



THE COURT OF APPEAL

Neutral Citation Number: [2022] IECA 56

Record Number: 2018/213

High Court Record No.: 2005/2747P

Costello J.

Haughton J.

Power J.

BETWEEN/

EUGENE MCCOOL

(SUBSTITUTED AS PLAINTIFF FOR MCCOOL CONTROLS AND ENGINEERING LIMITED BY ORDER OF THE MASTER MADE ON 8TH NOVEMBER 2017)

PLAINTIFF/APPELLANT

- AND -

HONEYWELL CONTROL SYSTEMS LIMITED

DEFENDANT/RESPONDENT

AND

Record Number: 2019/505

High Court Record No.: 2005/2747P

BETWEEN/

MCCOOL CONTROLS AND ENGINEERING LIMITED

PLAINTIFF

- AND -

HONEYWELL CONTROLS SYSTEMS LIMITED

DEFENDANT/RESPONDENT

- AND -

JUDGMENT delivered by Mr. Justice Robert Haughton on the 11th day of March 2022

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Introduction

1. Both of these appeals come within the High Court proceedings bearing Record No. 2005/2747P. In the first appeal (“first appeal”) the appellant (“Mr. McCool”) appeals from the judgment of Noonan J. delivered on 10 April 2018 and order perfected on 24 April 2018 whereby it was ordered that –

- (a) the Order of the Master of the High Court made on 8 November 2017 substituting Mr. McCool for McCool Controls and Engineering Limited (the “Company”) be discharged;
- (b) that the application brought by Mr. McCool pursuant to Notice of Motion dated 18 July 2017 (“the first substitution application”), seeking an order allowing Mr. McCool, as founder, managing director and 100% shareholder of the Company to be joined as co-plaintiff, be dismissed;
- (c) that the application brought by Mr. McCool pursuant to Notice of Motion dated 22 December 2017 seeking an order striking out the respondent’s pleadings be dismissed; and
- (d) that Mr. McCool do pay the defendant’s (“Honeywell”) costs of the said applications, to be taxed in default of agreement on a “solicitor and own client” basis.

2. In the second appeal (“second appeal”), Mr. McCool appeals from the judgment of Simons J. delivered on 25 October 2019 and the order perfected on 13 November 2019 whereby it was ordered that the application of Mr. McCool pursuant to Notice of Motion issued on 2 July 2018 seeking that he be substituted as plaintiff for the Company (“the second substitution application”) be refused and that Honeywell do recover its costs as against Mr. McCool personally on a “party and party” basis.

3. In relation to the second substitution application Simons J delivered a supplemental judgment on 11 November, 2019 rejecting Honeywell’s application for costs on a “solicitor and own client” basis, and he awarded Honeywell costs on a “party and party” basis. Honeywell cross appeals this costs order.

4. In essence, in the first and the second substitution applications Mr. McCool seeks to rely on purported assignments of the proceedings by the Company to him to enable him to continue the proceedings in circumstances where the Company can no longer afford a legal team. In relying on the assignments Mr. McCool seeks to avoid so-called ‘rule in *Battle*’ viz. the rule in *Battle & anor v Irish Art Promotion Centre Limited* [1968] IR 252 in which the Supreme Court held that a managing

director and major shareholder of the defendant company was not entitled to continue the defence of the proceedings on the company's behalf. In the High Court in the first substitution application Noonan J. found that the assignment to Mr. McCool was entered into solely for the purpose of circumventing the rule in *Battle* and that it was an abuse of process and invalid. He further held that even if the assignment was not invalid as an abuse of process, it savours of champerty and is thus contrary to public policy and invalid. In the second substitution application Mr. McCool sought to rely on a second purported assignment, in slightly different terms. Simons J. rejected the second substitution application on the basis that it was an attempt to re-agitate an issue which had previously been decided against Mr. McCool by Noonan J.

Background

5. Mr. McCool is a director and majority shareholder in the Company which was the sole plaintiff in these proceedings when the plenary summons issued on 9 August 2005.

6. The Company is involved in the provision of building management systems, including electronic control systems for building services such as heating and air conditioning. Honeywell is an English registered company, which is part of a multinational conglomerate, which manufactures and distributes such systems, amongst others.

7. In its original statement of claim the Company allege that an agreement reached between it and Honeywell in 1988 gave the Company exclusive distribution and installation rights to Honeywell products in Ireland, subject to certain exceptions.

8. In or about the year 2000, the Wyeth Pharmaceutical Company was engaged in a project involving construction of a very large state of the art plant in Clondalkin County Dublin.

9. The Company alleges that the project engineers invited it to become involved in what is suggested to have been a very lucrative project. The Company alleges that it introduced Honeywell

to the opportunity, in a cooperative venture. The essential claim is that Honeywell itself successfully tendered for the project by cutting the Company out, in breach of the 1998 agreement, and that this has resulted in substantial losses, estimated by Mr. McCool at some €11 million.

10. In its defence Honeywell denies the claim in full and pleads that any work done by it on the Wyeth project was either not covered by the 1998 agreement or came within express exceptions therein provided for. Honeywell further pleads that, in any event, the Company is estopped from maintaining the claim because a compromised agreement was entered into between it and Honeywell in November 2002 whereby Honeywell agreed to waive a sum of £143,626 then due by the Company to Honeywell in consideration of the Company waiving any claim it might have against Honeywell. Honeywell also pleads a counter claim against the Company in respect of goods sold and delivered in the amount of.£134,052.97.

11. Although the formal pleadings closed in May 2007, pre-trial exchanges and motions have been protracted. As the passage of time that this has entailed, and the legal expense involved, is a central theme in Mr. McCool's applications and appeals, it is appropriate to summarise what has occurred. The exchange of particulars and motions to compel particulars progressed over a period from 6 December 2005 to 2 March 2009. In January 2009 Honeywell issued a motion for security for costs, which was struck out in July 2010. In July 2011 the Company served Notice of Intention to Proceed. Notice of change of solicitor was filed on behalf of the Company in February 2012, and a further Notice of Change of Solicitor was filed on its behalf in June 2012. A motion then issued in which the Company sought an order adjourning the proceedings to allow alternative dispute resolution to take place, but that order was refused by Gilligan J. on 31 July 2012. On 13 September 2012 Mr. McCool sent an email directly to personnel within Pfizer and Jacobs Engineering, wherein he stated:

“Our legal fees for Fry’s alone are now at €260,000 ... Fry’s withdrew from the case just weeks before on ADR motion last February but despite numerous requests and issue of undertakings Fry’s have not handed over the files for the case.”

A further notice of change of solicitors was filed on behalf of the Company in October 2012. On 8 May 2013 the Company issued a motion to have the proceedings entered into the Commercial List in the High Court; that application was refused by order of Kelly J. made on 13 May 2013. Discovery was then made by Honeywell, the adequacy of which was disputed by the Company. On 20 September 2013 Honeywell issued a motion seeking an order striking out the Company’s claim for failing to make discovery in accordance with terms agreed by the parties. Contemporaneously a motion was also issued by Honeywell seeking to strike out the Company’s Reply to Defence and Counterclaim for failing to deliver adequate and complete Replies to Honeywell’s Notice for Particulars of matters arising therefrom. This led to an order of Cooke J. on 18 November 2013 requiring the Company to deliver a correct version of “Appendix 1” to the Company’s Replies to Defendant’s Notice for Particulars. Also on 29 October 2013 an order of the Master was made declining the Company’s application seeking an order striking out Honeywell’s Defence and Counterclaim for failure to make discovery, but awarding the Company the costs of its application. On 29 November 2013 the Company furnished a proposed Amended Reply to Defence and Defence to Counterclaim. There followed three affidavits of discovery sworn by Mr. McCool on behalf of the Company. The Company then filed Further Notice of Change of Solicitors on 19 June 2014, and the following month Mr. McCool’s fourth affidavit of discovery was delivered. Following delivery of a further motion by Honeywell seeking to strike out the claim for failure to provide discovery, the fifth affidavit of discovery of Mr. McCool was delivered on 8 September 2015. In that month Honeywell also obtained a Certificate of Taxation in the amount of €15,139.42 in respect of costs orders made against the

Company in favour of the respondent in the proceedings, and in respect of which no stay was imposed. It appears that this sum remains undischarged.

This whistle stop account of the proceedings to date does not purport to be comprehensive, but it serves to illustrate the regrettably protracted progress of this litigation up to the time Mr. McCool issued the first substitution application.

The first appeal

12. Mr. McCool issued a motion on 18 July 2017 seeking –

“(1) an order by way of allowing me, Eugene McCool, founder, managing director and one hundred percent owner of McCool Controls and Engineering Limited, to be joined as a co-plaintiff on the case, McCool Controls and Engineering Limited v Honeywell Control Systems Limited, Case Ref. 2005/2747P.”

