

**THE HIGH COURT**

[2020] IEHC 595  
[2018 No. 206 P]

**BETWEEN**

**MORTIMER JOHN WALTERS AND RONAN CAMPBELL**

**PLAINTIFFS**

**AND**

**LEXINGTON SERVICES LIMITED**

**DEFENDANT**

**AND**

**LEXINGTON SERVICES LIMITED**

**COUNTERCLAIM PLAINTIFF**

**AND**

**ANTHOLOGY S.A., MORTIMER JOHN WALTERS AND RONAN CAMPBELL  
COUNTERCLAIM DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 19th day of November, 2020**

**INTRODUCTION**

1. This is an application to join two individuals as parties to a dispute involving a defendant/counterclaim plaintiff ("Lexington"), the Malta incorporated vehicle of a successful Irish property developer Mr. J.P. Flannery ("Mr. Flannery"), who is resident in Andorra.
2. The main proceedings are against Mr. Flannery's former lawyer, the first named plaintiff/counterclaim defendant, Mr. Mortimer John Walters ("Mr. Walters"). Mr. Flannery says he relied upon Mr. Walters as a legal adviser and confidant for a period of 20 years, but that Mr. Walters defrauded him/his corporate vehicle in relation to a valuable software patent. The patent in question is US Patent No. 8,019,807 ("Patent 807") which was expected to generate \$54 million over a four-year period.
3. In the original proceedings, Mr. Walters and the second named plaintiff, Mr. Ronan Campbell ("Mr. Campbell") seek, *inter alia*, a Declaration that their appointment as receivers of Patent 807 is proper and valid. In the Counterclaim, Lexington claims that Mr. Walters is guilty of fraud and conspiracy in devising a scheme, through his corporate vehicle, the first named counterclaim defendant ("Anthology"), to deprive Lexington of its ownership rights to Patent 807. Lexington seeks various reliefs relating to Patent 807, including a Declaration that the respective appointments of Mr. Walters and Mr. Campbell as receivers of Patent 807 are invalid. These are the key issues in dispute in considering the current application to join two other individuals to these proceedings.
4. In the amended Counterclaim, Lexington claims that Mr. Walters, who died on 22nd March, 2019, engaged in a conspiracy with Mr. Campbell, but also with two other individuals whom Lexington seeks to join as defendants to its Counterclaim, namely Mr. Brian Connell ("Mr. Connell") who is resident in Dublin and Mr. Florian Karrer ("Mr. Karrer") who is resident in Andorra.
5. The primary purpose of the current application by Lexington is to amend its Counterclaim and to join Mr. Connell and Mr. Karrer as defendants to that proposed Amended Counterclaim.

## The law

6. The law regarding joinder of parties was succinctly summarised by O'Regan J. in *O'Brien v. Red Flag Consulting Ltd & Ors.* [2018] IEHC 143 at paras. 4 and 5 where she stated as follows:

"Laffoy J. in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd* [1998] 2 IR 519, interpreted O. 15 r. 13 to the effect that the provision requires the plaintiff to demonstrate that he has a stateable case against the proposed new defendant and the proper approach is to determine whether it is a stateable case on the basis of the plaintiff's version of the disputed facts.

Clarke J. stated in *Cunningham v. Springside Properties Ltd. (In Receivership) & Ors* [2009] IEHC 454 that the joinder application will ordinarily be granted except where prejudice may occur to either the existing parties or the proposed new defendant."

7. This Court would add to these observations the statement of MacMenamin J. in *O'Connell v. The Building and Allied Trades Union & Ors.* [2012] 2 I.R. 371 at 390 that:

"a court of first instance must always retain the discretion to dismiss an application to join co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process."

8. As regards the type of prejudice which it is envisaged would defeat an application for joinder, in *Allied Irish Coal Supplies Limited v. Powell Duffryn International Fuels Limited* [1998] 2 I.R. 519 Murphy J. referred to two key prejudices of delay and cost. At p. 537 he states that:

"In general a plaintiff may institute proceedings against any defendants without seeking permission of anyone. However the joinder of a defendant in an existing action may well cause delay, or add unnecessarily to the cost of the proceedings. The court undoubtedly has a discretion as to whether or not to order the addition of the new defendant and, as the present case illustrates, the submissions of an existing defendant may well be of assistance to the court in determining the how such discretion should be exercised. I satisfied that the requisite *locus standi* I exists."

