



THE HIGH COURT

Record No.: 2023/244 SP

Between:

MARTIN O'DONOGHUE

Plaintiff

V

THOMAS O'DONOGHUE

Defendant

**JUDGMENT of Mr Justice Rory Mulcahy delivered on 29 November 2024**

**Introduction**

1. The plaintiff and defendant are brothers. Each has commenced proceedings against the other in relation to assets over which it is agreed they share ownership.
2. In these proceedings, Martin O'Donoghue seeks an order pursuant to section 31 of the Land and Conveyancing Act 2009, as amended, directing the sale of a property he jointly owns with the defendant, a residential investment property in Athlone, County Westmeath ("**the Property**").
3. The defendant, Thomas O'Donoghue has responded to these proceedings by issuing separate proceedings against the plaintiff (Record No. 2024/2277P), alleging wrongdoing by the plaintiff with respect to a separate asset jointly owned by the brothers, a company called Enodare Limited ("**Enodare**").

4. The defendant has applied to consolidate the two sets of proceedings pursuant to Order 49, rule 6 of the Rules of the Superior Courts (“**the Rules**”). The plaintiff opposes that application. In this judgment, I explain why I consider consolidating the proceedings at this stage to be premature.

### **Factual background**

5. In his affidavit grounding the consolidation application, the defendant avers that the brothers jointly invested in three assets – the Property, a second jointly owned residential investment property located in France, and the company, Enodare – as part of what he calls a “*unified investment strategy*”. He avers that this strategy was characterised by a number of features, the most significant of which was that resources moved freely between the three investments. He gives examples of a loan to Enodare being allocated towards property expenses of the other investments, and of a top-up mortgage for the Property being used to fund investment in the French property and in Enodare. He also identifies other features, such as the fact that correspondence between the parties, including the plaintiff’s solicitor’s correspondence (the defendant is a lay litigant), references each of the investments. He also refers to a so-called “*joint management system*” for the assets from which he says he has been excluded by the plaintiff.

6. The defendant’s claim against the plaintiff relates solely to their investment in Enodare. The indorsement of claim in his Plenary Summons seeks relief in the following terms:

*“The Plaintiff’s claim is for the recovery of Intellectual Property, damages for the loss of income, breach of contract, loss of business and loss of reputation, as a result of the actions and torts of the Defendant in unlawfully removing assets from a jointly owned company, Enodare Limited, without the knowledge or consent of the Plaintiff and using same for his own personal gain and which said assets were and are jointly owned on a fifty-fifty basis by the Plaintiff and the Defendant.”*

7. The defendant elaborates on this claim in a Statement of Claim delivered in October 2024. The Statement of Claim is not in the form dictated by the Rules of the Superior Courts, but it appears that the thrust of the defendant’s claim is that the plaintiff is claiming sole

ownership of certain intellectual property, property which he alleges is owned by either Enodare or is jointly owned by the plaintiff and the defendant. Much of the damage that the defendant claims has been done by the plaintiff's actions has been done to the company, Enodare, e.g. loss of profits. As pointed out by counsel for the plaintiff, the defendant's entitlement to claim damages for the loss of Enodare must be open to doubt. That, however, is a matter for another day. The plaintiff denies the defendant's allegations in relation to Enodare and contends that the documentary evidence relied on by the defendant and exhibited in his affidavit grounding the consolidation motion does not support the defendant's claim in the manner alleged.

8. The plaintiff's claim, by contrast to the defendant's, is straightforward. He asserts that the Property is jointly owned by him and his brother. It is an investment property which has typically been let to tenants. Until recently, the defendant managed this investment and collected the rents but recently has failed to account for all of the rents. The plaintiff avers that his "*trust and confidence in the Defendant has irretrievably broken down and there can be no basis for our continued joint ownership of*" the Property. He seeks an order pursuant to section 31 of the Land and Conveyancing Act 2009, as amended, for the sale of the Property and the distribution of the proceeds. In his affidavit replying to the defendant's motion to consolidate, he makes clear his view that the net proceeds of sale should be distributed on a 50/50 basis.

