[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

GEORGHIOS HADJIATHANASSIOU,

Appellant-Defendant,

v.

LOIZOS PARPERIDES AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 5498).

Civil Procedure—Practice—Consolidation of Actions—When it may be ordered—Civil Procedure Rules, Order 14 r. 2—Four actions for damages arising out of the same accident filed by the same advocate against the same defendant—Application by defendant to consolidate made after filing of Writ of Summons—Facts in issue not established at that stage—Application refused—Discretion of trial judge—Court of Appeal being satisfied that his decision is not wrong not prepared to interfere with the exercise of his discretion.

Court of Appeal—Discretion of judge—Reviewing exercise of discretion—Principles governing intervention by appellate Court.

After the filing of the writ of summons in 4 actions, which have been instituted by different plaintiffs against the same defendant, the latter made an application to the Court below for an order of consolidation of these actions. The application was based on Order 14 rule 2 of the Civil Procedure Rules (quoted in full in the judgment *post*) and the facts in support were: That all actions pending are actions for damages arising out of the same accident and that all plaintiffs have filed their actions through the same advocate. Moreover, defendant alleged that all actions involved a common question of law or fact of such importance in proportion to the rest of the matters involved in such actions as to render it desirable in the interest of justice that they be consolidated.

Plaintiffs opposed the application on the ground that in the absence of pleadings there was not sufficient ma-

terial before the Court at that stage, to decide that the claims in all the four actions involved a common question of law or fact.

The Court below refused to grant the order applied for on the main ground that before consolidation is ordered the case must have progressed sufficiently to a degree establishing the issues in dispute.

The first submission of counsel for the appellant-defendant was that the judge misdirected himself in law when he decided that before consolidation is ordered the statement of claim should be filed first so that the issues in dispute be established; and that he failed to consider that from the writ of summons it was clear that there was a common question of law, that is the question of liability, or fact.

His second submission was that the judge wrongly exercised his discretionary powers in refusing to grant an order for consolidation because the considerations which have weighed with him were based on the mistaken belief that the claims of such actions did not involve a common question of law or fact.

In support of his argument counsel for the appellant relied on the case of *Healey* v. *A. Waddington & Sons Ltd.* [1954] 1 W.L.R. 688 where consolidation was, with the consent of all the parties and before the filing of the statements of claim, ordered until determination of liability, with liberty to each plaintiff to apply for separate representation on the question of damages.

Held, (I) with regard to the first submission after reviewing the authorities:

1. Although the judge has a discretion to order consolidation or refuse it, nevertheless, no clear principle is to be gathered from the reported cases, and we find ourselves in agreement with the Court below that the *Healey* case (*supra*) is not a good precedent laying down the considerations which should be borne in mind or those which should be ignored by the judge in exercising his discretion.

2. Moreover, the *Healey* case is not a good guide

for the present case where the judge refused to grant an order for consolidation and has given reasons which enable this Court to know the considerations which have weighed with him. We are of the view that the judge did not misconceive the effect of the *Healey* case. We would, therefore, dismiss this contention of counsel.

Held, (II) with regard to the second submission.

1. The true proposition regarding the grounds on which the Court of Appeal will interfere with the discretion entrusted to the judge was stated in *Charles Osenton & Co.* v. *Johnston* [1941] 2 All E.R. 245 where Lord Wright said at p. 257:

"No doubt that Court starts with the presumption that the judge has rightly exercised his discretion. It must be satisfied that the exercise was wrong. 'Clearly satisfied' is the phrase used. If the Court is said to be satisfied. however, it must bear that it is 'clearly satisfied'."

(See also *Evans* v. *Bartlam* [1937] 2 All E.R. 646; *Ward* v. *James* [1965] 1 All E.R. 563; and in *Re F. an Infant,* reported in the Times of November 17. 1975).

2. Having considered the material which was before the judge and the contentions of both counsel. we are satisfied that his decision is not wrong, and we would not interfere with the exercise of his discretion, because the judge has given sufficient weight to the fact that the writ of summons did not contain sufficient facts to show that the claims of those actions of the plaintiffs involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the actions to render it desirable that the whole of the matter should be consolidated.

Appeal dismissed.

