

PARTIES: DEANS INVESTMENTS PTY LTD
AND
JENNIFER PHYLLIS SELINA JONES
AND
PETER NOEL DEANS
v
BELLVIEW INVESTMENTS PTY LTD
AND
BRIAN RAWLINGS
AND
SEAN RAWLINGS

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 35 of 1997

DELIVERED: 12 June 1997

HEARING DATES: 20 March 1997

JUDGMENT OF: Kearney J

CATCHWORDS

Practice - Northern Territory - Application to transfer Local Court proceedings to Supreme Court - *Local Court Act* (1989) (NT) - Discretion to be exercised having regard to all the circumstances

Local Court Act s18(1),(3)

Practice - Northern Territory - Application to consolidate two Local Court proceedings when transferred into Supreme Court - *Supreme Court Rules* 9.12(1) - Consolidation permissible only if proceedings already pending in the Court - Order for transfer does not per se render proceedings pending

Tummers v Robert [1961] Qd R 580, followed

REPRESENTATION:

Counsel:

Plaintiffs:	B.J. Cassells
Defendants:	J.E. Hebron

Solicitors:

Plaintiffs:	Michael Whelan & Associates
Defendants:	de Silva Hebron

Judgment category classification:	A
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kea97013
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 35 of 1997

BETWEEN:

DEANS INVESTMENTS PTY LTD
First Plaintiff

and

**JENNIFER PHYLLIS SELINA
JONES**
Second Plaintiff

and

PETER NOEL DEANS
Third Plaintiff

AND:

**BELLVIEW INVESTMENTS PTY
LTD**
First Defendant

and

BRIAN RAWLINGS
Second Defendant

and

SEAN RAWLINGS
Third Defendant

CORAM: Kearney J

REASONS FOR JUDGMENT
(Delivered 12 June 1997)

The application

This is an application by the plaintiffs under s18(1) of the *Local Court Act* to have transferred to the Supreme Court two proceedings which they have variously instituted in the Local Court. They also apply, pursuant to r9.12(1) of the *Supreme Court Rules*, to have those proceedings consolidated or heard together, when transferred.

The background

Mr Cassells of counsel for the plaintiffs relied on the affidavit of 25 February 1997 of Mr Whelan their solicitor, as the basis of the application. In pars2 and 3 Mr Whelan deposed that as a result of “further investigations” counsel now considered that the damages recoverable would exceed \$40,000, while the two proceedings were “closely related” as to subject matter. The proceedings in question are as follows.

In Local Court claim No. 9524890 filed 21 December 1995 the first plaintiff seeks damages from the first defendant of \$40,000, for its various alleged breaches between 10 June and 15 November 1995 as lessor, of the first plaintiff’s right to the quiet enjoyment of its rights as lessee of certain premises known as the Palms Diner. The first plaintiff claimed that it became the lessee of those premises on or about 11 April 1995, as assignee from the previous lessee of its interest under a lease by the first defendant dated 9 June 1994; the first defendant admitted this claim in par3 of its Defence of 19 February 1996.

In Local Court claim No.9524887 also filed 21 December 1995 the second and third plaintiffs seek damages from the second and third defendants of \$40,000, for assaults allegedly made on them by those defendants on 15 November 1995. Those alleged assaults also constituted one foundation of the claim in proceedings 9524890, the first plaintiff's contention therein being that the second and third defendants were then acting as servants or agents of the first defendant which "caused or permitted" them to assault the first plaintiff's servants or agents; see par4(a)-(e) of the Statement of Claim of 21 December 1995.

The submissions

Mr Hebron of counsel for the defendants did not oppose the application to transfer proceedings 9524890 to this court. However, he contended that proceedings 9524887 should not be transferred. He submitted that any damages awarded to the plaintiffs in those proceedings could not exceed about \$3500; hence those proceedings had been properly instituted in the Local Court.

He opposed consolidation of the two proceedings, citing various authorities: *Cameron v McBain* [1948] VLR 245; *Bolwell Fibreglass Pty. Ltd. v Foley* [1984] VR 97; and *Fong Consultants Pty Ltd v ATI Management Pty Ltd* (1992) 108 FLR 140. To these might be contrasted considerations stemming from *Payne v British Time Recorder Co. & W. W. Curtis Ltd* [1921] 2 KB 1 at 16 per Scrutton LJ, since r9.12(1) and r9.02(1) are clearly closely

linked. He submitted that as to the claim in proceeding 9524890 there would be argument as to whether the first defendant had “caused or permitted” the alleged assaults by the second and third defendants to take place; and that, as to proceedings 9524890 and 9524887, the parties differed, the causes of action were dissimilar, the evidence was potentially different in each case, and the question of possible damages was very different. He also submitted that for these reasons it was not suitable for the two claims to be heard together.

