

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

NO. SC 3235

BETWEEN:

NORWESTER LTD.,

Plaintiff

- and -

THE BRITISH AVIATION INSURANCE COMPANY LIMITED,

Defendant

NO. SC 3234

BETWEEN:

ARNY'S GENERAL STORES LTD.,

Plaintiff

- and -

REED SHAW STENHOUSE LIMITED, carrying on business under the firm name and style of LANKY AGENCIES, and LANKY AGENCIES, and ROSE M. BYRNE, BARBARA ROSE KNUTSEN and DONALD PATRICK BYRNE, administrators of the Estate of NORMAN JOHN BYRNE, deceased NORWESTER LIMITED and THE BRITISH AVIATION INSURANCE COMPANY LIMITED,

Defendants

NO. SC 3638

BETWEEN:

AUKJE JUNE MAGRUM, JAMES TIMOTHY MAGRUM by his next friend AUKJE JUNE MAGRUM, DANIEL KEVIN MAGRUM by his next friend AUKJE JUNE MAGRUM and MICHAEL MARVIN MAGRUM and TERRANCE GEORGE MAGRUM,

Plaintiffs

- and -

NORWESTER LTD., and ROSE M. BYRNE, BARBARA ROSE KNUTSEN and DONALD PATRICK BYRNE in their capacity as Administrators of the Estate of NORMAN J. BYRNE, deceased,

Defendants

NO. SC 3642

BETWEEN:

BRIAN KEITH MOORE also known as LARKIN by his next friend PATRICIA W. FLIEGER, Public Trustee in and for the Northwest Territories, JAMES JOHN LARKIN by his next friend PATRICIA W. FLIEGER, Public Trustee in and for the Northwest Territories, CHRISTINA MARY LARKIN by her next friend PATRICIA W. FLIEGER, Public Trustee in and for the Northwest Territories, GERALD ROBERT LARKIN by his next friend PATRICIA W. FLIEGER, Public Trustee in and for the Northwest Territories, CLIFFORD RYAN MOORE also known as LARKIN by his next friend PATRICIA W. FLIEGER, Public Trustee in and for the Northwest Territories and JOHN BERNARD LARKIN and DOROTHY SARAH LARKIN,

Plaintiffs

- and -

NORWESTER LTD., and ROSE M. BYRNE, BARBARA ROSE KNUTSEN and DONALD PATRICK BYRNE in their capacity as Administrators of the Estate of NORMAN J. BYRNE, deceased,

Defendants

Application for Consolidation Order

Heard at Yellowknife, N. W. T. July 26, 1977

Order asked for not granted. Ordered that the four actions be placed on the Trial List in the following order:
No. 3638, No. 3642, No. 3234 and No. 3235

Judgment filed September 15th, 1977

Reasons for Judgment of the Honourable Mr. Justice C. F. Tallis

Counsel: P. Chomicki for the Applicant British Aviation Insurance Company Limited on Files: SC 3234, SC 3235, SC 3638 and SC 3642

S. F. Goodard for Army's General Store Ltd. on File SC 3234

John Singleton on behalf of Norwester Ltd. on File SC 3235 and on behalf of the Administrators of the Estate of Norman John Byrne on File SC 3234

John Sowa for Reed Shaw Stenhouse on File SC 3234 and Third Parties on Files SC 3638 and SC 3642

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

NO. SC 3235

BETWEEN:

NORWESTER LTD.,

Plaintiff

- and -

THE BRITISH AVIATION INSURANCE
COMPANY LIMITED,

Defendant

NO. SC 3234

BETWEEN:

ARNY'S GENERAL STORES LTD.,

Plaintiff

- and -

REED SHAW STENHOUSE LIMITED, carrying
on business under the firm name and
style of LANKY AGENCIES, and LANKY
AGENCIES, and ROSE M. BYRNE, BARBARA
ROSE KNUTSEN and DONALD PATRICK BYRNE,
administrators of the Estate of
NORMAN JOHN BYRNE, deceased NORWESTER
LIMITED and THE BRITISH AVIATION
INSURANCE COMPANY LIMITED,