13. The motion came on for hearing before the Master on 28 July 2017. It appears that based on submissions made on behalf of the respondent, the Master indicated that Mr. McCool had no personal claim against the respondent which he could litigate in his own right, but the Master ventilated the possibility with Mr. McCool that the Company could assign its cause of action to him. The matter was adjourned to 13 October 2017.

14. On 13 October 2017 Mr. McCool now claimed that the Company had executed an assignment of its claim to him on 28 September 2017, and he renewed his application to be joined as co-plaintiff on that basis. However the Master concluded that since the Company had assigned its interest in the proceedings to Mr. McCool, it could no longer be a plaintiff. The matter was adjourned to 27 October to facilitate the filing of further affidavits and ultimately on 8 November 2017 the Master made the order substituting Mr. McCool for the Company as plaintiff in the proceedings.

15. It is that order that Honeywell applied to have discharged in the High Court. At para. 10 of his judgment Noonan J. records –

“10. The essential argument of Honeywell in this application is that the assignment is invalid because first, it is a device deployed to avoid the effect of the rule in *Battle v Irish Art Promotion Centre Limited* [1968] I.R. 252 which precludes a director or shareholder from representing a company in legal proceedings and is thus an abuse of process, and secondly, that it is champertous and/or savours of champerty and is thus contrary to public policy and invalid.”

The first assignment

16. On 28 September 2017 the board of the Company passed a resolution authorising the Company to assign the legal proceedings to Mr. McCool. In recitals the Resolution acknowledges “the personal financial input by Mr. Eugene McCool, over the past sixteen years since Honeywell’s breaches of contract occurred, which allowed McCool Controls to continue trading”, and his personal input “in dealing with the serious problems and difficulties arising from the sixteen year old legal case”, and his personal role in dealing with the activities of Honeywell. The Resolution then records:–

“4. ‘The Company’ noted the receipt this morning, by registered letter, of O’Grady’s Solicitors’ application to the court to come off record on McCool Controls Legal case against Honeywell, on the allegation that they were due €40,000 in outstanding fees, yet McCool Controls accounts report that there are no outstanding payments due to O’Grady Solicitors on the account system.

5. ‘The Company’ recorded the total failure of the legal system to protect McCool Controls against the aggressive activities of the Defendant, Honeywell Control Systems, over the twelve years of litigation, which has resulted in McCool Controls being denied its

constitutional right of access to justice within a reasonable time frame and under such circumstances it was thereby agreed that the only possible solution at this time, was that ‘the Company’ would assign the legal proceedings against Honeywell Control Systems Case No: 2005/2747P, to Eugene McCool in a suitable proportion, whereby Eugene McCool could pursue the claim for damages against the Defendant, in these legal proceedings and Eugene McCool confirmed his commitment to the protection and wellbeing of McCool Controls, its staff, customers and suppliers and to bring these legal proceedings to a conclusion.”

This Resolution was signed by Mr. McCool as chairman/secretary and Mary O’Donnell, a co-director.

17. The “Assignment of claim agreement” executed pursuant to the Resolution and also dated 28 September 2017 (“the first assignment”) follows the form of a document which Mr. McCool states he discovered on the internet by using the Google search engine. The relevant operative parts provide

—

“[The Company] (hereinafter “Assignor”) for good and valuable consideration, hereby irrevocably sell, convey, transfer and assign [*sic*] to, Eugene McCool ... (hereinafter “Assignee”) all of the Assignor’s rights, title and interest in and to the claim or claims of the Assignor (the “Claim”) in the claim/contract(s) described as follows: High Court Record Number 2005/2747P, a legal claim by McCool Controls and Engineering Limited ... against Honeywell Control Systems Limited ... and all rights and benefits of the Assignor, relating to that claim, including, without limitation,

- (i) the Assignor’s right to receive interest, penalties and fees, if any, which may be paid with respect to the claim and,

- (ii) any actions, claims, rights, or lawsuits of any nature whatsoever, whether against the Defendant or any other party arising out of or in connection with the claim and,
- (iii) all cash, securities, instruments and other property which may be paid or issued by the Defendant in satisfaction of the claim.

Assignor agrees that all rights and obligations of the Assignor arising under the above legal proceedings or otherwise by law or by the existence of conditions precedent, which may or may not have occurred as of the date of this Assignment, are hereby included in this Assignment and Assignee hereby agrees to accept same as if the Assignee was an original party to the aforesaid legal case/contract(s).

...

...

Assignor hereby acknowledges that the Assignee may at any time reassign any or all, of the transferred rights, together with all right, title and interest of the Assignee in and to this agreement.

It is the intention of the parties that in the event a court of competent jurisdiction finds that any provision or portion of this Assignment is unenforceable for any reason, the balance and remainder of this Assignment shall remain effective and enforceable to the extent possible under the circumstances then existing.

...”

The italics are added to a clause of particular significance that appeared in the first assignment, but was which was deleted from the second assignment.

18. The first assignment does not specify what the consideration is, but Mr. McCool ultimately advised the High Court that the consideration was €1.00.

19. At paragraphs 15 – 18 of his judgment the trial judge emphasises averments initially relied upon by Mr. McCool in the affidavit sworn by him on 10th June 2017 to support his application to be added as a plaintiff, before the Assignment was executed. At para. 13 of that affidavit Mr. McCool averred

–

“... that as the founder, 100% shareholder and as managing director of the company, it is my duty to take all necessary steps under s. 228 to protect the company, its employees, creditors and customers and it is on that basis that I am making this application to request the court to order that I be allowed to act as co-plaintiff in these proceedings...”

At paragraph 15 Mr. McCool averred –

“15. As [the Company] cannot repay my loan, I was forced to write a letter of complaint to Mary O’Donnell, a director of [the Company], about the Company’s position and the fact that the [Honeywell] case had been blocked from proceeding to trial. The outcome of this was that [the Company] held a board meeting at which it was decided that I was a heavily connected party to the MCC/HW dispute and as the legal system had failed to protect [the Company] from the aggressive activities of the defendant, that the only way to protect [the Company] and to advance the legal case to trial, was that I was to be joined as a co-plaintiff in the proceedings. This proposal was put to the board and passed unanimously ...”

Later on in the same affidavit Mr. McCool averred –

“41. I am the only person who can protect [the Company], its employees, creditors and customers. [The Company] is dependent on me for its survival and it is on that basis that the board of [the Company] has agreed for me to act as co-plaintiff in these proceedings...

42... The Company is dependent on me to bring this case to trial.

43. I am a heavily connected party to this case and in order to protect the Company and to advance the case to trial, I have agreed to this request to be joined as a co-plaintiff.”

20. Subsequent to the date of the first assignment, in an affidavit which he swore on 11 October 2017 Mr. McCool states –

“35. The court should be aware that I am not making a personal claim or any form of contractual claim, nor making a claim for recovery of reflective loss, nor a claim for diminution of the value of my shareholding in the company, in this case against the defendant.

36. My application to the court is to be entered as a co-plaintiff, is on a no costs basis, for the sole purpose of protecting the company against the activities of the defendant, whose actions have exposed the company to the risk of collapse over a twelve year period of litigation. The legal system is presently constituted, has failed the plaintiff, who has been unable to advance its case to trial and the court systems and procedures, do not afford any control, sanction or means of protection against the aggressive campaign of the defendant, to force a collapse of the plaintiff, in view of a defence in the proceedings.”

In a further affidavit sworn by Mr. McCool on 24 October 2017 he states –

“Summary

34. As a result of the failure of the legal system, including those solicitors who have been on record for the plaintiff, to professionally and diligently advocate the plaintiff's position in these proceedings, and where the plaintiff's financial standing has been targeted and subsequently damaged to the extent that its case is at risk of collapse, the company has assigned the case to Mr. Eugene McCool, who has undertaken to diligently continue the proceedings solely for the benefit of the company and at no cost to the company.

35. Mr. McCool has a detailed knowledge of this case from the time he introduced the Wyeth project to the then CEO of Honeywell, Mr. Leo Quinn, when he came to visit McCool's in Dublin on 20th June, 2000. As the only person who can protect [the Company], its employees, creditors and customers, the plaintiff is dependent on Mr. McCool for its survival and its on that basis that the board of [the Company] has agreed to assign these proceedings to Mr. Eugene McCool.

