintiff both remedies."

He observed that the order made was in unqualified terms, that the point was overlooked by everybody, and that no discussion had taken place about the form of order. He then described how the plaintiff had proceeded to enforce both remedies, observing that there was "thus no question of the plaintiff having chosen to take an account of profits rather than payment of damages", although later the plaintiff's choice was made clear when, by amended pleadings, it sought damages against which it gave credit for the sums received in respect of secret profits, and obtained an assessment of damages on that basis.

70. Lord Nicholls stated the Board's conclusion on the issue as to election at pages 525F-526F:

> "In these unusual circumstances it would make no sense to treat receipt of the amount of $1,807,774 as an election by the plaintiff for an account of profits and against damages. To treat receipt of this payment as an election would lack a rational basis, given the terms of the judge's order, and given the continuing steps to proceed with the assessment of damages. It would also be extremely unfair to the plaintiff. It would mean that by accepting payment of one sum due under the court order of 25 August 1992, the plaintiff had unknowingly and inadvertently disabled itself from enforcing payment of a much larger amount due under the same order. That would be unfair, because there is no reason to doubt that, in so far as the two remedies are inconsistent in the present case, the plaintiff, armed first with any further information it required, would have chosen damages had it been required to elect at the time judgment was entered.
> The conclusion would be otherwise if in the light of all the circumstances it would be inequitable to permit the plaintiff, after receiving the secret profits payment, to proceed with the damages claim even though it gave credit for the amount received. There is no such inequity in this case. The defendant did not make the payment under any misapprehension about the plaintiff's intentions. The belatedness of the plaintiff's choice did not prejudice the defendant.

> The defendant sought to meet these points by submitting there is an inflexible rule of law whereby, irrespective of intention, satisfaction of what is due under one remedy is an irrevocable election to have that remedy. There is no later point at which a plaintiff can elect. Satisfaction, it was submitted, includes part satisfaction, as happened in the present case. Having accepted payment, it was not thereafter open to the plaintiff to proceed with a damages claim.
> This submission is misconceived. As already noted, the function of satisfaction in this field is that complete satisfaction bars a plaintiff from subsequently pursuing any other remedy in respect of the same loss. He cannot recover more than the amount of his loss. That principle is not in point here. The payment of $1,897,774 to the plaintiff on 26 June 1993 was not full satisfaction even of the profits which by that date were known to be due under the judge's order.
> Clearly, in the ordinary way enforcement and acceptance of payment, even in part, confirms and reinforces an election made between alternative remedies at the time judgment was entered. *But here no election was made at that time. So acceptance of the payment signifies nothing, given that the order had (wrongly) provided for the plaintiff to have both remedies and that the plaintiff was actively pursuing both.*
> It follows that in their Lordships' view the Court of Appeal fell into error in concluding that the plaintiff elected to take the remedy of an account of profits rather than damages. Since the plaintiff did not so elect, it is unnecessary to consider what would have been the consequences for the damages claim had the plaintiff elected. Their Lordships therefore express no view on the distinction between income and capital drawn by the Court of Appeal."
> (My emphasis)

In the course of Mr Midwinter's submissions on this authority, he skilfully deployed the passages in which Lord Nicholls had referred to unfairness, lack of knowledge, inadvertence, and lack of prejudice to the other party, as relevant in the context of whether an election had taken place.

71. In my judgment, what was of critical importance in *Tang* was that the plaintiff was not put to an election, as it should have been, at the time when judgment was entered. The order made was made in the wrong form. The passages which I have referred to, or cited, above from what Lord Nicholls said at pages 520B-C, and 525C demonstrate that:

    (i) There was an inconsistency between an account of profits from the letting of the properties, and an award of damages relating to the plaintiff's loss of use.

(ii) If, as should have happened, the plaintiff had been put to an election, then, had it chosen an account of profits, it could have had an award of damages only so far as, on the facts, it would not have been inconsistent.

If the plaintiff had been put to an election when the order was made, then once it made its choice, it would have been bound by it, and the fact of inability to recoup on the basis that it had chosen would not have affected the situation; it would have been different if the remedies concerned had been cumulative rather than alternative; see *per* Lord Nicholls at page 523G-H. The very manner in which Lord Nicholls framed the question for the Board (at page 520H-521A) indicates that the Board considered that if the plaintiff had made a choice between remedies, then it would have been bound by it. The Board's decision turned on the conclusion that, "no election was made ... So acceptance of the payment signifies nothing ..." as the plaintiff's acceptance of such payment was explicable on a basis other than election.

(iv) Election: the principles derived from the authorities

72. From the authorities I derive the following principles, as to issues of election, which I have to apply on this application:

(i) Where an election has been made between rights, it cannot be retracted. Thus, where a contract has been affirmed by the innocent party, following repudiatory breach by the other party, the innocent party cannot later go back upon his affirmation. His decision stands, and so does the contract. For this purpose, election, whether intended or not, by an unequivocal act communicated to the other party, is conclusive; *Scarf v Jardine*, pages 359-361, *per* Lord Blackburn. It is, therefore, possible for the making of a claim against one party, even though it does not proceed to judgment, to represent an unequivocal manifestation of an election between inconsistent rights which might affect a claim against another party; see *Scarf v Jardine*, *per* Lord Blackburn at page 362.

