

PARTIES TO A PROCEEDING

Who can be a party to a proceeding

3.1 (1) A person is a party to a proceeding if he or she is:

- [3.1.1] Meaning of “proceeding” The word “proceeding” is very wide and includes everything from the moment the court’s jurisdiction is first invoked until final judgment is enforced or performed: *Poyser v Minors* (1881) 7 QBD 329 at 334; *Re Shoesmith* [1938] 2 KB 637 at 648, 652.

(a) the claimant; or

- [3.1.2] Who may be a claimant A person may not be a claimant unless they have an actual or contingent legal (as opposed to merely commercial) interest in a proceeding: *Re I G Farbenindustrie AG Agreement* [1944] Ch 41 at 43; [1943] 2 All ER 525 at 528.

(b) the defendant; or

- [3.1.3] Who may be a defendant A person may be a defendant if some relief is claimed against him: *Amon v Raphael Tuck* [1956] 1 QB 357 at 380, 386; [1956] All ER 273 at 286-7, 290; [1956] 2 WLR 372 at 392, 397. A person cannot be joined as a defendant merely to obtain costs: *Burstall v Beyfus* (1884) 26 Ch D 35 at 40.

(c) a person who becomes a party; or

(d) a person whom the court orders to take part in the proceeding.

- [3.1.4] Impossibility of being a claimant and a defendant A person cannot be a claimant and a defendant (or an applicant and respondent): *Ellis v Kerr* [1910] 1 Ch 529 at 537.

(2) There can be more than one claimant and defendant in the one proceeding.

- [3.1.5] Parties only named once However, a claimant or defendant is named only once, even if their status as a party involves them in different capacities: *Hardie v Chiltern* [1928] 1 KB 663 at 699.

Adding and removing parties

E CPR r19.2(2)
E SCR O15r 6

3.2 (1) The court may order that a person becomes a party to a proceeding if the person’s presence as a party is necessary to enable the court to make a decision fairly and effectively in the proceeding.

- [3.2.1] History The object of such provisions was to give effect to the aim of the *Judicature Acts* to prevent a multiplicity of proceedings by bringing all parties to the dispute before the court at the same time and thus reduce delay, inconvenience, expense, etc: *Byrne v Brown* (1889) 22 QB 657 at 666; *Montgomery v Foy* [1895] 2 QB 321 at 324; *John Cooke v Commonwealth* (1922) 31 CLR 394 at 411.

- [3.2.2] Prevention of injustice A further object of the provision is to prevent injustice to a person whose rights or liabilities may be affected by the court’s judgment by failing to afford them the opportunity to be heard: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999 (“a fundamental rule of procedure”); *Dinh v Samuel* [2010] VUCA 6 at [33]; CAC 16 of 2009 (an “inflexible” rule); *Gurtner v Circuit* [1968] 2 QB 587 at 595, 602-3; [1968] 2 WLR 668 at 673-4, 680; [1968] 1 All ER 328 at 332, 336. A person

indirectly interested will not be added: *Moser v Marsden* [1892] 1 Ch 487 at 490; [1891-4] All ER 458 at 459-60; *Re I G Farbenindustrie AG Agreement* [1944] Ch 41 at 43; [1943] 2 All ER 525 at 528; *Westpac Banking Corp v Goiset* [2009] VUSC 103; CC 213 of 2007.

