THE HIGH COURT

[2016 No. 1434 P]

BETWEEN

GRAHAM BYRNE

PLAINTIFF

– AND –

ORLA JOHNSTON, t/a GRANGE CROSS MEDICAL CENTRE, FIONA MCGRATH, CIARA JOYCE

– AND –

LORCAN BIRTHISTLE

– AND –

LIAM DUFFY

– AND –

HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 30th June 2021.

SUMMARY

This is an unsuccessful application for an order of consolidation under Order 49(6) of the Rules of the Superior Courts 1986, as amended. This summary is part of the court's judgment.

1. This is an application by the first and second-named defendants to the within proceedings seeking an order under O.49(6) of the Rules of the Superior Courts 1986, as amended, for the consolidation of the above-entitled proceedings with proceedings entitled Bernadette McDonnell v. Orla Johnston t/a Grange Cross Medical Centre and Ors. 2016/1433P. All fatal injury cases are tragic but the death that underpins the within proceedings is particularly tragic, involving the death of a 26-year old mother of two young children; all affected have the court's condolences.

2. Order 49(6) provides simply that "*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*."

3. A solicitor for the first and second defendants has sworn the grounding affidavit sworn in support of the motion in which she avers, *inter alia*, as follows:

> "*B. CONSOLIDATION OF PROCEEDINGS*
>
> *13.* *I say that these two separate set*[s] *of proceedings issued under Record Number 2016 1434P and Record Number 2016 1433P arise from the same tragic index events, and there is significant overlap between these two cases. The First and Second Named Defendants have requested that these proceedings be consolidated to save costs for all parties.*

14. *I say that on 12th July 2018 this firm wrote to the plaintiff's solicitor requesting that they consolidate the two sets of proceeding in order to save on costs and expenses for all parties….*

15. *I say that on 31st January 2019 the plaintiff's solicitor wrote to this firm advising that they did not intend to consolidate the proceedings. They advised that the plaintiffs wished to consolidate their individual actions and that consolidation would not save costs or convenience. They advised that they would however be agreeable to listing the cases together….*

16. *I say that on 10th July 2020 this firm wrote to the plaintiff's solicitor again requesting that they consent to the consolidation of these proceedings and advising that these defendants did not agree with the points made by the plaintiffs. This firm noted that the plaintiffs appeared likely to proffer identical expert evidence from the same experts to address alleged breach of duty and causation. It was noted that each plaintiff appeared to have obtained a report from the same expert on their personal injuries, that the same counsel appeared to be involved in each case, and that there appeared to be no risk of confusion arising for the court from consolidation of these two sets of personal injury proceedings. This firm advised that keeping these cases separate would create unnecessary duplication, and that the costs of defending two sets of proceedings would be unnecessarily doubled for the separate groups, with a commensurate doubling of the exposure to awards of costs against each plaintiff should the court find against them. Finally this firm advised that the reasons proffered by the Plaintiffs for not wishing to consolidate the proceedings did not appear to meet the relevant tests, referred the plaintiffs to relevant and recent caselaw….*

17. *I say that on 13th July 2020 the plaintiff's solicitor wrote to this firm advising that the plaintiffs wished to maintain their individual cases. They advised that the injuries suffered by each plaintiff are individual, and as each consolidation in their view would not save costs.*

18. *I further say that this firm wrote to the solicitors for the plaintiff on 7th August 2020 seeking clarification, firstly, on the suggestion by the solicitors for the plaintiff in the letter dated 31st July 2020 that the cases would be heard simultaneously, and secondly, how it might be proposed that the issue of costs would be approached in such circumstances….*

19. *I say that this firm wrote to the solicitors for the plaintiff again on 9th September 2020 and 20th October 2020 seeking a response. I say that as of the date of swearing herein* [29th October 2020] *no acknowledgement or response has been received to any of these letters….*".