(ii) The entry of a judgment, at least a final one, against one person in an action against two persons in a case of alternative liability, will

constitute such a conclusive step; *Morel v Earl of Westmorland*, pages 76-77 in the Court of Appeal, *per* Collins MR, later affirmed in the House of Lords.

(iii) A claimant cannot have both alternative and inconsistent remedies. He must elect between them, when judgment is given, but need not do so before; *United Australia*, at pages 18-19, and 29-30, respectively *per* Viscount Simon LC, and Lord Atkin. See also *Tang Man Sit*, at pages 521-522, *per* Lord Nicholls.

(iv) The form in which the case is initially issued or pleaded is not conclusive; it may be amended, and recast, up until judgment is entered; on this point, see the authorities in (iii) (especially *per* Viscount Simon at page 19 in *United Australia*, but it is important to note that he was there speaking of actions against the same defendant), and also *Côte à Côte*, *per* Hale LJ.

(v) In the case of cumulative remedies, against the same or several parties, a claimant is not obliged to choose between them; he can pursue them against all relevant parties to judgment, and by enforcement, until the judgment has been fully satisfied; *United Australia*, page 30, *per* Lord Atkin, and *Tang Man* Sit, at page 522, *per* Lord Nicholls. It is only when full satisfaction has been received that the claimant will be barred; *United Australia*, page 21, *per* Viscount Simon.

(vi) Where a claimant needs more information before he makes his choice between remedies, subject to ensuring that the orders made are not oppressive to a defendant, the court can fashion its orders on the handing down of judgment with a view to providing the necessary information to the claimant for him to make his decision; see *Tang Man Sit*, at page 522, per Lord Nicholls. This kind of post-judgment enquiry is generally available, but it is especially well-known in relation to claims relating to breaches of trust or fiduciary duty. As Lord Millett explained, at para 168, in his judgment in *Libertarian Investments Limited v Hall* [2014] 1 HKC 368, a decision of the Hong Kong Court of Final Appeal, an order for an account is "merely the first step in a process which enables [the plaintiff] to identify and quantify any deficit in the trust fund and seek the appropriate means by

which it may be may good." Thus, the form and extent of the final relief may be ascertained some considerable time after judgment.

(vii) The principles applicable are means to the end of conducting justice in a manner that strikes a fair balance between the interests of the parties, having regard also to the public interest in the proper conduct of court proceedings; see *Tang Man Sit*, at pages 521-522, *per* Lord Nicholls, *Johnson v Agnew* at 398, *per* Lord Wilberforce, *United Australia*, page 22 *per* Viscount Simon, *per* Lord Atkin, page 29. Legal relics, including ghosts of the past, should not be allowed to stand in the way. Thus a "pure technicality of pleading" will be an unpromising basis for a case based upon election; see *Côte à Côte*, *per* Hale LJ.

Approbation and reprobation

73. The doctrine of approbation and reprobation was considered by the House of Lords in *Lissenden v Bosch* in 1940. A workman ("the appellant") obtained an award of compensation under the Workmen's Compensation Act 1925 of £66 3s. representing compensation at the rate of 12s. 3d. per week for a period ending on 31st October 1938. He appealed the award on the basis that it should not terminate on that date, but continue for the period of his incapacity. Pending the hearing of the appeal, the appellant had accepted payment of the sums made under the award. An objection was taken by the respondents at the hearing of the appeal that by accepting the payments, the appellant had approbated the award. The Court of Appeal (with expressed reluctance) upheld that objection; the decision was reversed by the House of Lords.

74. Viscount Maugham said at page 417:

> "I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7th ed., vol. i., pp. 141-2; and he treats "the Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English jurisprudence." It is, I think, now settled

by decisions in this House that there is no difference at all between the two doctrines. I will cite three cases."

His lordship then went on to consider those cases, to which I need not refer, then he continued at page 418:

> "In the light of these authorities it seems that the phrase "you may not approbate or reprobate," or the Latin "quod approbo non reprobo," as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth …
> It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles that apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question."

75. Viscount Maugham then went on to explain that election in equity was concerned with preventing a person from taking a benefit under an instrument, such as a will, whilst making a claim against it. This doctrine, he considered (page 419) could not be applied to the right to appeal from an award under the 1925 Act.

76. Lord Atkin's considered the specific injustice of a workman's being denied any compensation until after an appeal was heard to be opposed to the scheme of the 1925 Act; see page 423. Turning to approbation and reprobation, he said at page 429:

> "But I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of "approbation and reprobation." The noble Lord on the Woolsack [Viscount Maugham] has to my mind clearly shown the limitations of that doctrine as defined in the law of Scotland from which it comes. In this country I do not think it expresses any formal legal concept: I regard it as a descriptive phrase equivalent to "blowing hot and cold." I find

great difficulty in placing such phrases in any legal category: though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.
The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights: it is the same right that he claims but in larger degree. In *Mills v. Duckworth*[9], a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into Court and then had appealed against the quantum of damages and was met by a similar objection to his appeal. Lord Fairfield in overruling the objection pointedly said: "The plaintiff said 'I am not going to blow hot and cold. I am going to blow hotter'." Here the applicant is not faced with a choice between alternative rights: he has exercised an undisputed right to compensation: and claims to have a right to more. You have not lost your right to a second helping because you have taken the first."