### **Application to consolidate**

9. Order 49, rule 6 of the Rules provides as follows:

*6. Causes or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order.*

10. The parties are agreed that the applicable principles in an application to consolidate are as set out in the Supreme Court decision in *Duffy v News Group Newspapers Ltd* [1992] 2 IR 369 (at p. 376):

*“The legal principles are:—*

*(1) Is there a common question of law or fact of sufficient importance?*

*(2) Is there a substantial saving of expense or inconvenience?*

*(3) Is there a likelihood of confusion or miscarriage of justice?”*

**11.** It is clear that it is not sufficient to show that one of the three criteria are met to justify consolidating proceedings. In *JOC v GD, JOC v KW* [2017] IEHC 781, the High Court (Keane J) refused to consolidate proceedings notwithstanding the court’s conclusion that there was “*an obvious commonality of questions of fact*” and “*significant commonality of questions of law*” and “*no obvious likelihood of confusion or miscarriage of justice*” in the event of consolidation. There was, however, no basis for thinking that there would be a substantial saving of expense or inconvenience, rather it would likely further delay resolution of the proceedings. In those circumstances, the court refused to consolidate but did direct, in the exercise of the court’s inherent jurisdiction, that the cases should be heard at the same time.

**12.** It is apparent that in order to address the first of the questions posed in *Duffy*, a court must consider the questions of fact and/or law which may need to be resolved in each case in order to determine whether there is any question common to both proceedings. It is necessary, therefore, to consider the nature of each set of proceedings.

### **The plaintiff’s proceedings**

**13.** The plaintiff’s claim is for an order pursuant to section 31 of the Land and Conveyancing Act 2009, as amended.

**31.—** *(1) Any person having an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.*

*(2) An order under this section includes—*

*(a) an order for partition of the land amongst the co-owners,*

*(b) an order for the taking of an account of incumbrances affecting the land, if any, and the making of inquiries as to the respective priorities of any such incumbrances,*

*(c) an order for sale of the land and distribution of the proceeds of sale as the court directs,*

*(d) an order directing that accounting adjustments be made as between the co-owners,*

*(e) an order dispensing with consent to severance of a joint tenancy as required by section 30 where such consent is being unreasonably withheld,*

*(f) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.*

*(3) In dealing with an application for an order under subsection (1) the court may—*

*(a) make an order with or without conditions or other requirements attached to it, or*

*(b) dismiss the application without making any order, or*

*(c) combine more than one order under this section.*

*(4) In this section—*

*(a) “person having an estate or interest in land” includes a mortgagee or other secured creditor, a judgment mortgagee or a trustee,*

*(b) “accounting adjustments” include—*

*(i) payment of an occupation rent by a co-owner who has enjoyed, or is continuing to enjoy, occupation of the land to the exclusion of any other co-owner,*

*(ii) compensation to be paid by a co-owner to any other co-owner who has incurred disproportionate expenditure in respect of the land (including its repair or improvement),*

*(iii) contributions by a co-owner to disproportionate payments made by any other co-owner in respect of the land (including payments in respect of charges, rates, rents, taxes and other outgoings payable in respect of it),*

*(iv) redistribution of rents and profits received by a co-owner disproportionate to his or her interest in the land,*

*(v) any other adjustment necessary to achieve fairness between the co-owners.*

14. Wylie on *Irish Land Law* (6<sup>th</sup> ed., Bloomsbury Professional, 2020 at 8.42) sets out a number of guidelines as to how the discretion in section 31 should be exercised. Most, however, concern cases involving applications in relation to the family home or where partition and sale is sought by a judgment mortgagee in order to satisfy a judgment debt.

15. The author refers to one case concerning an application for partition of a commercial property, *Yippi Trading Ltd v Costello* [2013] IEHC 564, in support of his first guideline that courts will generally be “sympathetic” to section 31 applications subject to remaining mindful of the disadvantages and complications which may arise. That case involved shared ownership of a car park. Each co-owner also owned neighbouring developments, and disputes had arisen regarding use of the car park during the course of construction works by one co-owner. The other co-owner sought an order for partition. In refusing partition, Ryan J (as he then was) stated as follows:

*“The 2009 Act gives the court a wide discretion in cases of dispute to decide how best to reconcile the competing interests. Section 31 includes the power to refuse to make an order and dismiss the application outright. S-s.(3) permits the court to attach conditions to any order or to grant a combination of orders under s. 31. There is no guiding case law on this provision. There will undoubtedly be situations where there is little sense in keeping tenants in common tied in to a legal relationship which does not meet their needs and in which shared ownership of the property is no longer feasible. In such a scenario there is merit in the court making an order in favour of partition of the property in question. However, I do not feel that this case fits that category.*

...

