Neutral Citation No: [2019] NICh 13 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McB11045** *Delivered: 27/09/19*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2016/011373

BETWEEN:

ANDREA McILROY-ROSE

First Plaintiff;

ANDREA McILROY-ROSE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN McILROY (DECEASED)

Second Plaintiff;

-and-

ROBERT McKEATING

Defendant.

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McBRIDE J

Application

[1] This is an application by the defendant, Robert McKeating to join:-

- Barry Gilligan
- Daire McCaughley
- Colm McCaughley
- Kevin Stanley
- Kevin Lagan
- Conor Mulligan
- Ruskin Developments Limited ("Ruskin");

as parties against whom his counterclaim is made, on the basis that they are liable to him along with the plaintiffs.

[2] The applicant appeared as a litigant in person. Mr David Dunlop of counsel appeared on behalf of the proposed defendants Kevin Lagan, Conor Mulligan and Ruskin. Mr Gilligan was legally represented. He advised the court that he did not consent to the application but did not otherwise actively participate in the proceedings. The plaintiffs were represented by Mr Jonathan Dunlop of counsel. The other proposed defendants did not appear and were not represented.

Chronology of proceedings

[3]

a) The first plaintiff Andrea McIlroy-Rose and the second plaintiff John McIlroy, deceased, issued a writ against the defendant on 10 February 2016 whereby the plaintiffs sought an order pursuant to Articles 2, 3 and 5 of the Protection from Harassment (Northern Ireland) Order 1997.

b) On 18 February 2016 Horner J granted an interlocutory injunction to the plaintiffs restraining the defendant from harassing them.

c) On 16 November 2016 the statement of claim was amended as the second plaintiff had died and the first plaintiff was substituted as personal representative of his estate.

d) On 25 May 2017 the defendant served his defence and counterclaim.

e) On 7 July 2017 the court ordered that any application by the defendant to join parties to his counterclaim be filed within 6 weeks.

f) On 8 September 2017 the defendant's solicitors came off record.

g) On 3 October 2017 the plaintiff applied to sever the counterclaim from the claim.

h) On 30 November 2017 the court dismissed the plaintiff's application to sever the counterclaim and ordered that any application by the defendant to join parties should be made on or before 28 December 2017.

i) On 30 January 2018 the court made an "unless order" requiring the defendant to issue and serve his application to join parties on or before 20 February 2018.

j) On 21 February 2018 the defendant made the present application to join parties pursuant to Order 15.

Evidence

[4] The evidence before the court consisted of a grounding affidavit sworn by the defendant on 21 February 2018; an affidavit sworn on 25 April 2018 setting out reasons for his failure to comply with the 'unless order', and a replying affidavit sworn on 31 August 2018. Conor Mulligan filed a replying affidavit on 29 August 2018 which was made on his own behalf and on behalf of Mr Kevin Lagan and Ruskin.

Factual background

[5] The present proceedings arise out of transactions in relation to lands situate at Little Patrick Street/Nelson Street, Belfast ("the subject lands"). The factual background is complex not least because the subject lands had been the subject of a number of legal proceedings.

[6] The first named plaintiff is a solicitor and a partner in the firm of Pinsent Mason Belfast LLP. She was formerly a partner in L'Estrange and Brett, solicitors. John McIlroy is the first plaintiff's father. He is now deceased and the plaintiff acts as personal representative of his estate.

[7] The defendant is a son of Mr McKeating Senior, who was the legal owner of the subject lands. The defendant is also a brother of Francis Frederick McKeating Junior, Dominic McKeating and Jim McKeating.

[8] The subject lands comprised 2 portions of land. The smaller portion is referred to as the "A lands" and the larger portion of land is referred to as the "B lands".

[9] John McIlroy and Kevin Lagan were directors of Ruskin. Ruskin owned a portion of land adjacent to the subject lands which are referred to as the "C lands".

[10] John McIlroy on behalf of Ruskin entered into discussions with Mr McKeating Senior regarding the sale of the subject lands. On or about 26 August 2003 heads of agreement were prepared which reflected the terms of agreement reached between them. During negotiations it had always been understood and agreed by the parties that the A lands would be sold to Clanmil for social housing.