4. In a replying affidavit sworn by a solicitor for the plaintiff in the within proceedings, the solicitor avers, *inter alia*, as follows:

"*8.* *I say that although the within proceedings and those of the deceased's mother…have their origin in the tragic circumstances of the death of Laura McDonnell…and while the initial issue of law and fact to be determined in both cases is the same, concerning whether or not negligent acts or omissions on the part of the defendants caused the death of the deceased. I say that the remainder of the legal and factual issues to be determined in both proceedings are different and distinct and raise separate and distinct issues of law. I say that in all the circumstances, these cases are*

simply not cases in which the issue of consolidation would be appropriate, or in the interests of justice, or would lead to a significant saving of costs. I say that once the issue of liability for the death of the deceased is determined, and in the event the liability is established then each of the statutory dependents, including the plaintiff in the within action, are automatically entitled, pursuant to statute, to recover specific and well-defined heads of damages. I further say that the plaintiff has specifically brought a hybrid claim, comprised of the claim made pursuant to Part IV of the Civil Liability Act 1961 on its own behalf and on behalf of the statutory dependents, and, a claim for personal injuries sustained by him, mindful of the issue of legal costs and the importance of the efficient and appropriate use of the court's time….

9 *….I say that the plaintiff in the within proceedings will call evidence from* inter alia *quantum experts in childcare, and from an actuary, in support of the claim for special damages as advanced in the proceedings and I say that the necessity to call these experts, in addition to the liability experts in general practice, accident and emergency medicine, neurosurgery and psychiatry, cannot be avoided by consolidation of the within actions. I say that consolidation of the within actions could very well generate significant difficulty in respect of the identification of which of two plaintiffs might be responsible for what component of costs, if the cases were consolidated and either or both of the plaintiffs were unsuccessful. I say that should issues in respect of overlap of work done in the context of costs arise in respect of both actions, then these are matters that can be expertly dealt with in the realm of the taxation and adjudication of costs, and ought not to be a decisive factor*

in otherwise compelling unwilling and estranged plaintiffs to consolidate their separate and distinct actions.

10. *I say that in the event the plaintiff is successful in the hybrid claim, or in circumstances where the action was otherwise compromised between the parties, then given the minority of his children, the same would have to be approved by this Honourable Court, by way of infant ruling. In those circumstances I say that it would be inappropriate to order the consolidation of the within action with the separate and distinct action taken by the deceased's mother…which would unfairly fetter the deceased's mother in terms of the resolution of her action, in circumstances where neither the plaintiff in the within action or the deceased's mother, wish for either party to be privy to the course of the litigation in their individual actions.*

11. *I say that even if the issue of liability for the death of the deceased were to be established or determined in favour of the plaintiffs, both plaintiffs would still have additional hurdles to overcome in terms of the legal test that each must prove….Thus, while there are factual similarities in terms of the negligence alleged against the defendants and the circumstances of the death of the deceased, the application of the legal tests to the factual matrix and the expert of evidence arising for each individual plaintiff is separate and distinct….I also say that…it is intended that evidence will be adduced from each plaintiff's individual general practitioner. I further say that prior to the reciprocal exchange of witness schedules and expert reports it is premature for these defendants to make assumptions concerning the identity of experts or the manner in which the plaintiffs will each run their cases.*

12. *I say that the plaintiff in the within proceedings and the deceased's mother are not related to each other and I say they are not connected through marriage….I say that a number of months after the death of the deceased…the relationship between the plaintiff and the deceased's mother broke down completely, to the extent that neither party wishes to have any contact whatsoever with the other and cannot be in the same room….I say that in purely practical terms, if the matters were to be consolidated, it would present very considerable difficulties for your deponent in terms of attempting to consult with and advise the plaintiffs in respect of their individual claims, at the same time given the animosity that exists between the plaintiffs….*