Cases referred to:

Payne v. *British Time Recorder Co.* [1921] 2 K.B. 1;

Horwood v. *Statesman Publishing Co. Ltd.*, 141 L.T. 54, at p. 58;

Healey v. *A. Waddington & Sons Ltd.* [1954] 1 W.L.R. 688;

Lewis & Another v. *Daily Telegraph Ltd. & Another* [1964] 1 All E.R. 705;

Evans v. *Bartlam* [1937] 2 All E.R. 646;

Charles Osenton & Co. v. *Johnston* [1941] 2 All E.R. 245 at p. 257;

Ward v. *James* [1965] 1 All E.R. 563 at p. 570;

In Re F. an Infant, "The Times" Newspaper November 17, 1975.

Appeal.

Appeal by defendant against the order of the District Court of Larnaca (Pikis, Ag. P.D.C.) dated the 26th September, 1975, (Action No. 546/75) refusing to grant an order for consolidation of four actions brought by different plaintiffs against the same defendant.

A. Dikigoropoulos, for the appellant.

J. Kaniklides, for the respondent.

The judgment of the Court was delivered by :-

HADJIANASTASSIOU, J.: This is an appeal by the defendant Georghios HadjiAthanassiou against the Order of a judge of the District Court of Larnaca dated September 26, 1975, refusing to grant an order for consolidation of the four actions pending in Court, brought by different plaintiffs against the same defendant, claiming damages.

Now, the powers of the Court to grant or refuse an Order of Consolidation of the actions pending are contained in Order 14 r. 2 which says :-

> "When two or more actions are pending in the same Court, whether by the same or different plaintiffs against the same or different defendants, and the claims of such actions involve a common question of law or fact of such importance in proportion to the rest of the matters involved in such actions, as to render it desirable that the actions should be consolidated, the Court or a judge may order that they be consolidated."

It appears that from the endorsement of the writ of summons in Action No. 546/75, the plaintiff Loizos K.

Parperides brought an action against the defendant claiming general and special damages for personal injuries because of a collision which took place on February 22, 1975, between his own car and that of the defendant.

On September 9, 1975, the defendant made an application to the District Court of Larnaca for an order of consolidation of the four actions pending against him and arising out of the same road accident. The said application was based on Order 14 r. 2 of the Civil Procedure Rules, and the facts in support of the application are these: That all actions pending are actions for damages arising out of the same accident and that all plaintiffs have filed their actions through the same advocate. Furthermore, the defendant alleged that all actions involved a common question of law or fact of such importance in proportion to the rest of the matter involved in such actions as to render it desirable in the interest of justice that they be consolidated.

On September 18, 1975, the plaintiffs opposed the application for consolidation on the ground that there was not sufficient material before the Court at that stage, in the absence of pleadings, to decide that the claims in all the four actions involved a common question of law or fact.

On September 26, 1975, the trial judge, having heard the contentions of both counsel and having considered both the application of the defendant and the opposition of the plaintiffs, in the exercise of his discretion, refused to grant an order for consolidation, because he was of the opinion that before consolidation is ordered, the case must have pogressed sufficiently to a degree establishing the issues in dispute. Then he put the matter in this way:-

> "Even if I were to assume, and I leave this point entirely open, that it is possible to order consolidation before the close of the pleadings, in the absence of agreement among the parties as to the facts in issue there would be nothing before the Court to enable it to exercise its discretion whether to order consolidation or not and it would plainly be an exercise in futility to venture to support such facts."

Later on he said :-

"Learned counsel for the respondents made reference to passages in Halsbury Laws of England, 3rd edition, vol. 30, at pages 371, 389 and 390 where it is stated that the proper time for making an application for consolidation is at the stage of an application by summons for directions and argued thereupon that as a matter of correct practice the proper stage for making an application for consolidation is after the close of the pleadings. Learned counsel for the applicant made, in his address, reference to what he anticipates to be the facts in issue and invited the Court to order the consolidation. I must remind him that in the absence of agreement as to the facts in issue an anticipatory statement of the facts in issue by either side cannot constitute a substitute for the pleadings, the only means by which the issues in a case may be defined. The writ of summons is not designed to elicit the facts in issue but is merely intended to serve notice of the cause of action and to commence the proceedings."