9. As regards the amendment of the pleadings which is sought as well as the joinder, it seems clear that the primary consideration for a court in this regard is whether the amendments are necessary to determine the real issues in dispute between the parties, since in *Croke v. Waterford Crystal Limited & Anor.* [2005] 2 I.R. 383 Geoghegan J. stated at p. 393 that:

"While undoubtedly there is a discretion in the court as to whether to make the order or not and other factors may come into play, the primary consideration of

the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation.”

### **Background to the substantive proceedings**

10. Having considered the applicable legal principles, it is necessary to give some background to the substantive dispute between the parties. In 2014, there was litigation between Lexington and Mr. Flannery, on the one hand, and Mr. Walters and Mr. Connell (one of the two parties sought to be joined), on the other hand, regarding allegations made by Lexington. These were that Mr. Flannery that Mr. Walters and Mr. Connell had improperly taken control of several patents. This litigation was compromised by the execution of a Settlement Agreement dated 10th November, 2015 (the “Settlement Agreement”). Under the terms of this Settlement Agreement it was agreed that Patent 807 would come under the full ownership and control of Lexington and that Lexington would pay half of the \$54 million, which the patent was expected to generate over a four year period, i.e. \$27 million, to Mr. Walters or his nominee. Clause 3(b) of the Settlement Agreement provides that:

“3. Lexington shall pay to Mortimer Walters or his nominee (“MJW”) the sum of US\$27 million dollars (the “Agreed Sum”) subject to the following conditions and on the following terms:

[...]

- b. If at the end of four years, insufficient funds have been generated from 50% of the net profits to discharge the Agreed Sum, then:
  - (i) In the event that Lexington and MJW agree, the four year period may be extended for such additional period of time and on such terms as may be agreed; or,
  - (ii) Any balance from the Agreed Sum then outstanding may be discharged by Lexington by 1 March 2020; or,
  - (iii) In the event that neither (i) or (ii) above occurs, MJW may insist on the sale of the Patents by Lexington, such sale to be completed within 3 months of 1 March 2020.”

11. Clause 6(g) of the Settlement Agreement refers to the security for the said payment, i.e. the Charge which is the Patent Security Agreement (referenced below) and states:

“MJW [Mortimer John Walters or his nominee] may enforce the Charge in the event of all or any of the following events of default:

- i. MJW not receiving the sum identified in 3(a)(iv), above by the date specified in 3(a)(iv) above,
- ii. MJW not receiving Annual Revenue Report in accordance with 3(a)(ii) above, provided that MJW gives 14 days’ notice in writing of his intention to do so following expiry of the period in 3(a)(ii) above,
- iii. A total of US\$27 million not being received by MJW on or before 1 June 2020,

- iv. The insolvency, winding up, liquidation or bankruptcy of Lexington or the appointment of a receiver or administrator over Lexington.”
12. The nominee of Mr. Walters was Anthology, an Andorra incorporated company, and so it is clear therefore that the settlement agreed between the parties was that Lexington was to have four years to pay \$27 million to Anthology, i.e. by 1st March, 2020. However, it will be seen that Anthology appointed a receiver (and subsequently an additional receiver) to this valuable patent just over a year into this four-year period on 6th March, 2017, thereby depriving Lexington of the opportunity to comply with this part of the Settlement Agreement. Lexington claims that this was done unlawfully in order to appropriate the patent. This is disputed by Anthology and by the receivers of the patent, Mr. Walters and Mr. Campbell.

### **The Charge**

13. The background to the appointment of the receivers is that under the terms of the Settlement Agreement, Lexington granted a first fixed charge over Patent 807 to Anthology through the execution of a Patent Security Agreement dated 22nd December, 2015 (the “PSA”). Section 2.4 of the PSA dealt with the scenario envisaged in the Settlement Agreement where the revenue generated from the patent was insufficient to discharge the Agreed Sum by 1st March, 2020 (the “Final Payment Date”). Section 2.4 states:

“If by the Final Payment Date insufficient funds have been generated from 50% of the net profits and paid to [Anthology] in discharge of the Secured Liabilities and the Secured Liabilities have not been otherwise discharged in accordance with the terms of this agreement then [Anthology]:

- (i) may at its discretion, agree to extend the Final Payment Date on such terms as may be agreed by it with [Lexington]; or
- (ii) shall, if [Lexington] makes payment of the then outstanding balance of the Secured Liabilities in accordance with the provisions of this agreement, accept that payment in discharge of the outstanding balance of the Secured Liabilities and immediately release all of the Security hereby granted by [Lexington] to [Anthology] over the Secured Asset; or,
- (iii) in the event that neither (i) or (ii) above shall have occurred, [Anthology] may insist on the sale of the Combined Patents by [Lexington], such sale to be completed within 3 months of 1st March 2020.”