13. *I say and believe and am advised by counsel that in all the circumstances, this…Court ought not to make an order to consolidate the within proceedings with those of the deceased's mother. I say and believe and am advised by counsel that the within action is a hybrid action, comprised of a personal injury claim and a claim pursuant to Part IV of the Civil Liability Act 1961, and that it raises separate and distinct factual and legal matters that are distinct from the personal injuries matter brought by the deceased's mother, I say and believe and am advised by counsel that in the particular circumstances of the case, and given the position with respect to the sad breakdown of the relationship between the plaintiffs in both actions, it would be unfair and unjust to compel both plaintiffs to consolidate their actions. I say that the court ought to balance the competing interests of the efficient running of litigation with the plaintiff's individual positions and distinct actions, in what is a tragic set of circumstances. I say and believe and am advised that the consolidation of the two actions will not*

> *lead to a real saving of costs or to the more efficient use of this…Court's time. I say that it would be in the interests of justice, and the proper, efficient and appropriate use of this…Court's time, and the reduction in costs, if both actions were to be listed together and dealt with consecutively by a judge of this…Court.*"

5. The law in this area has been addressed by this Court in its own judgment in *Murphy v. Croft Nursing Home Ltd* [2020] IEHC 65. In that judgment, the court observed, *inter alia*, as follows, at paras.5-6:

> "*5. The leading case on consolidation orders remains the judgment of McCarthy J., for the Supreme Court in* Duffy v. News Group Newspapers Ltd. *[1992] 2 IR 369, McCarthy J. observing as follows, at p. 376:*
>
> > "On behalf of both parties, counsel are agreed on the legal principles to be applied, citing a number of authorities….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?" ,
>
> *adding as to the common question point:*
>
> > 'This derives from a much quoted observation of *Scrutton L.J. in* Horwood v. Statesman Publishing Company *(1929) 45 T.L.R. 237*:

> ‘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’ ,

and noting as follows, at p. 379:

> ‘Whilst the wording of the relevant rule is…very wide, that does not mean that it is to be applied widely or that a heavy burden does not lie upon those who seek to join or consolidate actions. It is a matter of discretion but this Court is free to exercise its own discretion and in an application of this kind is in the same position as the High Court in doing so. I would not order the consolidation of the actions nor a joint trial of them. It does seem appropriate, however, to direct that the actions should be tried in succession and that the trials should be presided over by the same judge.’

6. In Duffy, *as here* [and as in the present case], *the application was brought pursuant to O.49. r.6, RSC.*”

6. This Court also made a number of observations at para.4 of its judgment in *Murphy*, some of which might usefully be quoted here:

"*(i)* *as to listing/hearing together, that is a different form of order to a consolidation order, and a key issue that presents is that when two cases are listed/heard together, two sets of High Court costs result, whereas the effect of an order of consolidation would, in the context just described, halve the legal costs presenting both in the defence of the proceedings (and the related exposure for the plaintiffs should they fail to succeed in their actions)*

[Court Note: It would not always follow that consolidation would necessarily halve costs; however, some reduction, even considerable reduction, in costs will likely often present. High Court costs are substantial and a saving in such costs, in terms of having one set of High Court costs, rather than two, is likely to be a factor that weighs heavily in any court's consideration of a consolidation application.]

(ii) *the court ultimately retains a discretion as to how to order costs at the end of the substantive proceedings...however, if the court intervenes at this point in time, provided it is satisfied that the* Duffy t*est, considered hereafter, is satisfied, that may have an effect in terms of the impetus and resolution of the proceedings (because all parties will have some certainty as to the likely costs presenting);*

...

(v) *a custom has arisen in practice whereby proceedings are issued separately in a fatal claim matter and a personal injuries claim is also brought; however, that is but a custom, and here the fatal injuries claim is really a special damages-type claim that does not create any confusion (there is an amount for solatium and an amount for*

expenses), with the result that by refusing consolidation the court would in effect be acceding to a separate set of High Court proceedings (and related costs) for what is essentially a related special damages-type claim.

