

Neutral Citation No: [2025] NIKB 41

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Ref: McB12786

ICOS No: 15/68028

Delivered: 19/06/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

MARTIN SHEEHAN

Plaintiff in the Counterclaim/Appellant

and

HERBERT LUSBY

Defendant to the Counterclaim/Respondent

and

**KATHLEEN LUSBY, DANIEL LUSBY AND
PORTHALL ENTERPRISES LTD**

Proposed Defendants to the Counterclaim

**The plaintiff was represented by Mr McAteer, McKenzie Friend
Mr Stevenson (instructed by Walker McDonald Solicitors) for the proposed Defendants**

McBRIDE J

Application

[1] This is an appeal from a decision of Master Harvey, who on 2 May 2024 refused Mr Sheehan's application to join Kathleen Lusby, Daniel Lusby and Porthall Enterprises Ltd ("the proposed parties") as defendants to the counterclaim in the above entitled action.

Representation

[2] Mr Sheehan was represented by Mr McAteer his McKenzie Friend who had also been granted rights of audience by order of Simpson J. The proposed parties were represented by Mr Stevenson of counsel.

The proceedings – chronology

[3] Mr Herbert Lusby issued the present proceedings (“2015 proceedings”) against Daniel McAteer, Gavin McGill, Kevin Downey and Martin Sheehan. He discontinued proceedings against the second and third defendants and on 1 March 2017 the claim against the first defendant was struck out.

[4] Mr Sheehan amended his defence to the claim by adding a counterclaim in February 2019. The counterclaim was solely against Mr Herbert Lusby.

Mr Sheehan’s counterclaim

[5] In the counterclaim Mr Sheehan contends that he entered into a “joint venture development” which he submits was a partnership with Herbert and Kathleen Lusby in relation to lands which were to be developed for housing at Springtown Road, Londonderry. The development lands were comprised of approximately 20 acres and were divided into seven plots denoted by the letters A, B, C, D, E, F and H some of which were owned by Herbert Lusby and some owned by Kathleen Lusby.

[6] In or around 2000 Mr Sheehan purchased plot F comprising approximately five acres from Mr Herbert Lusby. Mr Sheehan was also granted an option to purchase plot A from Mr Herbert Lusby and plot B from Kathleen Lusby.

[7] Subsequently in or around 2002 Mr Sheehan purchased plot A and H from Mr Herbert Lusby and plot B from Kathleen Lusby. Consequently, Mr Sheehan owns plots A, B, F and H which comprise approximately 10 acres.

[8] Mr Sheehan claims that on foot of the partnership agreement entered into with Herbert and Kathleen Lusby he set about securing planning permission for the development lands and expended time and money in applying for planning permission during the period 2002 to 2004.

[9] Mr Sheehan contends that he also expended £40,000.00 in securing three sightlines and spent further monies acquiring land to secure a fourth sightline.

[10] In or around 2004 planning permission was granted in respect of part of the development lands and thereafter Mr Sheehan claims he acted as project manager carrying out various works between 2005 and 2010.

[11] On 11 May 2005 Mr Herbert Lusby and Mr Sheehan entered into a written joint venture agreement also known as the Harrison Agreement. This agreement related to the development and disposal of the lands in plots C, B and A. Mr Herbert Lusby owned plot C and Mr Sheehan owned plots A and B. On foot of the Harrison agreement, they agreed to share the profits in respect of the development of these lands on an equal basis. This agreement also granted to Mr Sheehan an option to purchase plot C.

[12] Mr Sheehan claims that Mr Herbert Lusby acted in breach of contract and made misrepresentations when Mr Herbert Lusby claimed the joint venture only related to lands in plots A, B, C and H and not the other developments lands and thereby caused Mr Sheehan to sustain loss and damage.

[13] In his prayer for relief Mr Sheehan claimed damages as follows:

- (a) £20,000.00 in respect of the balance due and owing in respect of £40,000 paid to purchase three sightlines.
- (b) £32,500.00 for the purchase of property, part of which was used to secure the fourth sightline.
- (c) £37,500.00 for works done between 2002 and 2004 to secure planning permission.
- (d) £176,214.00 for works done as a project director.
- (e) £704,114.00 for damages for misrepresentation and breach of contract.

Mediation

[14] Mr Herbert Lusby and Mr Martin Sheehan entered into an agreement at mediation on 10 September 2021. The agreement recited the title to the above entitled proceedings namely 2015 No 68028 and recorded the following terms:

- “(1) Having entered into mediation with Gareth Jones LLB the parties hereto agree that the plaintiff’s writ and the fourth defendant’s counterclaim be withdrawn, each party bearing their costs.
- (2) That the plaintiff pay the sum of £90,000.00 to a company as nominated by the fourth defendant namely Milwell Ltd within 12 weeks of the date of this agreement.

- (3) That the plaintiff and the fourth defendant enter into a Memorandum of Understanding executed by both parties on today's date.
- (4) That the terms of this agreement remain confidential between the parties save for the event of enforcement proceedings arising from breach of this agreement by either party.
- (5) This agreement is made without admission of liability on the part of either the plaintiff or fourth defendant.
- (6) Liberty to apply in the event of default.
- (7) Each party shall bear their own costs."

