

THE HIGH COURT

[2021] IEHC 9
[2015/1766P]

BETWEEN

FERGUS SLATTERY

PLAINTIFF

AND

GERARD MCCOY

DEFENDANT

JUDGMENT of Ms. Justice Butler delivered on the 14th day of January, 2021

1. This is an application brought by the defendant's wife to be joined to these proceedings as a co-defendant or otherwise as a party in such capacity as the court directs. Although ostensibly a straightforward procedural application, because the application has been made after the plaintiff obtained judgment in default of appearance against the defendant, it gives rise to difficult conceptual issues as regards the nature and status of that judgment and the extent to which the issues raised in the plaintiff's claim can be revisited at the instigation of another party whilst the judgment remains in being.
2. The background to this application is complex and has given rise to six sets of legal proceedings between these parties and the financial institution which is now responsible for the loan central to the issues between the parties. The plaintiff and the defendant, both of whom are businessmen, entered into a partnership at some time in the mid-2000s. In 2006 the partnership purchased a premises known as Owenstown House in County Dublin with a view to carrying out a redevelopment of the property. The purchase was funded or part-funded by a loan from Ulster Bank. The precise details of the loan, the security provided and the contributions made by the partners to the balance of the purchase monies are not entirely clear from the papers. Unfortunately, what is clear is that the timing of the purchase was not propitious. The intended redevelopment and with it the partner's ability to repay the Ulster Bank loan stalled in the recession which devastated the Irish economy and, in particular, the property sector from 2008.
3. The loan was for an amount of €686,500 and four separate securities were provided for it. These were a mortgage over Owenstown House itself, a life assurance policy, the deposit of title deeds to a property owned by the plaintiff and a legal charge over what is described in the plaintiff's proceedings as "a site with planning permission at Taney Park... the property of the defendant". The papers before the court do not indicate what the total purchase price for Owenstown House was but it seems that in addition to the loan the parties also made direct contributions to that purchase price.
4. The history of the property at Taney Park is relevant to the issues the court has to decide on this application. According to the applicant, herself and her husband sold their family home and purchased a relatively large site at Taney Park in 1999. This purchase was registered in the sole name of her husband. They constructed what is now their family home, known as Dael Lodge, on part of that site. The applicant describes this house as having "a large garden and potential for the construction of an additional house." The property is comprised within Folio 114644F of the Register for County Dublin which shows

that the Folio was created by the amalgamation of plans from two different folios in 1996. It was then transferred by the original owner to the defendant in 1999. Significantly, the two plans which comprise the Folio are separately identified as "plan(s) 54, BN8MH" and "plans: 55". Thereafter the various charges registered on the Folio distinguish between those which affect the entire of the Folio and those which affect only plan BN8MH.

5. In his proceedings the plaintiff defines the "Taney Park premises" as being a site with planning permission at Taney Park, the property of the defendant. The *lis pendens* registered by the plaintiff on 20th April, 2015 relates only to the part of the property shown as plan BN8MH. Therefore, it seems that the property comprised within Folio 114644F comprises two distinct sites for planning purposes, one of which was developed as Dael Lodge and the other of which remains undeveloped but which was granted planning permission, presumably for the erection of a second house, in 2005 and later again in 2010 and 2015. The lands in plan BN8MH are this development site. As the site remains undeveloped it appears to be used functionally as part of the garden of Dael Lodge. Unfortunately, no details of the planning permissions have been put before the court despite their potential relevance to certain of the arguments made by the applicant regarding the status of the entire folio as her family home.
6. As mentioned above, there are now multiple sets of proceedings in being arising out of the partnership between the plaintiff and the defendant most of which concern the attempts by the successor-in-title to Ulster Bank (Promontoria (Oyster) DAC – "Promontoria") to enforce its security in order to recover the loan in respect of this and possibly other transactions. Two sets of proceedings are relevant to this application. On the 4th March, 2015 the plaintiff issued these proceedings against the defendant seeking to recover the sum of €160,000 and seeking a declaration to the effect that the plaintiff holds an equitable interest in the Taney Park premises and a well charging order in respect of that interest. On 20th April, 2015 the plaintiff registered a *lis pendens* over the Taney Park premises in respect of the proceedings. The defendant did not enter an appearance to the proceedings and on 7th December, 2015 the High Court (Gilligan J.) granted the plaintiff judgment in default of appearance and adjourned the assessment of damages. The plaintiff served a notice for trial on 4th May, 2016 and the matter was listed for hearing before judge Heneghan on 7th November, 2016. In the event the matter did not proceed, the judge who was assigned to hear it having retired shortly before the scheduled hearing date.
7. Meanwhile, the applicant has averred in separate proceedings that when she learnt of her husband's financial difficulties and of the plaintiff's claim she "demanded" that her husband "transfer Dael Lodge and the site" into their joint names. The transfer to this effect was executed on 18th September, 2015 and registered on Folio 114644F on 17th November, 2015. The plaintiff's motion for judgment had issued prior to this latter date on 7th November 2015. Despite the transfer being prompted by the plaintiff's proceedings, it seems that neither the applicant nor her husband, the defendant, brought it to the attention of the plaintiff. Therefore, the plaintiff proceeded with his application for judgment in default of appearance on 7th December, 2015 without any actual

knowledge of the applicant's interest in the property although of course the plaintiff relies on the conclusive nature of the registration of her title some weeks earlier. Equally, notwithstanding the registration of the plaintiff's title, she had not sought to be joined as a party to the proceedings before the date on which judgment was sought in December, 2015.

