PARTIES:	TSAKIRIOS & KELLY PTY LTD v BAYRIDGE (NORTHERN TERRITORY) PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	Interlocutory Application
FILE NO:	235/92
DELIVERED:	16 December 1997
HEARING DATES:	4 December 1997
JUDGMENT OF:	The Master

CATCHWORDS:

PRACTICE - Northern Territory - consolidation - r 9.12 Supreme Court Rules - limitation defences - prejudice

CASES REFERRED TO

Anglo-Irish v Federal Stevedores 140 ALR 658
Bolwell Fibreglass Pty Ltd v Foley (1984) VR 97
Bridge Shipping v Grand Shipping SA (1991) 173 CLR 231
Cameron v McBain (1948) VLR 245
Fong Consultants Pty Ltd v ATI Management Pty Ltd (1992) 108 FLR 140
Ketteman v Hansel Properties (1987) AC 189

REPRESENTATION:
Counsel:

Plaintiff:	Mr Taylor
Defendant:	Ms Kelly

Solicitors:

Plaintiff:	Cridlands
Defendant:	Halfpennys

Judgment category classification:	
Judgment ID Number:	mas9727
Number of pages:	4

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

235/92 (9217256) Between:

TSAKIRIOS & KELLY PTY LTD

Plaintiff

and

BAYRIDGE (NORTHERN TERRITORY) PTY LTD

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 16 December 1997)

By a writ issued on 3 September 1992 the plaintiff claims damages from the defendant Bayridge (Northern Territory) Pty Ltd in proceeding numbered 235 of 1992.

In its amended statement of claim the plaintiff alleges that on 18 June 1992 the parties entered into a sole agency agreement in respect of units situated at 38 Georges Crescent, Fannie Bay, by which the defendant was to receive commission on any such units sold during the currency of the agreement. It is further alleged that the defendant failed to pay commissions for units sold and on 19 August 1992 repudiated the agreement, which repudiation was accepted on 27 August 1992.

The plaintiff relies on a number of causes of action, including breach of contract, misleading and deceptive conduct, unconscionable conduct and quantum meruit.

The defendant admits that a sole agency agreement was signed on its behalf, but denies any contract with the plaintiff and denies any liability.

Lists of documents have been exchanged and the plaintiff has interrogated. Considerable time appears to have been taken in securing the defendant's costs.

On 12 September 1995 the plaintiff commenced proceeding numbered 171 of 1995 against Bayridge Pty Ltd and Messrs Schollbach and Mullane, its directors. It is alleged in the statement of claim that the second and third defendants arranged for a sole agency contract to be executed in favour of the plaintiff by Bayridge (Nothern Territory) Pty Ltd. This appears to be the same sole agency agreement referred to in proceeding numbered 235 of 1992.

It is alleged that it had been represented by the second and third defendants that the units, the subject of the agreement, would be acquired by Bayridge (Northern Territory) Pty Ltd and, in breach of this representation, the units had been transferred to Bayridge Pty Ltd.

The plaintiff is claiming damages similar to those claimed in proceeding numbered 235 of 1992 and, in addition, any costs incurred in that proceeding in the event that it transpires that the proceeding was misconceived.

No defence has been filed to the statement of claim in this proceeding. I have been informed that the defendants are contemplating a counterclaim.

The plaintiff has applied to consolidate the two proceedings pursuant to O.9.12 and has submitted a draft consolidated statement of claim. The application is opposed.

The criteria in O.9.12 (1) (a) and (b) have been met. There are common questions of law and fact involved in the interpretation of the sole agency agreement, the events surrounding the alleged agreements between the parties and the damages

claimed. Further, the rights to relief arise out of the same transactions, the sole agency agreement and the surrounding events.

Subject to any prejudice, it appears desirable in accordance with the objects of O.1.10 (a) that these proceedings be consolidated (and see ***Cameron v McBain (1948) V.L.R. 245,247***). Proceeding numbered 235 of 1992 is relatively well advanced, but the defendants may be compensated for any costs thrown away. The Court's attention was drawn to the comments of Young C.J. in ***Bolwell Fibreglass Pty. Ltd.v Foley*** (***1984) V.R. 97***, at page 100, however, it is not entirely clear in what manner the Court's discretion may be constrained.

As to prejudice, the defendants allege that they will be deprived of the benefit of defences under the Limitation Act if the proceedings are consolidated. The alleged repudiation of the sole agency agreement occurred more than three years before the commencement of proceeding numbered 171 of 1995. The question is whether the consolidation will deprive the defendants of the limitation defence. The defendants rely on ***Fong Consultants Pty. Ltd. v ATI Management Pty. Ltd***. ***(1992) 108 FLR 140*** but it is not clear how this may be relevant. The argument appears to be that, on consolidation, the second proceeding in time relates back to the date of the first proceeding, depriving the defendant in the second proceeding of any limitation defence which may have accrued since the institution of the first proceeding.

However, the addition of a defendant does not relate back to the commencement of the proceeding but takes effect from the date of the amendment (see ***Ketteman v Hansel Properties*** (***1987) AC 189*** and ***Bridge Shipping v Grand Shipping SA*** (***1991) 173 CLR 231,236***). There appears to be no reason in principle why the defendants may not be able to rely on any limitation defence in the event of consolidation.

Different considerations may apply in relation to any new cause of action which is pleaded against Bayridge (Northern Territory) Pty Ltd (see ***Bridge Shipping*** at page 236 and ***Anglo-Irish v Federal Stevedores*** ***140 ALR 658, 663***), however, this was not argued and may be dealt with separately.

It is ordered that the proceeding numbered 171 of 1995 be consolidated with proceeding numbered 235 of 1992.