77. Like Lord Atkin, Lord Wright regarded it as "a shock to one's sense of justice" that a workman should be barred from appealing in the circumstances described; see page 431. Addressing the doctrine under consideration, he said, at pages 435-436:

> "But it is not safe to act upon them unless and to the extent that they have received definition and limitation from judicial determination. How this has happened in respect of the doctrine of "approbate and reprobate" has been fully and clearly explained by my noble and learned friend Viscount Maugham. Indeed, the formula in its more precise and technical significance has become an equivalent derived from Scots Law of the equitable doctrine of election. The formula is also sometimes used to indicate the position where a person takes benefits under a deed and is held bound because of his conduct in so doing by conditions expressed in the deed, though he has not executed it. In such and similar cases the formula becomes, as it were, a label, and lawyers know when and where to apply it. A more doubtful but still not infrequent use of the formula is in cases of common law election, where there is a choice between alternative and inconsistent remedies, for instance, between charging a defendant in tort and charging him for money had and received or between charging the principal or the agent. In these latter cases the alternatives are mutually exclusive. In the cases of equitable election, the conscience of the

[9] [1938] 1 All ER 318,321.

> defendant is affected because, in the language of Lord Cairns L. C. quoted by Viscount Maugham from *Codrington v. Codrington*[10], it would be inequitable that he should "accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." It is in my judgment impossible to apply any such idea to the present case. The appellant was doing nothing inequitable or inconsistent."

78. Lord Russell agreed (at page 430) with the speeches of Viscount Maugham and Lord Atkin, and Lord Romer (at page 436) agreed.

79. In light of what was said by their lordships in *Lissenden*, it does not seem to me that the decision in that case is any warrant for the proposition that the Scots law doctrine of approbation and reprobation, though it may have been assimilated into English law, had, by 1940, taken the position any further than would English common law and equitable principles as to waiver and election. That is not to say, however, that the doctrine has not been extended since 1940, or that it has not since informed the development of the law in England as to abuse of process.

80. In the course of his submissions, Mr Davies-Jones took me to the decision of Sir Nicolas Browne-Wilkinson V-C, as he then was in *Express Newspapers Plc v News (UK) Ltd & others* [1990] 1320, a case in which a newspaper adopted contrary positions in a claim and counterclaim, both of which were concerned with alleged infringement of copyright, and an issue as to the existence of a press custom of adopting news stories from other newspapers. Holding that it was not open to the newspaper to adopt such a stance, his lordship said at page 1329:

> "The fact is that if the defences now being put forward by the defendants in relation to the "Daily Star" article are good defences to the Ogilvy case, they were and are equally good defences to the claim by the "Daily Express" against "Today" newspaper relating to the Bordes claim. I think that what Mr. Montgomery describes as what is sauce for the goose is sauce for the gander has a rather narrower legal manifestation. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not

[10] L.R. 7 H.L. 854, 861.

> allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.
> To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case."

81. In *Ashworth*, Robert Walker LJ referred to this passage of the judgment in *Express Newspapers* at page 31:

> "The principle that a party to litigation cannot "approbate and reprobate" (or "blow hot and cold") does sometimes curtail that party's theoretical freedom to plead wholly inconsistent cases as alternatives. The principle is an importation into English law from Scotland, and although it covers much the same ground as elective waiver and waiver by estoppel, it may be rather more flexible: there is a fairly recent example in the decision of Sir Nicolas Browne-Wilkinson V.-C. in *Express Newspapers Plc. v. News (U.K.) Ltd.* [1990] 1 W.L.R. 1320. No authorities are cited in the relevant passage of the judgment, at p. 1329, but the principle and its limits were considered by the House of Lords in *Lissenden v. C.A.V. Bosch Ltd.* [1940] A.C. 412, especially in the speech of Viscount Maugham, at pp. 417-418. It seems to me at least arguable that by demanding and suing for rent the landlord was unequivocally treating the tenant as not being a trespasser; and that the subsequent amendment of the statement of claim to plead an alternative and inconsistent case should not be allowed to operate retrospectively so as to make the tenant's occupation unlawful."

However, this part of Robert Walker LJ's judgment was *obiter*; *Ashworth* was concerned with whether a landlord could claim double rent from a tenant who remained in occupation of premises following the expiration of his lease. The tenant had sought to deny the claim on the basis that the landlord, by purportedly having elected to treat the lease as continuing, was precluded from claiming such double rent. The Court of Appeal held, however, that the landlord had no right to have treated the lease as continuing, and therefore had had no choice between substantive rights. As Robert Walker made clear at page 31E-F of his judgment, the tenant had relied only on elective waiver, and had not sought to argue the case on the basis of "the third route" described by Robert Walker LJ. The case was actually decided in favour of the tenant, not on the basis of waiver or election, but because the combined effect of the 1737

Act, and the Landlord and Tenant Act 1730, was to permit a landlord to recover double rent only where the tenant was a trespasser and had been treated as such by the landlord, and, on the facts, the landlord had not so treated the tenant.

82. Further, Laws LJ stated in terms (at page 32E) that he expressed no view as to the possibility canvassed by Robert Walker LJ as to approbation and reprobation, which he said, was a point not explored by counsel in the course of argument. Stuart-Smith LJ (at page 39) simply said that he agreed.