36. [The Company] have a right of access to a hearing within a reasonable time frame. That right has been denied to [the Company] by the actions of the defendant and the court system's failure to deal with such activities. There is no other alternative for [the Company] at this time and hence the company is dependent on Mr. McCool to bring this case to trial. Mr. McCool is a heavily connected party to this case and in order to protect the company and to advance the case to trial, Mr. McCool has agreed to this request to this assignment and we now beg this court to amend these pleadings, to add Mr. Eugene McCool, as a plaintiff to the proceedings, case number 2005/2747P with immediate effect."

The decision of Noonan J.

21. Having considered this evidence Noonan J. made the following findings: -

“18. It is thus clear beyond doubt that Mr. McCool’s application as originally constituted was an attempt to avoid the consequence of the rule in *Battle*, a rule with which Mr. McCool is well familiar, as he has stated on affidavit and in submissions.”

And -

“21. It will readily be seen that all of these averments are entirely inconsistent with a purported absolute assignment of [the Company’s] cause of action to Mr. McCool in circumstances where it would retain no residual interest in the proceedings. It is also noteworthy that Mr. McCool has repeatedly asserted on oath that Honeywell have absolutely no defence to [the Company’s] claim and he has brought a motion before the court, currently pending, by which he seeks to have Honeywell’s defence struck out on the basis that it is not bona fide, is frivolous and vexatious and an abuse of process. Yet this indefensible claim, which according to Mr. McCool has a value of €11 million, has been assigned to him absolutely for €1 by [the Company].”

22. Noting that Mr. McCool did not contest the application of the rule in *Battle* to the proceedings, the trial judge quoted from the unanimous judgment of O’Dálaigh C.J. in the Supreme Court, at p. 254: -

“This survey of the cases indicates clearly that the law is, as we apprehended it to be when this application was first made to us, *viz.* that, in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own *personae* for the *persona* of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience

which they would have as individuals; but the choice has been their own. One sympathises with the purpose which the appellant has in mind, to wit, to safeguard his business reputation; but, as the law stands, he cannot as major shareholder and managing director now substitute his *persona* for that of the company. The only practical course open to him would, it appears, be for him personally to put the company in funds for the purpose of presenting its defence. The Court in my judgment should refuse this application.” (para. 22)

Noonan J. also referred to *AIB v Aqua Fresh Fish Limited* [2017] IECA 77¹, another case in which the managing director and principal shareholder of the defendant company sought to represent the company in proceedings before the High Court. In that case the managing director, Mr. Flynn, sought to challenge the ruling *Battle* on various grounds. Having cited the above passage from *Battle*, McKechnie J. stated, at p. 5: -

“9. As is evident from this passage, the essence of the rule was firmly anchored in the legal personality of a company as a separate and distinct entity from its members, subscribers, office holders and indeed from all others. Very much the same reason explains why the statutory provision in question in *Abbey Films v. The Attorney General* [1981] 1 I.R. 158 did not fall foul of the equality provision of Article 40.1 of the Constitution (p. 172 of the Report). As the incorporation of such an entity is a decision of choice, those who regulate their business activities in such a manner had also to accept the consequences of this characterisation. Such was the logical consequence of the House of Lord's decision in *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22, in respect of which see para. 31, *infra*.”

¹ There was a further appeal to the Supreme Court, where judgment was delivered on 18 October 2018 (after Noonan J. delivered his judgment in the present matter), reported at [2018] IESC 49. The Supreme Court in the unanimous judgment of Finlay Geoghehan J., to which reference is made later in this judgment, affirmed the decision and judgment of McKechnie J. in this court.

As Noonan J. noted, in that judgment McKechnie J. also dealt with potential exceptions to the rule in *Battle*. McKechnie J. referred to *Stella Coffey No. 2 GM Ltd & Ors. v The Environmental Protection Agency* [2014] 2 I.R. 125, where at para. 35 Fennelly J. said the following: -

“35. This ruling proceeds from the fact that the incorporated company is, as a strict matter of law, a legal person separate from its members and from its directors and management. Nonetheless, in practice, the courts have to deal on a daily basis with difficult cases involving unrepresented companies, frequently because there are simply no funds to provide for legal representation. The company, being a purely legal or notional person, cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although that is far from ideal, it represents the present law.”

McKechnie J. then noted that Fennelly J. endorsed what he described as “a slight modification” of the strict rule regarding companies, and continued: -

“39. Nor do I think that the attempt to represent the company No2GM Ltd. gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the court's brief adjournment of the hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit.”

23. Noonan J. then quoted further from McKechnie J. in *AIB v Aqua Fresh Fish Limited* in which he went on to summarise the effect of the authorities, at p. 26: -

“Companies:

...

(iv) A company, or any other artificial or fictitious person with a distinct legal persona, can be represented only by a lawyer duly accredited with a right of audience in our courts.

(v) There is no right for a secretary, director, shareholder or any other officer to appear in court proceedings on behalf of a company.

(vi) However, this rule does not interfere with the court's undoubted discretion to permit an individual person to act on behalf of the company where justice so demands.

(vii) The manner in which this might be done will reflect the presenting circumstances of each particular case, with the courts generally adopting a pragmatic approach to such relaxation on both the personal and corporate side.

(viii) The existence of such judicial flexibility when the rule might defeat the interests of justice, which is evident in the case law, is not an insignificant factor when the very existence of the rule is under challenge.”

Noonan J. also quoted from p. 32 where McKechnie J. dealt specifically with an impecunious company: -

“Impecuniosity, of itself, not sufficient:

60. Impecuniosity of a company, on its own and without more, will rarely if ever justify an exemption. In virtually every comparable jurisdiction such is the prevailing situation. As has been said numerous times, the lack of funds in the first instance is neither rare nor exceptional. From time to time, however, one finds an occasional judgment in which a company's inability to pay for representation is considered as a significant factor in the exercise of the court's discretion. One such case is *Arbuthnot Leasing International Ltd v. Havelet Leasing*

Ltd [1990] B.C.C. 627, in which Scott J., having espoused such view, continued to contextualise his position by adding:-

‘...I see no reason why an individual should be forced to incur the horrendous costs of commercial litigation if he is willing to appear in person...’

Shortly thereafter, however, the more traditional position was reasserted in *Radford v. Freeway Classics* [1994] 1 B.C.L.C. 445 and *Floods of Queensferry Ltd v. Shand Construction Ltd & Ors* [1997] 81 B.L.R. 49. This apparent conflict ceased to have any importance in England and Wales after the implementation of civil procedural reforms in those jurisdictions in the late 1990s (see para. 71 *infra*).

...

63. The second point, whether discussed in the context of the Irish constitution or the Convention, is one which is not free of concern. In a great number of cases, the lack of resources is the pivotal reason for non-legal representation. Where that arises, it may create a real problem for the company and for its subscribers, investors and many others. Unless some solution is found, its voice will not be heard, a situation described by Fennelly J. in *Stella Coffey* as being ‘far from ideal’, but nonetheless one which represents the present law (para. 35, *supra*).”

24. Having considered these authorities, Noonan J. then stated: -

“27. I think it is true to say that by far the most common reason for companies not to be represented in legal proceedings is impecuniosity. As noted above, it is therefore by definition neither a rare nor exceptional circumstance and certainly not one, which of itself, could normally justify an exception to the rule in *Battle* which the authorities make clear. Mr.

McCool has repeatedly made the argument in his affidavits and in submissions that it is unfair that a company with what is alleged to be a claim for €11 million that is indefensible, is deprived by the legal system of advancing that claim due to lack of funds. There are of course arguments for and against this proposition and many of them were identified by McKechnie J. in *Aqua Fresh*.

28. However the fact remains that unless and until it is changed by the legislature or perhaps the Supreme Court, the rule in *Battle* remains the law and I am bound to apply it.”

25. Noonan J. then noted that Mr. McCool did not “cavil with the ruling *Battle* nor does he suggest that he comes within any exception to that rule”. He then concluded this section of his judgment with the following: -

“30. I think it is clear beyond any real doubt that the assignment in this case was entered into for the sole purpose of circumventing the rule in *Battle*. As such, it cannot be regarded as other than an artifice which, if upheld, would set the rule at naught. I am therefore satisfied that it is an abuse of process and invalid.”