- [3.2.3] **Meaning of “necessary”** It is difficult to attempt exhaustively to describe what might be “necessary”: *Gurtner v Circuit* [1968] 2 QB 587 at 595, 602-3; [1968] 2 WLR 668 at 673-4, 680; [1968] 1 All ER 328 at 332, 336. It may be “necessary” to add a person against whom there is no cause of action so that they will be bound by the result: *Amon v Raphael Tuck* [1956] 1 QB 357 at 380, 386; [1956] All ER 273 at 286-7, 290; [1956] 2 WLR 372 at 392, 397. It may also be “necessary” to add a party for case management reasons: *Woodings v Stevenson* (2001) 24 WAR 221 at 226. Other examples of necessity may include where rights may be directly affected by a declaration to be made (*London Passenger Transport Board v Moscrop* [1942] AC 332 at 345; [1942] 1 All ER 97 at 104) and where a co-owner's rights in land may be affected (*Pralle v Scharka* [1978] 2 NSWLR 450 at 451). Regrettably, there are many cases in Vanuatu, particularly land cases, where the obviously necessary parties are not joined, with disastrous results. It is clear that, in some of these cases, the parties are aware of the interest of others and deliberately refrain from alerting the court to them, a strategy which should be, but seldom is, discouraged with costs orders. See generally the discussion in *Dinh v Samuel* [2010] VUCA 6 at [33] *et seq*; CAC 16 of 2009.
- [3.2.4] **Necessity distinguished from other things** The provision may not permit the addition of a party only because it is “just” or “convenient”: *Vandervell v White* [1971] AC 912 at 936; [1970] 3 WLR 452 at 463; [1970] 3 All ER 16 at 24. On the other hand, the considerations in Part 1 may lead to a “watering down” of the requirement of necessity as in *Benard v Vanuatu Investment Promotion Authority* [2003] VUCA 3; CAC 29 of 2003. See also *Iata v Hooten* [2008] VUSC 28; CC 194 of 2002 where a non-party who had made gratuitous contributions toward a judgment debt to foster peace between the disputants was not joined in proceedings under enforcement.
- [3.2.5] **Requirement of existing proceedings** There must be an existing proceeding to which a party can be added. If, for example, a party dies and the cause of action does not survive the party's death, there can be no addition of a party to save the proceedings: *International Bulk Shipping v Minerals & Metals Trading Corp of India* [1996] 1 All ER 1017 at 1024, 1028; [1996] 2 Lloyd's Rep 474 at 478, 481.

(2) The court may order that a party to a proceeding is no longer a party if:

- (a) the person's presence is not necessary to enable the court to make a decision fairly and effectively in the proceeding; or**
- (b) for any other reason the court considers that the person should not be a party to the proceeding.**

- [3.2.6] **Removal of improper party** A defendant who is improperly included as a party ought to be removed: *Vacher v London Society of Compositors* [1913] AC 107 at 116; [1911-3] All ER 241 at 245; *Edmanly v The Police Service Commission* [2005] VUSC 135. It is, unfortunately, common for lawyers to give inadequate thought to the proper parties, leading to wasteful applications. The problem is especially acute in relation to Government, where s.5 of the *State Proceedings Act* No.9 of 2007 makes clear how to name Government parties, but is widely overlooked.

(3) A person may apply to the court for an order that:

- (a) a person be made a party to the proceeding; or**

- [3.2.7] **Description of added party** A person may be added as a “claimant” (see further [3.1.2]), a “defendant” (see further [3.1.3]) or otherwise (eg. “amicus”, etc) as appropriate. It is conventional for persons with private or incidental interests to be added as “interested party”.
- [3.2.8] **Public interest issues** See further Part 4 *State Proceedings Act* No.9 of 2007 as to the involvement of the Attorney-General.

(b) a person (including the party applying) be removed from the proceeding.

[3.2.9] Time for making application The application may be made at any stage of the proceedings so long as something remains to be done (even if only an assessment of damages): *The Duke of Buccleuch* [1892] P 201; 61 LJP 57; 67 LT 7392; 40 WR 455; *Bullock v London General Omnibus* [1907] 1 KB 264 at 271; [1904-7] All ER 44 at 47; *Ives v Brown* [1919] 2 Ch 314 at 321; *The W H Randall* (1928) 29 Lloyd's LR 234 at 236. There may, of course, be case management considerations, and it is suggested that parties should make an appropriate application early: *Roberts v Evans* (1878) 7 Ch D 830 at 833; *Ruston v Tobin* (1879) 49 LJ Ch 262; *Sheehan v Great Eastern Railway* (1880) 16 Ch D 59 at 63-4; *Thomas v Moore* [1918] 1 KB 555 at 569.

(4) A person affected by a proceeding may apply to the court for an order that the person be made a party to the proceeding.

[3.2.10] Meaning of "affected" This seems to be an entirely different and separate test to the "necessity test" in subrule (1). It has been said to be a fundamental rule of procedure that a person whose rights in respect of the subject matter of an action will be directly affected by any order which may be made in the action must be joined as a party. This rule is based on the need to prevent injustice by there being an adjudication upon the matter in dispute without the person whose rights will be affected being a given proper opportunity to be heard: *Rarua v Electoral Commission of Vanuatu* [1999] VUCA 13; CAC 7 of 1999 (majority judgment applying *Pegang Mining v Choong Sam* [1969] 2 MLJ 52 and *News Ltd v Australian Rugby League* (1997) 139 ALR 193 at 298). In *Westpac Banking Corp v Goiset* [2009] VUSC 103; CC 213 of 2007 the application to become involved at an enforcement stage was refused on the basis that the applicant's interest was purely commercial and arose after judgment (and with knowledge of it).