8. Instead, on 10th May, 2018 the applicant issued separate proceedings against the plaintiff (Record No. 2018/4158P) in which she sought an order pursuant to s. 123 of the Land and Conveyancing Law Reform Act 2009 vacating the *lis pendens* which the plaintiff had registered over plan BN8MH, or alternatively, an order directing the plaintiff to apply to vacate the *lis pendens* and damages for negligence and slander of title. Those proceedings were prompted by the fact that the applicant and the defendant had secured a purchaser for the development site and had reached agreement with Promontoria as to the partition of the applicant's interest from that of her husband. The existence of the *lis pendens* prevented that sale from being concluded. An interlocutory motion seeking to have the *lis pendens* vacated was brought in those proceedings on 2nd July, 2018 but was refused by O'Connor J. on 31st October, 2018 in an *ex tempore* ruling. Much of the background information available to the court as to the relations between the parties comes from the affidavits sworn in the *lis pendens* proceedings.
9. A number of additional allegations and counter-allegations have been added by the parties to this already complex mix. The applicant contends that her husband has been mentally unwell since 2013 and thus was unable to defend the plaintiff's proceedings. There is no medical evidence before the court as to the state of the defendant's health at any relevant time and the defendant himself has not confirmed his wife's statement. Indeed, the applicant has been deliberately vague as to the state of relations between herself and her husband. The plaintiff disputes the validity of the September 2015 transfer – asking not unreasonably how the applicant can say that the defendant was incapacitated so as to be unable to defend the plaintiff's proceedings but at the same time had sufficient capacity to execute a transfer of property to her. The plaintiff also challenges the *bona fides* of the transfer of the property into the joint names of the applicant and defendant in circumstances where the defendant was heavily indebted and the applicant was on notice of his indebtedness. Issues are raised about the effect of this transaction not just on the interest claimed by the plaintiff in these proceedings but because the non-availability of the share of the property now claimed by the applicant has a consequent impact on the extent of the plaintiff's potential liability on foot of the loan since the security provided by the defendant is necessarily reduced. Issues are also raised by the plaintiff as against both the defendant and the Ulster Bank in relation to the alleged subsequent charging of the same property as security for the defendant's other indebtedness to Ulster Bank which had a similar effect of reducing the security available in respect of the joint indebtedness of the plaintiff and the defendant.
10. The applicant contends that the entire transaction in respect of the Taney Park premises as claimed by the plaintiff was in breach of her rights under the Family Home Protection Act 1976 and, consequently, was void pursuant to s. 3 of that Act. The plaintiff disputes

the applicability of the Family Home Protection Act on the basis that the definition of “dwelling” under s. 2(2) of that Act, whilst including a garden usually occupied with the dwelling, excludes lands being developed for commercial purposes. Therefore, the status of the site comprised within plan BN8MH either as a garden occupied with the dwelling house or as land being developed for commercial purposes is very much in issue between the parties.

11. It does not fall to the court to determine all of these matters on foot of this application but it is relevant to note the extent of the fundamental disagreement between the applicant and the plaintiff both as to the transaction concerning the Taney Park premises and as to the proceedings concerning that transaction, albeit that none of these issues have been raised by the defendant to these proceedings. The issue before the court now is whether the applicant should be joined to the proceedings as a co-defendant, presumably for the purpose of ensuring that all of these issues are ventilated before final orders are made. In this regard it is also relevant to note that an application by the plaintiff that all six sets of proceedings be consolidated was opposed by Promontoria and instead an order was made on consent of all parties that the proceedings be linked and heard in an agreed sequence. As the applicant is already a party to two of the six sets of proceedings, had the proceedings been consolidated she would have been entitled to be heard on all issues including those arising between the plaintiff and the defendant. Instead, the agreed sequencing of the cases means that these proceedings will be heard before any of those to which she is a party but, because the proceedings are linked, presumably judgment will not be delivered in the earlier cases until the later cases have also been heard.
12. The applicant issued this motion to be joined to the proceedings as a co-defendant on 19th December, 2019. The application is brought pursuant to O. 15, r. 13 of the Rules of the Superior Courts which provides as follows:

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. ... Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party”.

13. The application appears to have been prompted by a plea in the plaintiff's defence to the *lis pendens* proceedings that the applicant was aware of these proceedings but had not sought to be joined in them before judgment had been secured by the plaintiff.

14. The applicant relies on two judgments, namely *Barlow v. Fanning* [2002] 2 IR 593 and *Fincoriz SAS Di Bruno Tassan Din v. Ansbacher* [1987] IEHC 19. In the former case, Keane C.J. cited with approval a passage from the 4th Edition of Halsbury's Laws of England dealing with potential exceptions from the general rule that a person who institutes civil proceedings is entitled to choose those against whom they wish to pursue their claim: -

"A person having no legal but only a commercial interest in the outcome of the litigation between the plaintiff and the original defendant cannot be added as a party either for the convenience of the court or otherwise. On the other hand, a person may be added as a defendant, either on his own application or the application of the defendant, where his proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially, by any order which may be made in the action, or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly".

15. There is no question of the applicant being made liable to satisfy the plaintiff's judgment but there is now an issue as to whether her proprietary or pecuniary rights might be affected by the proceedings. I use the word "now" deliberately as it is apparent from the facts outlined above that the plaintiff would have had no reason to suppose the applicant's proprietary or pecuniary rights would be affected at the time of the proceedings were instituted, at the time the *lis pendens* was registered or when the motion for judgment was issued and he was not made aware by the applicant or by the defendant of the transfer of the property into their joint names prior to judgment being obtained.

16. Further, in *Barlow v Fanning* Keane C.J. endorsed the judgment of Lynch J. in *Fincoriz SAS* in which he held that there must be some exceptional circumstances to justify the joinder of a person as a defendant against the wishes of a plaintiff. Lynch J. had expanded upon this theme as follows: -

"The exceptional circumstances must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance or alternatively even if it was not unreasonable that they were not joined as defendants by the plaintiff in the first instance it is shown at the time of the application to the court to join them that their presence before the court will as a matter of probability be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the cause or matter".