Defendants

NO. SC 3638

BETWEEN:

AUKJE JUNE MAGRUM, JAMES TIMOTHY
MAGRUM by his next friend AUKJE
JUNE MAGRUM, DANIEL KEVIN MAGRUM
by his next friend AUKJE JUNE
MAGRUM and MICHAEL MARVIN MAGRUM
and TERRANCE GEORGE MAGRUM,

Plaintiffs

- and -

NORWESTER LTD., and ROSE M. BYRNE,
BARBARA ROSE KNUTSEN and DONALD
PATRICK BYRNE in their capacity
as Administrators of the Estate
of NORMAN J. BYRNE, deceased,

Defendants

NO. SC 3642

BETWEEN:

BRIAN KEITH MOORE also known as LARKIN
by his next friend PATRICIA W. FLIEGER,
Public Trustee in and for the Northwest
Territories, JAMES JOHN LARKIN by his
next friend PATRICIA W. FLIEGER, Public
Trustee in and for the Northwest Territories,
CHRISTINA MARY LARKIN by her next friend
PATRICIA W. FLIEGER, Public Trustee in
and for the Northwest Territories, GERALD
ROBERT LARKIN by his next friend PATRICIA
W. FLIEGER, Public Trustee in and for the
Northwest Territories, CLIFFORD RYAN MOORE
also known as LARKIN by his next friend
PATRICIA W. FLIEGER, Public Trustee in and
for the Northwest Territories and JOHN
BERNARD LARKIN and DOROTHY SARAH LARKIN,

Plaintiffs

- and -

NORWESTER LTD., and ROSE M. BYRNE, BARBARA
ROSE KNUTSEN and DONALD PATRICK BYRNE in
their capacity as Administrators of the
Estate of NORMAN J. BYRNE, deceased

Defendants

Counsel on the Hearing:

P. Chomicki for the Applicant British Aviation Insurance Company Limited on Files: SC 3234, SC 3235, SC 3638 and SC 3642

S. F. GODDARD for Army's General Store Ltd. on File No. SC 3234

John Singleton on behalf of Norwester Ltd. on File SC 3235 and on behalf of the Administrators of the Estate of Norman John Byrne on File SC 3234

John Sowa for Reed Shaw Stenhouse on File SC 3234 and Third Parties on Files SC 3638 and SC 3642

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

This is an Application on behalf of the Defendant The British Aviation Insurance Company Limited for an Order consolidating the pre-trial proceedings in these actions, including an exchange of affidavits of documents, and their use by any party at trial, one examination for discovery of each party or person, and the use of the transcript thereof by any party at trial, and for a further order that all actions herein referred to be tried at the same time, or, one immediately after the other, pursuant to the provisions of Rule 229.

The affidavit evidence in support of the Application consists of the affidavit evidence of Eric Lane which reads as follows:

" I ERIC M. LANE, of the City of Toronto, in the Province of Ontario, Barrister and Solicitor, MAKE OATH AND SAY:

- "1. That I am a Barrister and Solicitor, duly qualified to carry on the practice of law in the Northwest Territories, and I am the solicitor of record for The British Aviation Insurance Company Limited who are named as one of the Defendants in the first two of the above-mentioned actions and a Third Party in the last three of the above-mentioned actions, and as such I have a personal knowledge of the matters hereinafter deposed to except where otherwise stated.
2. That in Actions Nos. 3234 and 3235 both Plaintiffs assert a claim against The British Aviation Insurance Company claiming indemnity for \$43,000.00 under a certain policy of insurance which was alleged to have been issued by the said British Aviation Insurance Company Limited and claiming the sum of \$43,000.00 on account of damage sustained to a certain aircraft described as a 1973 Cessna 185, Serial No. 18502258 bearing registration CF-HCN, and I do verily believe that the Plaintiffs in both of these actions are claiming for the same relief from the Defendant, The British Aviation Insurance Company Limited, who are also named as a Third Party in Action No. 3234.
3. That actions Nos. 3638 and 3642 are actions commenced by the estates of John David Larkin and James Robert Magrum respectively, whom I am informed and do verily believe were passengers riding in the aforesaid Cessna 185, registration No. CF-HCN, and who were apparently killed as a result of the accident involving the same accident as set out in the first two mentioned actions.
4. That in actions Nos. 3638 and 3642 the Defendants have issued Third Party proceedings against The British Aviation Insurance Company Limited claiming indemnity under a certain policy of aviation insurance issued by The British Aviation Insurance Company Limited.
5. That The British Aviation Insurance Company Limited has filed Statements of Defence in all of the actions in which it

