

PARTIES: DEANS INVESTMENTS PTY LTD
v BELLVIEW INVESTMENTS PTY LTD
and DEANS and ANOR v
RAWLINGS and ANOR

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: Interlocutory Application

FILE NO: 148/97 and 149/97

DELIVERED: 11 September 1997

HEARING DATES: 28 August and 3 September 1997

JUDGMENT OF: The Master

CATCHWORDS:

PRACTICE - Northern Territory - consolidation - r 9.12(1) Supreme
Court Rules - discretion

CASES REFERRED TO

Bolwell Fibreglass Pty Ltd v Foley (1984) VR 101
Cameron v McBain (1948) VLR 245
Payne v Young 145 CLR 609

REPRESENTATION:

Counsel:

Plaintiffs: Mr Cassells
Defendants: Mr De Silva

Solicitors:

Plaintiffs: Whelan & Associates
Defendants: De Silva Hebron

Judgment category classification:

Judgment ID Number: mas9718

Number of pages: 4

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

AT DARWIN

148/97 (9715288)

Between:

DEANS INVESTMENTS PTY LTD

Plaintiff

and

BELLVIEW INVESTMENTS PTY LTD

Defendant

and

149/97 (9715290)

Between:

PETER NOEL DEANS and ANOR

Plaintiffs

and

BRIAN RAWLINGS and ANOR

Defendants

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 11 September 1997)

The plaintiffs in two proceedings before the Court have applied pursuant to O.9.12(1) for their consolidation.

In proceeding No. 148 of 1997, Deans Investments Pty Ltd claims relief arising out of alleged breaches of a lease of premises known as the "Palms Diner". The breaches relate to a covenant of quiet enjoyment and include allegations that servants or agents of the defendant assaulted the plaintiffs employees. Proceeding No. 149 of 1997 comprises a claim for damages by the employees for the alleged assaults.

The plaintiffs have submitted a draft consolidated statement of claim which contains allegations as to breaches of the covenant of quiet enjoyment,

including the alleged assaults. There is also evidence from the plaintiffs' solicitor that the same persons are alleged to have been involved in the incidents the subject of the plaintiffs' claim, including the alleged assaults, and that one of them is a director of the defendant company.

O.9.12(1) reads as follows:

- “(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.”

The defendants, who are represented by the same solicitors, oppose the consolidation on the grounds that it would be unfair to involve the personal defendants in the more comprehensive proceeding and the corporate defendant in the claim for damages for assault. There was a suggestion that liability for the assaults may be admitted by the personal defendants, leaving the issue as to the corporate defendants' liability for their actions to be decided, however, the assaults are denied on the pleadings, and no such concession was made in argument.

It is clear that a common question of fact arises in both proceedings, the fact of the alleged assaults. There is also another issue which may be common to both proceedings, 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 question remains as to the exercise of the Court's discretion. As suggested by Herring C.J. in **Cameron v McBain (1948) V.L.R. 245**, at p.247 "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 defendants cited **Bolwell Fibreglass Pty. Ltd. v Foley (1984) V.R. 101**, in which case it was suggested that a consolidation order should rarely be made and was better confined to cases where several actions may have been joined in one writ. The rules have changed somewhat since then, so that O.9.02(1), which relates to the joinder of parties confers a wide discretion, such that the plaintiffs' actions in the proceedings the subject of this application may have been joined in the one writ (see also **Payne v Young 145 CLR 609, 618**). Without elaboration, the caveat expressed in **Bolwell** does not provide assistance in defining the manner in which the Court's discretion may be constrained.

It was suggested on behalf of the defendants that a conflict of interest may arise so that they may be unable to continue to have joint legal representation. How such a conflict may arise was not adequately explained and it does not appear to be a consideration which ought to carry much weight.

The parties have provided no evidence as to the time likely to be taken at trial by the various issues, although the plaintiffs' solicitor has deposed that "the primary incident of harassment" occurred when the personal plaintiffs were assaulted.

The proposed consolidated statement of claim does not specifically allege that the corporate defendant is also liable for the damages claimed by the personal plaintiffs against the personal defendants for assault, although it may be arguable on the material facts alleged.

On the evidence before the Court, it is not entirely clear where the balance of convenience lies. In these circumstances the predominate consideration must be the desirability of avoiding multiplicity of actions in relation to the issues arising from the alleged assaults which are common to both proceedings.

It may be that this could be achieved by an order that the proceedings be heard at the same time, subject to the discretion of the trial judge (see O.9.12(2)). However, the course of conduct alleged against the defendants provides a basis for the consolidation of the proceedings so that they may be more effectively, completely, promptly and economically determined (see O.1.10).

It is ordered that

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