(vi) *the defendants are entitled to seek the consolidation order now being sought under the Rules of the Superior Courts, rather than having to wait for two sets of costs to present.*

(vii) *as to the point that the plaintiffs want to sue separately and ought to be allowed to proceed as they, in their discretion, want, that: (a) forms no part of the test in* Duffy *(considered below), (b) would allow the obstructive free licence to be obstructive (this is by way of general point: the court makes no suggestion, nor should its words be construed to suggest, that Ms. Murphy and/or her brother have at any time sought to be obstructive), and (c) would seem to fly in the face of O.49, r.6, RSC which states that a consolidation order may be made* 'whether or not all the parties consent to that order'".

[Court Note: Here, the court notes, there has, regrettably, been a complete falling out between the prospective plaintiffs to the consolidated proceedings. The solicitor for Mr Graham has averred that "*in purely practical terms, if the matters were to be consolidated, it would present very considerable difficulties for your deponent in terms of attempting to consult with and advise the plaintiffs in respect of their individual claims, at the same time*". The court returns to this aspect later below; however, it would note that "*very considerable difficulties*" do not equate to insurmountable difficulties.]

7. The court notes the contention made by counsel for the plaintiff that the potentially large savings inherent in there being one set of High Court costs, rather than two, post-consolidation, would mean that a party opposing consolidation would always, if the court might use a colloquialism, 'come a cropper', under the second question posited in *Duffy*. However, it seems to the court to be important to recall in this regard that the Supreme Court in *Duffy* does not identify the type of 'tick-box' test that might apply if, for example, a court was bringing to bear whether a person did or did not meet prescribed statutory criteria. Rather the Supreme Court posits three questions that a court should ask itself, with the deciding judge ultimately having a discretion (clearly adverted to by McCarthy J. in *Duffy*) to decide how best to proceed having addressed those three questions. Sometimes the answers to the three *Duffy* questions may so clearly point in one direction that the discretion presenting, though it presents, is not so great as it would be in a case where matters are more finely balanced. But, just to take an extreme example, and it does not present here, it is perfectly feasible that a "*substantial saving of expense*" could be perceived to present and an application for consolidation would still fail because, for example, the judge before whom the said application was made perceived there to be a likelihood that there would be a miscarriage of justice if s/he was to order consolidation. Given the current scale of High Court costs it is difficult to see that potential savings arising from having one set of High Court proceedings rather than two is likely to weigh heavily in a consideration of whether or not to consolidate. Even so, there will doubtless be cases, perhaps many cases (and this is such a case) where, having considered the three questions posited in *Duffy*, a court in the application of its discretion (and in the face of potential savings of cost) nonetheless considers that cumulatively the various factors presenting militate against consolidation.

8. Turning then to the three questions raised in *Duffy* and applying them to the case at hand:

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

9. It is conceded that there is a lot of overlap between the would-be consolidated proceedings, with all the claims arising ultimately from the same fatal injury.

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

a. Expedition in Proceedings

10. A notable factor to be borne in mind when it comes to this question is the need for the swiftest despatch of proceedings consistent with, and pursuant to, the requirements of justice. In this regard, the court notes that when the fatal injury occurred in this case, the two young children of the unfortunate lady who died were respectively aged 2 years and 7 years; they are now aged 10 years and 14 years, so a *lot* of time has passed and, if not yet quite of *Jarndyce*-ean proportions, these proceedings need to come on for hearing as expeditiously as possible consistent with the diktats of justice. So, while there likely would be some saving in expense, there would be heightened inconvenience in the addition of still further delay to proceedings that have been and are taking quite some time to come on.

