PARTIES:	BELLVIEW INVESTMENTS PTY LTD AND BRIAN RAWLINGS AND SEAN RAWLINGS v DEANS INVESTMENTS PTY LTD AND PETER NOEL DEANS AND JENNIFER PHYLLIS SELINA JONES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	148 of 197 (9715288) and 149 of 1997 (9715290)
DELIVERED:	18 December 1997
HEARING DATES:	16 October 1997
JUDGMENT OF:	Thomas J

CATCHWORDS:

Practice and procedure - Consolidation - Principles relevant to exercise of Court's discretion

Supreme Court Rules (NT), r9.12(1)

Cameron v McBain [1948] V.L.R. 245, applied.
Bolwell Fibreglass Pty Ltd v Foley & Anor [1984] V.R. 97, considered.
Bishop v Bridgelands Securities (1990) 25 FCR 311, applied.
Payne v British Time Recorder Co. [1921] 2 KB at 16, applied.
Payne v Young (1981)145 CLR 609, considered.

REPRESENTATION:

Counsel:

Appellant:	J. Tippett
Respondent:	B. Cassells

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Whelan & Associates

Judgment category classification:	C
Judgment ID Number:	tho97018
Number of pages:	12

tho97018

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 148 of 1997 (9715288)
No. 149 of 1997 (9715290)

BETWEEN:

BELLVIEW INVESTMENTS PTY LTD
First Appellant

AND

BRIAN RAWLINGS
Second Appellant

AND

SEAN RAWLINGS
Third Appellant

AND

DEANS INVESTMENTS PTY LTD
First Respondent

AND

PETER NOEL DEANS
Second Respondent

AND

JENNIFER PHYLLIS SELINA JONES
Third Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 December, 1997)

This is an appeal from a decision of the Master made 11 September 1997 consolidating proceeding No.148 of 1997 and 149 of 1997. The appeal comes to this Court pursuant to O77.05 of the Supreme Court Rules (the Rules). It is by hearing *de novo*, pursuant to O77.05(7), of the application to the Master. The appeal is unfettered by the Masters decision though such weight may be given to the Master as appears proper.

On 11 September 1997 the Master made the following orders pursuant to O9.12(1) of the Rules:

> "1. Proceedings numbered 148 and 149 of 1997 be consolidated;
>
> 2. The plaintiffs have leave to file and serve a consolidated statement of claim ."

O9.12(1) of the Rules states:

> "(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 series of transactions; or
>
> (c) for any other reason it is desirable to make an order under this rule

> the Court may order proceedings 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 of them."

The plaintiffs in proceeding No.148 and No.149 of 1997 seek their consolidation pursuant to O9.12(1).

In proceeding No.148 of 1997 the plaintiff, Deans Investments Pty Ltd, is a tenant to the defendant Bellview Investments Pty Ltd. Deans Investments Pty Ltd leases premises from Bellview Investments Pty Ltd occupied by the business 'Palms Diner'.

The tenant plaintiff alleges a breach of a covenant of quiet enjoyment by the defendant landlord. It is alleged that servants or agents of the defendant assaulted the plaintiffs employees.

Proceeding No.149 of 1997 comprises a claim for damages by the employees of Deans Investments Pty Ltd for the alleged assaults.

The plaintiffs in proceeding No.149 of 1997 are Peter Deans, who is the Director and principal shareholder of Deans Investments Pty Ltd, and Jennifer Jones, who is employed by Deans Investments Pty Ltd to manage and run the business known as 'Palms Diner'. The defendants are Brian Rawlings and Sean Rawlings. It is the plaintiffs submission that Brian Rawlings is the Director of Bellview Investments Pty Ltd and Sean Rawlings is a servant or agent of Bellview Investments Pty Ltd. Mr Tippett for the

appellants conceded that Bellview Investments Pty Ltd is a part of Mr Brian Rawlings business. He did not concede that Sean Rawlings is in any way connected to that company.

Mr Cassells, counsel for the respondents, argued for the consolidation of the proceedings. He argued that the individuals are common, there is a central common issue involving all the parties and that most of the evidence in respect of each claim will be common. He submitted that it is for the convenience of all the parties that the matters be consolidated and dealt with in one set of pleadings, one set of interrogatories and one set of interlocutory steps.

In developing this submission Mr Cassells argued that the entirety of the evidence available to the plaintiffs in matter No.148 of 1997 involves the assault and other activities of Mr Brian Rawlings and Mr Sean Rawlings. Central also to the claim for damages in matter No.149 of 1997 is the alleged assault by Mr Brian Rawlings and Mr Sean Rawlings.

It was argued that the assault would remain relevant to both matters throughout any proceeding. It is evidence which will be required to be lead in the case against the individual defendants for damages and in the case by the corporate plaintiff as part of its claim for damages for breach of covenant.