17. These authorities are relied upon by the applicant to support the proposition that as her proprietary and pecuniary rights are affected by the litigation, she should be joined

thereto either because this amounts to exceptional circumstances or, more generally, in the interests of justice. The applicant's argument does not address the effect her joinder to the proceedings would have on the judgment already obtained by the plaintiff. Indeed, her position on this point is trenchant. She contends that she does not have to apply to have that judgment set aside, describing it as no more than a "process order" which allows the plaintiff to proceed with the action on an undefended basis. At the same time, she makes it quite clear that if joined to the proceedings it is her intention to defend them in full which would of course deprive the judgment of even the limited effect she ascribes to it. Further, it is clear that if joined to the proceedings, the applicant does not intend to confine her arguments to the appropriateness of final orders being made which would directly impact on her interest in the property but also challenges the terms of the agreement between the plaintiff and the defendant and disputes the validity of the same in the absence of a note or memorandum under the Statute of Frauds. These latter arguments were open to the defendant who chose not to raise them when he failed to engage with the proceedings and to that extent it seems that in effect the applicant now wishes to substitute herself for her husband so that these arguments can be made. Indeed, whilst the argument relating to the Statute of Frauds is one which, by definition, depends on the existence or non-existence of documentary evidence, as the applicant was not a party to the agreement between the plaintiff and the defendant the only way she can advance the other argument is by calling the defendant to give evidence impugning the plaintiff's characterisation of that agreement despite the fact that he has not disputed the terms of the agreement as pleaded by the plaintiff. The applicant contends that the arguments are sufficiently important to justify her joinder at this stage.

18. The applicant also asserted in oral argument that the plaintiff was at fault for not telling Gilligan J. that she was a co-owner of the property at the time judgment was obtained. In my view no such fault can be ascribed to the plaintiff in circumstances where there is no evidence before the court that he was aware of this change in the registered ownership at the time judgment was obtained. Strikingly, although the transfer of the property by the defendant into the joint names of himself and the applicant was prompted by the applicant's concerns arising from the plaintiff's claim (thus indicating that she was aware of the proceedings), she did not notify the plaintiff of the steps which she had taken in conjunction with her husband and which were potentially relevant to the plaintiff's claim.
19. The plaintiff disputes the entitlement of the applicant to be joined to the proceedings on two main grounds. The first is that as a matter of principle, a party should not be joined as a co-defendant to proceedings after judgment has been granted and the only live issue remaining in the proceedings is the remedy to be awarded. Further, not only is there no application on the part of the applicant to set aside the judgment, the circumstances in which this can be done by a person who is not a party to the proceedings are necessarily limited. The existing case law on the point concerns circumstances of suggested fraud or collusion, neither of which apply to the plaintiff in the current proceedings. However, the plaintiff's primary argument is that the applicant should be required to apply to have the judgment set aside before her joinder to the proceedings can be considered as an ancillary issue.

20. The second objection advanced by the plaintiff is that the applicant's real intention in seeking to join the proceedings is to set aside the *lis pendens*. As an application to have the *lis pendens* vacated has been made and refused by O'Connor J., it is contended that this application amounts to a collateral attack on O'Connor J.'s judgment.
21. In addition to these two principal arguments the plaintiff also raises a number of more factually based arguments. Firstly, it is disputed that the site to which the proceedings and the *lis pendens* relate form part of the applicant's family home. Although both sides' positions are dependent on whether the site is or is not part of the family home, the issue itself is not one properly before the court on the current application and nor does the court have the evidence necessary to determine it. At most, all the court can say is there was a reasonable basis for the plaintiff not to regard the site as part of the family home due both to the defendant's treatment of it as security for commercial lending and the fact that planning permission was granted for development, apparently unrelated to the family home, in 2005, 2010, and 2015. Consequently, regardless of what might ultimately be determined to be the legal position, I do not accept that the plaintiff should have been aware that what was presented to him as a development site was in fact part of the defendant's family home. It is relevant in this regard that the applicant felt it necessary to procure the transfer of the property into joint names although the benefit of the Family Home Protection Act 1976 is not dependant on the property being in joint names. If the development site is part of a family home, the transfer was not necessary to ensure that the statutory protections applied to it.
22. The resolution of this issue is also potentially relevant to the related question of whether the transfer by the defendant of the property comprised in Folio 114644 F into the joint names of himself and the applicant at a time when he was insolvent was a fraudulent transaction. The plaintiff contends that this transfer was undertaken with the intention of the defendant avoiding his lawful obligations to the Ulster Bank/Promontoria and to the plaintiff. The applicant on the other hand states that it did no more than give legal recognition to the equitable interest she already held in her family home. The *bona fides* of the transfer insofar as it relates to the development site may well depend on the extent to which the site is properly characterised as part of the applicant's family home. Despite the fact that these issues remain seriously in dispute between the parties, the applicant has made this application on the basis that the property to which the plaintiff's proceedings relate comprise part of her family home both as a matter of law and a matter of fact. The extent to which this can be assumed to be correct in an application where the applicant bears the onus of proving as a matter of probability that the order she seeks should be made is open to question.
23. Finally, the plaintiff points to the fact that this case is now part of a complex set of multiple proceedings arising out of the same commercial relationship which have been linked by order of the High Court and which will be heard consecutively. The applicant already has proceedings in being against the plaintiff which are part of this linked set of proceedings and is a co-defendant with her husband in another set of proceedings brought by Promontoria. The plaintiff acknowledges that the applicant should be entitled

to address her claimed interest in the property but asserts that she can do so through the other proceedings in which the issue is raised and which will be heard alongside these proceedings.