[11] The basic structure of the heads of agreement was that a joint venture company would be formed between Mr McKeating Senior and Ruskin. Mr McKeating Senior would transfer the subject lands into the joint venture company and Ruskin would transfer the sum of £900,000 into the joint venture company. The joint venture company would then develop the subject lands in conjunction with the C lands. The subject lands and the C lands were together known as 'the site'.

[12] The plaintiff acted for Ruskin in 2004 in respect of its dealings with Francis Fredrick McKeating Senior in respect of the subject lands. Mr McKeating Senior was represented by James Doran and Company, solicitors.

[13] Pursuant to the heads of agreement Ruskin and McKeating Developments Limited ("RMKD") was incorporated on 27 April 2004 as the joint venture company.

[14] On 2 July 2004 Mr McKeating Senior, Ruskin and RMKD entered into a joint venture agreement. It provided, inter alia, that:-

(a) Mr McKeating Senior and Ruskin would each hold a 50% shareholding in RMKD and have equal positions on its Board.

(b) The subject lands would be transferred to RMKD.

(c) The site would be developed and RMKD would act as the vehicle for this development.

[15] The joint venture agreement was conditional upon:-

(i) The granting of planning permission for the site which was to the reasonable satisfaction of Ruskin.

(ii) Ruskin being satisfied as to title of the site.

(iii) Good and marketable title of the site being transferred by Mr McKeating Senior to RMKD.

[16] The joint venture agreement also contained the following material terms:-

a) Ruskin was to lodge an application for planning permission for the development of the site and keep Mr McKeating Senior informed of its progress.

b) The Board was to consist of A and B shareholders. The A directors were John McIlroy and Kevin Lagan and the B directors were Fred McKeating Junior and Mr McKeating Senior.

c) The business of RMKD was defined as "the acquisition, development and disposal of the site". This business was to be conducted in the best interests of the shareholders.

[17] Mr McKeating Senior died on 19 February 2006.

[18] On or about 28 February 2006 planning permission was granted for the construction of 48 apartments and 18 terraced houses on the site.

[19] At a Board meeting on 12 May 2006 the plaintiff advised that the A lands should be transferred to Ruskin as opposed to RMKD to avoid excessively high stamp duty payments.

[20] On 15 June 2006 the plaintiff sent correspondence warning Mr McKeating Junior that if the A lands were not transferred to Ruskin there was a potential claim against him as the sale to Clanmil could now be aborted.

[21] On 28 June 2006 Mr McKeating Junior transferred the A lands to Ruskin. On the same date he transferred the B lands to RMKD.

[22] On or about October/November 2006 Mr McKeating Junior learned that the A lands had not been sold to Clanmil. Rather the A lands together with the C lands had been transferred to Big Picture Developments, a Barry Gilligan Company on 31 July 2006 for the sum of £3.5 M.

[23] As a result of these transactions a number of legal proceedings were issued by a number of different parties. From the documentation made available to the court, which is not complete, it appears that the subject lands have been the subject of, at least, the following legal proceedings:-

(a) An unfair prejudice petition, number 2010/81531 brought by Fredrick McKeating Junior against John McIlroy, Kevin Lagan, Ruskin and RMKD. In this petition Mr McKeating Junior alleged that in breach of their fiduciary duties John McIlroy and/or Kevin Lagan permitted the sale of the A lands to Big Picture Developments rather than to Clanmil to the benefit of them and/or Ruskin alone. He further alleged that they procured the transfer of the A lands at an undervalue based on false representations the lands would be sold for social housing and further alleged that in all the circumstances the A lands were 'key lands'. He further made allegations of improper transactions through the accounts of RMKD.

(b) Proceedings brought by Ruskin against Mr McKeating Junior, Dominic McKeating and RMKD. The court has not been provided with details of these proceedings.

(c) High Court proceedings number 2009/51902 brought by Kevin Stanley and Michael Stanley against Dominic Robert McKeating and Jim McKeating. The court does not have a copy of these proceedings.

(d) Proceedings numbered 2012/59128 brought by Mr McKeating Junior and RMKD against the first plaintiff. The court does not have details of these proceedings.