It will be seen that these provisions of the PSA are in similar terms to the Settlement Agreement in relation to the deadline for payment of the \$27 million.

14. Clause 2.2(a)(ii) of the PSA states:

“Without prejudice to the provisions of clause 2.1 during the Security Period the Debtor shall make the following annual payments in full or partial discharge of the Secured Liabilities until such time as the Secured Liabilities have been discharged in full:

- (a) In the first and succeeding three years of the exploitation of the Combined Patents by the Debtor (the first year to commence on 1st January 2016), 50% of the net profits derived from exploitation of the Combined Patents shall be paid by the Debtor to the Creditor subject to the following terms:  
[...]
- (ii) the Annual Revenue Reports for each of the said years shall be furnished to the Creditor on or before 31st January 2017 and so on; the last Annual Revenue Report being due on or before 31st January 2020."

15. Clause 8.1 of the PSA goes on to provide that:

*"Security becomes enforceable on Event of Default*

The security established and constituted by this agreement shall become enforceable immediately on the occurrence of an Event of Default."

16. Schedule 1 of the PSA sets-out the Events of Default. Included in these Events of Default at Clause 1.2 of Schedule 1 is the following:

"Events of default

[...]

- 1.2 [Lexington] not delivering the Annual Revenue Reports to [Anthology] in accordance with Clause 2.2(a)(ii) and following the expiry of a further period of 14 days after [Anthology] serving a notice on [Lexington] of its intention to enforce the Security created under this Agreement."

17. To summarise these provisions, it is clear therefore that Clause 2.2(a)(ii) of the PSA required Lexington to furnish Anthology with the Annual Report showing gross revenue and net profit derived from Patent 807. It is clear from Schedule 1 of the PSA that the failure to deliver the first Annual Report by 31st January 2017 constituted an Event of Default under that Agreement.

### **Background to the allegations of fraud and conspiracy**

18. It is Lexington's case that, on 31st January, 2017, Mr. Flannery, with the assistance of his son, attempted to fax the 2016 Annual Report to the fax number for Anthology specified in the PSA. The relevant clause in the PSA (Clause 20.1) states:

"Any notice or other communication required to be given to a party under or in connection with this agreement shall be:

- (a) in writing;
- (b) delivered by hand, by pre-paid first-class post or other next working day delivery service or sent by fax; and
- (c) sent to:  
[...]

- (ii) the Creditor [Anthology] at:  
WKI Andorra, C/ Bonaventura Armengol, 10 – Edifici Montclar 1, 4<sup>o</sup>-3<sup>o</sup>,  
AD 500 – Andorra la Vella, Principality of Andorra  
Fax: +376 800 443  
Attention: Mr. M. J. Walters

or to any other address or fax number as is notified in writing by one party to the other from time to time.”

Since Anthology is a legal, as distinct from a natural, person, the natural person to whom the fax had to be sent to satisfy the notice requirement is listed as Mr. Walters. However, Lexington claims that Mr. Flannery attempted to send the Annual Report by fax on 31st January, 2017, but a fax delivery report was received which stated that no answer had been received from that fax number.

Lexington claims that an attempt was then made to send the Annual Report from a different fax machine, but this was also unsuccessful. Since Clause 20.1 of the PSA requires the fax to Anthology, to be sent for the attention of Mr. Walters, Lexington states that Mr. Flannery arranged for an email to be sent, by Lexington’s solicitors, at 8.22 am on 1st February, 2017 to Mr. Walters’ email address enclosing the Annual Report. This appears to have been duly received by Mr. Walters at this time.

19. Lexington claims that its failure to fax the Report was caused by Anthology, since its fax was inoperative, and for this reason there was no failure by it to furnish the Annual Report to Anthology by the 31st January, 2017 deadline. Lexington further claims that, in any event, this alleged failure was almost immediately cured (within the 14 day period specified in Clause 1.2 of Schedule 1, which Lexington refers to as the ‘cure’ period) by the email delivery of the Annual Report within eight hours and 22 minutes of that deadline to the very person who was to receive the Report on behalf of Anthology, Mr. Walters. While not denying that Mr. Walters received the Report by email, Anthology claims that the notice provisions in the PSA only provides for delivery of notices by hand, pre-paid postal delivery or by fax and not by email.