83. My conclusion, therefore, is that the Court of Appeal's decision in *Ashworth* did not extend the application of the doctrine under consideration beyond what was described in *Lissenden.* That said, the observations of Robert Walker LJ, even though *obiter* on the matter, carry very considerable weight. *Ashworth* apart, the law in England seems to have been consciously developed in the period since *Lissenden* was decided. The Vice-Chancellor acknowledged that he was extending the reach of the doctrine in *Express Newspapers*, and since that case was decided, very recently in *8 Representative Claimants v MGN Ltd* [2016] EWHC 855 (Ch), Mann J also relied upon the *Express Newspapers* decision in support of his conclusion that the defendant was precluded from adopting diametrically opposed positions in different litigation as to the recoverability of Conditional Fee Agreement additional liabilities. Mann J said this at para 34:

> "Having relied on the availability of the recovery of CFA additional liabilities in this class of litigation, the defendant now seeks to rely on the absence of that recovery in the present application. That is a classic approbation and reprobation. It is an inconsistency which should not be allowed. An alternative way of looking at it would be to view it as an abuse of process, which in my view it is. But whichever label one chooses to give it, the present stance is one which MGN should not be allowed to adopt."

84. Further, and importantly, the doctrine has also been developed in its application in Scotland, from where it originated; see the decision of Lord

Menzies *Redding Park Development Company Limited v Falkirk Council* [2011] CSOH 202 where he said at para 54:

> "Although the doctrine of approbate and reprobate was initially developed in the field of trusts, wills and succession, it is clear that it has been applied much more widely in the context of determinations of commercial and other compensation disputes over the last 70 years — see the cases of *Lissenden*, *Linnett*, *PT Building Services*, and *Shimizu* referred to above[11]. I am satisfied that the doctrine may be applied in the present circumstances."

Applying the doctrine of approbation and reprobation, his lordship held that payment of a sum pursuant to an expert determination was incompatible with the assertion that there has been no valid determination.

85. I invited counsel to make supplemental written submissions on the *MGN* and *Redding Park* cases (which had not been before me during the hearing), and I am grateful to them both for so doing. Mr Midwinter fairly pointed out that the former involved the adopting of inconsistent positions in the same litigation, which would have led to unfairness between the same parties; no such unfairness would arise here, he submitted, as the Bank's position was not altered by anything done in the Ackerman Proceedings. As for *Redding Park*, Mr Midwinter submitted that "approbate and reprobate" in Scots Law is used differently from its English law usage, namely to mean an election. For this he relied on *Lissenden.* With respect to his argument, it seems to me that the submission does not take into account Viscount Maugham's analysis that the Scots doctrine equated to equitable as opposed to common law election in English law, and in both jurisdictions was confined to cases arising under wills, deeds, and other instruments *inter vivos* (see page 419 in *Lissenden*). As Lord Menzies' Opinion demonstrates, by reference both to Scots and English law principles, over the decades, the doctrine has been developed outside of those narrow confines so that a person who has adopted one stance will not be permitted later to adopt a completely different stance from that adopted previously.

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[11] *Linnett v Halliwell* [2009] EWHC 319 (TCC), [2009] BLR 327; *PT Building Services Ltd v ROK Build Ltd* [2008] EWHC 3434 (TCC); *Shimizu Europe Ltd v Automajor Ltd* [2002] BLR 113.

86. Mr Davies-Jones drew attention to Lord Menzies' conclusion following his review of the authorities, at para 58, that "it is unnecessary for approbation to be established that the approbating party should obtain a benefit". He submitted that even if it were necessary to demonstrate that the approbating party had benefited, it could be shown in this case, amongst other things, from the taking of the judgment, not merely as to the £5m, but also £622,848 in relation to interest payments made to the Bank. The latter item was included in the petition debt against Mr Ackerman, and, I would add, in respect of which the Claimants anticipate some, albeit modest, degree of recovery. He submitted, further, that the public policy considerations against abusive and improper conduct dictate that issues as to detriment to the Bank, and the fact that the present case is not confined to the parties to the Ackerman Proceedings, but involve a non-party in that litigation, are not relevant. The policy remains engaged. I accept those submissions.

87. I therefore have come to the conclusion that the doctrine of approbation and reprobation has now become an established feature of English law (and it would seem Scots law) for the wider principle described in *Express Newspapers*. It is, therefore, a doctrine which Mr Davies-Jones was rightly able to invoke in this case, if it is justified upon the facts.

Abuse of process

88. Mr Davies-Jones particularly relied upon the following passage from the judgment of Auld LJ (a judgment with which both Nourse and Ward LJJ agreed) in *Bradford & Bingley BS v Seddon* at page 1498:

> "In my view, there is nothing inherently abusive of process about making inconsistent or merely new allegations possibly resulting in different outcomes in different actions (though this may be affected by Part 22 of the new Civil Procedure Rules (S.I. 1998 No. 3132 (L.17)), under which a party must swear to the truth of his pleading). It depends upon the circumstances, often whether some additional element is present. Election is a possible element rendering a second claim an abuse. But, in my view, to do so it should have been of such a nature that the two claims are mutually exclusive or impossible in law, as in *Scarf v. Jardine*, 7 App.Cas. 345, or of a formal or otherwise positive

nature, e.g. abandonment of or release of a party from an earlier claim, as in *Morris v. Wentworth-Stanley* [1999] 2 W.L.R. 470, or the failure to pursue a pleaded claim in an earlier action, as in *M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe)* [1998] 4 All E.R. 675. Otherwise every advertent inconsistency as to the party sued or the nature of claim made would be an abusive election."