(e) High Court proceedings, number 2005/108489 brought by Mr McKeating Junior against his former solicitor. The court does not have details of these proceedings.

[24] On 19 November 2013 a settlement agreement was entered into between Ruskin, RMKD, Francis Frederick McKeating Junior on his own behalf and as executor of the estate of his late father, John McIlroy, Kevin Lagan and Margaret McKeating (wife of Mr McKeating Senior), in respect of proceedings numbers 2010/81531, 2011/65067, 2010/81305 and 2012/123844. The settlement agreement further provided for the discontinuance of writ action 2012/59128.

[25] The settlement agreement provided that, in consideration of discontinuance of proceedings, and an agreement by all the parties not to recommence the said proceedings or to commence any new or further proceedings making the same or similar allegations or raising any other cause of action relating to the subject matter of any of those proceedings, RMKD would be placed into voluntary liquidation.

[26] RMKD was placed in voluntary liquidation. The B lands were sold for sum of £400,000.

Defence and counterclaim

[27] In his defence and counterclaim the defendant sets out the history of the various transactions relating to the subject lands. He alleges that his father entered into the joint venture agreement on the basis of the following representations made by Mr McIlroy and Mr Lagan on behalf of Ruskin:

a) That the subject lands were zoned only for social development.
b) That the A lands would be sold to Clanmil for the purposes of social housing, and
c) The B lands would be developed and then leased to the Department of Health and Social Services.

[28] The defendant alleges that these representations were false as:

a) The lands were designated as "development opportunity lands"
b) Mr McIlroy and Kevin Lagan together with the plaintiff failed to transfer the A lands as agreed to Clanmil. Rather they procured the transfer of the A lands to Ruskin so that they could then sell them to Big Picture Developments, a company owned by Barry Gilligan, who was a business associate of Mr McIlroy and Mr Kevin Lagan. He alleged that this was to the financial benefit of Mr McIlroy, Kevin Lagan and Ruskin.

c) The B lands were not developed and leased as agreed.

[29] The defendant further alleges that the plaintiff was guilty of fraud as she made false representations that Clanmil was not going to purchase the land if the A lands were not transferred to Ruskin thereby falsely inducing Mr McKeating to transfer the A lands to Ruskin rather than to RMKD as per the terms of the joint venture agreement.

[30] The defendant in addition alleges that the transactions carried out by the plaintiff, Mr McIlroy, Mr Lagan and Ruskin amounted to fraud.

[31] The defendant further refers to a Public Audit Accounts Committee Report dated February 2016 which he alleges reported that Big Picture Developments made a planning application in respect of the subject lands which did not include social housing. NIHE objected to this application. Subsequently Mr Colm McCaughley, son of Daire McCaughley, who is an employee of Big Picture Developments, unsuccessfully attempted to withdraw this objection. The PAC held that if Colm McCaughley's intervention had been successful it would have enabled Big Picture Developments and Mr Barry Gilligan in particular to potentially gain millions of pounds.

[32] The counterclaim further states that in 2010 the PSNI sent a file to the PPS recommending prosecution of John McIlroy, Conor Mulligan, Barry Gilligan, Colm Mulligan, Barry Gilligan, Colm McCaughley, Daire McCaughley for fraud, money laundering and obtaining land by deception together with a number of related offences arising out of the sale of the subject lands and transaction in respect of lands at Millmount.

[33] The defendant claims that by reason of the fraud, breach of agreement, misrepresentation, negligence, breach of fiduciary duty, conversion, conspiracy and fraudulent misstatement of these parties, the transfer of the A lands to Ruskin and the B lands to RMKD should be set aside, together with a claim for damages and costs.

The defendant's submissions

[34] The defendant submits that the proposed defendants are liable to him along with the plaintiff in respect of the claims set out in his counterclaim and accordingly should be joined as parties in accordance with the provisions of Order 15 rule 6.

[35] He further seeks an extension of time to enable him to comply with the terms of the unless order. The grounds for extension of time are set out in his affidavit sworn on 25 April 2018. In this affidavit he avers that he drafted the summons to join the defendants on 19 February 2018. He then met his McKenzie Friend on 20 February 2018 and thereafter intended to lodge the application with the Chancery office that afternoon. As a result of road works and the consequent heavy traffic he

was delayed. He phoned the court office to advise that he was "running late". He arrived at the court office at approximately 4.00 pm but the office was closed. He immediately e-mailed the documents to the Chancery Office at 4.05 pm. He returned to the Chancery office the next day and had the documents stamped and sworn. He then served them on the proposed parties by first class post on 21 February 2018.