(5) An application must have with it a sworn statement setting out the reasons why the person should be made a party, or be removed as a party.

Joining and separating claims

E SCR O15r 1

3.3 (1) The court may order that several claims against the one person be included in the one proceeding if:

- (a) a common question of law and fact is involved in all the claims; or**
- (b) the claims arise out of the same transaction or event; or**
- (c) for any other reason the court considers the claims should be included in the proceeding.**

[3.3.1] Meaning of "arising out of the same transaction or event" This rule should be construed liberally. The expression "arising out of the same transaction or event" in paragraph (b) is wide enough to encompass all matters of relevance to, or which have a connection with, the transaction which is the subject of a dispute. The situation must be viewed as a whole. The claimants must show some causal act or breach on the part of the defendant which damaged them: *A-G v Pacific International Trust* [1998] VUSC 4; CC 8, 12 and 13 of 1997.

(2) The court may order that several claims against the one person be treated and heard as separate proceedings if:

- (a) the claims can be more effectively dealt with separately; or
- (b) for any other reason the court considers the claims should be heard as separate proceedings.

[3.3.2] Examples Such reasons may include where the joined claims might embarrass or delay a fair trial.

- (3) A party may apply to the court for an order that:
 - (a) several claims against the one person (including the party applying) be included in the one proceeding; or
 - (b) several claims that are included in the one proceeding be treated and heard as separate proceedings.

E SCRO15 r5

[3.3.3] Time for making application The application should be made as soon as possible, though it can be made as late as the trial: *Thomas v Moore* [1918] 1 KB 555 at 569.

Consolidated proceedings

E SCRO4r 9(1)

- 3.4 The court may order that several proceedings be heard together if:**
- (a) the same question is involved in each proceeding; or
 - (b) the decision in one proceeding will affect the other; or
 - (c) for any other reason the court considers the proceedings should be heard together.

[3.4.1] Opportunity to be heard before order No order should be made unless all parties are given the opportunity to be heard: *Daws v Daily Sketch* [1960] 1 All ER 397 at 399; [1960] 1 WLR 126 at 129.

[3.4.2] Scope of rule Proceedings may be consolidated even if the result is that one of the parties obtains a limitation advantage: *Arab Monetary Fund v Hashim (No4)* [1992] 4 All ER 860 at 864; [1992] 1 WLR 1176 at 1181. Where there are several claims arising from the same circumstances (eg. multiple personal injuries) it may be appropriate to consolidate only up to the point where liability is decided: *Healey v Waddington & Sons* [1954] 1 All ER 861 at 862; [1954] 1 WLR 688 at 692.

[3.4.3] Effect of prejudice Prejudice to a party will militate against consolidation: *Payne v British Time Recorder & WW Curtis* [1921] 2 KB 1 at 16; [1921] All ER 388 at 393.

[3.4.4] De-consolidation There is probably nothing to preclude an order for the de-consolidation of an action which was previously consolidated under this rule: *Lewis v Daily Telegraph (No 2)* [1964] 2 QB 601 at 616; [1964] 2 WLR 736 at 743-4; [1964] 1 All ER 705 at 711; *Bolwell Fibreglass v Foley* [1984] VR 97 at 100, 119.

Costs

- 3.5 When making an order under rule 3.2, 3.3 or 3.4, the court may also make an order about who is to pay the costs of that order.**

Amending documents after change of party

- 3.6 (1) After an order is made changing the parties to a proceeding, the person who applied for the order must:**

- (a) file an amended claim showing:
 - (i) the new party; and
 - (ii) the date of the order; and
 - (b) serve the amended claim on the new party; and
 - (c) if the order added or changed a defendant - serve the amended claim on the continuing party.
- (2) The amended claim must be filed and served:
- (a) within the time fixed by the order; or
 - (b) if no time was fixed – within 14 days of the date of the order.
- (3) If the order added or substituted a defendant, everything done in the proceeding before the order was made has the same effect for the new defendant as for the old defendant, unless the court orders otherwise.