**Evidence disclosed through discovery**

20. Certain evidence was disclosed as part of the discovery in this litigation and this forms the basis, *inter alia*, of Lexington’s claim that Mr. Karrer and Mr. Connell should be added as counterclaim defendants to the claim of fraud and conspiracy.
21. As regards Mr. Karrer’s involvement in the alleged conspiracy, the following email was discovered. It is from Mr. Walters to Mr. Karrer at 4:04 pm on the 30th January, 2017, the day before the deadline was due to expire. It states:

“Hi Florian ! Please test fax.

Tomorrow is a big day...

Best Mort”

Lexington rely on this reference to 'testing the fax', as the deadline approached, as evidence that there was a conspiracy involving Mr. Karrer to use an inoperative fax line to 'manufacture' an event of default on the part of Lexington.

22. Mr. Karrer replies immediately at 4:06 pm that same day that:

"Will try it again but I suspect it will be as with Rick... no planes landing at the airfield !"

Lexington submits that the reference to planes, is a reference to the fact that there wasn't a hand-delivery by courier of the Annual Report, which in addition to delivery by fax, would have complied with the notice provisions in the PSA.

23. Mr. Walters replies at 6:11 pm that day that:

"Hopefully not in this instance. It would be an amazing default on his part. Let's see and keep the fingers crossed."

24. Mr. Karrer replies at 7:26 pm on the same day that:

"What are the consequences/next steps if he does not?"

25. Then, two days later, on the 1st February, 2017, after the deadline expired, Mr. Walters received the 2016 Annual Report by email, from Lexington's solicitors, in or around 8.22 am and he forwarded it by email within the hour to Mr. Karrer (with whom he had the foregoing email exchange the night before) and Mr. Connell. This email from Mr. Walters to both Mr. Connell and Mr. Karrer, forwarding the email from Lexington's solicitors, simply states:

"Best Mort"

26. As regards Mr. Connell's involvement in the alleged fraud/conspiracy, Lexington rely on the submission by counsel for Mr. Campbell (who is resisting the joinder application) that Mr. Connell, who was party to a previous dispute regarding Patent 807, who released his interest in that patent under the terms of the Settlement Agreement, is in fact the inventor of the patent. For this reason, counsel for Mr. Campbell submitted that he is the person who is critical to its exploitation for financial gain. Lexington claim therefore that he has a clear interest in the alleged conspiracy by Mr. Walters to take back control of that patent.

27. Lexington also relies upon the following exchange of emails between Mr. Connell and Mr. Walters which were disclosed as part of the discovery. Thirteen minutes after receiving the Annual Report by email from Mr. Walters on the morning of 1st February, 2017, Mr. Connell replies to Mr. Walters by email, with the following observation:

"Interesting choice for mode of delivery."

Lexington submits that this is a reference to the fact that the Annual Report was not sent by fax (or by some other accepted form of delivery).

28. Fifteen minutes later at 9:35 am, Mr. Walters replies by email to Mr. Connell that:

"It's not delivery !

Can you bring a print out of the charge

Best Mort"

Lexington submits that this is a reference to the PSA, which charges the patent as security in favour of Anthology and which provides for the appointment of a receiver.

**Issue of the notices of default**

29. The next development is that a few hours later that same day on 1st February, 2017, at 3:49 pm, Mr. Walters sent by fax a notice of default under the PSA on behalf of Anthology to Lexington based on the alleged failure by Lexington to deliver the Annual Report by 31st January, 2017. This notice of default states:

"DATE: 1st February 2017

Susan Court, B1, Triq IL – Prinjolata Ta' Xbiex XBX, Malta

Fax: +356 214 99920

Attention: Ms. Rachael Flannery

TAKE NOTICE that in accordance with the terms of the Patent Security Agreement executed between Lexington Services Limited ("Debtor") and Anthology SA ("Creditor") dated 23rd day of December 2015 ("PSA") and in particular Clause 20 thereof, we hereby give notice of your default to deliver the Annual Revenue Report for 2016 in accordance with Clause 2.2(a)(ii).

TAKE FURTHER NOTICE that in accordance with Clause 1.2 of Schedule 1 Events of Default of the PSA, following the expiry of 14 days from the date of service of this Notice, it is our intention to enforce the Security over the Secured Asset (as defined in the PSA) and to appoint a Receiver or Delegate in accordance with Clause 10.1 of the PSA.

