

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 133 of 2018

BETWEEN : **MUNIF DEAN** and **RUXHANA BEGUM** a.k.a
RUXHANA BEGUM DEAN both of 10 Raymond Road,
Papatoetoe, Auckland, New Zealand, Businessman and
Businesswoman respectively.

Plaintiffs

AND : **RASULAN JAN** aka **ZAIBUN NISHA** aka **JAIBUN**
NISHA of Prospect N.S.W, Sydney, Australia as the sole
Administratrix and Trustee of the **ESTATE OF**
MOHAMMED DEAN, late of 32 Hilda Street, Prospect
2149, N.S.W, Businessman

First Defendant

AND : **SALEEM DEAN** of 8 Sinclair Avenue, Black Town,
N.S.W 2148, Sydney Australia, Electrician

Second Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Singh (on instruction) for the plaintiffs
Ms. R. Chand for the defendants

Date of Ruling : 12 March 2021

RULING

(Order 4 rule 2, Consolidation of Proceedings, Discretion,
Orders the court can make under the rule)

01. This is the summons filed by the plaintiffs pursuant to Order 4 of the High Court Rules seeking consolidation of this action with Civil Action No. HBC 218 of 2017 pending in this court. The summons is supported by an affidavit sworn by the first named plaintiff.

The defendants opposed the summons and filed their affidavit sworn by the first defendant and it was followed by the affidavit in reply sworn by the deponent of supporting affidavit. At hearing of the summons both counsels made oral submission and later filed their respective written submission.

02. The courts have broad discretion to order a joint hearing or trial of any and all matters at issue in actions involving common questions of law or fact, including ordering consolidation of the actions. Consolidation may take several forms and in some jurisdiction the rule permits the court to combine cases for discovery only, or for trial only, or for all purposes. Courts usually consolidate cases to speed up the trial process and to eliminate duplicative trials involving the same parties, issues, and evidence. The courts, in general, when exercising this discretion look with favour of motion to consolidate that promotes judicial economy and does not prejudice the parties. The rules of the courts provide for the matter to be considered and the orders that may be made by the courts. The Order 4 rule 2 of the High Court Rules provides for the law to consolidate matters pending in the High Court. It reads that:

Consolidation of Proceedings (O.4, r.2)

2. Where two or more causes or matters are pending, then, if it appears to the Court-
- (a) that some common question of law or fact arises in both or all of them, or
 - (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
 - (c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

03. The effect of the above rule in its unambiguous language is that, firstly, it is a wide discretion that is given to the court. Secondly, there must be two or more matters or causes pending in the court. Thirdly, it must appear to the court that one of the three subparagraphs of the rule is satisfied. Finally and more importantly the orders the court may make under this rule. The court may make three orders under this rule. They are (a) order those causes or matters to be consolidated on such terms as it thinks just, or (b) may order them to be tried at the same time or one immediately after another, or (c) may order

any of them to be stayed until after the determination of any other of them. The order (a) for consolidation is different from other two orders (b) and (c), even though it has been used in a looser sense to include other two orders.

04. Austin J in **A Goninan & Co Ltd v. Atlas Steels (Australia) Pty Ltd** [2003] NSWSC 956 lengthily discussed the genesis and the development of the law and the current practice in common law in relation to consolidation of related matters and stated at paragraph 28 that:

The third limitation arising of the wording of the rule is that the order authorized by the rule is (relevantly) an order that the proceedings be "consolidated". An order for the consolidation of proceedings is, by the terms of the rule, different from an order that proceedings be tried at the same time or immediately after one another, or that one be stayed until determination of another. Sometimes, in the past, the word "consolidation" has been used in a looser sense to encompass these other kinds of orders: *Lee v Arthur*, at 62 per Moulton LJ. But in its "proper sense", an order for consolidation is an order "combining actions so that they thereafter proceed as one": *Cameron v McBain*, at 246 per Herring CJ; see also *Thomas & Morgan (United Kingdom) Ltd v Erica Vale Australia Pty Ltd (1995) 31 IPR 335*.

05. In that case, Austin J made an order consolidating five separate proceedings involving seven different parties into one proceeding, where all the proceedings raised the commons issue. The significance of the order was that, the five proceedings became one single proceeding, with one of the parties as plaintiff and two of the others as defendants. Each of the original parties was able pursue its claim against the others by way of cross-claim, resulting in only one set of pleadings of lesser volume.
06. On the other hand, there are circumstances which militate against the order for consolidation of related matters. For examples, two causes cannot be consolidated even though the parties are same, unless one action can be ordered to stand as counter-claim or third party proceedings in the other action. Likewise, it is generally impossible to order consolidation of matters where there are several lawyers have been instructed (see: **White Book 1999**, Vol I para 4/9/2 at page 30). These limitations, however, apply only in relation to order (a) mentioned in paragraph 3 above. However, the power to order consolidation is discretionary and will not be exercised if a party can show a real possibility of prejudice.