Collateral attack on refusal to vacate *lis pendens*?

24. A significant proportion of the argument before the court was directed at the status of the *lis pendens* registered by the plaintiff over the property prior to seeking judgment. The applicant feels very strongly that the *lis pendens* should never have been registered and has instituted separate proceedings seeking to have it vacated. Undoubtedly, the existence of the *lis pendens* has impacted negatively on the applicant's ability to deal with the property of which she is now a registered co-owner. Many academic commentators have commented on the contrast between the ease with which a *lis pendens* can be registered and the difficulty in having it vacated and indeed the applicant was unsuccessful in an interlocutory application to have the *lis pendens* vacated. Unfortunately, at this stage the parties were unable to agree the basis upon which that application was refused by O'Connor J. and whether the refusal of the interlocutory application renders the applicant's application for the same relief in the substantive proceedings *res judicata*.
25. In my view the focus of the parties on the *lis pendens* for the purposes of this application is misplaced. In principle, a *lis pendens* means no more than there is litigation in being capable of affecting a title to property and the registration of a *lis pendens* serves to put a prospective purchaser on notice of the litigation so that any subsequent decision of a court in the proceedings binds the purchaser. The practical effect of registration of a *lis pendens* is undoubtedly to constrain the owner of land in dealing with their property as the uncertainty thereby created will likely deter any interested purchaser. However, the registration of a *lis pendens* does not of itself affect any change to the underlying title to the property to which it relates. That remains to be determined in the proceedings in respect of which the *lis pendens* has been registered.
26. There are now two separate mechanisms through which a *lis pendens* can be registered and there is some lack of clarity as to the precise relationship between them. Firstly, a *lis pendens* is capable of being registered as a burden against registered title under s. 69(1)(i) of the Registration of Title Act 1964. In addition, under s. 121 of the Land and Conveyancing Law Reform Act 2009 a register of *lis pendens* affecting land is maintained in the Central Office of the High Court. A *lis pendens* may be entered in this register in relation to both registered and unregistered land and, consequently, such registration is in addition and parallel to the registration of a *lis pendens* as a burden against unregistered title. The plaintiff in this case has certainly registered a *lis pendens* on the defendant's title under the 1964 Act. It is not clear from the papers whether he has also registered a *lis pendens* under the 2009 Act or indeed whether that happens automatically when it is registered under the 1964 Act. However, one of the many issues on which the parties disagree is whether s. 123 of the 2009 Act now represents the sole basis upon which a person can seek to vacate a *lis pendens* either generally or more

specifically where that *lis pendens* has been registered as a burden on the Folio under the 1964 Act.

27. From the applicant's perspective, vacation of the *lis pendens* would allow her greater freedom in giving effect to the proposed sale of the site. It would not, however, resolve the underlying question as to whether she has title to do so in circumstances where, notwithstanding the registration of the transfer of the property into joint names, the plaintiff disputes the validity of that transaction. The court in this application cannot embark upon a consideration of whether the applicant's proceedings seeking to vacate the *lis pendens* are *res judicata* by virtue of the interlocutory application in that regard having been refused. It is also not appropriate for the court to consider whether an application to vacate the *lis pendens* could now be made by the applicant on any basis other than s. 123(b)(ii) of the 2009 Act. Of course, if and when the plaintiff's proceedings against the defendant are concluded, the *lis pendens* registered in respect of those proceedings will necessarily fall to be vacated.
28. Regardless of the benefit the *lis pendens* provides to the plaintiff, I find it difficult to understand his argument that by seeking to be joined to these proceedings, the applicant is launching a collateral attack on O'Connor J's refusal to vacate the *lis pendens*. The joinder of the applicant as a co-defendant would not of itself serve to vacate the *lis pendens*. Strictly speaking the *lis pendens* does not affect the applicant's claimed interest in the development since it is expressed to affect the "*interest of Gerald McCoy in the part of the property shown as plan no. BN8MH*", although the very existence of the *lis pendens* is likely to deter most intending purchasers. Equally of course the joinder of the applicant as a co-defendant would not prevent the plaintiff from disputing the validity of the transfer through which she claims her interest in the property. I accept that there is an issue between the parties as to the status of the *lis pendens* proceedings in light of O'Connor J's order, but it does not seem to me that any order I might make on foot of this application would impermissibly impinge upon the order which O'Connor J has already made or prejudge the outcome of the substantive *lis pendens* proceedings.

Discussion

29. The crux of the legal issue the court has to decide is whether the applicant should be joined as a co-defendant to the plaintiff's proceedings against her husband in circumstances where the plaintiff has already been granted judgment in default of appearance and no application is made by the applicant to set that judgment aside. Bound up in this issue are a number of discrete elements which I propose to consider separately before returning to the central issue.
30. Firstly, as the applicant contends, notwithstanding the general rule that a plaintiff is entitled to choose the defendants whom he wishes to sue, O. 15, r. 13 confers upon the court a power to add a person as a co-defendant against the will of a plaintiff (*see Barlow v. Fanning* [2002] 2 IR 593). Generally, this will arise where the person seeking to be joined has proprietary or pecuniary rights which are potentially affected by the outcome of the proceedings. For example, there is a line of case law most recently considered by MacGrath J in *Quatja v Badila and Axa Insurance* [2018] IEHC 202 dealing with the

position of insurers in road traffic cases. Insurers are nominally strangers to the litigation between plaintiff and defendant but, by virtue of the contractual relationship between the insurer and the defendant and the statutory obligation on the insurer to meet any judgment in favour of the plaintiff, they are directly interested in and potentially adversely affected by any judgment awarded against the insured defendant in the plaintiff's favour. Consequently, in circumstances such as those in *Quatja* where the evidence strongly suggested collusion between the plaintiff and defendant in stage-managing the accident, it was appropriate not just to join the insurer as a co-defendant but also to set aside the judgment subsequently obtained by the plaintiff against the original defendant in default of appearance. The emphasis in the case law is on the impact of the litigation on a person's legal rights and not merely their commercial or other interests or any general connection they may have with the subject matter of the litigation (see Ryan J. in *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2014] IEHC 78, approving Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 QB 357).