Signed: Janet Christensen (Director)

For and on behalf of Anthology SA"

30. This notice of default does make reference to the 14-day period, which Lexington describes as the 'cure period'. Lexington claims, *inter alia*, that only after this 'cure' period had passed would an Event of Default have occurred and that only then would Anthology



be permitted to claim that an Event of Default had occurred so as to appoint a receiver pursuant to Clause 8.1 of the PSA.

31. It is also relevant to note that some six days later on 7th February, 2017 Lexington received a second notice of default under the PSA from Anthology on the grounds that Lexington was "*becoming insolvent, being wound up, liquidated or becoming otherwise bankrupt*". However, Lexington denies that it was at that point, or at any point before or after, insolvent or bankrupt or being wound up or liquidated and it claims that this was an attempt by Anthology to detract from the invalid basis for the Event of Default on the 31st January, 2017.

**Appointment of receiver and immediate transfer of patent to Mr. Walters's company**

32. The next development occurred a month later, when on 6th March, 2017, by Deed of Appointment, Anthology purported to appoint Mr. Walters as receiver over Patent 807. Lexington was not notified of this appointment until 21st March, 2017 upon receipt of a letter dated 15th March, 2017 from Mr. Walters. That notification was on the headed notepaper of SOLV International Ltd, a company which Lexington claims is owned/controlled by Mr. Walters and Mr. Karrer, which claim is not disputed in these proceedings. Mr. Connell confirms on affidavit that the Malta Financial Services Authority has taken action against that company for what he describes as "*regulatory and administrative shortcomings*".
33. By the stage Mr. Walters had notified Lexington of his appointment as receiver over the patent, he had already purported to transfer the patent from Lexington to a company owned by Mr. Walters. This is because within 24 hours of his appointment as receiver, i.e. on 7th March, 2017, Mr. Walters purported, as receiver of Lexington's patents, to transfer Patent 807 to a Delaware company called Delegate. It appears that Delegate had been incorporated only a short time earlier, i.e. on 6th March, 2017, with Mr. Walters as its beneficial owner, and significantly, in light of the current application, with Mr. Karrer, as its sole director.
34. By Deed of Appointment dated 31st October, 2017, Anthology purported to appoint Mr. Campbell as an additional receiver, with Mr. Walters, over Patent 807. It is however relevant to note that Mr. Campbell has sworn that he has no knowledge of the events surrounding the alleged Event of Default, which happened some months prior to his appointment as a receiver.
35. The substantive proceedings are to be heard as part of a modular trial and the first module deals with whether the failure to deliver the Annual Report by fax on 31st January, 2017 constitutes an Event of Default and also whether the appointment by Anthology of Mr. Walters and Mr. Campbell as receivers over Patent 807 is valid.

**Lexington's claim of conspiracy against Mr. Walters/Mr. Connell/Mr. Karrer**

36. Lexington claims that because of, *inter alia*, the fact that Anthology's fax was inoperative and the fact that the Report was delivered to Mr. Walters within 8 hours and 22 minutes of the 31st January, 2017 deadline and bearing in mind that the 14 day period (which it describes as a 'cure period') had not passed, there was not in fact an Event of Default

justifying the issue of a notice of default within one day of that deadline (on the 1st February, 2017).

37. For this reason, and because of the actions of Mr. Walters with Mr. Connell and Mr. Karrer, as evidenced by this discovered evidence, combined with other facts, such as Mr. Karrer's role as a director of Delegate and Mr. Connell's necessary involvement in any exploitation of the patent, Lexington claims that these three people were all involved in a fraudulent attempt to deprive Lexington of its right to pay off the Agreed Sum any time up to March 2020 and that they acted together to unlawfully appoint receivers over the patent.

**Mr. Walters and Mr. Campbell cannot give evidence regarding alleged conspiracy**

38. In support of its application for joinder, Lexington also points out that when it comes to the modular trial regarding the alleged event of default and the alleged invalidity of the appointment of the receivers, Mr. Campbell, as previously noted, by his own sworn answers to interrogatories will be of no assistance regarding the alleged unlawful dealings between Mr. Walters and Mr. Connell/Mr. Karrer in and around January 2017. In addition, as previously noted, Mr. Walters died in March 2019. Also, the third and final counterclaim defendant is not a natural person, but is a company, Anthology (and it is relevant to note that Mr. Connell is a director of that company). Accordingly, Lexington point out that the persons who are most likely to give relevant evidence regarding the issues in dispute in the modular trial are Mr. Connell and Mr. Karrer, the two parties which Lexington wish to join as counterclaim defendants.