*The benefits of severance of common ownership are clarity and simplicity and freedom to control one's own property without the need for third party consent. I think that a court will generally be sympathetic to an application under s.31. However, the disadvantages and complications of partition in the circumstances of this case outweigh*

*the gains that the plaintiff hopes will result. I would have come to that conclusion on balance without the car park agreement but when the 1980 deed is put into the equation the practical justice of retaining common ownership becomes even more clear.”*

16. There is no dispute in this case that the plaintiff has an interest in the Property and therefore is a person entitled to make an application in respect of the Property pursuant to section 31. The court hearing that application will, nonetheless, have a wide discretion in deciding whether to make the order for sale sought and, if making an order for sale, in deciding on the terms of that sale. Given the apparent breakdown in the relationship between the brothers, the benefits of severance of common ownership will likely render a court determining the application sympathetic to it. The court will, however, have to be mindful of any disadvantages or complications which may arise. An order for sale may involve less scope for complication than the order for partition sought in *Yippi Trading*. The court will, though, have to consider whether any injustice would arise by ordering the sale of the Property. Even if an order for sale is made, the court will have to consider the terms on which any sale takes place, the extent of each brother’s interest in the Property, including whether any accounting adjustment requires to be made in accordance with section 31(2)(d).

17. As the plaintiff points out, an application under section 31 is an application required to be commenced by special summons (see Order 72A, rule 2(1)(c) of the Rules) and is, in principle, capable of being dealt with on affidavit. However, in any proceedings commenced by special summons, a court retains the power to adjourn proceedings to plenary hearing on such terms as it considers appropriate (see Order 38, rule 9). The plaintiff accepts that the fact that each set of proceedings has been commenced by a different procedure is not, of itself, a barrier to consolidation.

### **The defendant’s proceedings**

18. It is more difficult to identify the questions which will need to be resolved in the defendant’s proceedings, notwithstanding the delivery of a statement of claim. As appears from the Statement of Claim, the defendant repeats his claim that the brothers had a unified investment strategy. However, there is no claim concerning the French property or, more

importantly, the Property the subject of these proceedings, both of which he expressly pleads were purchased as “*personal property (outside of the company)*”.

19. At part 3 of the Statement of Claim, the defendant alleges breaches by the plaintiff of his duties as a director of Enodare. He also claims that the defendant has misappropriated the intellectual property “*created within Enodare*” which he alleges the plaintiff has transferred to a competing company, established by him. He alleges that the plaintiff has engaged in oppressive and bullying tactics towards him and that his actions have caused Enodare financial harm. He alleges that his brother misused company funds.

20. Part 4 of the Statement of Claim is headed “Key Claims Against the Defendant”. It, in effect, summarises the allegations contained in part 3.

21. Leaving aside any question of whether the defendant can maintain an action for harm done to a company of which he is a shareholder, the proceedings as framed by him will require an examination of the lawfulness of the plaintiff’s conduct *qua* director of Enodare, and require consideration of the ownership of the intellectual property referred to in the defendant’s Statement of Claim.

## **The arguments**

22. The defendant contends that, applying the legal principles in *Duffy*, the two cases ought to be consolidated. Central to this argument is his contention that the brothers’ three investments were all part of a joint investment strategy and that, in effect, the dispute regarding one element of that joint strategy, the Property, should not be decoupled from the dispute regarding another element, Enodare. He says that there will be a saving in time and costs if all issues are dealt with together and there is unlikely to be confusion or a risk of a miscarriage of justice. On the contrary, he argues, deciding the cases separately may lead to such an outcome.

23. The plaintiff disputes that there was any joint investment strategy but contends that, in any event, each case throws up different factual and legal issues. He argues that his case, the first in time, can be disposed of summarily and at relatively little cost, but that if



consolidated with the defendant's case, the costs of those proceedings will increase significantly and an outcome will be hugely delayed. He says that consolidation will lead to confusion. To paraphrase his replying affidavit, he characterises the defendant as seeking to muddy the waters of what, in his view, is a straightforward case.