31. Further, the exercise of this power requires that the court be satisfied that there are exceptional circumstances which justify forcing a plaintiff to litigate against a defendant not of his choosing. Presumably, the categories of exceptional circumstances which might be relied on are not closed but the courts have drawn from O. 15, r. 13 two categories of cases in which they are most likely to arise. These include cases where the party seeking to be joined ought to have been added as a defendant at the outset, implicitly suggesting some misjudgement if not actual impropriety on the part of the plaintiff in choosing not to do so. More generally, the courts have accepted that where the presence of a party will "as a matter of probability be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the course of a matter" then that party should be joined. Although the judgment of Lynch J. in *Fincoriz SAS Di Bruno Tassan Din v. Ansbacher* [1987] IEHC 19 (Unreported, 20th March 1987) is cited by the applicant as authority for this proposition, in fact the language used in the extract quoted above is taken directly from O. 15, r. 13 itself. What Lynch J. added to our understanding of the rule is firstly that the necessity to be joined to the proceedings is to be assessed "at the time of the application to the court to join them" and not necessarily at the time the proceedings were instituted and, secondly, that the test in the rule is to be satisfied "as a matter of probability".
32. There may be a significant overlap between the potential applicability of these two categories in any individual case, as is evident in the decision of Ryan J. in *Persona Digital Telephony v. Minister for Public Enterprise* [2014] IEHC 78. That case was one in a series of cases taken by entities which had been unsuccessful in a public competition for the award of a mobile phone licence by the Minister. The proceedings alleged a conspiracy between the entity which had succeeded in the competition and the Minister and the payment of bribes to the Minister. These allegations had also been the subject of investigation by a Tribunal of Inquiry. Notwithstanding the allegation of conspiracy, the plaintiff made a deliberate tactical choice not to sue either the principal of the successful entity or the politician who held office as Minister at the material time. On the application of the State defendants these persons were joined as third parties to the proceedings.

One of the third parties, the principal of the successful entity, then sought to be joined as a co-defendant, an application to which the State defendants consented but to which the plaintiff objected.

33. Ryan J. identified the fundamental question before him as being: -

“ . . . what is the just procedural decision in the circumstances of the case?”

This focus on procedural justice is evident in his subsequent analysis of what he described as the practically unique position of the third party in unique litigation. In considering that position, he stated as follows: -

“There is no question about his centrality to the fundamental issues. It is impossible to think that the actions could proceed to a conclusion in which all the questions involved would be effectually and completely decided without his being a leading participant. It is equally difficult to conceive how his interests, whether legal, proprietary or as to good name will not be materially affected by the outcome of the litigation . . .

There is considerable force in the argument that Mr. O'Brien ought to have been joined as a defendant in this case because he is alleged by the plaintiffs to have conspired with the Minister to achieve a corrupt outcome of the licence competition. It is true that he is not named, but he is implicitly identified. Although it is permissible to plead a conspiracy between some named persons and persons unknown, I do not know of any practice that permits a conspiracy to be alleged against persons known to the pleader without actually naming them.

If Mr. O'Brien is not joined as a defendant and is left to stand by as the plaintiffs' claim is presented against the State defendants only, he and the Court will be observing a drama unfold in which he is the central participant but without any entitlement to intervene. The case alleging misconduct of the most serious nature will proceed without any involvement of the person alleged to be the major wrongdoer....

It is clear that there must be very exceptional circumstances before the choice made by a plaintiff as to whom to sue will be interfered with by the addition of another defendant. Having said that, the rule envisages that the court will make a decision that is not dependent on the consent of the plaintiff. It follows that the absence of such consent is not determinative of the application. It is also relevant that the plaintiff is not deprived of his right to sue any defendant. The decision is concerned with what is necessary to do justice, that is, to decide all the questions involved in the case effectually and completely.

The constitutional right to litigate is not threatened by the jurisdiction under O. 15, r. 13 RSC. The plaintiffs made a tactical decision in this case and they are entitled to have that respected as far as practicable and as far as consistent with the

interests of justice but no further. The plaintiffs' rights fall to be balanced against the interests of others and the requirements of justice in the determination of the issues that arise in the case. The right to decide whom to sue is not an absolute right and the entitlement of a party to retain tactical advantage is similarly, or even more subject to being set aside or adjusted to take account of other vital considerations . . .

If the plaintiffs do not wish to sue Mr. O'Brien to seek any relief that is a decision open to them. They cannot be forced to make a case that they do not want to make they cannot be obliged to change their pleadings so as to include a claim against the new added party. The point of joining a new defendant is in the interest of justice, in the court's interest in seeing that litigation is properly and effectively conducted and that its processes are operated in a way that is just and fair and also in the interest of the added party because of the impact of the litigation on his rights".