In addition to those submissions Mr Cassells relied upon and adopted the reasons of Master Coulehan in his decision of 11 September 1997.

In that decision the Master clearly found that a common question of fact arose in both proceedings, the fact of the alleged assault. He found also that there may be another issue common to both, the extent to which the behaviour of the defendants has contributed to the alleged loss of earning capacity of one of the personal plaintiffs and the alleged difficulty the corporate plaintiff has in retaining employees. The Master also suggested, although this was not specifically pleaded in the consolidated statement of claim, that it may be arguable that the corporate defendant is liable for the alleged damages claimed by the personal plaintiffs against the personal defendants.

He concluded that the course of conduct alleged against the defendants provided a basis for consolidating the proceedings. He reasoned that this would avoid a multiplicity of actions and allow the matters to be dealt with more effectively, completely, promptly and economically.

Mr Tippett, counsel for the appellants, argued against the consolidation of No.148 of 1997 and No.149 of 1997.

He argued that the assault is an isolated and separate incident and should be dealt with separately. It is Mr Tippett's submission that by not being dealt with separately both the individual and the corporate defendants will suffer prejudice.

Mr Tippett submitted that the plaintiffs had failed in their consolidated pleadings to connect the alleged assault by Mr Brian and Sean Rawlings to the damage or loss suffered by the corporate plaintiff. The individual defendants therefore suffer prejudice by becoming involved in a complex and possibly lengthy commercial proceeding. Mr Tippett estimated the commercial dispute could last three to four weeks as opposed to just three or four days to hear the assault matter.

The appellants argue that the commercial dispute will involve complex and lengthy evidence in relation to the issue of causation and that each proceeding involves a separate damages issue. They submit that evidence will need to be adduced about the extent to which the alleged activities of Mr Brian and Sean Rawlings contributed to the alleged loss and damage suffered by the corporate plaintiff. The alleged assault is only one discreet aspect of the behaviour of the individual defendants pleaded by the corporate plaintiff and they have not, at this stage, adequately linked it to any loss allegedly suffered by the corporate plaintiff.

Mr Tippett argued that Mr Sean Rawlings involvement is limited to the alleged incident of assault. He is not connected in any other way to the other activities pleaded in the commercial proceeding and therefore should not be put to the cost and inconvenience of involvement in a lengthy matter.

It was suggested that it would be unfair to expose Sean Rawlings to the possibility of a significant costs order against him in the event the defendants were not successful in the trial of the consolidated proceedings. He is entitled to be viewed independently of the commercial dispute. As I noted earlier, the plaintiffs do not accept that Sean Rawlings is not a servant or agent of Bellview Investments. It seems likely that he will be drawn into the commercial dispute both before and at trial.

It was also suggested on behalf of the appellants that a conflict may arise during the course of a consolidated proceeding requiring one or more of the appellants to engage separate legal representation. Mr Tippett suggested that in matters such as these there is a very real possibility that a conflict may arise once the factual matrix becomes clearer, this may then prejudice the appellants in the conduct of their defence.

O9.12(1)(c) makes it clear that the Court has an unrestricted discretion to make the consolidation orders sought by the plaintiffs. As to what principles ought to guide the exercise of the discretion, the case law is sparse.

The passage most frequently cited in regard to the Courts discretion to consolidate is that of Herring CJ in *Cameron v McBain* [1948] V.L.R. 245 at p247;

> "The cases, however, lay down no principle upon which discretion of the Court in the matter is to be exercised. And so each case must be decided on its own special circumstances. The question would seem to be whether in all the circumstances it is convenient that the actions be consolidated, and in deciding whether it is convenient, regard may be had to such matters as the desirability of avoiding multiplicity of actions, and the saving of time and expense. At the same time the interests of the parties should not be prejudiced by the making of the order."

The appellants cited *Bolwell Fibreglass Pty Ltd v Foley & Anor* [1984] V.R. 97 as authority for the proposition that consolidation orders should rarely be made. Young CJ suggested in *Bolwell* that, as a general rule, the Court will not consolidate one proceeding with another if the claim between plaintiff and defendant in the first proceeding and between plaintiff and defendant in the second could not have been properly joined in one writ. The proceedings the subject of this appeal before me could have been joined in one writ. I respectfully agree with the Master's conclusion that *Bolwell* provides no guidance in these circumstances as to how the Court ought exercise its discretion.

In seeking guidance as to the exercise of the Courts discretion the following authorities in relation to the discretion to permit joinder have been of assistance. I think there is a significant degree of overlap in the considerations relevant to the discretion to allow joinder and to allow consolidation.