Third Parties

- 3.7 (1) If a defendant claims a contribution, indemnity or other remedy against a person not a party to the proceeding, the defendant may file and serve a notice (a "third party notice") on that person stating:**

[3.7.1] Scope of third party procedure The third party procedure does not afford any defence but does give a defendant the ability to seek contribution, etc simultaneously with the claimant's proceedings: *Benecke v Frost* (1876) 1 QB 419 at 422; *Barclays Bank v Tom* [1923] 1 KB 221 at 224; [1922] All ER 279 at 280. This is limited to contribution in respect of the same liability that the claimant is asserting: *Meyer v Whitesands Resort & Country Club* [2008] VUSC 60; CC 54 of 2006.

- (a) that the defendant claims the contribution, indemnity or other remedy; and
 - (b) that the person is a party to the proceeding from the date of service.
- (2) The third party notice must be in Form 4.
- (3) The defendant must obtain permission of the court (leave of the court) if the third party notice is filed after the defence has been filed.

[3.7.2] Factors affecting leave The question of leave may involve case management, public interest or prejudice considerations. The court will not, however, consider the merits of the third party claim except to the extent to determine that it is not frivolous: *Carshore v North Eastern Rwy* (1885) 29 Ch D 344 at 346; *Edison v Holland* (1886) 33 Ch D 497 at 499. The application for leave ought to be made as soon as possible and

may be refused due to case management considerations if the delay would be multiplied: *Meyer v Whitesands Resort & Country Club* [2008] VUSC 60; CC 54 of 2006.

(4) The person becomes a party to the proceeding with the same rights and obligations in the proceeding as if the defendant had started a proceeding against the person.

- [3.7.3] Rights and obligations of third party Accordingly, the third party may cross-examine the claimant's witnesses (*Re Salmon* (1889) 42 Ch D 351 at 360, 362); appeal (or seek leave to appeal) the judgment between the claimant and defendant (*Asphalt and Public Works v Indemnity Guarantee Trust* [1969] 1 QB 465 at 471; [1968] 3 WLR 968 at 971-2; [1968] 3 All ER 509 at 511; *Helicopter Sales v Rotor-Work* (1974) 132 CLR 1 at 5, 15; 48 ALJR 390 at 390; 4 ALR 77 at 79), etc. It does not appear, however, that there is any obligation on the third party to file any kind of defence to the third party notice.

Persons under a legal incapacity

3.8 (1) A person is under a legal incapacity if the person:

(a) is a child; or

- [3.8.1] History The common law has traditionally considered children to be under a disability. It is presumed that a child cannot assert rights or form judgment: *Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62.

(b) is a person with impaired capacity.

- [3.8.2] Extent of impairment required A person must have the necessary legal capacity to perform legally effective acts and make legally effective decisions. Without such capacity, such acts and decisions will be void. The test is said to be whether the party to proceedings can understand (with explanation from legal advisers) the issue on which their decision is called for: *Masterman-Lister v Brutton* [2003] 3 All ER 162; [2003] 1 WLR 1511; [2002] EWCA Civ 1889 at [55] *et seq.*

E CPR r21.6(1)

(2) The court may appoint a person to be the litigation guardian of a person under a legal incapacity.

- [3.8.3] Appointment and powers of guardian A child's litigation guardian will usually be the legal guardian or a close relative of that child: *Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62 at 113. This person invariably provides free and flexible assistance and has an intimate knowledge of the circumstances and best interests of the child. There may be cases, however, where such a person is unavailable or unwilling, or where the issues sought to be raised by the child are adverse to a guardian. In such cases the court may use this power to appoint a suitable person.
- [3.8.4] Replacement of guardian The court may use this power to replace a litigation guardian, whether appointed by the court or otherwise. This may occur where there is concern that the guardian is unfit or as to the conduct of the proceedings. Applications to appoint, or appoint a new, litigation guardian, should probably depose to the appropriateness of the proposed guardian and, if applicable, the inappropriateness of the current guardian.

E CPR r21.2(1)

(3) A person under a legal incapacity may start or defend a proceeding only acting through the person's litigation guardian.