34. It is clear that Ryan J.'s views as to whether the third party should have been made a co-defendant against the wishes of the plaintiff were influenced in part by the fact that the plaintiff had made a tactical decision to deliberately exclude him from the proceeding whilst at the same time making very serious allegations against the State defendants to which the third party was central and which would, if borne out, have a significant effect on his reputation. The same cannot be said of the plaintiff in this case. These proceedings concern a commercial agreement between the plaintiff and the defendant to which the applicant was not a party. At the time of the agreement, the property which was allegedly provided by the defendant as consideration for a loan to him by the plaintiff was registered in the sole name of the defendant. The applicant had no ostensible interest in the property. Although the property was contained in the same Folio as the applicant's family home it is identified as a separate plan within that Folio and was described as a site with planning permission which would in principle take it out of the statutory definition of what is comprised within the family home. That position remained unchanged at the time the proceedings were instituted and indeed at the time the motion for judgment was brought. This is not a case in which the plaintiff made a tactical decision to exclude a party who should obviously have been joined from the outset.
35. Of course, as Lynch J has pointed out, when considering whether the applicant's joinder is now required to enable the court to properly adjudicate on all matters in the proceedings, this consideration must focus on matters as they stand at the time of this application and not as they stood at the time the proceedings were instituted. However, insofar as O.15, r.13 identifies two potential categories of case in which it might be appropriate for the court to join a defendant whom the plaintiff has not sought to sue, it is the second rather than the first of these two categories that is relevant to this application. Therefore, it is not necessary to address the potential illogicality of having to decide on the basis of matters as they stand at the time of this application whether the applicant ought to have been joined to the proceedings, presumably at the time the proceedings were instituted.

36. It is perhaps evident from the factual analysis above, that I have considerable concerns in respect of this application arising out of the fact that the applicant has deliberately brought about the circumstances now relied upon by her as justifying her joinder to the proceedings. She instigated the transfer of the property by the defendant into joint names thereby giving herself a proprietary interest in the property the subject of the plaintiff's proceedings. This interest is at the core of the exceptional circumstances on which she now relies. However, notwithstanding that she instigated this transfer because she was aware of the plaintiff's claim and was concerned at the effect it would have on the property, she did not notify the plaintiff of her newly acquired interest and instead allowed him to proceed to judgment, presumably unaware of the claim she now makes.
37. Does this have a bearing on the question of whether now, i.e. at the time this application is made, the applicant's joinder to the proceedings is necessary to enable the court to effectually and completely adjudicate upon all the issues in the proceedings? If the fact that the plaintiff has already obtained judgment is left aside for a moment, then the fact that the applicant is now a joint owner of property which is the subject of relief sought in the plaintiff's proceedings would, in normal course, be sufficient to justify her joinder to the proceedings even against the wishes of the plaintiff.
38. Of course the plaintiff disputes the validity of the transfer of property into joint names and certainly does so insofar as it relates to the development site in plan BN8NH. In another case the court might have to decide whether a dispute as to the claimed interest on which a party relies as constituting exceptional circumstances should be resolved before that party is permitted to join proceedings in order to defend that proprietary interest. This is because the party seeking to be joined bears the onus of establishing as a matter of probability that their presence is necessary to enable the court to effectually and completely determine all of the issues in the proceedings. Where the proprietary interest on which reliance is placed is itself disputed, it cannot be simply assumed even if only for the purposes of the application. However, in this case that issue is already raised as between the applicant and the plaintiff in the plaintiff's counter-claim to the *lis pendens* proceedings. Given the large number of proceedings already in being arising out of this transaction and the procedural complexity that necessarily involves, I do not think that the interests of justice would be served by requiring the applicant to establish her claimed proprietary interest as a condition precedent to consideration of her application to be joined as a co-defendant.
39. Were that the only impediment facing the applicant, the application might be allowed but the court cannot ignore the fact that judgment has been granted in the plaintiff's favour. The applicant downplays the significance of this judgment, saying that it is no more than a standard Monday morning order, that it is not a final order, that no evidence has been heard and consequently that the issue of the plaintiff's claim to an equitable and beneficial interest in the property remains to be adjudicated upon. It is correct to observe that the order of 7 December 2015 is in a standard form. It states that "It is ordered and adjudicated that the plaintiff do recover against the defendant such amount as the court may assess in respect of the plaintiff's claim herein for damages and costs". The matter is

then set down for assessment before a judge without a jury and it was intended that final orders would be made following a hearing before Heneghan J. in November 2016 which did not in fact occur. On this basis, the applicant characterises the judgment obtained by the plaintiff as no more than an enabling order which allowed the matter to proceed to trial undefended.

40. However, I do not think that matters are quite that simple. Under O. 19, r. 13 RSC, every allegation of fact in a pleading that is not denied (or stated to be "not admitted") in the pleading of the opposite party "shall be taken to be admitted". This is consistent with the adversarial nature of our legal system in which, by and large, the courts are only called upon to determine disputes *inter partes* so that if a party does not dispute a claim made against them then the courts do not have to resolve the factual issues underlying that claim. It may still be necessary for an application to be made to court as a formal court order may be required for the party bringing the claim to enforce it against the other side. It may or may not be necessary for the court to hear evidence in order to make final orders, but it cannot be assumed, as the applicant suggests, that because evidence has not been heard a judgment given in default is somehow not actually a judgment. Much will depend on the nature of the case as pleaded, the relief sought and the extent to which the other side has either expressly or by default admitted that claim.
41. The plaintiff characterises judgment in default as creating a presumption, albeit rebuttable, that the facts have been found in the manner pleaded by the plaintiff. I think this characterisation is fair. At the point in time when Gilligan J. granted judgment in circumstances where the defendant had not entered an appearance and by extension had not filed a defence, the plaintiff's claim against the defendant was, as a matter of law, admitted by the defendant. Whilst it remained to be determined which of the range of alternative reliefs sought by the plaintiff should be ordered by the court, that assessment fell to be made on the basis that every allegation underlying the plaintiff's claim was admitted by the defendant. This is of some significance where the applicant's stated intention if joined as a co-defendant is to defend the proceedings in full including disputing the nature and validity of the agreement allegedly made between the plaintiff and the defendant.
42. At the same time, O. 13, r. 11 RSC confers upon the High Court jurisdiction to set aside or to vary any judgment granted in default of appearance on such terms as may be just. Consequently, the focus of the case law on O.13, r.11 has largely been on the injustice that might occur if a defendant who has a good defence to a case is precluded from disputing the claim against them because of judgment obtained in default. The fact that a judgment obtained in default can be set aside distinguishes it from a judgment granted as a result of the trial of an action or issue which cannot, in principle, be set aside except as the result of an appeal. For example, there is a limited jurisdiction under O.28, r.11 for a court to correct clerical mistakes or errors in a judgment or order and an inherent jurisdiction to amend an order previously made but the circumstances in which the latter jurisdiction can be exercised are limited to cases where it is necessary to ensure that the judgment correctly reflects what the court actually intended or decided (see *Bellville*