07. The more common order made under Order 4 rule is that two or more proceedings to be tried or heard together and the evidence in one is to be evidence in the other/s. In such a case, the parties and the pleadings remain as they were subject, however, to any subsequent amendments, but there will be only one hearing/trial in respect of all matters or causes. The ultimate purpose of the orders made under this rule is to serve costs and time. No order will be made under this rule unless there is some common question law or fact. **The White Book 1999**, in Vol I para 4/9/2 states at page 30 that:

The main purpose of consolidation to save costs and time, and therefore it will not usually be ordered unless there is “some common question of law or fact bearing sufficient importance in proportion to the rest” of the subject-matter of the actions “to render it desirable that the whole should be disposed of at the same time” (*Payne v. British Time Recorder Co.* [1921] 2 K.B. 1 at 16; *Horwood v. British Statesman Publishing Co. Ltd* [1929] W.N. 38; *Daws v. Daily Sketch* [1960] 1W.L.R 126; [1960] 1 All E.R. 397, CA). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same, or where the plaintiff or defendants or all are difference (*Horwood v. British Statesman Publishing Co. Ltd* (1929) *per* Sankey L.J. at 59). The circumstances in which actions may be consolidated are therefore generally similar to those in which parties may be joined in one action under O, 15, r, 4.

08. Accordingly, if there are two or more related cases pending in the same court, that court should first consider whether (a) some common question of law or fact arises in both matters or all of them, or (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or (c) some other reason makes it desirable to make an order under this rule. If the court is satisfied any of the above factors, then the court, considering the circumstances of the cases, may make any of the three orders mentioned in the rules, and they are (a) order that, those causes or matters to be consolidated on such terms as it thinks just or (b) order that, them to be tried at the same time or one immediately after another or (c) order any of them to be stayed until after the determination of any other of them. If the court makes an order for consolidation of several matter as per (a) above, it should then specify as to who will be the plaintiff/s, who will be the defendant/s, who will be cross-defendant/s and which pleading should be the claim and cross-claim etc. This is what that is meant by the phrase “on such terms as it thinks just” in the rule.
09. The first named plaintiff is the lawful issue of late Mohammed Dean and a beneficiary in his Estate. The second named plaintiff is the wife of the first named plaintiff. The first defendant is the sole Administratrix and Trustee of the Estate of late Mohammed Dean.

The second defendant is a sibling of the first plaintiff and also a beneficiary in Estate of late Mohammed Dean. Late Mohammed Dean died testate on 22.05.1996 bequeathing his estates to the first named plaintiff and other beneficiaries including the second defendant. The Estate owned inter alia Housing Authority Sub-Lease No. 227022 described as Lot 6 on DP No. 4044 in the Province of Ba in the Tikina of Vuda and containing an area of 34.8 perches. Admittedly, the first defendant, with the consent of all beneficiaries of the Estate, entered into a Sale and Purchase Agreement with the plaintiffs to sell the above mentioned Housing Authority Lease to them (plaintiffs). However, the first named defendant terminated the said agreement. It was alleged that, the second named defendant, by unlawfully uplifting all the documents from the Housing Authority between April and June in 2016, prevented the transfer of the above property to the plaintiff, after all the necessary consents were obtained and the stamp fee was duly paid. As a result, the plaintiffs sued the defendants for specific performance the Sale and Purchase Agreement and damages in this action.

10. Conversely, the first named defendant in this case had already taken out an Expedited Originating Summons in the Civil Action No. 218 of 2017 against the plaintiffs in this case and sought an order from the court to remove the Caveat No. 847675 filed by the plaintiffs in this case on the above mentioned Housing Authority Lease No. 227022. The first named defendant in this case sworn the supporting affidavit of that originating summons and she admitted entering into a Sale and Purchase Agreement with the plaintiffs in this case. However, she claimed that it was terminated in accordance with its provisions. Therefore, she prayed for an order to remove the Caveat filed by the plaintiffs in this matter. The plaintiffs opposed that Originating Summons and filed his affidavit. Their defence in that case is exactly what they claimed in this case.
11. The parties in both matters are the same. All are related. The second defendant in this action is not a party in the other Civil Action No. 218 of 2017, which seeks removal of Caveat. However, he is the sibling of the first named plaintiff in this case and beneficiary in the Estate of late Mohammed Dean. The issue in both matters is the same and it arose out of the Sale and Purchase Agreement entered into by and between the plaintiffs and the first defendant in this matter. There is a common question of law and fact which to be determined in both matter among the parties to both matters. Obviously, same witnesses and evidence of the same parties involve in both matters. The determination and outcome of one matter relates to the other. It appears to the court that, it is more desirable for the court to exercise its wide discretion conferred by Order 4 rule 2 of the High Court Rules as all the requirements under this rule have been met.
12. The next question is whether both matters can be consolidated together making as one action and one proceeding in the true sense of 'consolidation' as mentioned above or

whether an order may be made that both matters to be tried at the same time or one immediately after another or order any of them to be stayed until after the determination of other matter. The parties have their own claim in each matter. The claims and the issues in both matters are not complicated. As a result it is not necessary to consolidated both into one proceeding. It is more prudent to order that, both matters to be heard and tried at the same time, in order to save costs and time.

13. In result, I make the following orders:

- a. This matter (HBC 133 of 2018) and HBC 218 of 2017 be heard and tried at the same time, and
- b. The defendants in this matter should pay a summarily assess cost of \$ 1000.00 to the plaintiff within a month from today for this application.



U.L. Mohamed Azhar
Master of the High Court

At Lautoka
12.03.2021