IN THE HIGH COURT OF BELIZE AD 2019

ACTION NO. 260 of 2019

IN THE MATTER of Section 152 of the Supreme Court of Judicature Act, Cap. 91 of the Laws of Belize, R.E. 2011

and

IN THE MATTER of Matrimonial Causes Rules 65 for an Application for Permanent Alimony

BETWEEN:

[1] DIANE LORI TABONY

Petitioner

and

[1] AUGUST HENRY TABONY

Respondent

Appearances:

Mr. Fred Lumor SC with Ms. Sheena Pitts for the Petitioner/Applicant

Ms. Stacey Castillo led by Mr. Marshalleck SC for the Respondent

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2024: April 24th;

2024: May 28th.

DECISION

Consolidation – Principles Governing Consolidation – Consent by Counsel – Authority of Counsel to Consent – Limitation of Counsel's Authority – Withdrawal of Consent – Jurisdiction – Order 53 of the Rules of the Supreme Court.

[1] **ALEXANDER, J.**: This is an application for consolidation of Action No. 6 of 2018 and Action No. 260 of 2019 both pending in the High Court. The applicant filed two

summonses dated 16th January 2024 (together "the summons") one in each action for an order that these actions be consolidated and proceed as one action.

[2] These matters have had a protracted presence in the court system, with parties strenuously litigating every aspect of their case. The present application ("the consolidation") is just another application made and contested by parties and requiring the intervention of the court.

[3] I heard oral submissions from Mr. Fred Lumor and Ms. Stacey Castillo on 24th April 2024. I now dismiss the application for consolidation.

Background

[4] I find it necessary to give a short history of what led up to the summons being filed and to give some context to the refusal of the consolidation order. There matters were commenced in 2018 and 2019, long before the summons for consolidation was filed in January 2024.

[5] The summons came after a hearing before me on 14th June 2023 ("the hearing"). At that hearing, Mr. Lumor remarked that the matters ought to be consolidated, and counsel for the respondent, Mr. Andrew Marshalleck, "agreed" orally in court that consolidation was a way forward. Upon that indication, I made an order on the same 14th June 2023 ("the draft court order") to wit that:

> The Petitioner shall provide a draft consent order for the consolidation of the claim herein with Action No. 6 of 2018 Tabony v Tabony for the Respondent's approval.

[6] Consequent to the draft court order above, parties were to settle and submit **two draft** orders for my approval: (i) the draft court order above and (ii) the draft consent consolidation order. Mr. Marshalleck approved the draft court order above, which was then submitted for my approval, but he did not approve the latter draft consent consolidation order sent along with the draft court order. In the affidavit in support of the summons, the affiant, Ms. Attolene Crawford Lennan, stated that Mr. Marshalleck had

indicated instead that approval for the draft consent consolidation order would "follow in due course". The draft consent consolidation order was never approved by the respondent's counsel. It appears that, after the hearing, the respondent gave instructions to his counsel not to consolidate the two actions. The opposition to the present application takes heel against this backdrop.

The Actions

[7] Action No. 6 of 2018 ("Action No. 6") was commenced on 7th December 2018, where the petitioner claimed ancillary relief for distribution of matrimonial assets that she had acquired with the respondent during the subsistence of their marriage.

[8] On 13th August 2019, the petitioner petitioned the court for another ancillary relief. She filed Action No. 260 of 2019 ("the Alimony action") seeking the relief of permanent alimony.

[9] In answer first to Action No. 6, the respondent stated that there exists a valid prenuptial agreement ("the agreement") executed between the parties which is still operative. The agreement governs the matrimonial assets that were acquired by the petitioner during the subsistence of the marriage. In the agreement, the parties had expressly renounced the community of property, so each party holds separate properties independent of each other. The respondent also stated in his defence that, in any event, the majority of properties in which the petitioner seeks a beneficial interest are, "… owned by third party companies whose shares are owned by trustee of Tabony Family Trust which was created 10th May, 2007."

[10] In answer to the Alimony action, the respondent stated that the petitioner did not own, contribute, or have any interest or rights in his properties and investments, which he had held prior to marriage, whether financial or non-financial. He stated in an affidavit sworn on 1st October 2019, that the petitioner has no interest "… in the businesses and investments that I solely engaged in. Diana (sic) also does not have any interest or shares in properties in Belize or rental income from them or proceeds of sale. This is by virtue of

the prenuptial agreements (sic)." He also alleged that "… the listed assets have either been settled in the Trust or third-party companies." According to the respondent, these properties were held separately by him or by companies he held shares in, so he alone was entitled to the wealth generated by them including Tabony Gift Stores. He alone was entitled to the profits and rental income from all properties under Tabony Industries Limited. The agreement assures that the parties hold their properties and investments separate from each other. He was relying on the agreement to defend both claims, Action No. 6 and the Alimony action.