Holdings Ltd v Revenue Commissioners [1994] 1 ILRM 29 and *McG v W* (No.2) [2000] 4 IR 1). The scope of the jurisdiction under O.13, r.11 is not delineated by the rule itself. Although the discretion conferred upon a court by virtue of the rule is certainly broader than the jurisdiction under O.28, r.11 or the inherent jurisdiction to amend a final order, it does not follow from the potential breadth of the jurisdiction under O.13, r.11 that a judgment obtained in default is no more than a process or enabling order. It is a judgment of the High Court and remains a judgment of the High Court unless and until it is set aside or to the extent that it is varied.

43. The jurisdiction under O.13, r.11 is exercised frequently enough, particularly but not exclusively in circumstances where a defendant has been taken by surprise by the judgment or where the default has occurred due to a mistake on the part of the defendant or his solicitor. More recent case law recognises two clear categories of case in which judgment in default of appearance may be set aside, namely where judgment has been granted irregularly or where judgment was obtained regularly but the defendant has a good defence to the proceedings (see Murphy J. in *Collins v. Cummins* [2015] IEHC 354, citing Clarke J. in *O'Tuama v. Casey* [2008] IEHC 49). In cases where judgment was granted irregularly, it is sufficient to establish that fact in an application to set aside the judgment as in principle it should never have been granted in the first place. However, in cases where judgment has been granted regularly, it is necessary to establish on affidavit that the defendant has a good defence on the merits to the proceedings as it would be unjust to require a plaintiff who has already obtained judgment to have to meet an unmeritorious defence to the same claim.
44. Notwithstanding the fact that the plaintiff had been registered as the joint owner of the property shortly before judgment was granted, in the circumstances as set out above, I do not think it can be said that judgment was granted irregularly. The transfer of the property into joint names was not registered until after the notice of motion seeking judgment in default of appearance had been issued and served and apparently neither the applicant nor the defendant brought this change in the registered title to the attention of either the plaintiff or the court. It is an essential procedural requirement of an application for judgment in default that the moving party establish that the proceedings and the application have been properly served on the party alleged to be in default. Our adversarial system of justice assumes that each side will bring to the court's attention any factual material or legal argument relevant to the decision the court has to make and certainly will do so as regards material that is beneficial to their position in the litigation. Service of the proceedings and the motion on the other side is intended, at least in part, to ensure that that party can put before the court relevant material that has been omitted by the moving party including where it has been omitted because the moving party was not or could not have been aware of it.
45. Whilst there is a heightened onus on any party seeking relief from a court in the absence of the other side to ensure that the court is advised of all potentially relevant matters, clearly this cannot extend to matters of which that party is unaware. In circumstances where the transfer of the property into joint names was prompted by this plaintiff's claim

and designed to impact on the ability of the plaintiff to obtain the relief sought it is inexplicable that neither the plaintiff nor the court were not made aware of the transfer by the applicant or by the defendant. Even now the applicant has no explanation as to why she did not advise the plaintiff of the transfer at the time it was effected and before judgment had been granted save to acknowledge that she did not do so. Therefore, in my view the conduct of the plaintiff in seeking and indeed of the court in granting the default judgment falls very much at the regular rather than the irregular end of the spectrum (to paraphrase Clarke J. in *O'Tuama v Casey* (above)). This means that if the judgment were to be set aside it would have to be on the basis that the defendant, or in this case the would-be-defendant (i.e. the applicant), has a good defence on the merits with a real prospect of success.

46. Order 13, r. 11 does not limit the persons by whom an application can be made and, as a matter of principle, it is accepted that a non-party may apply to have a judgment set aside. However, the cases in which this has occurred are rare and usually involve some element of fraud or collusion between the plaintiff and the defendant to the detriment of the interests of the person seeking to have the judgment set aside (see for example *Mehaffy v. Mehaffy* [1905] IR 292 and *Quatja v Bardila* (above)). The plaintiff contends that where a non-party is seeking to have judgment set aside, it is not sufficient merely to establish the existence of a good defence on the merits and that the onus is somewhat higher. No authority is proffered for this latter point and nor is the higher threshold identified, rather the plaintiff seeks to infer this threshold from the circumstances of the limited cases in which a judgment has been set aside at the behest of a non-party.
47. Although counsel for the plaintiff canvassed the possibility that this higher threshold should apply where a non-party seeks to set aside a regularly obtained default judgment, he was careful to acknowledge that there is a significant lack of clarity in the law as to precisely what must be demonstrated by such non-party. Of course, the primary argument being made by the plaintiff on this point was that there was no application before the court to set aside the default judgment and consequently the court should not engage in an analysis of what might be required for such an application to succeed. The applicant in response asserts that she does not have to apply to have the judgment set aside as she simply wants to defend her interest in the family home. However, I do not think the applicant can side-step the existence of the default judgment in this manner. The fact that there is no application before the court to set aside the default judgment is a matter of serious concern as, in my view, whether the applicant should be allowed to defend the proceedings as a co-defendant is inextricably bound up with whether judgment has been properly granted against the existing defendant so as to put beyond dispute many of the arguments she wishes to make.
48. A judgment of the High Court, even a judgment obtained in default and which anticipates that further, final orders will subsequently be made is nonetheless a judgment of the High Court. Unless and until that judgment is set aside, the applicant cannot presume that she can proceed as if it did not exist. Consequently, the applicant's application to be joined to the proceedings as a co-defendant cannot be determined in a vacuum as if the case had