Mr Cassells submitted that all of the matters alleged in the two claims involved the behaviour of the second and third defendants, for whose actions, the plaintiffs contended, the first defendant must accept responsibility on the basis that they were then its agents acting within its apparent authority. He submitted that it would be more economical to have the claims determined in one action instead of two, and that the evidence would be largely concerned with the alleged assaults by the second and third defendants, and their aftermath. He submitted that an order that the actions be heard together would not be as beneficial as an order for consolidation; for example, there would be two sets of pleadings and this could give rise to complexities. He submitted that in reality there was a large degree of commonality of interest between the three defendants.

Conclusions

(a) *The application to transfer the proceedings*

Section 18(3) of the *Local Court Act* confers in the widest terms a discretion to order transfer of the proceedings; the order may be made “if [this Court] considers it appropriate to do so”. The discretion must be exercised with regard to all the circumstances; see *Tummers v Robert* [1961] Qd R 580 at 582. I consider that in all the circumstances outlined above it is desirable that the claim in proceedings 9524887 be determined by the same tribunal as determines the claim in proceedings 9524890. It is clearly desirable that the claim in proceedings 9524890 be transferred to this Court. It follows, in my opinion, that both proceedings should be transferred to this Court to be heard and determined, and I so order.

(b) *The applications for consolidation of the proceedings, or hearing them together*

This question is governed by r9.12(1) which provides:

- “(1) Where 2 or more proceedings *are pending in the Court* and -
- (a) a common question of law or fact arises in both or all of them;
 - (b) the rights to relief claimed in the proceedings are in respect of or arise out of the same transaction or series of transactions;
or
 - (c) for any other reason it is desirable to make an order under this rule,

the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of

them to be stayed until after the determination of any other of them.”
(emphasis added)

It will be noted that it is a precondition to making an order under r9.12(1), that the proceedings sought to be consolidated be at the time “pending” in this Court. Section 18(4) of the *Local Court Act* spells out the immediate consequences of the order for transfer of Local Court proceedings 9524890 and 9524887, viz:

“Where an order is made under this section -

- (a) the proceeding in the [Local] Court is discontinued;
- (b) the record and all documents relating to the proceeding shall be transmitted by the Registrar to the Supreme Court; and
- (c) the Supreme Court has power to regulate the procedure in the transferred proceeding.”

Neither party addressed the question whether the making of an order for transfer had the effect that the proceedings were *thereupon* “pending” in this Court, for the purposes of r9.12. The weight of authority is that the order for transfer does not have that effect. The question is discussed by Gibbs J in the similar situation which obtained in *Tummers v Robert* (supra) at 582-3, viz:

“However under O.61, r.5 [of the Rules of the Supreme Court of Queensland, which does not have an express “pending” limitation], there can be no consolidation unless there are “causes or matters”, i.e. causes or matters pending in this court, and in *Kirby v Elms* [[1957] Q.W.N. 21] it was held that where an action is transferred to this court from an inferior court *the action does not become one pending in this court until the plaintiff chooses to prosecute it here*. The applicant argued that *Kirby v Elms* should be distinguished on the ground that the applicant for consolidation in that case was the defendant in the Magistrates Court who could not force the plaintiff in the Magistrates Court to pursue his case

into this court, whereas *the applicant in this case is the plaintiff* in the Magistrates Court who states that he is desirous of proceeding with his action in this court. *I cannot accept this argument*, which is quite inconsistent with the action of the court in *Kirby v Elms* in expressly overruling *Donovan Brothers v Borrowdale* [[1927] Q.W.N. 34] so far as it ordered consolidation, for *Donovan Brothers v Borrowdale* was a case, like the present, in which the applicant for consolidation was the plaintiff in the inferior court. *Kirby v Elms* rests simply on the principle that *until the transferred action is in fact prosecuted in this court it will not be an action pending in this court* and thus not a “cause or matter” capable of being consolidated under O.61, r.5. I am bound to hold that there are not at present two causes or matters of the kind to which O.61, r.5, refers pending in this court. *I have no power therefore to order consolidation at the present stage.*” (emphasis added)

I respectfully adopt his Honour’s approach. See also *The Helenslea* (1881) 7 PD 57 at 60, on the effect of the “pending” requirement. It follows that the application for consolidation of the two proceedings cannot be dealt with at this stage, because the Court presently lacks power to do so. The transferred proceedings must first be ‘prosecuted’ in this Court, before they are “pending” for the purposes of r9.12(1); that is to say, some procedural step must first be taken, the obvious one being a summons for directions. I decline to entertain the applications to consolidate or hear together, at this time.

(c) *Costs*

The plaintiffs sought the costs of their application. However it is clear in my opinion that they must pay the costs of their application to transfer the proceedings, and any costs which the defendants have thrown away as a result of that transfer. The separate argument on the question of consolidation

occupied the greater part of the time before me, and as to that the parties should bear their own costs.

Orders accordingly.