**Original proceedings issued by Lexington claim fraud and conspiracy**

39. In further support of its application for joinder, Lexington points out that it is not making a new claim against the current counterclaim defendants or the proposed counterclaim defendants. This is because, as has already been noted, in its current Counterclaim (i.e. prior to any joinder and prior to its purported amendment in these proceedings), Lexington claims that Mr. Walters was guilty of fraud and conspiracy in creating a scheme to deprive Lexington of its economic interest in Patent 807.
40. Hence Lexington claims that there is nothing new in the claims put forward in the present application. It asserts that it is simply including Mr. Connell and Mr. Karrer as necessary parties to the counterclaim. Lexington submits that it did not include Mr. Connell or Mr. Karrer as parties in its original proceedings for good reason. The basis for the non-inclusion is the fact that it is well established that it is inappropriate to make allegations of fraud against a party without having cogent evidence for such a claim. It does appear to this Court that this is a plausible reason for a party not to be originally joined in a claim of fraud or conspiracy.
41. Lexington claims also that it only obtained the requisite evidence as a result of discovery that it received from Anthology and Mr. Campbell in these proceedings and reference has been made to the foregoing evidence which was obtained on discovery. This Court is of the view that it is plausible to say that this newly discovered evidence does provide some

support for the allegation that Mr. Connell and Mr. Karrer did have some knowledge and involvement in actions which could amount to a conspiracy.

**Other connections between Mr. Karrer/Mr. Connell and Mr. Walters re the patent**

42. Lexington also supports its application to join Mr. Karrer to these proceedings against Mr. Walters, by highlighting his connection with Mr. Walters. Mr. Karrer was a partner of Mr. Walters in an Andorra-based financial legal and corporate administration firm called *Walters and Karrer Internacional S.A.* On 6th March, 2017, the same day that Mr. Walters was appointed as a receiver of Patent 807, *Walters and Karrer Internacional S.A.* incorporated a Delaware company called 'US Patent 8019807 Delegate LLC' ("Delegate"). Mr. Karrer was appointed as the sole director of Delegate on its incorporation and Mr. Walters was its shareholder/beneficial owner.
43. The following day, on 7th March, 2017, Mr. Walters executed a Patent Assignment Agreement whereby he purported to assign Patent 807, in his capacity as a receiver of Lexington's patents, to Delegate. The consideration for this transfer of the Patent was €100. It is relevant to note that Mr. Karrer executed this Agreement on behalf of Delegate.
44. Lexington instituted proceedings seeking to invalidate the purported assignment of Patent 807 to Delegate in Delaware, which proceedings are currently stayed pending the High Court's determination of the substantive proceedings and in particular whether the appointment of Mr. Walters and Mr. Campbell as receivers is valid.
45. As regards Mr. Connell, he avers in these proceedings that he has acted as an agent and adviser for Anthology since 2014 and therefore he was an adviser and agent at the relevant time in or around January 2017. It is also the case that he is currently a director of Anthology, although he was not a director of that company in or around January 2017. As noted hereunder, in his capacity as director he has averred to having knowledge of some of the crucial events which occurred in January-March 2017.

**Mr. Karrer and Mr. Connell not bound by the court decision as not parties**

46. In these proceedings, Mr. Connell in resisting the application for joinder swears his affidavit as 'director of Anthology'. He accepts in this sworn evidence that "*it may be the case that [he and Mr. Karrer] will be called as witnesses as to fact to determine*" the issues in dispute. He also avers that:

"I say, without making any formal concession, I accept that should the Court determine that there was no event of default or that the appointment of the receiver by Anthology was not valid there may be wider questions for the Court to deal with. However I say that I do not believe (nor indeed did Lexington believe when it proposed these issues) that further parties need to be joined to the proceedings to determine these net and specific questions and therefore Lexington will not be prejudiced should they wish to amend their Defence and Counterclaim after the issues contained in the modular trial are determined."