- [3.8.5] Lawyers to be alert to incapacity Lawyers should be alert to any signs of mental incapacity in their clients and should not take any steps until satisfied of the position. If proceedings are started or continued without a litigation guardian, even in

good faith, the defendant may apply for an order that the lawyer should be personally liable for the costs: *Geilinger v Gibbs* [1897] 1 Ch 479 at 482; *Yonge v Toynbee* [1910] 1 KB 215 at 228; [1908-10] All ER 204 at 208. Such a proceeding may then be dismissed or continued with a litigation guardian, in the court's discretion: *Cooper v Dummett* [1930] 2 WN 248; (1930) 70 L Jo 394; 170 LT Jo 468.

- [3.8.6] **Duty of guardian** Common law recognises that the litigation guardian must act in the best interests of the person under a legal incapacity: *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579; *In re Taylor's Application* (1972) QB 369. A failure to do so may result in an order for costs against the guardian: *Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62. There is nothing which elaborates on the role which might be played by the incapacitated person in giving instructions or making decisions. As to children, see further art.12, *UN Convention on the Rights of the Child*.
- [3.8.7] **Critique of rule** So far as this rule restricts the ability of children to commence proceedings, it may be more than merely procedural and its validity should not be assumed: *Chester v Bateson* [1920] 1 KB 829; *R & W Paul Ltd v Wheat Commission* [1937] AC 139; *Haines v Leves* (1987) 8 NSWLR 442 at 449. There may also be arguable infringements of art.5(1)(d) of the *Constitution* and art.12 of the *UN Convention on the Rights of the Child*.

(4) In all civil proceedings, anything required to be done by a person under a legal incapacity may be done only by the person's litigation guardian.

Death of party

3.9 (1) If:

- (a) the claimant dies during a proceeding; and**
- (b) the proceeding involves a cause of action that continues after death;**

then:

- (c) the proceeding may be continued by the claimant's personal representative; and**
- (d) the court may give whatever directions are necessary to allow the personal representative to continue the proceeding.**

- [3.9.1] **Significance of cause of action** If death terminates the cause of action or the interest of the (sole) claimant at issue, the action is ended: *James v Morgan* [1909] 1 KB 564 at 566. This does not occur where the cause of action survives in other claimants in the proceedings: *Lloyd v Dimmack* (1878) 7 Ch D 398 at 399. The surviving claimants may proceed with or without the personal representative of the deceased: *Smith v London & North Western Railway* (1853) 2 E & B 69 at 74, 76; 118 ER 694 at 696-7. On the other hand, the death of the claimant before judgment in a wrongful dismissal claim did not, surprisingly, seem to trouble the court in *J v Public Service Commission* [2009] VUSC 128 at [30]; CC 216 of 2005 where Clapham J proceeded to judgment.

E CPR r19.8

(2) If, at the start of a proceeding:

- (a) the defendant is dead; and**
- (b) no personal representative has been appointed; and**

(c) the cause of action continues after the defendant's death

then:

- (a) if the claimant knows the person is dead, the claim must name the "estate of [person's name] deceased"; and**
- (b) after a personal representative is appointed, all documents in the proceeding must name the personal representative as defendant.**

[3.9.2] **Action commenced against deceased a nullity** An action commenced against a person already dead is usually a nullity and cannot be cured by substituting the executors as a party: *Dawson v Dove* [1971] 1 QB 330 at 335-6; [1971] 2 WLR 1 at 6; [1971] 1 All ER 554 at 558. Subrule (2) operates only in respect of such claims as continue after the death of a defendant.

Party becomes bankrupt, under a legal incapacity or dies during a proceeding

3.10 (1) If a party becomes bankrupt, becomes a person under a legal incapacity or dies during a proceeding, a person may take another step in the proceeding for or against the party only:

- (a) with the court's permission; and**
- (b) in accordance with the court's directions.**

(2) If a party becomes bankrupt or dies, the court may:

- (a) order the party's trustee or personal representative or, if there is no personal representative, someone else, to be substituted as a party; and**
- (b) make other orders about the proceeding.**

(3) The court may require notice to be given to anyone with an interest in the deceased party's estate before making an order under this rule.

(4) If:

- (a) the court orders someone, other than a personal representative to be substituted for a deceased party; and**
- (b) another person is later appointed as personal representative;**

the first person must give all documents in the proceeding to the personal representative as soon as practicable.

[3.10.1] **Example** See however *J v Public Service Commission* [2009] VUSC 128 at [30]; CC 216 of 2005 where Clapham J proceeded to judgment without reference to this rule.