"has been named either as a Defendant or as a Third Party and the Defence of The British Aviation Insurance Company is the same in each case, namely that the aircraft insurance policy was void.

6. That I do verily believe that the issues between the Plaintiffs and The British Aviation Insurance Company Limited in actions Nos. 3234 and 3235 are almost identical except for the allegation in action No. 3234 that The British Aviation Insurance Company agreed to issue an insurance policy naming Army's General Stores Ltd. as an insured and further protecting Army's General Stores Ltd. by a breach of warranty endorsement.

7. That I do verily believe that the issues in the Third Party proceedings in actions Nos. 3234, 3638 and 3642 are all identical and the issues are also almost identical with the issues in Actions Nos. 3234 and 3235, and I further verily believe that the evidence in all four actions will be almost identical insofar as it relates to the question of insurance coverage.

8. That to the best of my information solicitors representing the various Plaintiffs and Defendants will be obliged to travel from the City of Edmonton in the Province of Alberta or elsewhere to conduct Examinations for Discovery and to conduct the trial of the above-mentioned actions and I do further verily believe that at least some of the witnesses will be obliged to come from places outside of Yellowknife for purposes of both Examinations for Discovery and for Trial.

9. I verily believe that this is a proper case for the consolidation of the pre-trial proceedings and the exchange of affidavits of documents between all parties and thereafter for one Examination for Discovery of

"each party or person with the use of the transcript thereof by any party permitted at the trial of these actions at the same time, or one immediately after the other pursuant to the provisions of Rule 229."

Rule 229 provides as follows:

"229. Where there are two or more actions or proceedings that

- (a) have a common question of law or fact, or
- (b) arise out of the same transaction or series of transactions,

or where for any other reason it is desirable to make an order under this Rule, the court may order that the actions or proceedings be consolidated or 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."

It would appear to be clear from authorities that two types of orders can be made on an application under Rule 229 or its equivalent:

1. The actions may be consolidated. Under such an order the actions are then melded into one action and proceed as such. Under such an order there is one set of pleadings, one set of discoveries and judgment and one bill of costs; or

2. The actions may be ordered to be tried together. They are then set down on the list one after the other to be tried in such manner as the Court directs. The trial Judge has a discretion to direct that the evidence in one action is to be taken as evidence in the other action or actions. Nevertheless the actions maintain their separate identity and there are separate pleadings, discoveries, judgments and bills of costs.

See 1 *Williston & Rolls*, 410 - 423; *Williston and Rolls Court Forms* Chapter 17 p. 1; *Canadian Civil Procedure* by Watson Borins and Williams, 511.

During the course of argument in Chambers and in his written submission Counsel for the Applicant has made it quite clear that he is not seeking a formal consolidation order of all the actions in the form described in (1) above. He does however seek to have all the pre-trial proceedings consolidated in the following form:

1. That the pre-trial proceedings such as Examinations for Discovery, production and exchange of documents be consolidated as contemplated by Rule 229, to the extent of and subject to the terms and conditions of paragraphs 2 and 3 of this Order.
2. That one Examination for Discovery of each party in one or more actions take place at the same time and at a place to be agreed upon by all interested counsel, and that all parties adverse in interest be and are hereby entitled to a full and complete examination of any such adverse party.
3. That all answers given by a party on his or her or its Examination for Discovery may be used at trial by any other party adverse in interest in any of the actions but only in accordance with the rules of evidence and rules of court.
4. That after all pre-trial proceedings and third party proceedings are concluded, the actions are to be set for trial together, one following the other, with the order to be agreed upon by Counsel, failing which by further Order and direction of the Court.