26. In paragraphs 31 – 48 of his judgment Noonan J. then addresses “The Conduct of Mr. McCool”. This was for the purpose of addressing the suggestions of Mr. McCool on affidavit and in argument that the justice of the case required that he should in effect be allowed to represent the Company. Noonan J. felt it relevant in that context to comment on the conduct of Mr. McCool, and the “ever more serious allegations he has made against all and sundry throughout the protracted course of these proceedings”. I do not propose to record this part of the judgment at length, because in my view it is not integral to his primary finding that the first assignment was entered into for the sole purpose of circumventing the ruling in *Battle*, or to his a secondary conclusion that, even if the first assignment

was not invalid on the ground that it was an abuse of process, “it savours of champerty and is thus contrary to public policy and invalid” (para. 58). In summary, Noonan J. refers to –

- an allegation that a named officer of Honeywell committed perjury in an affidavit;
- an accusation that Honeywell swore false affidavits and issued false documentation;
- “myriad defamatory statements in his affidavits and elsewhere concerning the defendant and others and in particular alleging Honeywell has abused the legal system to cripple the plaintiff financially” (para.32);
- an accusation of committing criminal offences with impunity;
- allegations of the exertion of pressure on the Company’s own legal team and on Mr. McCool to withdraw allegations in affidavits (which Noonan J. considered were “obviously unfounded” – see para.33), and thereby causing the application to admit the proceedings to the Commercial List to be unsuccessful;
- accusing the Company’s own solicitor of “an act of great negligence” and failing “to protect their client as costs escalate” and “failing to professionally and diligently advocate the plaintiff’s position in these proceedings”;
- in the aftermath of the failed admission application, in an email sent by Mr. McCool on 25 October 2017 to various Honeywell personnel and copied to various solicitors in Arthur Cox and Courts Service personnel, allegations that he had been informed by the Company’s then solicitor that he had been offered a sum of €100,000, but did not reveal the source of the offer or why it was made, the inference being that Honeywell was responsible for trying to bribe the Company’s solicitor;

- in the same email Mr. McCool suggested that the Queens Counsel representing the Company in the application to admit to the Commercial Court had worked for Honeywell in the UK, inferring a conflict of interest and unethical behaviour by the counsel involved;
- the email also referred to a “further sinister event” whereby the Company’s solicitor’s offices in Lucan were burgled and computers and files stolen, while other solicitors’ belongings in the same building were left undisturbed, from which Mr. McCool deduced that “it would appear that our solicitor’s property was deliberately targeted”, again the inference being that Honeywell was responsible;
- an allegation that there was some irregularity about the manner in which the case was listed at the time the Company made an application to the High Court in 2012 to have the case referred to mediation, arising from which Mr. McCool made a complaint to the Solicitors Disciplinary Tribunal about the conduct of Mr. Monaghan. The Tribunal held that there was no *prima facie* complaint disclosed and dismissed it, and Mr. McCool’s appeal to the President of the High Court was also dismissed, and the further appeal of Mr. McCool to this court was dismissed on 4 May 2017 [2017] IECA 129, the judgment of the court being given by Hogan J. who found (at p.9) that there was “simply no evidence at all which has been adduced on the material before us upon which a complaint of this seriousness could properly be grounded”; the Supreme Court in a determination on 24 November, 2017 declined to permit Mr. McCool’s attempt to further appeal.

In paragraph 40 of his judgment Noonan J. concludes –

“All of the foregoing allegations by Mr. McCool are scurrilous, highly defamatory and without foundation.”

27. At paragraphs 41 – 48 in the context of champerty Noonan J. considered further Mr. McCool’s conduct in response to Honeywell’s solicitor Mr. Monaghan of Arthur Cox seeking information from the Company and Mr. McCool in relation to the intentions of Mr. McCool as regards any onward assignment to a third party. He quotes from Mr. McCool’s response in an email sent on 23 October 2017 (in error referred to by Noonan J. as having been sent on 23 November 2017) in which Mr. McCool stated that “the ability to assign the proceedings in future is a right reserved which is a normal condition of such issues” and added –

“We are entitled/obliged to take all necessary steps to protect our company, its employees, customers and suppliers and will do so by whatever means were are legally entitled to do. This would include assigning these proceedings to a third party, who may see a financial benefit of such assignment, as has occurred regularly in this country over recent years.”

In response Mr. Monaghan requested full details of the proposed further assignment of the claim to another party, and Mr. McCool replied by email on 24 October, 2017 stating –

“As regards my intentions of a proposed further assignment, I confirm that we have engaged with third parties who would be interested in taking over these proceedings, parties who have the necessary resources to run the litigation to a conclusion ... If such an assignment does occur, then I have undertaken to continue my role in the case ... The fact that the case is now ready to be set down for trial, makes this an attractive proposition for a potential assignee, particularly as they have the resources to deal effectively with the level of obstruction, delay and abuse that we had been subjected to over so many years.”

28. Mr. Monaghan in the affidavit which he swore on 27 October, 2017 suggests that these emails constituted “a direct and unambiguous statement on the part of Mr. McCool of engagement with third

party litigation funders”. In response Mr. McCool in his affidavit sworn on 2nd November, 2017 stated:

“7. ... I also refute, in the strongest possible terms the allegation that I have engaged with third party litigation funders in the United Kingdom (or indeed elsewhere) and that I am using the assignment process to get around the law forbidding third party funding of a legal case.”

Noonan J. concluded, in this section of his judgment, as follows –

“46. Despite therefore the clear implication in his email of the 24th October, 2017, a week or so later Mr. McCool swore on oath, in the strongest possible terms, that he had not engaged with third party litigation funders in the United Kingdom or anywhere else.

47. In the course of the hearing before me, counsel for Honeywell noted in his reply to Mr. McCool’s submissions that Mr. McCool had avoided dealing with this issue. Mr. McCool then responded to this submission and informed the court, without turning a hair, that he had been in contact with an organisation in the United Kingdom called Harbour Litigation Funding in relation to the case but they had declined to take it on and referred him to another smaller litigation funding company, the name of which Mr. McCool could not recall but was in a rural location in England. By his own admission therefore, what Mr. McCool swore on oath in his affidavit of 2nd November 2017 was entirely false.

48. In the light of all the foregoing matters, it seems to me that Honeywell have very good reason to be seriously concerned at the prospect of Mr. McCool being permitted to run this litigation in any shape or form.”

29. In paragraphs 49 – 58 Noonan J. addresses the second ground for finding the first assignment invalid, namely that it was champertous. Again it does not appear that Mr. McCool disputed the

applicable principles, which since the judgment have been confirmed by the Supreme Court. Noonan J. quotes at some length from the seminal decision of the House of Lords in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, in which Lord Wilberforce at p. 694 adopted the definition of “champerty” from Halsbury’s *Laws of England*, 4th Ed, vol. 9 (1974) para 400: -

“Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.”

There Credit Suisse had taken an assignment of a cause of action in which it had an interest, and Lord Wilberforce held champertous and invalid a subsequent purported assignment of that interest onwards to a disinterested third party. At p. 694 he stated –

“It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold by Credit Suisse to a third party, for a sum of US\$ 800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly “savours of champerty”, since it involves trafficking in litigation – a type of transaction which, under English Law, is contrary to public policy.”

Noonan J. also quotes from the judgment of Lord Roskill at p. 703 where he stated:

“My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Rolls [1980] Q.B. 629, 657 when he said in the instant case that ‘the old saying that you cannot assign a ‘bare right to litigate’ is gone’. I venture to think that that still remains a fundamental principle of our law. But it is to date true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to

that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.”

30. Noonan J. then referred to the judgment of Costello J. in *SPV Osus Ltd. v HSBC & Ors.* [2015] IEHC 602, a case arising out of the Bernard Madoff litigation. Costello J. in that case analysed the authorities including *Trendtex* and summarised the relevant principles as follows, at p. 20 –

“40. The following principles relevant to the current dispute emerge from these Irish authorities and the English authorities cited in the judgments:-

- (1) It is unlawful to fund or assign litigation in return for a share of the proceeds unless the funder or assignee has a lawful interest or some other legitimate concern in the litigation.
- (2) The assignment of a bare cause of action for purposes which the law does not recognise as legitimate savours of champerty.
- (3) Trafficking in litigation is contrary to public policy.

...

- (11) A shareholder or creditor of a company (or other entity) who already has an indirect link to the impecunious company (or other entity) may have an indirect and therefore legitimate interest in the litigation of the company (or other entity) and may lawfully fund the company’s litigation.
- (12) Professional third party funders who make a commercial decision to ‘invest’ in litigation in the hope of making a profit commit the torts of either maintenance and/or champerty.

(13) In considering whether an agreement is champertous, the Court should look at the totality of the transaction.

(14) The Court is concerned with substance rather than the form of a transaction in considering whether it offends the law of maintenance and/or champerty.”

Costello J.’s judgment was upheld on appeal by the Court of Appeal in the unanimous judgment delivered by the President [2017] IECA 56, and Noonan J. quotes from that judgment. At p. 25 the President stated –

“34. The general understanding which is not in dispute is that champerty is a variety of maintenance, in fact a more severe or heinous version. ... Champerty is taking a share in the outcome of the case in return for funding it. ... For the purpose of this case, I think that there is one clear rule that the court must recognise. That is that the assignment of a bare cause of action is invalid because it savours of champerty or is actually champertous in itself.”