The first complaint of counsel in this appeal is that the trial judge misdirected himself in law when he decided that before consolidation is ordered the statement of claim should be filed first so that the issues in dispute are established; and that he failed to consider that from the writ of summons it was clear that there was a common question of law, that is the question of liability or fact. We think, and it has not been disputed by counsel, that the trial Court has power to consolidate actions pending in the same Court and that it is exercisable where some common question of law or fact arises in all the actions to be consolidated. From the authorities we are about to quote, it appears that actions brought by the same persons against diferrent defendants in respect of the same libel or other connected cause, as well as for actions for negligence by different plaintiffs against the same defendant arising out of the same accident, the Court can exercise its discretionary powers to order consolidation; and generally when the plaintiffs could have joined in one action under the provisions of Order 9 of our Civil Procedure Rules.

That the power of the Court to allow the joinder is unquestionable, has been laid down in a number of cases, and we think the case of *Payne* v. *British Time Recorder Co.* [1921] 2 K.B. 1 provides the answer. This was a case where the plaintiff sued two defendants in the one case for the price of goods sold and in the other for damages, and both the statement of claim and the defence were filed before an application for consolidation was made. Scrutton, L.J., dealing with the construction of r. 4 of Order 16 said at pp. 15 - 16 :-

> ".... where there are common questions of law or fact defendants sued in respect of different causes of action may be joined. *Thomas* v. *Morre* [1918] 1 K.B. 555 is one of the latest of such decisions, and since that case was decided there has been the decision in *In re Beck*, 87 L.J. (Ch.) 335.
>
> The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the Court, if such inclusion is embarrassing to strike out one or more of the parties.
>
> 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 *Horwood* v. *Statesman Publishing Co. Ltd.*, 141 L.T. 54, a case of libel, the plaintiffs H. & C. each brought a separate action against the defendants, the publishers, the editor and the printers of a newspaper, claiming damages for the same alleged libel in which libel two plaintiffs were bracketed together. The defendants, the printers, took out a summons to consolidate the two actions. This was opposed by the plaintiffs, on the ground, as they alleged, that their causes of action

were distinct and different causes of action against the several defendants. The Master made an order consolidating the two actions. On appeal, the judge in chambers set aside the order for consolidation, holding that the Court had no jurisdiction to consolidate the two actions, but he expressed the view that the case was a proper one for consolidation. The two actions were brought in respect of the same words. The two plaintiffs appeared by the same counsel and solicitors, and the statements of claim in the two actions were nearly identical with the exception of a few words in the innuendo. The defendants' three defences had been severed. On appeal, Scrutton, L. J., after reviewing at length all the authorities, regarding the discretion of the Court to order consolidation, said at p. 58 :-

> "If, as I say, there is no doubt that if these two plaintiffs had issued one writ and put their two claims for libel against the same defendants in respect of the same publication on that writ the Court would not have interfered, I can see no reason why the Court should not exercise its powers under Order XLIX., r. 8, to consolidate. It appears to me that there is ample jurisdiction, and on the question of discretion, in the first place, I should not interfere with the view which the master took and which the judge, we are told, would have taken but for the fact that he thought he had no jurisdiction, because of what is, without disrespect to counsel for the plaintiffs, the possibility on a possibility which he has suggested, that the distinguished clients may be dissatisfied with their counsel or their counsel with each other, and may sever—a severance of which at present I see no signs—before the case comes on for trial.
>
> It appears to me that it is far better that these proceedings, arising out of one libel against people who are bracketed together as responsible for the methods by the alleged libeller, should be tried in one action and I personally am unable to see any of the difficulties which at present occur."

Later on he concludes :-

"In these circumstances, the Court sets aside the

order of the learned judge on the ground that he had jurisdiction to make the order which he thought he had not, and adopts the view of the master and the judge with regard to the course which should be pursued with regard to consolidation, namely, that the actions should be consolidated. The costs must be the costs of the defendants in the cause in any event."

In *Healey* v. *A. Waddington & Sons Ltd.*, [1954] 1 Weekly Law Reports, 688, (relied upon by counsel for the defendant) consolidation was ordered up to determination of liability before the statements of claim were delivered and separate representation was allowed as to the question of damages. It appears from the headnote of this case that :-

"Eight legally aided plaintiffs claiming damages arising from an accident in a pressure chamber during mining operations under the sea issued separate writs against three defendants, who were respectively the contractors employing the workmen killed or injured in the accident, a firm of technical consultants to the occupiers, and the occupiers, the National Coal Board. The defendants applied to the master in chambers for an order for consolidation and trial of all the actions together, and the master made that order, providing that one statement of claim should be delivered on behalf of one of the plaintiffs, to include the special damages of each of the other plaintiffs, with separate issues as to damages. On appeal from that order by one of the plaintiffs, the judge in chambers set it aside and ordered that the action of another plaintiff be tried first as a test action, all the other actions to be stayed meanwhile. On appeal by the technical consultants from that order :-