not already proceeded to judgment. Equally it cannot be determined without any consideration of the effect her joinder would have, and indeed is intended by her to have, on the existing judgment. In my view the proper course for the applicant to take in circumstances such as these would be to seek firstly to have the judgment set aside and secondly in the event that the judgment is set aside to be joined as a co-defendant to the proceedings. Whilst that is the logical sequencing of the applications, they could of course be brought together and both reliefs sought in a single motion acknowledging the relationship between them. What is not acceptable is that the applicant should seek what is logically the second relief without addressing the first save to assert that she does not need to do so. Whilst it is conceivable that there may be circumstances in which a new party can be joined to proceedings after judgment purely for the purposes of addressing the court on the final orders which should be made, it is clear from the way in which this application has been presented that this applicant does not see her role in the proceedings as being so limited. She wishes to defend the proceedings in full and to dispute all elements of the plaintiff's claim - even those of which she has no personal knowledge such as the nature and terms of the agreement between the plaintiff and the defendant. Given the existence of the judgment, she cannot substitute herself for her husband in order to defend all aspects of proceedings against him that he has chosen not to defend.

49. I accept the plaintiff's contention that it would be inappropriate for the court to consider whether the judgment in this case might be set aside. There is no formal application before the court seeking this relief - indeed the applicant's position is that she does not have to apply for this relief. Further, given that there are a number of issues potentially relevant to the question of whether the judgment should be set aside in dispute between the parties including, significantly, whether the transfer of the property into joint names was valid and whether the property comprised within plan BN8MH forms part of the applicant's family home, I do not think it appropriate that the court should proceed to consider the application under O.15, r.13 on the basis that an application under O.13, r.11 would, if brought, likely be allowed or, alternatively, refused. These issues go to the core of the interest which the applicant claims entitle her to be a co-defendant in the proceedings and by extension to whether her participation is "necessary". Not only are there serious factual disputes between the parties which would have a bearing on any application under O.13, r.11, there is a lack of clarity as to the legal test applicable to an application under O.13, r.11 brought by a person who is not - or was not at the time of the judgment - a party to the proceedings. These are all issues which can only be properly considered by a court on foot of an application brought specifically for that purpose and in respect of which all necessary and relevant evidence will be adduced by the parties.
50. In circumstances where there is an extant judgment in being against the defendant which has not been appealed and which is not the subject of any application to have it set aside, I am not prepared to consider the joinder of the applicant to the proceedings as if the judgment did not exist. In order for the court to consider whether the applicant should be joined to the proceedings, she must address the related question of the status of the

existing judgment. As she has singularly failed to do this, I refuse her application under O.15, r.13.

51. The motion before the court also seeks the joinder of the applicant "as a party in such capacity as the Court sees fit". In the course of the hearing, the court canvassed with the parties whether the applicant should be joined to the proceedings as a notice party for the purpose of being allowed to address the court hearing all six linked sets of proceedings on the question of an appropriate remedy in these proceedings. The applicant herself was reluctant to countenance joinder in this limited capacity taking the view that joinder as a notice party would normally be for the purpose of ensuring that she would be bound by any orders made and not to allow her defend the proceedings. Her position was that she must be permitted to be in the action and that she wants to be a co-defendant as she is a co-owner. From the plaintiff's perspective, joinder of the applicant as a notice party would be preferable to joinder as a co-defendant. However, the plaintiff maintains because the applicant is already a party to two of the six linked sets of proceedings and will be entitled to address the court in the context of those proceedings, there is no prospect that the plaintiff would be able to dispose of the property without the applicant being heard. In circumstances where the applicant did not seriously pursue this relief, I do not propose to consider it in any detail. In any event the same issues arise as regards the status of the existing judgment regardless of the capacity in which the applicant might be joined to the proceedings.
52. For similar reasons I do not consider it would be appropriate to join the applicant as a co-defendant to the proceedings on terms which would restrict her participation to making submissions on the form of the final orders to be made. I note that O.15, r.13 allows a party to be joined "on such terms as may appear to the Court to be just", which would normally cover procedural matters such as requiring the additional party to ready himself to join a scheduled trial so that the joinder does not cause delay to the existing parties. However, the rule itself does not limit the terms which might be imposed and may, in an appropriate case, allow for a restriction on the issues which the new party may raise or address. However, in this case the entire thrust of the application before the court is to allow the applicant to be joined as a co-defendant so that the proceedings are run *de novo* and she is permitted to defend all issues in place of the original defendant. The case made on her behalf was broad ranging and despite being encouraged by the court to focus on how she would address the issues remaining for determination after judgment was granted, the applicant did not attempt to confine herself in any way which might suggest that there would be a benefit in joining her to the proceedings as a co-defendant on a limited basis. Indeed, the upshot of such an order would be that the plaintiff would be required to endlessly police it during the remainder of the case.
53. For the reasons set out above I refuse this application.