89. In the *Bradford & Bingley* case, Mr Seddon brought a claim ("the Preston action") against Mr Hancock, an accountant for damages for negligence and/or an indemnity in respect of a failed investment upon which Mr Hancock had advised Mr Seddon to fund by taking a mortgage loan from the building society lender. Mr. Seddon claimed a total of £163,000, representing the mortgage loan and other expenses which he maintained Mr. Hancock's investment client had agreed to discharge. Mr. Hancock admitted liability under the indemnity for £120,000, and did not deny the allegation of negligence. Mr. Seddon entered judgment for the admitted sum, and Mr. Hancock was given unconditional leave to defend as to the balance.

90. Mr. Seddon was unable to enforce the judgment; Mr. Hancock had no money, and there was no point in proceeding with the balance of the claim against him. This left Mr Seddon owing the lender £180,000; it began proceedings against him for possession of his mortgaged home and the sum due to it. Mr Seddon then brought third party proceedings as to the unsatisfied claim against Mr. Hancock, as well as two of his partners, Messrs Walsh and Rhodes. The third party claim was cast more widely than the claim in the Preston action. Mr Seddon claimed against all three indemnity/contribution towards his liability to the lender, and damages for their failure to indemnify him, relying upon allegations of negligence, and misrepresentation. The third parties applied to strike out the claim as an abuse of process. On hearing the application, the judge struck out the third party claim as an abuse of process because the basis of the Preston action was that Mr Hancock alone was liable, and because the third-party proceedings were inconsistent with that stance.

91. Auld LJ said that the judge's finding of inconsistency was a possible, but not necessary construction of the pleading in the Preston action, and that the onus

had been on Messrs Walsh and Rhodes to establish the point with sufficient cogency to give jurisdiction to strike out. The need for caution, the emphasis upon the onus being upon the applicant in a striking out claim, the requirement that the court should only strike out a claim as an abuse after most careful consideration were all matters that were stressed at page 1496 of Auld LJ's judgment. He considered the earlier pleadings to be equivocal, so that the question was whether the obtaining of the earlier judgment which was arguably inconsistent with the allegations in the later proceedings made them an abuse of process. He continued as set out in the passage which I have cited above, following which, he said, at page 1498, that he saw no circumstances to justify treating Mr Seddon's decision to sue and secure judgment against Mr Hancock as an abuse of process. He explained that it might have been pointless and wasteful to join in other parties; the necessity to proceed against them only emerged when Mr Hancock could not pay, and the lender's claim proceeded. Auld LJ continued at pages 1498-1499:

> "The judge appears to have considered that inconsistency alone was enough to justify a finding of abuse unless it could be dispelled in some way by the new documentary material. In my view, he should have been more hesitant before striking out the third party claim on a conclusion of inconsistency based on his construction of what were arguably equivocal pleadings and disposal by the court in the Preston action. More importantly, he should have looked beyond the inconsistency that he found and should have considered whether Mr. Walsh and Mr. Rhodes had shown that it and the other differences between the two claims made the third party claim in all the circumstances an abusive process. Perhaps he was misled by the mistaken notion, as I consider it in a case such as this, that where there is inconsistency or a new claim which could have been, but was not, made before, only *Henderson* "special circumstances" could prevent a strike-out for abuse of process."

92. Whilst I recognise the judicial policy against inconsistency and "playing fast and loose" described in cases such as *Gandy* and *New Hampshire*, which Mr Davies-Jones identified, I note that in both those cases, there was a common identity between the parties to the litigation. That, it seems to me, is not necessarily an essential feature for the operation of the policy, but for the reasons explained by Auld LJ in the passages which I have cited from his

judgment in the *Bradford & Bingley* case, inconsistency alone will not, by itself be sufficient to justify the striking out or dismissal of proceedings, and I did not understand Mr Davies-Jones to be submitting that it was. I do not consider it necessary to refer to the other authorities (including *Hunter v Chief Constable West Midlands* [1982] AC 529 and *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1) to which Mr Davies-Jones referred me, and which were mentioned in his written submissions. I have referred above, in the context of approbation and reprobation, to Mann J's decision in *MGN*. I do not consider that *Gandy* or *New Hampshire* add to the reach of the judicial policy which emerges from cases such as *Bradford & Bingley* and *MGN*.

93. As for Mr Midwinter's point, relying upon *Wilson v Sinclair*, that it would be a rare case where litigation of an issue not previously decided between the same parties will amount to an abuse of process, Simon LJ's statement to that effect was in the context of a case which concerned whether it was an abuse of process for the claimant to bring a claim in the High Court relying upon the same evidence as the claimant had relied upon, but against a different party, in arbitration proceedings. In the arbitration, that evidence had been rejected. Teare J held the claimant's case to be an abuse; that decision was reversed by the Court of Appeal. At para 11 of his judgment, with which both Patten and Ryder LJJ agreed, Simon LJ summarised the material finding by Teare J:

> "The judge concluded that to permit MWP to make the same factual allegations which it had made in the arbitration and which had been rejected by the arbitrators was an abuse of the court's process."