Ordered, with consent of all the parties, that all the actions should be consolidated until determination of liability, with liberty to each plaintiff to apply in the consolidated action for separate representation if any question arose which appeared to put him or her in a position different from the other plaintiffs; that particulars as to injuries and damage of each

plaintiff should be delivered with the consolidated statement of claim; that if the plaintiff succeeded in the consolidated action against any or all of the defendants, the Court should fix a date to determine the quantum of damages for each plaintiff, in respect of which each might be separately represented; and that the costs of the appeal should be costs in the cause, and should include special allowances for solicitors attending without consent.

Order of Gerrard J. varied."

When the Court of Appeal heard the contentions of counsel, the Court, without giving a reasoned judgment, apparently because as it appears from the headnote the order was made with the consent of all the parties that all the actions should be consolidated, made this order :-

"(1) That Actions 1953 M. No. 172; 1953 M. No. 171; 1953 T. No. 82; 1953 T. No. 81; 1953 D. No. 80; 1953 H. No. 143; 1953 J. No. 960 be consolidated with Action 1953 H. No. 144 up to determination of liability.

(2) Liberty to apply in the consolidated action for separate representation if any question arises which appears to put one plaintiff in a different position from other plaintiffs.

(3) Particulars as to injuries and damage of each plaintiff to be delivered with statement of claim in consolidated actions within 28 days.

(4) When liability determined if plaintiff succeeds against all or any defendants, the Court to fix a date to determine question of quantum of damages for each plaintiff, in respect of which each plaintiff may be separately represented.

(5) That the costs of this appeal be costs in the cause, such costs to include special allowances for solicitors attending without counsel.

(6) Liberty to apply in chambers.

Appeal allowed.
Order of Gerrard J. varied, the parties consenting thereto."

In *Lewis and Another* v. *Daily Telegraph Ltd. and Another*, [1964] 1 All E.R. 705, Sellers, L.J., dealing with a case of libel, and having considered the contentions of counsel regarding the question of separate representation where actions of libel were consolidated, said at p. 714 :-

> "I am not saying that it would be impossible ever in any case to have separate representation, wholly or partially, in a consolidated action. It is not very easy to envisage such cases; but they can arise, and an illustration is *Healey* v. *A. Waddington & Sons, Ltd.*, [1954] 1 W.L.R. 688. In that case eight actions were consolidated as to the issue of liability, but separate representation was allowed as to the issue of damages. That is an interesting case, and it shows the possibility of, at any rate, partial separate representation in consolidated actions. But it is, in my view, not a good guide or a good precedent for the present case, because there the trials were going to be by judge alone and were in respect of an accident, whereas here we are faced with an action or actions for libel to be tried by judge and jury."

The learned judge in this case, in commenting on the *Healey* case (*supra*), made these observations :-

> "It appears from the context of this rather summary report of the proceedings that the Court of Appeal inclined to the view that in a proper case consolidation may be ordered before the close of the pleadings. The order of the Court cannot, however, be divorced from the facts before it and in particular the consensus of opinion among all parties appearing before the Court that consolidation was, in the circumstances of that case, a proper course."

Having reviewed the authorities as to consolidation of actions, we think that although the judge has a discretion to order consolidation or refuse it, nevertheless, no clear principle is to be gathered from the reported cases, and we find ourselves in agreement with the judge that the *Healey* case is not a good precedent laying down the considerations which should be borne in mind or those which should be ignored by the judge in exercising his discretion; and not a good guide for the present case

when the judge refused to grant an order for consolidation and has given reasons which enable this Court to know the considerations which have weighed with him. We would, therefore, dismiss this contention of counsel as we are also of the view that the judge did not misconceive the effect of the *Healey* case.

The second complaint of counsel was that the judge wrongly exercised his discretionary powers in refusing to grant an order for consolidation because the considerations which have weighed with him were based on the mistaken belief that the claims of such actions did not involve a common question of law or fact.