I fully recognize that it is desirable to conduct litigation in such a manner as to minimize costs and avoid a

multiplicity of steps in the proceedings. In this Application I must first determine whether or not I can consolidate the pre-trial proceedings in all the actions where the actions are not being consolidated in the traditional sense of the word. As recited above Rule 229 provides as follows:

"229. Where there are two or more actions or proceedings that

- (a) have a common question of law or fact, or
- (b) arise out of the same transaction or series of transactions,

or where for any other reason it is desirable to make an order under this Rule, the court may order that the actions or proceedings be consolidated or 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."

Learned Counsel for the Applicant stresses the word "proceedings" in his argument and submits that the word must be construed as meaning a step in the action. In other words it is submitted that pre-trial steps such as examinations for discovery, affidavits of documents and production of documents are covered by the word "proceedings" and accordingly can be consolidated.

In my opinion regard must be had to the context of the opening of Rule 229 which reads: "Where there are two or more actions or proceedings that".

Viewed in this light it is my opinion that the words "actions or proceedings" must be construed as referring to the

original form in which a cause, action, suit or proceeding is brought. In other words, used in this context it is my opinion that it does not refer to interlocutory steps in a civil action. See *Eddy v. Stewart* (1932) 3 W.W.R. 71, reversing (1932) 2 W.W.R. 699 (C.A.).

Under the circumstances I am not prepared to grant the order asked for by the Applicant. On the basis of the undisputed evidence as set forth in the affidavit evidence filed on behalf of the Applicant I am satisfied that this is a proper case for an order providing for trial of the actions together. I therefore order and direct that the four actions, when ready for trial, be placed on the list for trial of actions in the following order:

Action No. 3638

3642

3234

3235

I further direct that the said actions be tried together subject to any further or other order of the Judge presiding at the trial of the said actions. In granting an Order in this form I want to make it clear that I fully concur with the statement of O'Halloran, J. in *Lewis and Wilkie v. Warner* (1956) 19 W.W.R. 248 at p. 251:

" I would, therefore, allow the appeal and direct that the three actions, when ready for trial, be placed on the list for trial together, leaving it to the trial judge to work out a plan which

"will be fair to all concerned (see *Levin v. Feintuch, supra*). This does not mean that the order the trial judge shall then make may not be subject to appeal in the usual way; but it does mean the trial judge's hands shall not be tied by the order now made by this court."

In dealing with this matter I have also considered the following, *inter alia*, authorities: *Levin v. Feintuch*, (1932) 3 W.W.R. 459; *Warrior v. Isomaa and Zurich Insurance Co.*; *Kenyon v. Isomaa and Zurich Insurance Co.* (1963-64) 45 W.W.R. 253; *Breakes v. Bowell McLean Motor Co.* (1953-54) 10 W.W.R. (N.S.) 192.

My decision on this Application does not preclude Counsel from working out satisfactory arrangements to conduct examinations for discovery at the same time and agree upon the applicability of the evidence.

On the issue of costs, I direct that the costs of this Application be costs in the cause.

Dated at Yellowknife, Northwest Territories this 14th day of September, 1977.


C. F. Tallis, J.S.C.

NO.

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- and -

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COMPANY LIMITED,

Defendant

NO. SC 3234
BETWEEN:

ARNY'S GENERAL STORES LTD.,

Plaintiff

- and -

REED SHAW STENHOUSE LIMITED, ca
on business under the firm name
style of LANKY AGENCIES, and
LANKY AGENCIES et al

Defendant

NO. SC 3638
BETWEEN:

AUKJE JUNE MAGRUM, JAMES T
MAGRUM et al

Plaintiff

- and -

NORWESTER LTD., and ROSE M. BYE
et al,

Defendant

NO. SC 3642
BETWEEN:

BRIAN KEITH MOORE also known
LARKIN by his next friend
PATRICIA W. FLIEGER, Public
Trustee et al,

Plaintiff

- and -

NORWESTER LTD., and ROSE M. BYE
et al,

Defendant



REASONS FOR JUDGMENT OF THE HONORABLE
MR. JUSTICE C. F. TALLIS