[36] The defendant avers that he did not know the court office closed at 4.00 pm and highlights that he had previously attempted to comply with the original court order by serving the counterclaim on the proposed defendants. It was only later when he attended court for a review hearing that he learned that this did not constitute compliance with the terms of the original court order.

Proposed defendants' submissions

[37] Mr Dunlop submitted that the proposed defendants should not be joined as parties to the counterclaim for the following reasons:-

a) The defendant had failed to comply with the unless order and therefore he was barred from bringing the application unless the court extended time.

b) The court should not extend time as the excuses proffered by the defendant did not meet the test set out in *Hytec Information Services Limited v Coventry City Council* [1997] 1 WLR 1666. In particular he had failed to explain how the delay arose due to matters "beyond his control".

c) Under the rules joinder must be "necessary" and "just". He submitted that joinder was not necessary as the counterclaim was not related to or connected with the subject matter of the plaintiff's claim.

d) Joinder was not just as the defendant's counterclaim was without merit and was vexatious and the court should therefore dismiss it in accordance with Order 18 rule 19 and/or refuse the application in the exercise of its discretion in accordance with the overriding objective. In particular he submitted that the defendant had no interest in the lands in question. In support of his proposition he referred to a number of conveyances which he said established that the subject lands had been transferred by Mr McKeating Senior inter-vivos, initially into joint names with his wife Margaret on 2 April 2004 and thereafter to their son Frederick McKeating Junior on 11 February 2005 who then transferred the A lands to Ruskin and the B lands to RMKD on 28 June 2006. Accordingly the defendant had no interest in the lands and no locus standi to bring proceedings. Consequently the court should exercise its powers under Order 18 rule 19 to strike out the pleadings on the basis that they disclosed no reasonable cause of action and or were scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or were otherwise an abuse of the process of court. In the alternative

he submitted that in accordance with the overriding objective the court should refuse joinder, in the exercise of its discretion.

e) The counterclaim was res judicata. He submitted that there had been a number of previous proceedings dealing with the subject lands which were settled by way of a settlement agreement. Under the terms of the settlement agreement the parties agreed not to bring any further proceedings in respect of the subject lands. The settlement agreement was signed by Mr Fred McKeating Junior on his own behalf and as personal representative of the estate of his father. Therefore although the agreement was not signed by the defendant he was bound by it as any interest held by him in the lands arose from his status as a beneficiary under his father's Will.

Relevant provisions of Order 15

[38] Order 15 Rule 3 (1) provides as follows:-

> "Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the subject matter of the counterclaim, or claims against such other person any relief relating to or connected with the original subject matter of the action, then, subject to rule 5(2), he may join that other person as a party against whom the counterclaim is made."

Rule 3 (2) provides as follows:-

> "Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim and in the case of a person who is not already a party to the action the defendant must issue the counterclaim out of the appropriate office and serve on the person concerned a sealed copy of the counterclaim, and a copy of the writ or originating summons by which the action was begun and of all other pleadings served in the action; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had already been duly sued in the ordinary way by the party making the counterclaim."

Rule 6 entitled *Misjoinder and nonjoinder of parties* provides as follows:-

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party, and the court may in any case or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) 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 on such terms as it thinks just and either of its own motion or on application-
>
> (a) …
>
> (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 or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter …."

Consideration

[39] Joinder is resisted on a number of grounds by the proposed defendants. Firstly Mr Dunlop submitted that joinder was not 'necessary' as the counterclaim was not related to the subject matter of the plaintiff's claim. This submission has already been ruled upon by Burgess J who refused to sever the claim and counterclaim. I therefore consider that this matter is res judicata and I reject this submission.

[40] Secondly he submitted that the court should only join a party if it is satisfied that joinder is not only "necessary" but also "just" and argued that as the defendant's counterclaim was without merit the court should either dismiss it in accordance with Order 18 rule 19 of its own motion or dismiss the application for joinder in accordance with the court's overriding objective.