[11] The agreement has been the subject of at least two decisions of this court and is currently the subject of an appeal. Whilst the respondent insists on and maintains that it is valid and subsisting, the petitioner asserts that it does not govern the distribution of matrimonial assets in Belize. Further, she states that the Tabony Trust cannot hold title to the properties that she acquired with the respondent during the subsistence of the marriage. Therein lies the conundrum that has kept the parties before the court for over five years. The respondent also remains in non-compliance with an order of the court made on 28th January 2020 to file an application on or before 7th February 2020 to determine whether the properties, held by third party companies in this case, constitute matrimonial properties.

Issues

[12] The broad issue, as the court finds it, is whether the test for consolidation is satisfied such that the two actions should be consolidated? As an off shoot to that question is whether counsel can consent to an order and then subsequently withdraw his consent?

The Law

[13] Order 53 of The Rules of the Supreme Court ("the Old Rules") governs the present applications. The Order states:

1. Causes or matters pending in the Court may be consolidated by order of the Court in the manner in use in the Supreme Court of Judicature (England) before the commencement of the Supreme Court of Judicature Act, 1873 ("Imperial").[1]

[14] The English equivalent of Order 53 is Order 49, Rule 8, which provides that "Causes or matters pending in the same division may be consolidated by order of the Court or a judge in the manner in use before the commencement of the principal Act in the superior courts of common law."

Submissions

[15] During oral submissions on 24th April 2024, both parties stuck fiercely to their respective positions on the appropriateness or not of a consolidation order. Mr. Lumor stated that the respondent's counsel had the ostensible authority to and did agree to entering the draft consent consolidation order. There was no limitation on Mr. Marshalleck's ostensible authority when he consented to the consolidation. The respondent could not subsequently withdraw the consent of his counsel, without permission from the court. He relies on the English Court of Appeal case of **Neale v Lady Gordon Lennox**[2] and **Neale v Gordon Lennox**,[3] reversing the Court of Appeal decision (discussed below). In oral submissions, Mr. Lumor argued that consolidating the actions is appropriate as they involve substantially the same issues of law and fact, the same parties and the same witnesses.

[16] Ms. Castillo, the junior counsel in the matter, argued the consolidation application for the respondent. She submitted that the present case was not an appropriate one for consolidation. First, the two actions do not raise common questions of law, as the court must consider different factors when ruling on division of matrimonial property as against permanent alimony and, moreover, these factors do not overlap. Secondly, the validity of the agreement is under appeal and a case management of the appeal has not been fixed

[1] Supreme Court of Judicature CAP. 157 The Subsidiary Laws of Belize in force on 31st day of December 1989 R.E. prepared under the authority of The Law Revision Act Chapter 8 Vol. III 1991.
[2] [1902] 1 KB 838 at pp 843-844 (CA).
[3] [1902] AC 465 at 468, HL.

by the Court of Appeal. Thirdly, the petitioner in Action No. 6 has filed a summons for the joinder of 37 third-party entities to Action No. 6, where the orders sought against these entities are completely unrelated to the reliefs in the Alimony action. Fourthly, Ms. Castillo took a procedural swipe at the summons to consolidate, arguing that there was an irregularity in that only one summons was filed to join two separate actions. She stated that this is a procedural abnormality that ought not to go unnoticed. It is not open to a party to seek to engage the court's jurisdiction in two separate actions by way of a single summons without a prior consolidating order. Separate summonses were required to be filed. Since the proper procedure was not followed, the court does not have the jurisdiction to make any order for consolidation. The application should be dismissed with costs to the respondent. She relies on **Daws v Daily Sketch & Sunday Graphic, Ltd et al** and **Darke et al v Same**.[4]

[17] Mr. Lumor responded, and I agree, that **Daws** is distinguishable on the procedural irregularity argument. In the present matter, the petitioner had filed two summonses, one in Action No. 6 and the other in the Alimony action. The issue was moot.