At p. 31 (para.43) the President stated –

“Another basis of exclusion from champerty is where an assignment of a right of action is made to a party with a genuine commercial interest in taking it and enforcing it for its own benefit. *Trendtex* considered this exception although holding in the particular circumstances that a provision for onward trading of the cause of action to an anonymous third party involved the likelihood of profit and savoured of champerty. There is in this assignment no genuine commercial interest existing independent or antecedent to the transfer itself.”

31. Not long after Noonan J. decided the present case, the Supreme Court delivered judgment in the appeal in *SPV Osus Ltd*. The Court unanimously dismissed the appeal from the Court of Appeal,

and upheld the decision of Costello J., and I will refer to extracts from the judgment of O'Donnell J. (as he then was) later in this judgment.

32. On the issue of champerty Noonan J. concluded: -

“56. Clearly in the present case, the purported assignment, if it were valid, to Mr. McCool is the assignment of a bare cause of action and is *prima facie* champertous. However as Mr. McCool has a clear commercial interest in the cause of action, that without more might save it from offending the rule in relation to champerty.

57. However the assignment expressly provides for onward transfer to a disinterested third party. In the light of the authorities to which I have referred, it therefore clearly savours of champerty. The matters to which I have referred in the preceding section of this judgment dealing with the conduct of Mr. McCool merely serve to reinforce the correctness of that conclusion.

58. I am therefore satisfied that even if the assignment were not invalid on the ground that it is an abuse of process, it savours of champerty and is thus contrary to public policy and invalid.”

Discussion

33. It is important at the outset to identify the two key reasons given by the trial judge for discharging the order of the Master substituting Mr. McCool for the Company, and dismissing Mr. McCool's application for joinder as a co-plaintiff. His first reason, which in my view is clearly his principal reason, is that the first assignment was entered into by Mr. McCool with the Company for the sole purpose of circumventing the rule in *Battle*, and as such was an abuse of the process and invalid. The second or *further* reason given by the trial judge was that, even *if* the first assignment was not invalid on the grounds that it was an abuse of the process, it savoured of champerty because

it was capable of onward transfer, and was thus contrary to public policy and invalid. While a significant part of the judgment of Noonan J. addresses “the conduct of Mr. McCool”, and deprecates allegations made by Mr. McCool which the trial judge considered were without foundation, in my view those parts of his judgment contain findings and observations which are not core to his reasoning. Similarly the finding that Mr. McCool had engaged with third party litigation funders, notwithstanding statements in email and on affidavit to the contrary, is not core, although it does buttress his finding that the first assignment savoured of champerty.

34. I mention this at the outset because Mr. McCool in his Notice of Appeal, and in his written submissions, and in his oral submissions to this court, directed almost no argument against the trial judge’s core reasoning. In his oral submissions Mr. McCool concentrated his allocated time and his reply in contesting Noonan J.’s findings in relation to his conduct and his discussions with litigation funders, and in seeking to persuade the court of a strategy on the part of Honeywell to string out the proceedings and impoverish the Company, and that it was Honeywell that abused the process, in pursuing his motion to have Honeywell’s pleadings struck out. That motion of course could not be moved by Mr. McCool if he was not, as Noonan J. found, a proper party to the proceedings, and it was dismissed in the High Court.

35. I have carefully considered Mr. McCool’s Notice of Appeal, which unhelpfully contains 61 grounds of appeal in close print covering some 11 pages. It discloses many matters which in my view have no relevance to the core issues which I have identified, and the reasons why the trial judge found against Mr. McCool in respect of both those issues. In paras. 2 – 5 of the Notice of Appeal Mr. McCool protests at the trial judge’s statements and findings under the heading “The Conduct of Mr. McCool”, and at para. 5 seeks to portray himself/the Company as a victim given that “the defendant is 40,000 times the size of the plaintiff” – a theme to which he returns in para. 7. This it seems to me has little or no bearing on the two reasons given by the trial judge for his decision.

36. In para. 8 Mr. McCool points out an error in the judgment, where the trial judge referred to his wife as being Mary O'Donnell, who is a director of the Company, but not married to Mr. McCool (his wife is Denise McCool). This error has no relevance to the decision in the High Court or to this appeal.

37. In paras. 9 – 17 Mr. McCool deals at some length with the undoubtedly protracted course of the proceedings, which he considers was brought about by the respondent as part of a deliberate campaign. He suggests, in para. 9, that the trial judge was at error in not setting out at a greater length – as done in Mr. McCool's affidavits – the course of the proceedings (as I have done in summary form in para. 10 of this judgment). This cannot be characterised as an error – it was a matter for the trial judge to decide to what extent this procedural history should be set out in his judgment.

38. More importantly in my view the history of the proceedings is only relevant insofar as it records what took place, and the fact that the Company became impecunious to the extent that it could not continue to fund the proceedings, and that this in turn prompted the Company under the guidance of Mr. McCool to attempt to assign the cause of action to him. Mr. McCool can point to no more than his opinion that the protracted proceedings are “the core of the defendant's campaign” (para. 10 of the Notice of Appeal), and even if that opinion had some validity the procedural history was not core to the reasoning underpinning the decision in the High Court. Thus the points made by Mr. McCool in grounds 10 – 13 relating to the discovery process, and the ‘particulars’ process, were not critical to the decision, and are not in my view that relevant to this appeal. Similarly, the complaint by Mr. McCool at para. 15 that the respondent engaged in a Security for Costs “tactic” to delay the proceedings, and that the respondent failed to negotiate a settlement and resisted mediation (paras. 16 and 17 of the Notice) raise matters which are simply not relevant. It follows that complaints which he makes pursuant to Art. 6 of the European Convention on Human Rights related to the procedural

delays, at paras. 18, 19 and 20, do not arise when considering the correctness or otherwise of the trial judge's core reasoning.

39. At paragraphs 21 – 23 under the heading “Defendant interferes with Plaintiff's documents” Mr. McCool makes complaints related to his application to strike out the defence pleadings, which was at one point listed for hearing in Cork. His complaint relates to the alleged removal by Arthur Cox of numbered dividers from papers which were lodged in court. It is in the nature of a “fair process” complaint which, if it has any validity, becomes irrelevant in the event that Mr. McCool is not permitted to substitute for the Company as plaintiff. For the same reason, as I have indicated earlier, the grounds at paras. 24 – 27 under the heading “Defendant's Case should be struck out” do not arise if Mr. McCool is not a proper party to the proceedings in the first place.

40. At paras. 28 – 40 of the Notice of Appeal Mr. McCool sets out in some detail the background that prompted the execution of the first assignment. In para. 30 he acknowledges that he researched the issue of representing the Company personally, as 100% shareholder and managing director, “... but I discovered that I was not allowed to represent the Company under our current law” – a clear reference to the rule in *Battle*. He describes himself as the “driving force behind the company”, and that “the result of 17 years' legal history catapulted me into a legal quagmire, which had a catastrophic impact on our company”. The grounds repeatedly allege abuses of process by Honeywell at a time when the Company had solicitors on record, and state that this led to the dilemma posed by the rule that would not permit him to substitute for the Company. In para. 28 he says –

“28. ... It is this anomaly in the legal system that does not allow an SME [Small and Medium Enterprise] to borrow money to protect itself in legal proceedings, or for the owners/directors/shareholders to protect the SME when it is faced with collapse by aggressive legal tactics. This scenario gives the incentive for large well-funded companies, to instigate

the abusive tactics and abuse of process, that [the Company] has had to endure for the last thirteen years and is a major stumbling block for small company's seeking access to court".

This is no more than a comment on the rule in *Battle*, a rule which Mr. McCool accepts remains part of our jurisprudence and which he does not seek to challenge.

41. In paragraph 32 Mr. McCool refers to his injection of personal funds into the Company, and that it is "our family firm and my three sons work in the Company and our eight grandchildren were all placed in a position of imminent financial ruin, as a result of the success of the [respondent's] campaign". He explains, in para. 33, that the Company's solicitors would not take measures to protect the Company because funds were not available to discharge legal fees. In para. 34 he pleads that the Company's predicament could have been alleviated if the proceedings had been admitted to the Commercial Court. In para. 35 Mr. McCool again refers to the detail critical of Honeywell in the affidavit which ultimately was not deployed in the application to admit to the Commercial Court, on the advice of the Company's then solicitors, in relation to "the eight year history of defendant's abuses" and, in his view, this led to the refusal to admit.