The question is, in what circumstances will the Supreme Court interfere with the discretion of the judge. At one time, it was said that it would interfere only if the trial Court had gone wrong in principle; but since *Evans* v. *Bartlam*, [1937] 2 All E.R. 646, that idea has been exploited. The true proposition was stated in *Charles Osenton & Co.* v. *Johnston* [1941] 2 All E.R. 245, and Lord Wright had this to say at p. 257 :-

> "No doubt that Court starts with the presumption that the judge has rightly exercised his discretion. It must be satisfied that the exercise was wrong. 'Clearly satisfied' is the phrase used. If the Court is said to be satisfied, however, it must mean that it is 'clearly' satisfied. 'Clearly' strictly adds nothing, though it is useful to emphasise the strength of the presumption in favour of the judge's order being right. The appellate Court must not reverse the judge's decision on a mere 'measuring cast', or on a bare balance. The mere idea of discretion involves room for choice and for differences of opinion. I do not, however, understand that Singleton, J., felt any doubt that he would not have made the same order as the judge made. Each had exactly the same materials before him. Singleton, J., was satisfied in his own mind—that is, 'clearly' satisfied—what the order should have been. He should accordingly have assumed the responsibility, as Clauson, L.J., did, of acting upon that view. His other ground was based upon the words of Lord Atkin in *Evans* v. *Bartlam* at p. 480 ([1937] A.C. 473 at p. 480; [1937] 2 All E.R. 646

at p. 650), which I have quoted above, as constituting good reason for reversing the judge's decision: 'The decision will result in injustice being done'. Singleton, J., felt himself unable to say affirmatively that injustice would (*i.e.*, would necessarily) result from the order. I think, as I have explained, that this is a misreading of what Lord Atkin meant. A reasonable danger of injustice is, in my opinion, enough to justify review.

No doubt it is always a difficult and delicate matter for an appellate Court to interfere with an order made by a judge in the exercise of his discretion, but in proper cases it is the duty of the appellate Court to do so. I do not repeat what all their Lordships said on this matter in *Evans* v. *Bartlam*, nor refer again to the earlier authorities cited there."

In *Ward* v. *James*, [1965] 1 All E.R. 563, Lord Denning, M.R., in reviewing the discretion of the Court had this to say at p. 570 :-

"This Court can, and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. A good example is *Charles Osenton & Co.* v. *Johnston* [1941] 2 All E.R. 245 itself, where Tucker, J., in his discretion ordered trial by an official referee, and the House of Lords reversed the order because he had not given due weight to the fact that the professional reputation of surveyors was at stake. Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him, as in *Hennell* v. *Ranaboldo* [1963] 3 All E.R. 684 It sometimes happens that the judge has given reasons which enable this Court to know the considerations which have weighed with him; but even if he has given no reasons, the Court may infer from the way he has decided, that the judge must have gone wrong in one respect or the other, and will

thereupon reverse his decision; see *Grimshaw* v. *Dunbar* [1953] 1 All E.R. 350."

In *Re F. an Infant*, reported in the Times of November 17, 1975, the House of Lords dealt with the question of discretion and Lord Justice Browne said :-

"It had been clearly established by *Evans* v. *Bartlam* [1937] A.C. 473 and *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130 that a discretion entrusted to a judge could be reviewed not only on the grounds that he had erred in principle but also where he had not given proper weight to a relevant factor. In *Ward* v. *James* [1966] 1 Q.B. 273 Lord Denning said :

'The Court of Appeal will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him'.

Lord Justice Stamp thought that a different rule applied in infant cases and that the Court of Appeal could not reverse the judge on the ground that he had gone wrong in the balancing operation implicit in a reference to weight. There his Lordship's opinion differed from that of Lord Justice Stamp. In his judgment there was no reason why the general principle applicable to the exercise of discretion in respect of infants should be any different from the general principle applicable to any other form of discretion. In *In re O* Lord Justice Davies said : 'If an appellate Court is satisfied that the decision of the Court below is improper. unjust or wrong, then the decision must be set aside. I am unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of a discretion: so to do might well perpetuate injustice."

Having considered the material which was before the trial judge and the contentions of both counsel, we are satisfied that his decision is not wrong. and we would not interfere with the exercise of his discretion. because the judge has given sufficient weight to the facts that the writ of summons did not contain sufficient facts to show that the claims of those actions of the plaintiffs

involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the actions to render it desirable that the whole of the matter should be consolidated. We would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

1975
Dec. 9
--
GEORGHIOS HADJI-ATHANASSIOU
v.
LOIZOS PARPERIDES AND OTHERS