That is a wholly different basis for a finding of an abuse of process from that now under consideration. It is concerned with reliance upon evidence previously rejected by another tribunal. Simon LJ did not suggest that in every type of abuse of process case the concerns which he identified and were relied upon by Mr Midwinter, would arise; namely absence of a previous decision between the same parties (para 47), and lack of mutuality (para 90). Indeed, earlier in his judgment he had cited a passage from the speech of Lord Hobhouse in *Re Norris* [2001] 1 WLR 1388, which enumerated examples of

other kinds of abusive conduct, such as litigating without any legitimate interest in the proceedings. In cases concerned with reliance upon previously rejected evidence, it is readily understandable why it might be thought that the common identity of parties, and mutuality, might be extremely pertinent ingredients of an abuse of process, but the position is different where, as here, the abuse alleged involves not revisiting previously rejected testimony, but a claimant's invitation to a court to grant a remedy which is mutually inconsistent with one granted, at the request of the same claimant, by another court on an earlier occasion. I note that the *Bradford & Bingley* case which contemplated striking out for abuse consisting of the adoption of inconsistent stances in different litigation was not amongst the authorities before the Court in *Wilson v Sinclair.*

CONCLUSIONS

94. Any decision as to each of the bases upon which the Bank seeks summary judgment can only properly be reached by scrutinising with great care the factual matters which underpin each of those bases. I have considered whether an application for summary judgment offers a suitable basis for such consideration. In my view, the material that is relevant for consideration is contained in the documents before the court. It includes correspondence, pleadings and other court documents in the Ackerman Proceedings. Hearing from witnesses will not assist in evaluation of whether the background facts disclose that this case should be dismissed for the reasons relied upon by the Bank in its application. I consider, therefore, that this is a case which is capable of being properly considered on a summary application.

95. I return to the facts of the present case which I consider are material to the application that I have to decide:

    (i) It is perfectly clear that prior to commencing the Ackerman Proceedings, the Claimants had engaged experienced legal advisers to represent them, and they retained them for the purposes of that litigation. Furthermore, they were well aware, before that litigation commenced, that they were in dispute with the Bank as to the validity of the Charges, and that they also wished to seek indemnity or other

compensation from Mr Ackerman. This is clear from the correspondence with the Bank's solicitors pre-dating the earlier litigation, and the fact of the initiation of the Ackerman Proceedings.

(ii) If the Claimants wished to attack the validity of the Security, whilst preserving their claim against Mr Ackerman, they could have begun one action in which they joined both the Bank and Mr Ackerman as defendants, in which they claimed (i) against the Bank, as they have in the present proceedings, declaratory relief as to the invalidity of the Charges, and (ii) against Mr Ackerman for breach of fiduciary duty in causing the Claimants to enter into the Charges. The relief framed against him could have been in terms of an indemnity in respect of losses sustained as a result of having granted the Charges, further or alternatively, together with any consequential compensation to be assessed depending upon whether the Charges were held to be valid and binding upon the Claimants. Even if the Charges were declared to be invalid, it might have been possible that some loss, other than costs, might have been sustained as a result of the fact that the Charges had, for a while, subsisted.

(iii) It was equally open to the Claimants to initiate proceedings, first, against Mr Ackerman, in which it was made clear that the validity of the Charges was disputed, but in which they sought relief equivalent to that described in (ii) above. Had they proceeded on that basis and succeeded at trial against Mr Ackerman, the assessment of what was due under the indemnity would have had to be postponed until such time as it was known whether the Charges were indeed determined to be invalid. Appropriate orders would have been made to give effect to this course.

(iv) Yet another alternative for the Claimants would have been to commence proceedings against the Bank first, so that the validity of the Charges could be ascertained before proceedings against Mr Ackerman were initiated. This might have required thought as to how to guard against any limitation issues that might arise and be taken by Mr Ackerman – for example, a standstill agreement with him.

(v) Unless the course pursued in (ii) above were followed, it would have been necessary for careful thought to be given to be given to avoiding inconsistent findings that might arise from conducting separate proceedings. If proceedings were pursued initially against only one of Mr Ackerman or the Bank, it would have been prudent for the other prospective defendant, and, certainly, the court, to be informed as to the possibility of other proceedings involving the other possible party, so that the court could give necessary directions for case managing the proceedings, with a view to minimising costs and avoiding the risk of inconsistent findings.

(vi) The course actually adopted by the Claimants was to begin proceedings against Mr Ackerman only, and not to inform the Bank of that fact until after a judgment had ben obtained. The Bank did not have the chance (which the course described in (iv) above would have provided) to seek the joinder of Mr Ackerman, and the court was also deprived of the opportunity to consider how best a potentially three-way dispute could be managed.

(vii) The Claimants' pleadings in the Ackerman Proceedings did not suggest that there was a challenge to the validity of the Charges. The contrary was the case. The Particulars of Claim not merely sought indemnity from the granting of the Charges (without mentioning their alleged invalidity), but it asserted that an order for payment should be made pursuant to the declaratory relief, then calculated at £5m. That of course was the full amount then outstanding.

(viii) Apart from the brief exchange with Peter Smith J, initiated by him, during the opening of the case at trial, nothing was said that might indicate that validity of the Charges was to be challenged. I must make it clear, however, that there is no suggestion that the Claimants' then legal advisers had been attempting to conceal the true position from the court. As to the exchanges, it is not clear what was actually in judge's, or, indeed, counsel's minds. Whilst there was mention of ratification, there was also mention of being able to repay the Bank if it did not agree.