[41] I reject this submission for a number of reasons. First under Rule 6(2) the court has a discretion to join a party if he ought to have been joined; his presence is necessary; or it is just and convenient to join him. These are alternative grounds for joinder. Obviously the court always seeks to exercise its discretion in the interests of justice but it is difficult to see how if joinder is considered necessary or a person ought to be joined that it is not also in the interests of justice to do so. Secondly, carried to its logical conclusion Mr Dunlop's submission would mean that a person would be unable to issue proceedings if a proposed defendant argued they were without merit. That is not how our civil litigation system works. Rather a person is entitled to issue proceedings and if a defendant considers they are without merit he can then apply to have them struck out under Order 18 Rule 19. Alternatively he can let matters proceed to a fully defended hearing. Thirdly, I do not consider that the test for joinder does or should include an evaluation of the merits of the case. Such an approach would unduly delay the administration of justice. If a proposed defendant wishes to make such an argument the time to do so is not at the joinder stage but later by application under Order 18 Rule 19 or at the hearing. Valentine on "Civil Proceedings of the Supreme Court" notes that the court usually permits joinder on the basis the defendant pays the costs thrown away. I consider that this is the correct approach.

[42] If I am wrong about that, I am not satisfied that the counterclaim should be struck out at this stage either in accordance with Order 18 rule 19 or otherwise in accordance with the overriding objective. There is no application under Order 18 Rule 19 before the court. Although the court can act of its own motion, the absence of an application means that the court does not have the benefit of affidavit evidence. The court therefore only has limited material placed before it and as appears from the chronology did not have details of all the previous proceedings relating to the subject lands.

[43] On the basis of the material before the court there appears to be a number of issues which require further investigation by way of discovery and scrutiny through cross-examination in court. Firstly, it is clear from the pleadings before the court that there is a lack of clarity about whether the joint venture agreement was signed by Mr Frederick McKeating Senior or Mr Frederick McKeating Junior. The question of who signed the joint venture agreement will require careful investigation and scrutiny by the court as this goes to the question whether the joint venture was validly entered into and is therefore enforceable. If in fact the joint venture agreement is invalid then it may well be that the lands were not properly transferred and as a consequence the defendant is a beneficiary under his father's Will and has an interest in the lands.

[44] Secondly, although the proposed defendants and the plaintiffs submitted that the lands were transferred by Mr Frederick McKeating Senior inter vivos to his son Mr Frederick McKeating Junior, a careful reading of the relevant transfers raises a number of queries which require further investigation. The plaintiff sought to address the queries raised by the court in respect of the conveyances by way of letters dated 18 December 2018 and 13 March 2019. It is important to note that no sworn evidence was given in relation to these queries. The correspondence and the attached documents provided all reinforce the fact that there are a number of issues which would require careful scrutiny and examination by the court before the court can reach any determination on the question whether the defendant has or has not an interest in the relevant lands.

[45] The proposed defendants submitted that even if there were queries about the transfers these were not a matter of interest to the court as the defendant had accepted in his skeleton argument that the lands had been transferred inter vivos to his brother Mr Frederick McKeating Junior. A skeleton argument is not evidence. The defendant has always alleged that the transfers took place on the basis of a trust. Support for the existence of a trust appears from the fact some of the proposed defendants in their petition to the court dated 27 May 2001 at paragraph 4 stated:-

> "The respondent was the director of RMKD and acts in the interests of other members of the McKeating family who it is understood are beneficiaries of the deceased's estate and which include Frederick McKeating Junior, Dominic McKeating and Robert McKeating."

The plaintiff's statement of claim also states at paragraph 7 that the subject lands were transferred by Frederick McKeating Junior and Dominic McKeating to RMKD in accordance with the terms of the joint venture agreement and that monies were paid to both Frederick and Dominic McKeating. Dominic McKeating was not the legal owner of the subject lands and therefore payment to him calls for an inquiry into the question whether the subject lands were impressed with a trust of which the defendant was a beneficiary.