## **Discussion**

**24.** There are features of the cases, perhaps not encompassed by the principles in *Duffy*, which point in the direction of consolidation. The most obvious is the fact that the parties to the proceedings are the same in both cases. In addition, at least on one brother's argument, the subject matter of both proceedings are connected, in this case, as forming part of a joint investment strategy. There is a superficial attraction to the proposition that two brothers involved in two separate disputes about their joint investments should deal with all issues in one set of proceedings.

**25.** I am not persuaded that this would, as the plaintiff suggests, do him any great injustice. One notable feature of this application is that the plaintiff is legally represented in these proceedings but has entered an appearance in person in response to his brother's proceedings. He argues that he can't afford the financial burden of representation in his brother's case. He avers that if the proceedings were consolidated, he would have to withdraw this case to "*focus on the defence of the Defendant's action*". Quite why it would be necessary to withdraw his – on his argument – straightforward claim if it were consolidated with the defendant's claim is not at all clear. In any event, the plaintiff's objection is premised on the contention that his proceedings can be determined without the issues in the other proceedings having to be resolved. If that is not the case, then there is no "shortcut" to obtaining an order in these proceedings, which would have to be adjourned to plenary hearing whether or not they were consolidated with the defendant's proceedings.

**26.** The defendant's disputed contention that the brothers' three investments formed part of a joint investment strategy is not, however, sufficient to establish, at this juncture, that there are common questions of fact or law in the two sets of proceedings to warrant them being consolidated. Put otherwise, it is not clear that any of the issues in the defendant's

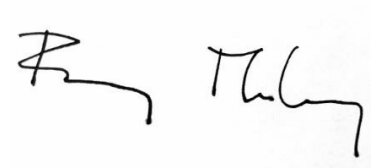
proceedings will have to be addressed, still less resolved for the purpose of determining the plaintiff's proceedings.

**27.** The resolution of the defendant's proceedings does not require any consideration of the ownership of the Property at all, save, potentially, in the most tangential of contexts. If the joint ownership of Enodare were to be disputed, which doesn't appear to be the case, it might be relevant for the defendant to show that the brothers jointly owned a number of assets as part of an overall strategy. But the manner in which the Property is owned and the question of whether it should be sold, doesn't appear to be relevant to any of the allegations of wrongdoing against the plaintiff in the defendant's proceedings.

**28.** Nor are the issues raised in the defendant's proceedings clearly relevant to the question of whether the plaintiff is entitled to seek an order under section 31, or whether, in the circumstances of the case, it is appropriate to make an order for sale. The shared ownership of the Property is not in dispute. Whether the parties should be required to continue with that common ownership may involve an assessment of the parties' conduct, but the Property can't be preserved as security for a separate claim by the defendant. The defendant appears to have a concern that the plaintiff is seeking to liquidate his share of one asset and will then dissipate any funds received so that they are not available to meet any claim for damages which the defendant may obtain in his proceedings. The defendant, however, is not entitled to require the plaintiff to hold on to his interest in the Property as security against a notional award of damages which the defendant may obtain. In effect, it appears that he wishes to obtain the benefit of a *mareva*-type order without making the appropriate application. That is not a basis for ordering consolidation.

**29.** I do not rule out the possibility that any court hearing the plaintiff's application pursuant to section 31 may consider it premature to determine that application by reference to issues raised by the defendant in his proceedings, or conclude that it is necessary to adjourn the application to plenary hearing. Even if an order for sale is made, it may be made on terms as to the distribution of the proceeds of sale which may be informed by the issues in the defendant's proceedings. However, at this stage, there is no basis for concluding that there is any benefit to consolidating the two sets of proceedings or, for that matter, directing that they be heard together.

**30.** In the circumstances, I refuse the order sought. I will list this matter in the Chancery Special Summons list on 9 December 2024 for the purpose of dealing with costs and fixing directions for the hearing of these proceedings.

A handwritten signature in black ink, appearing to be 'R. T. L.' or similar, written on a light-colored background.