47. In a sense this is the nub of the issue because, in many cases, except frivolous and vexatious cases, there is a 50-50 chance that either a plaintiff or a defendant will win the case and this Court must assume, at this stage of the proceedings, that either party may win the litigation. If Lexington wins then there will, in Mr. Connell's view be "*wider questions for the court to deal with*". In particular, if there were to be a finding that Mr. Walters and others colluded in defrauding Lexington of its property rights, then it seems to this Court that Lexington would be prejudiced if it was seeking to amend the defence and counterclaim, as suggested by Mr. Connell, only *after* those issues were determined in the modular trial.
48. This is because, in light of the evidence referenced in this judgment, Lexington has made a stateable case (but it is important to note that this Court is saying no more than that) that Mr. Connell and Mr. Karrer could have been in some way involved in assisting Mr. Walters in actions, which are alleged to constitute fraud and conspiracy. In these circumstances, if there was to be a finding in Lexington's favour regarding a fraud/conspiracy, and Mr. Karrer and Mr. Connell were not parties to those proceedings, then they could legitimately claim that they are not bound by that determination. On this basis therefore, it seems to this Court that Lexington would be prejudiced if these proceedings were determined in its favour, but Mr. Karrer and Mr. Connell were not bound by that determination.
49. This is therefore a factor in support of a finding that Mr. Karrer and Mr. Connell should be joined as parties to the proceedings. Other factors are as follow:
- Lexington avers, and it has not been disputed, that:
    - it was Mr. Karrer who was involved, through *Walters & Karrer Internacional S.A.*, in providing instructions for the incorporation of Delegate on 6th March, 2017, the company which in very short order after the disputed 'event of default' and the disputed appointment of a receiver became the owner of the Patent;
    - it was Mr. Karrer who was appointed as a sole director of Delegate upon its incorporation and thus its controlling mind when it acquired a patent which appears to be worth at least \$54 million for a sum of €100 as the final leg of the alleged conspiracy and fraud to deprive Lexington of this patent one year into its four-year period to pay the 'debt' of \$27 million;
    - it was Mr. Karrer who, on behalf of Delegate, executed the Patent Assignment Agreement, which assigned the patent to Delegate, and thus acquired this valuable patent for €100.
  - It is also the case that Mr. Walters is now deceased. Accordingly, the only person who is a counterclaim defendant (apart from the legal person, Anthology, of which Mr. Connell is a director) and thus able *personally* to deal with the allegations of fraud and conspiracy is Mr. Campbell. However, in answers to interrogatories, he has averred that he has no knowledge of the

alleged event of default. Hence the relevance of Mr. Connell and Mr. Karrer as co-counterclaim defendants.

- It is also relevant to note that Mr. Connell, by his own averments, has a very close involvement with what went on in January-February 2017. This is clear because he has sworn interrogatories on behalf of Anthology regarding the manner of Mr. Walters' appointment as a receiver in the substantive proceedings e.g. to the effect that Mr. Walters requested Ms. Janika Busuttil to become an additional director of Anthology and that Ms. Busuttil, in her capacity as a director of Anthology, appointed Mr. Walters as the receiver of Patent 807. In this regard, Mr. Connell has sworn that these and other events around January-March 2017 are within his own knowledge, even though he was not a director of Anthology at the time.

### **CONCLUSION**

50. In light of the foregoing, this Court is of the view that Lexington has established that it has a stateable case against Mr. Karrer and Mr. Connell that they were involved in an alleged fraud/conspiracy to unlawfully deprive Lexington of its economic interest in Patent 807.
51. However, in resisting the application for the joinder of Mr. Connell and Mr. Karrer, Mr. Campbell points out that Mr. Flannery's affidavit of discovery (on behalf of Lexington) in these proceedings contained falsified emails which he failed to bring to the attention of this Court. This is not disputed by Mr. Flannery and is a very serious issue, which will have to be addressed at the trial. However, these emails are not part of the evidence which is relied upon by Lexington to support its stateable case against Mr. Connell and Mr. Karrer and so, notwithstanding the seriousness of this issue, it is not a reason, in itself, for this Court to decline to join Mr. Connell and Mr. Karrer as counterclaim defendants.