(ix) The draft order presented to the court on 8th March 2016, it is to be inferred, provided for payment of £5m in respect of the relevant liability. I say it is to be inferred because I have not seen the draft of the order, but there was no discussion of the point, and the sealed order provided for payment of that sum. I find it is overwhelmingly likely that the draft included that provision. The framing of the draft was under the control of the Claimants. If they had simply wanted a declaration as to liability to pay whatever sum it might subsequently be determined had to be paid to the Bank, such a provision could have been included in the order. In fact, the wording as to the payment obligation, materially, was the same as to the obligation to pay the £4m liability in respect of the Loan Note – "The Defendant shall pay …". There was no conditionality attaching to either provision. Either could have been enforced.

(x) The sum of £5m in the order made by Peter Smith J was based upon the sum due to the Bank under the Facility; that is admitted in para 16 of the Reply in these proceedings.

96. Applying to these facts the legal principles that I derive from the authorities, I reach these conclusions:

(i) The Claimants had available to them cumulative remedies in that they could have sought, without inconsistency as to rights or remedies, declaratory relief against Mr Ackerman in respect of whatever liabilities they had, or had incurred, to the Bank, depending upon whether the Security was, or was not, actually binding upon the Claimants. Such claim for declaratory relief could have been coupled with a claim for payment of such sum pursuant thereto as upon enquiry it should be established was due by way of indemnity or equitable compensation. They could also have sought, whether in the same proceedings or otherwise, to challenge the validity of the Charges.

(ii) What was not open to the Claimants, in whatever order they chose to initiate proceedings, was to recover a judgment against Mr Ackerman on the basis that there was a £5m liability to the Bank under the Charges, whilst at the same time obtaining an order that the Charges

were not binding on them. This is conceded in para 17 of the Reply, though it is said to be irrelevant because if the proceedings had gone ahead together the questions of the Claimants' liability under the Charges, and Mr Ackerman's liability would have been determined at the same time. I do not accept the suggested irrelevancy. The determination would not have produced the very result (as the Claimants accept) which they are seeking to achieve in the current proceedings. They have a judgment against Mr Ackerman for £5m; they now seek a judgment as to invalidity against the Bank. They recognise the inconsistency of that position by the offer of an undertaking, to which I will return shortly.

(iii) No conclusive election was made by the Claimants simply upon their commencement of proceedings. In my judgment, the wording of the Particulars of Claim in the Ackerman Proceedings did not represent an unequivocal manifestation of an election between inconsistent rights. The body of the pleading and the prayer for relief both sought a declaration and an order for payment pursuant thereto, but the order sought for payment was couched in the language of current calculation. That can be read as meaning that as things stood at the time of pleading, that sum was the sum that would be pursued on the making of the order. I have in mind, also, that more recent authority leans against deciding points such as these on the technicality of pleading. As explained by Viscount Simon in *United Australia*, and mentioned by Hale LJ, in *Côte à Côte*, pleadings can always be amended. Once so amended, a passage giving rise to a suggested inconsistency or other mischief is effectively negated. This is demonstrated, for example, in the case of denial of a landlord's title by a tenant in his pleading, where amendment can later cure the denial, thereby undermining the landlord's claim to forfeit the lease based upon such denial; see the decision of the Court of Appeal in *Warner v Sampson* [1959] 1 QB 297, and especially the judgment of Hodson LJ, as he then was, at pages 321-322:

> "Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried....
> It is said that, the condition having been broken, this cannot be cured by amendment, even though the breach of condition is contained in a pleading which normally is capable of amendment. I cannot accept that this pleading should be regarded as any more immutable than any other pleading, and, accordingly, if it were necessary, would hold that the appeal should succeed on the ground that before the landlord had re-entered or taken effective proceedings for re-entry the defendant by amending his defence had removed from it the denial of title which it had previously contained."

(iv) Since the remedies concerned a judgment for £5m on the basis of Mr Ackerman's causing the Claimants to enter into Charges that gave rise to a liability to the Bank in that sum, on the one hand, and a declaration as to invalidity of the same Charges, on the other hand, were alternative and inconsistent, the Claimants had to choose no later than when judgment was entered. They made their choice no later than when Peter Smith J made the order that they asked him to make for a final order against Mr Ackerman for payment of £5m. When they made that request they had all the necessary information as to the course that they might wish to pursue against the Bank. They could have relented from seeking a final order for payment, and asked for an enquiry into the loss sustained, or an adjournment pending the trial of a claim against the Bank, but they did not do so. This is a case which falls within the "ordinary course" (as Lord Nicholls put it in *Tang*) where the choice made was made once and for all. There was no accidental slip, or omission, in the obtaining of the order; after obtaining it, the Claimants solicitors sent it to the Bank without suggesting that anything had gone wrong with the making of the order.

(v) I reject Mr Midwinter's submission that *Tang*, or any other decision in this field, is authority for the proposition that in every case (as opposed to cases outside the ordinary course) whether an election has been made between inconsistent remedies in an irrevocable fashion is a question to be decided according to the justice of the case, if by that he seeks to suggest that there is some discretionary "relieving

jurisdiction" to mitigate consequences for a party who regrets having made his earlier choice. The assessment as to whether an election has been made has to be undertaken justly looking at all material evidence, and upon a construction of documents by reference to established principle. In *Tang*, as in *Côte à Côte*, it was possible for the Board and the Court of Appeal respectively to conclude, on the facts of those cases, that no election had been made; in *Tang* because the form of the judge's order, and the conduct of the plaintiff post-judgment showed that no choice in favour of an account of profits had been made. In *Côte à Côte*, similarly, no choice between remedies had been made, and the judge, in consolidated proceedings, made orders at trial against both defendants, both of whom, in any event would have been liable in conversion. The present case is wholly different. The court will not use technicalities of pleading, and historic relics of legal fictions to convert conduct which did not amount to a choice, into an election. However, the history, in this case, plainly demonstrates that a choice, and one with the benefit of all information and legal advice, was made by the Claimants. There is no proper or principled basis for finding otherwise.