42. Again, I cannot see how this undermines the trial judge's core reasoning, his finding that the most common reason for companies not to be represented is impecuniosity, and the well-established principle that impecuniosity is not an exception to the rule in *Battle*. It would also have been extraordinary if proceedings, which were eight years in being, were to have been admitted to the Commercial Court. It is not therefore necessary to address whether the matters referred to by Mr. McCool in para. 35 of the Notice of Appeal are covered by client/solicitor professional privilege, and therefore not matters upon which Mr. McCool is entitled to place any reliance.

43. In paragraph 38 of the Notice of Appeal Mr. McCool refers to the Company having suffered a loss of €950,000 when it was put off the site on the Terminal 2 contract, although some two years' later the Company appears to have accepted a settlement of some 50% of what was owed because "it

did not have the funds to sue the main contractor”. In paragraph 39 Mr. McCool refers to further losses by the Company, in the order of €100,000 arising from breach of a 20 year old trading agreement with the Company. These matters form part of the explanation for the Company’s impecuniosity, but are only relevant to that extent, and do not constitute a valid ground of appeal.

44. From paragraph 41 on under the heading “The Need for Assignment” Mr. McCool addresses the first assignment. Mr. McCool accepts, in para. 43, that he –

“...researched the assignment process and had copied a US document on assignment and edited it to suit out *[sic]* particular case and in that document, there was a provision for future/potential re-assignment, which I had taken to be the norm. It was never some clever Machiavellian plot to circumvent the legal process as alleged by the defendant.”

45. In para. 44 he states that he had no knowledge of litigation funding or the law forbidding owners, directors or managers representing a limited company in court, and that “I had to research this and contacted litigation funders in the UK when I became aware of this on reading an article of a Supreme Court case on an application by a company I know to get funding from a UK funder.” In para. 45 he refers to his application to be added as a co-plaintiff and adds “... but when the Master advised that this was not possible I withdrew that application and I was then advised that the option of assignment of the case to me as I was a heavily connected party to the company”. Mr. McCool opens para. 46 by stating –

“If the case could not be assigned to me, then [the Company’s] 17 year claim against Honeywell would collapse on procedural issues”.

46. It is not the function of the Master to “advise” any litigant, and the fact that the Master may have passed such a comment does not provide a legal basis for using assignment as a device for avoiding the rule in *Battle*.

47. The rule continues to be good law. It is appropriate here to emphasise that the decision of this court in *AIB plc v Aqua Fresh Foods* was affirmed by the Supreme Court, reported at [2018] IESC 49. Finlay Geoghehan J., delivering the judgment of the court, repeats the rationale for retaining the rule in *Battle*: –

“33. As pointed out in many decisions, companies are used by persons to conduct business or other activities without the risk of being liable for losses incurred, and thereby create advantages for such persons. The use of a separate legal personality may also, however, have disadvantages. One such disadvantage is the inability of a company to represent itself in legal proceedings. It is, however, as stated by McKechnie J. in the Court of Appeal at para. 58, “the logical corollary of the *Salomon* principle”.

34. In the Court of Appeal in England in *Radford v. Freeway Classics Limited* [1994] 1 B.C.L.C. 445 (“*Radford*”), a decision given prior to the changes in the Civil Procedure Rules, Sir Thomas Bingham M.R., delivering a judgment (with which the other two members of the Court concurred) on an application by a Mr. Corry to represent companies, spoke of the rule in relation to the representation of a company as one which rests “on a basis of fairness and good sense”. Explaining the rationale succinctly at p. 448, he stated that:-

A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company but it is a benefit bought at a price.

Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is the rule that I have already referred to that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may not be able to compensate parties who litigate with them, should be subject to certain constraints in the interests of their potential creditors.

35. The same judgment, however, recognised by reference to authority, the inherent power of the courts to regulate their own procedure and, as part of same, the power to permit any advocate to appear for a litigant if the exceptional circumstances of the case so warrant. The exceptional circumstances sought to be relied upon in that case were the company's lack of means to instruct lawyers; a good defence to the plaintiff's claim and certain criticisms of the plaintiff's behaviour. Bingham M.R. upheld the decision of the trial judge to reject such circumstances as constituting exceptional circumstances."

Finlay Geoghegan J. goes on to uphold the principle that impecuniosity does not constitute an "exceptional circumstance" that would permit departure from the rule:

"43. As has been stated in a number of decisions, unfortunately the impecuniosity of a company or the lack of available funds in a company to procure legal representation is not in any sense exceptional or even unusual. It is a circumstance which in commercial life often occurs. Hence, that in itself cannot constitute exceptional circumstances. Similarly, a view expressed on behalf of a company that it has a good arguable defence or even the putting up of facts which objectively suggest an arguable defence is not of itself an exceptional set of circumstances. Reliance was sought to be placed on behalf of the Company by Mr. Flynn on the nature of the business conducted by the Company as being somewhat unique. In the context of a claim made by a bank seeking to enforce security for monies advanced or lent that again, does not of itself constitute, in my view, exceptional circumstances."

48. From para. 48 onwards in the Notice of Appeal under the heading “Judgment Based on Misreading of Documents” Mr. McCool addresses the trial judge’s findings in relation to Mr. McCool’s conduct in relation to litigation funding, and the contradictory statements arising from his email of 24 October 2017 and his affidavit as sworn on 2nd November 2017, and what he said to Noonan J. Mr. McCool points out in para. 50 that in para. 3 of his email he advised “that we have ENGAGED WITH **THIRD PARTIES** who would be interested in taking over these proceedings” (sic.) and that he did not say that “I engaged with **THIRD PARTY LITIGATION FUNDERS**”, as stated in the judgment at para. 44. In para. 51 Mr. McCool emphasises that in his email of 23 October, 2017 he was asserting the entitlement to take all necessary steps to protect the Company, its employees, customers and suppliers “**by whatever means that we are legally entitled to do**” (sic), and that the email was saying that “whatever I did would be within the law and [Honeywell] would be notified”. In para. 52, while it is not clear, Mr. McCool seems to be explaining his conduct by reason of the fact that he was not familiar with issues such as the rule in *Battle*, or that an assignment of the proceedings might be champertous. In para. 55 he asserts that he did not contradict his email statement of 24 October 2017 or rely on affidavit, and that he made it clear “... that whatever we did, in regard to Assignment or dealing with third parties, would be in accordance with what was legally allowed plus we would make it known to Honeywell”.

49. In these grounds Mr. McCool is, in my view, compounding the contradictory positions taken in his email and on affidavit. In his oral submissions he continued to insist that he “just made enquiries” and that he “didn’t lie to the court”. I am satisfied that the evidence, and the information that he provided to the High Court, pointed to him engaging with two third party litigation funders, and the trial judge was entitled to make the findings that he did, and that averments in the affidavit that he swore on 2 November, 2017 were demonstrably false.

50. In paras 56 and 57 of the Notice of Appeal Mr. McCool makes some attempt to address argument to the rule in *Battle*. In para.56 he complains that the trial judge did not refer to references to authorities made on affidavit and in his submissions to the High Court, but he does not does not seek to challenge the continued existence and application of the rule in *Battle*, and he does not suggest that Noonan J. erred in setting out the applicable principles.

51. In Ground 57 Mr. McCool states –

“57. The judgment states the assignment is invalid as it was contrary to rules in *Battle*, a rule whereby a director cannot represent a limited company in Court. This is not relevant to the assignment of proceedings to me as I was not acting in the capacity of a director representing [the Company].”

This Ground misunderstands the judgment and the reasoning of the trial judge, which was that the assignment was invalid because it was an abuse of process in attempting to *circumvent* the rule in *Battle*. In other words, knowing that he would not be entitled to an order substituting him for the Company as plaintiff on the basis that he was a shareholder/managing director, Mr. McCool adopted the device of securing the first assignment from the Company, solely to circumvent the rule. It was the use of an assignment as an artifice or device that led to the trial judge’s primary finding of invalidity. That finding was entirely in keeping with the principles enunciated by McKechnie J. in *Aqua Fresh*, and the approach taken by Fennelly J. in the *Stella Coffey* case where Fennelly J. held that Mr. Podger’s “stratagem of making himself a member of the company” was a device and without merit and would not entitle him to speak as a representative of the Company.

52. Paragraphs 58 – 61 in the Notice of Appeal seek to address the trial judge’s second finding that the first assignment was invalid as savouring of champerty. Mr. McCool suggests that the first assignment of the proceedings to him does not breach the case law on maintenance and champerty

“as I am a heavily connected party to [the Company], having founded and financially supported the Company over many years ... and it was my personal financial input which prevented the Company from collapse”. In para. 59 Mr. McCool pleads that “I do not understand how my alleged bad conduct has any bearing on champerty and I don’t accept that as a valid reason to challenge the assignment”. In para. 60 he indicates, as he had previously advised the court, that “I did not plan to put an onward provision in the assignment document as I merely copied a US document I found in my research”, and that “whatever action that [the Company] or I personally took in the future, would be in accordance with legal requirements that we would advise the defendant of any such action. This would mean that if I intended to reassign the litigation I would do so lawfully and the defendant would then be able to challenge that onward assignment, if it believed that it was an unlawful assignment”.