[18] Though not addressed in her written submissions, at the oral hearing, Ms. Castillo stated that to say that Mr. Marshalleck had consented to the consolidation was a mischaracterization of what transpired during the proceedings. She used the transcript of the proceedings where the purported consent was given to support her arguments. In the transcript, Mr. Marshalleck could be heard saying that he did not think consolidation was an issue because there was a degree of overlap between the two actions. He then indicated that he had not spoken to his client, the respondent, but did not see why counsel could not agree to the consolidation. Mr. Marshalleck then suggested that counsel can endeavour to agree to a consolidation order, but this was done without the consultation, authority, or approval of the respondent. In fact, when Mr. Marshalleck "consented" to come to an agreement on the issue of consolidation, the respondent was not at that point asked for his position on the consolidation. Mr. Lumor then gave an undertaking to send

[4] [1960] 1 All ER 397 per Wilmer LJ, at page 399.

a draft consent order for consolidation to the other side and stated that if they do not agree then he would make an application.

[19] Based on the transcript, Ms. Castillo argued that Mr. Marshalleck did not agree to a consolidation but merely suggested that parties try to agree to a consolidation as a way forward, which was subject to the approval of the respondent. She accepted that whilst counsel has the authority to agree on his client's behalf, there was no agreement to start with but a mere suggestion that counsel should try to agree on consolation as a way forward.

Discussion

Principles on Consolidation

[20] The law is settled on the principles governing consolidation. The objective is to avoid multiplicity of proceedings, by allowing all disputes between parties to be determined in one proceeding. As a rule, where there are two actions and there are common questions of law and facts in both, and the reliefs sought by the applicant against the respondent arise out of a series of transactions common to both actions, the matters would be consolidated. Consolidation would be ordered also for convenience, to save the court's time and resources and for the saving of costs and expenses of parties. Generally, the court would take a broad approach in exercising its power.

[21] In **Martin v Martin & Co**,[5] Lord Esher stated that the object of the rule was "to do away with waste of time and money". To achieve that object, the rule was broadly construed. This approach was taken in **Arab Monetary Fund v Hashim (No. 4)**[6] which confirmed that it was appropriate for a broad construction to be given to applications for consolidations.

[5] [1897] 1 QB 429.
[6] [1992] 1 WLR page 1180.

Consent, Counsel's Authority and Withdrawal

[22] The general principle is that counsel appearing for a party in an action has full authority in all matters which relate to the conduct of the action and its settlement. This holds true even if there is a limit placed on counsel's authority. The party for whom he appears is bound by the settlement unless the limitation was communicated to the other side, or consent was by mistake or misapprehension. Mr. Lumor argued that Mr. Marshalleck, having given his consent, and possessing the authority to do so, cannot now withdraw his consent but must approve the draft consent consolidation order. According to Mr. Lumor, Mr. Marshalleck's consent cannot be undone even if counsel had exceeded his authority in giving the consent. Mr. Marshalleck had full authority to do what he did, and it was not limited in any way. He simply needed to speak to the respondent.

[23] Ms. Castillo rejected Mr. Lumor's argument that Mr. Marshalleck was bound to approve the draft consent consolidation order, as there was no limitation on counsel's ostensible authority. Ms. Castillo argued that Mr. Marshalleck only learned, after the hearing, that the respondent did not want the matters to be consolidated and gave instructions to oppose any such application. The crux of her argument is that lead counsel at the hearing on 14th June 2023 did not consent to any consolidation. He merely indicated that consolidation was a likely way forward and not that it was agreed to. She pointed out that that must have been Mr. Lumor's understanding, as he had indicated at the hearing on 14th June 2023 that he would make an application if Mr. Marshalleck does not approve the draft consolidation order.

[24] In the present matter, there was no written consent in issue. When the question of consolidation arose in court, the records did not show Mr. Marshalleck "consenting" to the consolidation. He seemed to view it as a live possibility or way forward. He did say that he would need to get the respondent's instructions. It is trite law that counsel has authority to make decisions in conducting the litigation including to bind his client. That is not in dispute here. In the present proceedings, there are also no issues raised of Mr. Marshalleck being aware of any limitation to his authority or that he had failed to make

any such limitation known to Mr. Lumor. Mr. Marshalleck did not claim mistake or that he was operating under any misapprehension. Mr. Marshalleck has refused to approve the draft consolidation order sent to him. The question is whether the consolidation order can be approved by the court based on the discussion between counsel in court on the possibility of consolidation as a way forward.