(vi) In my judgment, therefore there was, therefore, an election, at the least between inconsistent remedies when Peter Smith J made his order, but I would find that there was at that point also an election between rights; the right to a enter a judgment for the money sum on the basis of a loss inflicted by creating a liability to the Bank, or the right to press on and challenge the Charges. The decision in *Morel v Earl of Westmorland* is particularly in point.

(vii) The Claimants' difficulties cannot be overcome by the offer of an undertaking not to enforce the earlier judgment against Mr Ackerman. By the course which they have taken, they have irrevocably changed the landscape. It will frequently be the case that persons choosing between inconsistent rights and remedies will realise, only when it is too late to change their minds, that they have backed the wrong horse, perhaps by electing to proceed against a less creditworthy party (*Scarf v Jardine*, *Morel*), perhaps by making a bad choice as to ratification (*Verschures*), perhaps, as a buyer, by treating a sale of goods as

repudiated just before the price of the rejected goods accelerates steeply, or perhaps, in the case of a landlord, by forfeiting a lease just as demand for accommodation in the locality plummets. Bad decisions, particularly with the benefit of hindsight, can be seen to have unpleasant consequences, but to permit them to be reversed in a case such as this by the offer of an undertaking is unprincipled and would undermine the need for the finality mentioned by Lord Nicholls in *Tang*. The election, once made, as Lord Blackburn said in *Scarf v Jardine*, "cannot be retracted, it is final and cannot be altered". If an undertaking could have "cured" the problem as suggested by Mr Midwinter, it would have overcome the difficulties for unfortunate plaintiffs in many of the cases mentioned above.

(viii) I reject the suggestion that the exchanges with Peter Smith J affect the application of the principles which I have mentioned. The judge did not suggest that the making of an order in the terms sought were without prejudice to the Claimants' position in any other claims that they might wish to bring. Unlike the judge in *Tang*, he did not make an order which actually provided for inconsistent remedies. He mentioned only ratification, in a fashion that did not amount to any kind of a ruling, and he said nothing which could be taken to be assurance that the making of the order in the terms ultimately made (in terms drafted on the Claimants' behalf) would preclude reliance by a third party on any of the bases that form the grounds for the present application.

(ix) The subjective intentions of the Claimants, and whether or not they intended to make an election are irrelevant, as explained by Lord Blackburn in *Scarf v Jardine* nearly 140 years ago.

(x) For the sake of completeness as to election, I should add that I would not, simply on the basis of Mr Davies-Jones' short point on the payment of interest to the Bank, have decided that there had been an election. As against the Bank alone, it seems to me that the payments would be compatible with the notion of paying, effectively under protest pursuant to correspondence pending resolution of the dispute between the Bank and the Claimants. So far as the claim for such interest in the Ackerman Proceedings is concerned, it adds nothing of

principle (albeit it added monetarily) to the claim for the capital sum of £5m.

(xi) The conclusions stated above are sufficient for me to dispose of the application for judgment in the Bank's favour. However, since the other bases of the application were fully argued, and in case this matter should go further, I will deal with the additional bases upon which the application was made. I consider that the principle of approbation and reprobation squarely applies to the present case so as to shut out the Claimants from proceeding with their case against the Bank. It would be difficult to find a much clearer instance of adopting contrary positions, or "blowing hot and cold" in relation to the same subject matter to suit one party's ends. The Claimants' position in the Ackerman Proceedings was that they had been caused to grant the Charges, as a result of which they had a liability of £5m to the Bank which should be the subject of compensation. They obtained a judgment in that sum and on that basis. They would have been entitled to seek to enforce that judgment. It seems to me that there is in the Claimants' conduct just the kind of unacceptable inconsistency, (and , if necessary, coupled with previous benefit in obtaining the judgment), that was identified in the positions adopted by the parties whose conduct was impugned by the Vice-Chancellor in *Express Newspapers*, by Lord Menzies in *Redding Park*, and by Mann J in *MGN*. In any event, and for the avoidance of doubt, the order which the Claimants obtained from Peter Smith J reflected the case which they had advanced before him.

(xii) Finally, I find for equivalent reasons to those stated above, that the pursuit of the claim against the Bank amounts to an abuse of process by the Claimants. Having regard to the principles identified in *Bradford & Bingley v Seddon*, the complaint in this application is not merely one of inconsistency; there are other features present, such as election, and the pursuit of mutually exclusive claims. There is no additional material that requires careful evaluation at trial, unlike in the case just mentioned. There are no equivocal matters that require further exploration.

DISPOSAL

97. In the circumstances, I shall dismiss the Claimants' case, as I am satisfied that the Claimants have no real prospect of success on their claims, and that there is no other compelling reason why the case should be disposed of at a trial.

98. I will hear submissions as to any orders to be made on the Counterclaim upon handing down this judgment, when I will also deal with the form of order, including all other consequential matters.

99. Finally, I express my gratitude to both counsel for their excellent submissions. I also thank the solicitors on both sides for agreeing, and then compiling, very accessible and well-focussed bundles of documents and authorities which greatly facilitated the efficient disposal of this case.