b. Late Stage of Proceedings

11. A further factor to be borne in mind by the court when addressing the second of the three questions in *Duffy* is the stage that the proceedings have reached. These proceedings relate to a death in 2014, they were instituted in 2016, the pleadings have closed, the defence was delivered in May 2019 and we are now nearing the end of the Trinity Term of 2021, with the plaintiff apparently ready to serve notice of trial. The court makes no criticism of any of the parties that the chronology is so; however, as a matter of historical fact, the chronology is so. As counsel for the plaintiff put matters, the lateness in the bringing of a consolidation application has been "*the rock on which a number of parties have floundered*" when it comes to such applications (see, for example, *Lismore Homes Ltd v. Bank of Ireland Finance Ltd* [2006] IEHC 212, albeit that there the proceedings were especially protracted). Adding consolidation into the mix at the late stage which these proceedings have reached seems likely to do more harm than good. (It may assist for the court to note its recollection is that in *Murphy* the application came on at a relatively early stage and that there are significant savings to be made through early consolidation, given that one can, for example, pre-empt unnecessary duplication of motions; here such savings could have been made if the motion for consolidation issued and was heard at an early stage in the proceedings but in fact it only issued in late-2020).

c. Breakdown in Relations Between the Parties

12. Here there has, regrettably, been a complete breakdown in the relationship between the plaintiff and the family of his late partner. That obviously presents real, though not

insurmountable, difficulties for a legal team in terms of taking instructions, giving advice, and just the usual ongoing liaison with the parties if the respective actions were now to be consolidated. A court cannot be blind to this practical reality, though conversely courts cannot be expected to countenance non-consolidation of proceedings just because two or more plaintiffs find it hard to be amicable towards each other. Were this the only factor presenting in these proceedings as a reason for not consolidating the actions, the court might well have taken the view that (i) the plaintiffs to the consolidated action would just have to get along for the currency of the proceedings as it is not fair that a defendant should be exposed to the additional costs of separate High Court proceedings just because plaintiffs entertain some degree of acrimony towards each other, and (ii) that their lawyers could and would have to structure matters so as to deal with challenges, but not insurmountable challenges, posed by such acrimony. In other words, as a reason for not consolidating proceedings, the fact that there is a degree of personal acrimony between plaintiffs seems a fairly weak factor in and of itself. In life we all have sometimes to do things we do not like, to deal with people whom we would prefer not to have to deal with, and to 'get along' for a time with others when the wider reality is that we just do not 'get along'. However, in this case, when viewed with the other factors arising, the acrimony presenting between the would-be plaintiffs to the consolidated proceedings buttresses the court in its separately arising sense that this is not a case for consolidation.

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

13. The court does not see that confusion would present if there was consolidation, or that any miscarriage of justice would be likely to result therefrom – though it would but reiterate the old adage that 'justice delayed is justice denied'. Here, to engineer into already protracted proceedings still-further delay through the requested consolidation cannot, to the court's mind be seen to be consistent with justice.

Conclusion

14. For the reasons stated above, the court respectfully declines to grant the order of consolidation sought. However, given the heavy overlap between the separate non-consolidated proceedings, the court will order that they be listed together so that they are heard by the same

trial judge who will be able to order matters so that they proceed as expeditiously and economically as possible.

15. In passing, the court notes, as adverted to in *Murphy*, that there is no rule that there cannot be consolidation of a nervous shock claim and a fatal injuries claim. It may be, as counsel for the plaintiff observed at the hearing of this application, that "*It has previously been the standard practice for a very long time that* [such actions]…*are dealt with by linkage rather than consolidation*". But legal tests are legal tests, and the posited standard practice is not the legal test for whether or not to consolidate (and just because something may be or have been standard practice it does not follow that it ought to have been, be, or remain, standard practice). The legal test for whether or not to consolidate is the test as identified by the Supreme Court in *Duffy*; and one succeeds or fails in an application for consolidation following on a consideration by the court before which such application is made of the three questions posited in *Duffy*, not by reference to the posited (or any other) standard practice.

16. As this judgment is being delivered remotely, the court should perhaps indicate that it is minded, given that the applicants to the motion have failed in their application, to order costs against them. If any of the parties object to the court so proceeding, they should advise the registrar or the court's judicial assistant within 14 days of the date of delivery of this judgment and the court will thereafter schedule a brief costs hearing.