53. I have thus far referred primarily to the Notice of Appeal. Mr. McCool filed legal submissions in support of the first appeal on 16 January 2019. Unfortunately the first 59 paragraphs consist of a narrative much of which replicates the content of Mr. McCool’s affidavit evidence and his Notice of Appeal, and repeats his complaints and allegations of abuse of process by Honeywell.

54. In para. 62 of his submission Mr. McCool repeats the argument in para. 57 of his Notice of Appeal to the effect that the rule in *Battle* does not apply because ultimately his application for substitution was based on the first assignment and not his position as a shareholder or director. Mr. McCool also pursued this in his oral submissions, arguing that he was not trying to intervene in the proceedings in his capacity as shareholder or director, but rather sought to have himself substituted for the Company on the basis of the first assignment, and on the basis that the Company was no longer a proper party to the proceedings. He maintained that the first assignment was a “valid assignment” to him, and no more than that.

55. Consistent with this submission Mr. McCool did not challenge the continued application in Irish law of the rule in *Battle*; nor did he attempt to argue that he came within an exception to the

rule. In particular he did not argue that an exception should be made on the grounds that, as he alleges, the impecuniosity of the Company was brought about by the protraction of the proceedings due in turn to the alleged abuse of the legal system by Honeywell.

56. In making his arguments Mr. McCool failed to engage with the primary reason given by the trial judge for vacating the Master's order, namely that the first assignment was a device designed to circumvent the rule in *Battle* and therefore invalid as an abuse of process. Whether Mr. McCool deliberately chose to misunderstand that this was the *ratio decidendi*, or simply had no answer to the trial judge's primary conclusion, the fact is that he put up no argument, let alone any cogent argument, to suggest that Noonan J. erred in law or in his finding of an abuse of process.

57. This is unsurprising because it is clear from Mr. McCool's evidence that first substitution application in its final manifestation, based at that point on the first assignment, was brought about for the direct purpose of escaping the effect of the rule in *Battle* the import of which he was by now aware. Mr. McCool initially sought to be joined as co-plaintiff was because the Company was no longer in funds to discharge the cost of legal representation. In his first affidavit sworn on 10 July 2017 Mr. McCool exhibits a letter dated 3 July 2017 from him to Ms. Mary O'Donnell, director in which he refers to his investment in the Company being under "serious risk of collapse, due to failure of the legal system", and that on that basis he now needed to be joined in the proceedings as co-plaintiff "in order to protect [the Company], its employees and its creditors, plus the McCool family's and my financial investment in [the Company]".

58. The appropriate course of action in circumstances where the Company was impecunious was for Mr. McCool as shareholder to put the Company in funds. It is obvious that when Mr. McCool became aware that he could not become a co-plaintiff or substitute for the plaintiff by reason of the rule in *Battle*, he sought to avoid that rule by adopting the artifice of assignment. There can be no doubt but that Mr. McCool contrived the first assignment for the purpose of escaping the effect of the rule

in *Battle*. The trial judge found that, for that reason, the purported first assignment gave rise to a clear abuse of process, and was therefore invalid and unenforceable.

59. It is not in dispute that the trial judge correctly identified the rule in *Battle* and the relevant case law. I am satisfied that he correctly applied it to the circumstances of this case in coming to the conclusion that the first assignment was an abuse of process. Mr. McCool has failed to identify any error of law or relevant error of fact on the part of the trial judge on this issue. Nor has Mr. McCool identified any principle or authority that would warrant treating Mr. McCool's complaints and allegations in relation to the conduct of the proceedings to date by Honeywell as justifying an exception to the rule in *Battle*.

Mr. McCool's further submissions and the issue of champerty

60. In his written legal submissions at paras. 68 – 74, Mr. McCool addresses “Referrals to my Conduct”. At paras. 75 – 84 he addresses the “Commercial Court application in 2013”. In paras. 85 – 90 he addresses “Plaintiff's documents tampered with at assignment hearing in Cork”. This narrative re-states matters already covered in the Notice of Appeal and in Mr. McCool's affidavits, but does not address legal submissions to either of the core issues. In paras. 91 – 97 under the heading “Cox issue Notice to Wind Up [the Company] + Assignment Application”, Mr. McCool explains that what prompted him to obtain the first assignment from the Company was firstly that Honeywell issued a 21 day notice on 20 October 2017 to wind up the Company alleging non-payment of fees awarded in the unsuccessful Commercial Court admission application in May 2013, which in turn prompted his response to Honeywell that he would sell their Company rather than allow it to be put into liquidation; and secondly that he became aware of litigation funding as a result of the *Persona* case, in which the name of Harbour Litigation Funding UK came to his attention. In para. 92 he accepts that he contacted Harbour, and also “a smaller UK company”, both of whom advised him that litigation funding was not permitted in this jurisdiction, and in para. 93 he argues that this “... meant

assignment was the only option left to [the Company], after thirteen years of crippling litigation.” From para. 98 onwards in his written submission Mr. McCool refers to certain legal materials and case law to argue that the first assignment is not champertous. As Mr. McCool did not use the opportunity of his oral submissions to amplify his position in relation to champerty, it is appropriate to refer to materials in his written submission.

61. Mr. McCool refers to O. 15, r. 13 of the Rules of the Superior Courts, which provides: -

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

62. This is an empowering provision, which allows the court to join or strike out parties, whether as plaintiffs or defendants. However it does not give *carte blanche* to the court to join or substitute parties where any rule of law or statutory provision does not, as a matter of law, permit that joinder or substitution.

63. Mr. McCool then cites s. 28(6) of the Judicature (Ireland) Act, 1877, which provides that an absolute assignment by the assignor of any debt or any other legal chose in action can pass the legal right to the debt or chose in action to the assignee. He refers to the four main conditions to be satisfied for the purposes of s. 28(6), as set out by Finlay Geoghegan J. in *O'Rourke v Consadine* [2011] IEHC 191, where she stated –

“First, the assignment must be for a debt or other legal chose in action. Second, there must be ‘absolute assignment’ meaning that the assignor must not retain an interest in the subject matter of the assignment. Thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by s. 28(6) of the 1877 Act. Third, the assignment must be in writing by the assignor. Fourth, the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (*i.e.* any form of payment) to be valid. The assignee can then sue the debtor in their own name, without joining the assignor as party to the action.”

Mr. McCool argues that as these conditions are satisfied the presumption should be that the first assignment is valid.

64. Undoubtedly the proceedings are a “legal chose in action”, and the third and fourth conditions are satisfied by the first assignment. However, leaving aside for one moment the question of champerty, in my view the first assignment on its face does not satisfy the second condition for a valid assignment. As the trial judge correctly points out at para. 57 of the judgment, the first assignment expressly provides for onward transfer, or *transfer back* to the Company, in the clause that provides that “... the Assignee may at any time reassign any or all, of the transferred rights, together with all right, title and interest of the Assignee in and to this agreement.” Moreover, in the preceding clause it is provided that the first assignment is binding upon and ensures “to the benefit of Assignor and Assignee and their respective affiliates, successors, assigns, heir and devisees and legal

representatives”. Insofar as the first assignment retains on its face some benefit, undefined as it may be, for the Company, it fails to comply with the second condition identified by Finlay Geoghegan J.

65. Further, the Resolution executed by Mr. McCool and Mary O’Donnell on behalf of the Company resolves at para. 5 that the Company will assign the legal proceedings to Mr. McCool “in a suitable proportion, whereby Eugene McCool could pursue the claim for damages against the Defendant...”. This strongly suggests that the intention behind the first assignment was that Mr. McCool and the Company would retain some undefined proportion of any benefit that might ultimately derive from the chose in action.

66. Since judgment was delivered by Noonan J. the Supreme Court has rejected a similar argument to the effect that s. 28(6) was a statutory recognition of the lawfulness of assignments of choses in action, and that legal analysis should start from a presumption of validity unless precluded by considerations of public policy, rather than the reverse. Counsel for the first and second defendants in *Osus* argued that the subsection effected a procedural change only, permitting the assignment in law of what hitherto had only been assignable in equity. They argued that the 1877 Act did not purport to alter in any way the distinction between the classes of assignments which were lawful and those which were void as contrary to public policy, being those constituting maintenance or champerty, or savouring of champerty. O’Donnell J. (as he then was), giving the unanimous judgment of the court, agreed:-

“[29] ... While it is not in any way decisive in this case, I consider that the defendants are correct in this regard at least. The Judicature Acts represented the procedural fusion of law and equity rather than the statutory regulation for the first time of the substantive law relating to the assignment of choses in action. Prior to the Judicature Acts, equity did not permit assignments savouring of champerty and the Acts did not make any change in that regard. However, the very existence of s.28(6) is relevant in one respect. It illustrates the fact that

there is no absolute rule against the assignment of rights of action. In some cases, such as assignment of debts, assignment is permissible, and arguably to be encouraged. There are, therefore, some permissible and legitimate assignments of a right to litigate, and other assignments which are impermissible and void. ...”