The agreement was dated 10 September 2021 and signed by Mr Herbert Lusby and Mr Martin Sheehan.

[15] The Memorandum of Understanding was entered into between Herbert Lusby and Martin Sheehan and it provides as follows:

- "(1) That each party and Daniel Lusby shall use their best endeavours not to frustrate, object to, nor interfere with any planning application brought by either party in relation to the area appended hereto as shown in the discovery of the fourth defendant at page 4 and signed by each party. (The attached map referred to lands on both sides of the Springfield Road in Londonderry. It included the 20 acres already referred to and other lands.)
- (2) This Memorandum of Understanding shall not be deemed to amount to a joint venture agreement."

The Memorandum of Understanding was dated and signed by Martin Sheehan, Herbert Lusby and Daniel Lusby.

Proposed amendments to counterclaim

[16] On 19 August 2022 Mr Sheehan applied to join the proposed parties as defendants to the counterclaim and to amend his defence and counterclaim to include a number of amendments particularly at paragraph 25 and paragraphs 29-33 which essentially set out the basis for the joinder of each party.

[17] In respect of the basis for joining Kathleen Lusby, the proposed amendment at paragraph 25 claims that she was a party to the original joint venture and undertook to make available her lands in plot E to the joint venture partnership. It further claims that Mr Daniel Lusby as Kathleen's legal representative under a power of attorney has refused to make available the lands in plot E to the joint venture. There is also an averment that the lands may have been transferred to other third parties.

[18] The joinder of Daniel Lusby is based on a contention that he is the legal representative of Kathleen Lusby under a power of attorney and further it is claimed that he is the sole director of Greyhollow Developments Ltd, a special purchase vehicle created to develop the lands in plots D, E and F.

[19] The basis for joining Porthall Enterprises Ltd which had been incorporated on 5 August 2019, is that Mr Herbert Lusby transferred lands in plot D to this company for a consideration of £50,000.00 and Mr Daniel Lusby is the sole director of this company.

[20] Mr Sheehan further seeks to amend the pleadings to claim that by reason of the conduct of Herbert Lusby and Daniel Lusby it is just and equitable that the partnership be dissolved.

[21] Paragraphs 29-33, amend the relief claimed and seeks to amend the claim for damages to include a claim for breach of fiduciary duty, breach of partnership agreement, malicious falsehood and unlawful intervention with trade together with a claim for dissolution of the joint venture partnership.

[22] On 23 September 2022, Simpson J held that breaches of the Memorandum of Understanding meant that the 2015 proceedings were not settled.

[23] On 2 May 2024, the Master refused Mr Sheehan's application to join the proposed parties as defendants to his counterclaim.

[24] On 27 May 2025, following the Master's decision Mr Sheehan issued new proceedings against Herbert and Daniel Lusby ("the 2025 proceedings").

The 2025 proceedings

[25] Paragraph 6 of the statement of claim states as follows:

"The case between Mr Herbert Lusby and Mr Sheehan (and Mr Sheehan's counterclaim) were settled following mediation, the terms of settlement being reflected in an agreement and Memorandum of Understanding dated 10 September 2021. Whilst Mr Daniel Lusby was not a party

to the action he is named as a party in the Memorandum of Understanding.”

[26] The 2025 proceedings seek the following relief:

- (a) Damages for loss and damages claimed by the plaintiff by reason of breach of contract and failing to honour the agreement.
- (b) Malicious falsehood.
- (c) Unlawful interference by the defendants with the economic interests of the plaintiff.

The plaintiff claims an injunction restraining the defendants from interfering further with the economic interests of the plaintiff together with an injunction compelling the defendants to withdraw their objections to planning permission made by the plaintiff and to compel the defendants to remove obstacles regarding access to sites for which the plaintiff is applying for planning permission. Thirdly, the plaintiff claims further or other relief including accounts and inquiries in relation to a transfer of lands on Springtown Road by Mr Herbert Lusby to Porthall Enterprises Ltd and in relation to the transfer of share capital to Daniel Lusby by his brother Mr Gavin Lusby on 5 August 2023.

[27] The defendant’s defence at paragraph 7.1 states:

“It is admitted that the 2015 proceedings were settled at a mediation on 10 September 2021.”

Relevant legal provisions

[28] Mr Sheehan’s application is brought under Order 15 rule 6(2)(b)(i), which provides:

“Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter (whether before or after final judgment) the court may in such terms as it thinks just and either of its own motion or on application:

- (b) Order any of the following persons to be added as a party namely:
 - (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause of the matter maybe effectually and completely determined and adjudicated upon.”

[29] Special considerations apply where the limitation period against any proposed party has expired – see Article 73 of the Limitation (Northern Ireland) Order 1989.

[30] Order 15 rules 5 and 6 provide that where a limitation period has expired against a new party that party can only be added if (i) the limitation period was current (ie had not expired) and the proceedings were commenced and (ii) the addition of the parties is necessary within the meaning of Order 15 rule 6.