#### **Prejudice to Mr. Campbell and Anthology?**

52. The next question is whether there is sufficient prejudice to the existing counterclaim defendants, in permitting the joinder of Mr. Connell and Mr. Karrer, so as to justify a refusal of same.
53. It seems clear that on most occasions when a defendant is added to proceedings, it is likely to cause some delay to the other defendants, since some additional time will be required for the other defendants to deal with issues which arise as a result of the joinder of a new defendant. In addition of course, since time costs money, there will often be an additional cost to the other defendants. However, as noted by Clarke J. (as he then was) in *Ryanair Ltd v. Unister GmbH & Ors.* [2013] 1 I.R. 177 the default rule is to permit the addition of defendants for the very good reason that there is no bar to a plaintiff suing whatever defendant he wants. A similar, but not identical approach is taken, to a decision to add co-defendants. It is for this reason that the default rule is that a plaintiff should be entitled to join a defendant to proceedings, unless there are substantial countervailing reasons. At p. 200 of the *Ryanair* judgment Clarke J. states that:

"[...] a court will normally be sympathetic to an application to join a co-defendant. If the proposed co-defendant could have been named as a co-defendant in the first place then it needs some substantial reason to refuse to later join the same party as a new co-defendant. The fact that there may be logistical prejudice because the case has come close to trial where the trial would inevitably be significantly delayed by the joinder of a co-defendant would be an obvious example of circumstances where a court might well find a substantial countervailing factor and, thus, not accede to an application for joinder. However there would be very few cases where an early application to join a co-defendant would be refused especially where the case sought to be made against the proposed co-defendant was, as here, very closely linked to the case sought to be made against the existing defendant."

54. In this case the matter has not been set down for trial. As there is not a trial date, it is not a case where there is a trial which is about to start, which will be significantly delayed. Rather, this Court has been provided with a plausible reason why the two parties were not originally listed as co-defendants, namely the reluctance to allege fraud without substantial evidence and the fact that significant evidence only came to light as part of the discovery process.
55. So while it does seem to this Court that an argument can be made that the current counterclaim defendants will suffer some prejudice in the form of delay and additional cost as a result of the addition of the two parties to the proceedings, this is not, in this Court's view, sufficient to deny that application or to amount to a 'substantial countervailing factor'.
56. This is particularly so when it appears to be in both parties' interests to reduce the delay arising from joining new parties to the proceedings. This is because Lexington, like Anthology, is claiming to be entitled to Patent 807, which is a wasting asset as it is due to expire in just over five years' time. Hence logic would dictate that both parties should wish to expedite the trial of this action, so that whoever is the winner of the litigation gets as much time as possible to exploit the valuable patent.
57. However, most significantly, it seems to this Court that a greater prejudice, than delay and increased costs to the existing counterclaim defendants, is likely to be suffered by Lexington if the application is refused. This is because, as previously noted, if Lexington were to be successful in its claim of fraud and conspiracy against the deceased Mr. Walters and Anthology, this Court finding would not be binding on Mr. Connell or Mr. Karrer, who, on Lexington's version of events, were centrally involved in the alleged fraud and conspiracy.
58. Mr. Connell in his affidavit appears to suggest that at that stage, Lexington could join the two parties to the proceedings. However, this does seem to raise significant issues regarding whether they would be bound by court findings to which they were not a party and this Court is not persuaded by this argument. Hence, this Court concludes that there

could be prejudice to Lexington if it were not permitted to join Mr. Connell and Mr. Karrer as co-counterclaim defendants at this stage of the proceedings.

59. In addition of course, the evidence to which reference has been made shows a *prima facie* involvement of Mr. Connell and Mr. Karrer in the acts which are alleged to amount to fraud and conspiracy. In light of this *prima facie* evidence, it also seems to this Court that Lexington could be prejudiced if it were deprived of the right to seek discovery and interrogatories from both Mr. Connell and Mr. Karrer, particularly where Mr. Walters is deceased, and Mr. Campbell has confirmed that he has no first-hand knowledge of the events surrounding the purported event of default.
60. For all these reasons, the joinder of Mr. Connell and Mr. Karrer will be permitted.

**Amendment to Counterclaim**

61. As regards the application to amend the Counterclaim to take account of the joinder of Mr. Connell and Mr. Karrer, Mr. Connell swears in his affidavit regarding the proposed amendments that:

“[I]t is apparent from the proposed amendments that they simply expand the allegations already made in the proceedings to include [Mr. Connell] (in my personal capacity) and Mr Karrer.”

62. This Court agrees with this characterisation of the proposed amendments to the Counterclaim, i.e. as being concerned with simply including Mr. Connell and Mr. Karrer in the conspiracy and fraud allegations. As this Court has found that there is a stateable case against Mr. Connell and Mr. Karrer in this regard, it seems to this Court that it follows that these amendments are necessary to determine the real issues in dispute between the parties. Accordingly, these amendments will be permitted.
63. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention this day week at 10.30 am.