

THE HIGH COURT

[2023] IEHC 631

[Record No. 2020/8200P]

BETWEEN

OLIVER SEARS & SEARS GALLERY LTD

APPLICANT

AND

COLIN DAVIDSON & COLIN DAVIDSON LTD

RESPONDENT

[Record No. 2020/976P]

BETWEEN

COLIN DAVIDSON LTD

APPLICANT

AND

OLIVER SEARS & SEARS GALLERY LTD

RESPONDENT

EX TEMPORE JUDGMENT of Mr Justice Kennedy delivered on the 13th day of

November 2023

1. This is an application pursuant to a Notice of Motion dated 3 August 2023 for an order pursuant to O. 49, r. 6 of the Rules of the Superior Courts for the consolidation of the following entitled proceedings: *Oliver Sears & Sears Gallery Ltd v. Colin Davidson & Colin Davidson Ltd* (2020/8200P) and *Colin Davidson Ltd v. Oliver Sears & Sears Gallery Ltd* (2020/976P).
2. All parties to both proceedings support the application. It is clear from the grounding affidavit that all three criteria for a consolidation application (which were laid down by McCarthy J. in *Duffy v. Newsgroup Newspapers Limited* [1992] 2 IR3 69 (“*Duffy*”) have been met. Those three criteria are: whether there is, firstly, a sufficiently important common question of law or fact; secondly, a substantial saving of expense or inconvenience; and, thirdly, a likelihood of confusion or a miscarriage of justice. Therefore, before considering the judicial discretion and an additional issue which arises on this application, it should be noted that on the basis set out in the grounding affidavit all three criteria are *prima facie* met.
3. The legal question which the court is asked to determine for the first time is whether the Court has jurisdiction to direct consolidation when the parties to the two proceedings are not identical. Counsel were unable to identify any authority on point. The provisions of O. 49, r. 6 do not specifically confirm whether or not it is a precondition to consolidation that the parties to both proceedings must be identical nor was any such requirement articulated by the Supreme Court in *Duffy*.
4. Accordingly, this issue seems to arise as a matter of first impression. In the absence of an express requirement in O. 49, r. 6 that the parties must be identical, and since the previous decisions on that provision have not identified any such requirement, the Court does not consider that it is necessary or appropriate to impose such a requirement. The Court considers that, in determining whether or not two proceedings should be consolidated, it is the wording of O. 49, r. 6 and the *Duffy* criteria which must be considered. It is neither necessary nor

appropriate to impose an additional requirement that the parties must be identical. In practice, if there are different parties to the two proceedings then that may well make it impossible to satisfy all three *Duffy* criteria in most cases. However, no such difficulty arises in this particular case, particularly given the consent of all parties.

5. In this case, even though the parties are not identical, it is noted that, although some different corporate entities are involved, both proceedings are essentially between the same parties in substance. All parties have agreed that the same issues will need to be determined in both proceedings and that consolidation would be the most efficient way of resolving the matter. Therefore, because the Court is satisfied that all three *Duffy* criteria are met, the Court will make an order in the terms set out at para. 1 of the Notice of Motion and it will reserve the costs of the application.

6. The Court will make no further directions at this time since the parties have undertaken to liaise with regard to the steps required to progress the consolidated proceedings. The pleadings in both underlying actions are closed and, rather than require the pleadings to be reconstituted, which would normally be the appropriate course, the parties submit that the simplest way to avoid unnecessary expense or delay may be to proceed with the existing pleadings (which would be managed by the Court in the same way as the pleadings in a third party action are managed along with the substantive pleadings in the “main” action). Accordingly, the Court is not making any direction with regard to the pleadings at this time, but the parties may seek further directions if necessary and the parties will in any event be seeking directions in relation to discovery unless agreement can be arrived at in that regard.