Consideration

[31] The basis for joinder of the proposed parties is that they were parties to the original joint venture agreement/partnership and their joinder is necessary on the basis they either breached the partnership agreement and/or their joinder is necessary to obtain the relief sought by Mr Sheehan.

Should Porthall Enterprises Ltd be joined?

[32] I am satisfied that Porthall Enterprises was not a party to the alleged partnership agreement. It only came into existence when it was incorporated on 5 August 2019 which pre-dates the date of any alleged partnership or the joint venture agreement. Accordingly, Porthall Enterprises Ltd could not have been a party to any joint venture agreement or partnership.

[33] Further, I do not consider that Porthall Enterprises Ltd joinder is necessary on the basis that there is an issue arising out of or connected with the relief claimed. The relief sought in the statement of claim is for damages only. The only possible basis on which it would be necessary to consider joinder of Porthall Enterprises Ltd would be if Mr Sheehan was seeking an order for transfer of lands which were transferred to Porthall Enterprises Ltd. No such relief is claimed and, therefore, I consider there is no basis for joinder of Porthall Enterprises Ltd.

[34] Further, even if the reason for joinder relates to enforcement of any future court order, I note that the 2025 proceedings seek enforcement in respect of the lands transferred to Porthall Enterprises Ltd. In these circumstances joinder of Porthall Enterprises Ltd would amount to an abuse of process.

Should Daniel Lusby be joined?

[35] I consider there is no basis for the joinder of Daniel Lusby. There is no sustainable claim that he was a party to the original joint venture partnership. He owned none of the development lands; was not a party to the joint venture agreement and there is no other evidence that he was a party to any other partnership agreement. Accordingly, I consider no sustainable claim can be made

out that he breached any of the terms of a partnership agreement or joint venture agreement or was in breach of any duties owed as a partner.

[36] Mr Sheehan additionally seeks to join Daniel Lusby on the basis that he is a legal representative or holds a power of attorney for Kathleen Lusby. A power of attorney is not a basis for joining such a person as a party in his own right. Rather, any claim against Kathleen needs to be brought against her and then Daniel Lusby in his capacity as her attorney, can act on her behalf.

[37] It is further claimed that Daniel Lusby ought to be joined because he is the sole director of Greyhollows which is a special purchase vehicle being used to develop the lands and, accordingly, this special purchase vehicle controls the partnership lands and as its sole director he is a necessary party. The pleadings specifically however do not allege any breach of any duty owed by Daniel Lusby to the partnership or breach any other duty owed by Daniel Lusby to Mr Sheehan in his capacity as director of this company. The only possible basis for joining him would be on the basis that his joinder is necessary in relation to relief claimed. Such a claim is unsustainable as the only relief sought is damages.

[38] Additionally, I consider that joinder of Daniel Lusby as a defendant to the 2015 proceedings would amount to an abuse of process as he would then be facing the same set of claims in two sets of proceedings, as the 2025 proceedings seek relief against him in respect of breach of contract, failing to honour an agreement, malicious falsehood, and an injunction order relating to removing obstacles regarding access to the sites to which the plaintiff is applying for planning permission and an order for accounts and inquiries in relation to the transfer of lands to Porthall Enterprises Ltd by Mr Herbert Lusby. As the same or similar issues pleaded in the 2015 proceedings are now being canvassed in the 2025 proceedings it would be an abuse of process to join Daniel as a defendant to the counterclaim in the 2015 proceedings.

Should Kathleen Lusby be joined?

[39] In respect of Kathleen Lusby, I also refuse the application for the following reasons.

[40] Order 15 rule 6(2)(b)(i) provides that the court can join a party at any “stage of the proceedings.” As appears from the 2025 proceedings it is common case between Mr Herbert Lusby and Mr Sheehan and Daniel Lusby that the 2015 proceedings namely the writ and counterclaim were settled at mediation on 10 September 2021. Therefore, notwithstanding the decision of Simpson J that the proceedings were not settled, the parties have now subsequently agreed between themselves that the 2015 proceedings were indeed settled on 10 September 2021. In these circumstances I consider the 2015 proceedings are at an end and no more steps need to be taken in respect of those proceedings.

[41] Whilst technically joinder can take place after judgment this is only done if anything remains to be done in an action. In the present case I consider nothing more needs to be done. The case is settled and any steps which need to be done relate to enforcement and are the subject of the 2025 proceedings. Accordingly, I consider the present proceedings are no longer extant and, therefore, joinder is not necessary or appropriate.

[42] Secondly, I note that the 2015 proceedings were settled without Kathleen Lusby's involvement thus indicating that her joinder was not necessary to ensure all matters were determined, thus indicating her joinder is unnecessary to determine the issues in the case.

[43] In relation to the submission that Kathleen's joinder is needed to gain access to part of the development lands I note that this claim is made in the 2025 proceedings and, therefore, I consider it would be an abuse of process to bring the same claim in two sets of proceedings.

[44] Accordingly, I dismiss the application and I will hear the parties in respect of costs.