[46] I am satisfied that it would not be just for this court to refuse to join the proposed defendants on the basis that the alleged counterclaim is without merit as this would be effectively dismissing the counterclaim without an adequate adjudication on the disputed issues. It is clear from the allegations and counter allegations that a number of matters require further investigation and I am satisfied that further evidence from the PSNI, Clanmil and the Public Accounts Committee will need to be carefully examined before the court could make any determination as to the merits or otherwise of the counterclaim. In all the circumstances the test to strike out the counterclaim is not met at this stage.

[47] I further do not accept Mr Dunlop's submission that the overriding objective in some way "trumps" Order 15 Rule 6. A general rule must always give way to specific provisions. In any event I consider that the application of the specific rule accords with the overriding objective in the present case.

[48] I am further not satisfied that the proceedings are res judicata. Firstly, this defendant was not a party to any of the previous proceedings and not a signatory to the settlement agreement. Secondly, it is unclear if the previous proceedings related to the same or similar issues as all the pleadings in respect of the previous proceedings are not before the court. Thirdly it appears that the defendant's counterclaim raises some new causes of actions and therefore even if Mr McKeating signed the settlement agreement as executor of his father's estate this does not bar the defendant from bringing the present counterclaim as it contains new causes of action. I therefore do not find the counterclaim to be res judicata or otherwise an abuse of court.

[49] In accordance with Order 15 Rule 3(1) a defendant can join a person as a party to his counterclaim if he alleges that, that other person is liable to him in respect of the subject matter of the counterclaim or if he claims relief against that person which is related to or connected with the original subject of the action. If he follows the process set out in Order 15 Rule 3 (2) then those persons, without more, will become parties to the counterclaim. The defendant failed to follow the procedures set out in Rule 3 (2) correctly and as a result he has been compelled to make the present application.

[50] In deciding whether to join the proposed defendants it is necessary to first consider whether the court has power to join the parties and if so the grounds upon which the court should exercise that power.

[51] Order 15 Rule 6 gives the court a general power to add a party or parties to proceedings on the basis that that person or persons "ought to have been joined" or "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon". I am therefore satisfied that the court has power to join the proposed defendants as parties.

[52] In determining whether the grounds for joinder set out in Rule 6 are satisfied I consider that the court should have regard to the provisions of Rule 3(1), as this joinder application relates to joinder of parties to a counterclaim.

[53] The defendant's counterclaim makes a number of specific allegations against each of the proposed defendants save Kevin Stanley. In particular he alleges that they are each guilty of fraud, breach of agreement, misrepresentation, breach of fiduciary duty, negligence, conversion, conspiracy and fraudulent misstatement in relation to transactions in respect of the subject lands and are liable to him along with the plaintiff. I am therefore satisfied that the counterclaim satisfies the

conditions set out in Rule 3 (1) in respect of all the proposed defendants save Kevin Stanley.

[54] I am further satisfied that the presence of all the proposed defendants before the court is necessary to ensure that all the matters in dispute set out in the counterclaim are effectually and completely determined and adjudicated upon.

[55] Although Kevin Stanley is not referred to by name in the counterclaim there are other extant proceedings relating to the subject lands to which Mr Stanley is a party. I am satisfied that it is necessary for him to be joined to the proceedings so that all the matters in dispute can be fully addressed and finally and completely disposed of. Accordingly I consider the test for joinder in Rule 6 (2) is met for all the proposed defendants.

[56] The final matter the court has to consider is whether it should now extend time for the application given that the defendant did not comply with the unless order. The principles for extension of time to comply with an unless order are set out in *Hytec*. It is clear that the core basis on which the court exercises its discretion to extend time is whether it is in the interests of justice to do so.

[57] Having regard to the fact that the delay was less than one day; the delay arose due to roadworks and heavy traffic which were matters beyond the control of the defendant; the fact the default was not deliberate or wilful, and the fact that there is no prejudice to the proposed defendants I consider that it is in the interests of justice to extend time for both the issue and service of the present application and I extend time accordingly.

[58] Valentine "Civil Proceedings of the Supreme Court" notes that the usual order is to permit joinder on the basis that the defendant pays the costs thrown away. I see no reason to depart from that approach and accordingly I order joinder of all of the proposed defendants with an order that the defendant is liable for the costs. I direct that the case is listed for further case management.