[25] **Neale v Lady Gordon Lennox** involved the giving of authority to counsel to enter a consent in a defamation claim, under certain limitations. The limitation of the ostensible authority to counsel was not communicated to the other side, and it was held that counsel exceeded the actual authority given to him by agreeing to the terms without the limitation required by his client. The Chief Justice held that the order should be set aside, and the action set down for trial. The Chief Justice stated that the fact that counsel had exceeded the authority actually given to him did not, in the absence of mistake or anything analogous thereto, provide any reason/ground for setting aside the order. There must be some definite and substantial ground for setting aside a compromise. This principle was applicable whether it related to an interlocutory or final order.

[26] On appeal, the Court of Appeal disagreed that the compromise ought to be set aside on the ground that it was made without the authority of the client. The consent was binding. The matter went to the House of Lords and in **Neale v Gordon Lennox**, the decision of the Court of Appeal was reversed. Counsel having exceeded his authority was entitled to have the agreement set aside.

[27] Although the question of whether a "consent" was given did not arise in **Neale**, and to that extent is distinguishable, this case supports the position that the purported "agreement" is not binding and so need not be approved.

Do common questions of law arise?

[28] A court might grant leave for consolidation of pending matters pursuant to Order LIII r. 1 of the Supreme Court Rules 1963. The power to consolidate matters has been described thus:

> Under the former rules, consolidation of proceedings could be ordered where it appeared to the court (a) that some common question of law or fact arose in both or all of them, (b) that the rights to relief claimed were in respect of or arose out of the same transaction or series of transactions, or (c) that for some other reason it was desirable to make an order for consolidation. These conditions reflected the fact that the main object of the consolidating power was to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground.

[29] I have considered whether common questions of law and fact arise in the present actions before me. Action No. 6 is for division of matrimonial property and the Alimony action seeks permanent alimony. In making orders to alter property rights and interests of either the husband or wife, different factors are to be considered to the factors considered when making a permanent alimony order. These factors do not overlap. I accept that some facts may overlap as the reliefs are both linked to a marriage that was dissolved. If they are not of sufficient importance in proportion to the remaining issues in each action, then consolidation will not be ordered.

[30] In **Daws** supra an application for consolidation was denied on appeal since there were no common questions of law or fact in the two actions, having sufficient importance in proportion to the rest of each action, to make it desirable to dispose of the matters at the same time.

[31] I am not satisfied that both actions have common questions of law or similar factors to be considered in determining them to make consolidation necessary.

Stage of proceedings

[32] I have also considered if consolidation is appropriate given the stage of the proceedings. Action No. 6 for alteration of property rights and interests is still at an early stage of the proceedings, where applications are being made to amend the pleadings. This action is also awaiting a case management date on appeal of a procedural application to amend. On the other hand, the Alimony action is almost ready for trial.

[33] To my mind, the gap in the stage of proceedings do not justify a consolidation order.

Joinder

[34] In Action No. 6, a summons dated 19th February 2020 for joinder of 37 third-party entities has been filed. The orders sought by the petitioner against these 37 third-party entities are unrelated to and do not overlap with the Alimony action. This militates against a consolidation order.

Draft Consent Consolidation Order

[35] The draft consolidation order was not signed by Mr. Marshalleck, so it was never sent to the court for its approval or to be perfected. This is unlike the **Neale case** where the draft compromise was signed by counsel although the order was not drawn up or perfected. In the circumstances of this case, therefore, can the court be bound by the act of a counsel who acted without the authority of his client? In **Neale** in the House of Lords, this question was considered. I will quote in full the response of Earl of Halsbury L.C. who stated:

> … **to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard**. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent is to refer – to take it from the jurisdiction of the ordinary tribunal – shall only be on certain terms, **to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to**. [Emphasis added].

[36] This position was supported by both Lord MacNaghten and Lord Brampton who confirmed that a party to litigation retains a "… veto upon a course proposed to be taken

by his or her own counsel which rightly or wrongly in his or her judgment" is prejudicial to his interests in the matter. Lord MacNaghten stated it thus:

> **I do not think that the Court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement that counsel may make when the arrangement itself is not in its opinion a proper one**. In the next place, I do not think that any counsel has authority to compel his client to refer an action which the client desires to try in open Court. [Emphasis added].

[37] The statements in the House of Lords seem to provide a decisive answer to the present application. Even if counsel exceeded his authority, an agreement can be set aside. I refuse to order consolidation of the two actions pending before me and dismiss the application.

Costs

[38] I have considered costs and the principle that these usually follow the event. The respondent sought costs should the application go in his favour. In the circumstances of this case, I exercise my discretion and order costs to be in the cause.

Disposition

[39] It is ordered that the summons for consolidation is dismissed with costs to be in the cause.

Martha Alexander
High Court Judge