Partners

3.11 (1) One partner may start a proceeding in the partnership name.

- [3.11.1] Corollary of rule that partners may bind each other. This reflects the ordinary law of partnership that each partner is *praepositus negotiis societatis* and may consequently bind the other partners by his acts. Any dissent within the partnership may be resolved internally. A difficulty arises where a partner of a defunct partnership wishes to take action in the partnership name on a cause of action arising during the life of the partnership. See *Seal v Kingston* [1908] 2 KB 579 at 582.
- [3.11.2] Partners may not sue each other in partnership name. This rule does not affect the ordinary law of partnership and the rights of partners against each other. Accordingly, it does not permit one or more partners to sue other partners in the partnership name: *Meyer v Faber (No 2)* [1923] 2 Ch 421 at 434.

(2) A proceeding against persons who are alleged to be partners may be brought against the persons in the partnership name.

- [3.11.3] Convenience. The use of a partnership name is merely a convenience denoting that each partner is sued as though their names were all set out: *Western National Bank of New York v Perez* [1891] 1 QB 304 at 314.
- [3.11.4] Proceedings not affected by change in partnership. A change in the partnership during the proceedings does not constitute a change of parties: *Re Frank Hill; Ex parte Holt & Co* [1921] 2 KB 831 at 834.

(3) A party to a partnership proceeding may by written notice require the partnership, within not less than 2 days of the date of service, to give the names of all partners.

(4) The notice must be served:

- (a) at the place of business of the partnership; and
- (b) on one of the partners.

(5) If the partnership does not give this information, the court may:

- (a) order the proceeding be suspended (stayed) until the information is given; or
- (b) order a document that has been filed be struck out; or
- (c) make any other order it considers appropriate.

(6) If a judgment is given against a partnership, the court may by order allow enforcement against individual partners.

Representative party

E CPR r19.6(1)

3.12 (1) A proceeding may be started and continued by or against one or more persons who have the same interest in the subject-matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

- [3.12.1] **Objective** This rule is another way of ensuring that all parties having an interest in the proceedings are before the court: *Dinh v Samuel* [2010] VUCA 6 at [34]; CAC 16 of 2009.
- [3.12.2] **Meaning of “same interest”** It is necessary for the persons to have the same interest and not merely parallel but different interests arising from the same facts: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006.
- [3.12.3] **Identification of all class members unnecessary** It is not necessary to identify each and every member of the represented class, provided the class is identified with sufficient particulars: *Carnie v Esanda Finance* (1995) 69 ALJR 206 at 217; 127 ALR 76 at 91; *Campbell v Thompson* [1953] 1 QB 445 at 451, 453-4; [1953] 2 WLR 656 at 659, 661; [1953] 1 All ER 831 at 833-4. Accordingly, it is possible, where large numbers are involved, to bind unidentified members of a class: See for example *EMI Records v Kudhail* [1985] FSR 36; [1983] Com LR 280; (1984) 134 NLJ 408; *Maritime Union of Australia v Patrick Stevedores* [1998] 4 VR 143 at 159; (1998) 144 FLR 420 at 437.
- [3.12.4] **Wide discretion** The rule is flexible and ought to be used according to its permissive scope: *John v Rees* [1969] 2 All ER 274 at 282-3; *Carnie v Esanda Finance* (1995) 69 ALJR 206 at 217; 127 ALR 76 at 91. The court's discretion is at large and the court will consider matters of expense, delay, etc which are relevant to the overriding objective. See also the various discretionary factors considered in *Kolou v Traverso* [2009] VUSC 58; CC 81 & 82 of 2008.
- (2) At any stage of the proceeding the court may appoint one or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.**
- (3) When appointing a person who is not a party, the court must also order that the person is to become a party.**
- (4) An order made in a proceeding against a representative party may be enforced against a person not named as a party only with the court's leave.**
- [3.12.5] **Unnamed party not bound by judgment** On the application for leave, the non-party is bound by the estoppel created by the judgment and cannot challenge its correctness – he may only challenge the enforcement to the extent of the circumstances particular to the non-party: *Commissioners of Sewers v Gellatly* (1876) 3 Ch D 610 at 615-6.
- (5) An application for leave to enforce the order must be served on the person against whom enforcement is sought as if the application were a claim.**
- [3.12.6] See further rr.5.2, 5.3.