In *Bishop v Bridgelands Securities* (1990) 25 FCR 311 Wilcox J. said at pp314-315 of the principles which ought to guide the exercise of the Courts discretion:

> "The basic principle, as it seems to me, is that the Court should take whatever course seems to be most conducive to a just resolution of the disputes between the parties, but having regard to the desirability of limiting, so far as practicable, the cost and delay of the litigation. Considerations of cost and delay may often support the grant of leave...; but, in my opinion, leave ought not be granted unless the Court is affirmatively satisfied that joinder is unlikely to result in unfairness to any party. Secondly, regard must be had to practical matters. For example, it would normally be inappropriate to grant leave for the joinder of applicants who were represented by different solicitors … . Similarly, although all applicants might propose to rely upon some common, or similar facts, there may be such

> differences between the evidence intended to be relied upon in support of the claims of particular applicants as to make it inexpedient to join the claims. The discrete material may overbear that which is common to all the claims."

In *Payne v British Time Recorder Co*. [1921] 2 KB at 16 Scrutton LJ said:

> "It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

In *Payne v Young* (1981)145 CLR 609 Mason J said at p618 that joinder of separate causes of action accruing to different plaintiffs is authorised when the relief claimed is in respect of, or arises out of, the same or a particular series of transactions. It was not authorised where each transaction was peculiar to each individual plaintiff.

As I stated earlier, the case law is sparse. Having said that, I have by no means exhaustively canvassed all the authorities. However, based on those authorities mentioned, I would summarise the principals relevant to the exercise of the Courts discretion as follows:

1. Are there common questions of law or fact, or a common transaction or series of transactions, of sufficient importance which render it desirable that the whole of the matters should be disposed of at the same time.
2. Is it convenient that the actions be consolidated in order to avoid a multiplicity of actions and ensure savings of time and cost.
3. Is the Court satisfied that the consolidation is unlikely to result in

unfairness to any party, or to prejudice a parties ability to conduct their case.

4. Will the consolidation be conducive to a just resolution of the issues between the parties.

5. The Court should have regard to any relevant practical matters which may make it inexpedient to consolidate the proceedings.

This is by no means an exhaustive list. Regard must always be had to the particular circumstances of any application to consolidate proceedings.

In the present case the application of these principals would seem to me to lead to a conclusion that the matters ought to be consolidated.

It is clear that a common question of fact arises in both proceedings. I agree with the submission of the respondents that the alleged assault will remain relevant throughout both proceedings. It is central to the claim for damages by the personal plaintiffs and it is an important particular in the pleaded breach of covenant against the corporate defendant. Each action will involve a separate damages issue but I do not consider this is a sufficient reason for not ordering a consolidation having regard to other issues which strongly favour consolidation.

I agree with the Master that there may also be another issue common to both; the extent to which the behaviour of the defendants has contributed to the alleged loss of

earning capacity of one of the personal plaintiffs and the alleged difficulty the corporate plaintiff has in retaining employees. I agree that it is also arguable that the corporate defendant may be vicariously liable for the alleged damages claimed by the personal plaintiffs against the personal defendants. The issue of liability in each of the actions depends upon a common set of facts. This does not appear to be a case involving distinct issues requiring the investigation of different sets of facts for each proceeding.

It seems to me, therefore, that there are common questions of law and fact of such importance that it is desirable that the whole of the matters should be disposed of at the same time.

Is there likely to be any prejudice or unfairness suffered by the appellants? It does not seem to me that the appellants are likely to suffer any prejudice or unfairness. They lose no opportunity to properly conduct their defence. They are currently all represented by the same solicitors and the same counsel. There was a suggestion that a conflict may arise during the course of the trial. There was no evidence as to what issues may possibly give rise to such a conflict. I agree with the Master that this mere possibility, in the absence of something more affirmative, should not be a consideration which ought to carry much weight.

There was also a suggestion that it would be unfair to expose one of the personal defendants to the possibility of a potentially significant costs order in the event the defendants are not successful. This appears to be a case were it does not seem practicable

for one of the personal defendants to remain detached from the resolution of the questions between the other parties. It is likely that he will be drawn into that contest to a large extent both before and at trial. The cost issue would seem to be one which could be dealt with as between the various parties by appropriate orders at the appropriate time. I am satisfied that the consolidation presents no obvious prejudice or unfairness to the appellants.

There were no submissions from counsel as to likely practical matters, other than the mere possibility of a conflict arising, which would make it inexpedient to consolidate the proceedings. I am satisfied that the consolidation will be conducive to a just resolution of the issues between the parties. I am also satisfied that it will allow the issues between the parties to be disposed of promptly and economically.

I confirm the decision of the Master of 11 September 1997. The appeal is dismissed and I confirm the orders made by the Master on 11 September 1997.

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