67. Mr. McCool then cites a number of cases in support of his argument that the first assignment is not champertous. He refers to *Waldron v Herring* [2013] IEHC 294, where Edwards J. stated: -

“[32] The Court must be concerned at the end of the day with doing justice, and it is inimical to the interests of justice that a tortfeasor or other wrongdoer should escape being made liable, where for technical or legal reasons, a person who ought to be a party to proceedings is not a party to those proceedings.”

68. In so stating, Edwards J. was enunciating a general principle which falls to be applied when a court is considering the exercise of its jurisdiction to add a party to proceedings. I would not take issue with that principle, but it is not absolute, and does not override the principles of public policy underpinning the rule that an agreement that is champertous is invalid.

69. Mr. McCool next , misquotes from the decision of Hogan J in *Greenclean Waste Management Limited v Leahy* [2014] IEHC 314. What Mr. McCool appears to rely upon is the following statement by Hogan J. –

“24...The courts should not place any unnecessary obstacles in the path of those with a legitimate claim...”

70. The context of this statement in *Greenclean waste* was very different. That case concerned the validity of a so-called “After The Event” (“ATE”) insurance – an insurance which provides funding to allow proceedings to be brought on the basis of a substantial “premium”, payable on successful recovery of costs. This type of arrangement is permissible in the UK where the torts and crimes of

maintenance and champerty were abolished in 1967. In *Greenclean Waste* what was proposed was a “no win, no fee” agreement coupled with ATE insurance. The question which arose, in the context of an application for security for costs, was whether such an agreement was to be regarded as champertous in Ireland, and thus unenforceable. Hogan J. recognised that the principle of champerty had to be viewed against modern developments including the constitutional right of access to the court. He discerned a common thread in the case law, stating –

“25. Against this background it can be said that agreements which involve the trafficking in litigation or - as in *Simpson v Norfolk Hospital NHS Trust* [2011] EWCA Civ. 1149, [2012] Q.B. 640 - which concern the assignment of a bare cause of action for purposes which the law does not recognise as legitimate will be held to be void as contrary to public policy on the ground that they savour of champerty. That, in my opinion, is the true *leitmotif* which runs through all of this case-law in this area.”

Hogan J. concluded that, when viewed in light of modern developments, ATE insurance was not unlawful, stating –

“26. In truth, the real objection to ATE insurance is to the size of the premium and the fact that it is normally payable only after a positive court decision or settlement. At one level it is easy to represent this as simply a disguised method of investing in litigation and recovering a share of the proceeds of the action under the guise of a handsome premium. If ATE coverage was confined to this, then I think the argument that it savoured of champerty and was therefore void as contrary to public policy would be almost unanswerable.”

It is important to note that the decision of Hogan J. was appealed and overturned by the Court of Appeal [2015] IECA 97 (decision of Kelly J. with whom the other judges agreed).

71. Mr. McCool also relies on the earlier judgment of Clarke J. (as he then was) in *Thema International Fund Plc. v HSBC Institutional Trust Services (Ireland) Limited* [2011] IEHC 357, which concerned an application brought by the defendant seeking disclosure of how the plaintiff was being funded as part of the *Madoff* litigation. The defendant there relied on case law from a number of other common law jurisdictions in which security for costs had been ordered against third party funders. In para. 5.6 Clarke J. stated –

“5.6 I am not satisfied that case law from other common law jurisdictions which post date a change in the law in relation to maintenance and champerty (whether by judicial decision or by statute) is of great assistance in determining the extent of the court’s jurisdiction to order disclosure at an early stage of a third party funder in a jurisdiction such as Ireland where maintenance and champerty remains the law. Here the situation is very different. In Ireland it is unlawful for a party without an interest (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds. The only form of third party funding which is, therefore, legitimate in Ireland is one which comes within the exceptions to maintenance and champerty. Charitable intent, where the funder does not hope to benefit personally, would, of course, take the case outside the third party funder costs order jurisdiction identified in *Moorview*, for that jurisdiction is confined to persons who fund litigation which they hope will indirectly benefit them in capacities such as shareholders and creditors.

5.7 That such parties are, even though they not be guilty of maintenance or champerty, exposed to potential orders for costs is clear from *Moorview*. However, such parties are not, in my view, in the same category as professional third party funders who make a commercial decision to ‘invest’ in litigation in the hope of making a profit. After all, if the litigation is well founded then the shareholder or creditor is only getting their due. If an insolvent company

has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are *bona fide* progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders). The law of maintenance and champerty always made a distinction between such parties and professional third party funders. It seems to me that it is appropriate to maintain that distinction.”

As this decision demonstrates, it is legitimate for shareholders who would indirectly benefit from company liquidation to themselves provide funding for the litigation. It would still be open to Mr. McCool as director and 100% shareholder to personally fund the litigation.

72. Although Mr. McCool does not set out with any clarity how he relies on the authority of *Thema*, or the other authorities set out in his submissions, in the concluding paragraphs in his submission he argues that the first assignment was seen by him as the “best permissible option”, and one that complied with O. 15, r. 13 of the RSC, and that as it came into being towards the end of a thirteen year process, and not at the beginning, “it is not a case of encouraging a party to commence litigation, nor is it interfering, intermeddling or stirring up litigation” (para. 107). He argues that given the unfortunate circumstances of this case, it is unconscionable for Honeywell to argue that the first assignment is contrary to public policy, an abuse of the process, or that it savours of champerty. He asks rhetorically, “why would [the Company] assign their case to Eugene McCool, if, as alleged, a third party funding was available to the Company?”.

73. These arguments do not persuade me that the trial judge erred, or that the first assignment does not savour of champerty. In principle I cannot see how the timing of a purported assignment of a chose in action, whether it occurs before proceedings are initiated, or after commencement, or many

years later before the litigation is finalised, can have a bearing on its validity; it is either valid, or it is invalid, when it is created. Moreover the quoted dicta of Clarke J. in *Thema* in para. 5.6 do not assist Mr. McCool. He has sufficient interest as a shareholder/director to fund the litigation being pursued by the Company, but what he cannot do is take an assignment of the proceedings for the purpose of securing a third party funder, or take an assignment on the basis that the Company retains, or may retain a share in the proceeds of the action, or secure a reassignment. The charitable intent exception does not apply, because it cannot be said that Mr. McCool does not hope to benefit personally. In para. 5.7 Clarke J. emphasises that parties such as shareholders or directors having an interest as such in the outcome of the proceedings and funding the Company are not guilty of maintenance or champerty, although they may be exposed to potential orders for costs. In this respect, such funders are different from professional third party funders. But it is important not to lose sight of the fact that what is that issue in the present appeal is not professional third party funding of litigation but a purported assignment to Mr. McCool with express provisions that contemplate onward assignment or reassignment to the Company.

74. Furthermore, the judgment of O'Donnell J. (as he then was) in *Osus* undertook a review of the law and public policy underpinning maintenance and champerty, and considered and followed the reasoning of the House of Lords in *Trendtex* which formed the basis for the decision of Noonan J. in the High Court. Noonan J. quoted *inter alia* from the judgment of Lord Wilberforce where he stated, at p. 694: -

“The vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold by Credit Suisse to a third party, for a sum of US\$ 800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In

my opinion this manifestly ‘savours of champerty’, since it involves trafficking in litigation – a type of transaction which, under English Law, is contrary to public policy ...”

O’Donnell J. at para. [76] of *Osus* also quotes this passage and in para. [78] he stated: -

“The outcome, therefore, of the decision of the House of Lords is very clear, and in my view illuminating. In the first place, it is clear that an assignment to Credit Suisse for its own purposes would have been valid. Second however, the assignment was in fact void because it contemplated and permitted the onward assignment of the cause of action to an unconnected third party who would have control of the litigation. Such a transaction was considered to be contrary to modern public policy.”

In *Trendtex* the Court of Appeal had permitted the assignment, and the plaintiff in *Osus* urged the Supreme Court to prefer the approach of that court over the House of Lords. O’Donnell J. gave a number of reasons for preferring the decision of the house of Lords, noting that it has been broadly accepted in New Zealand, Australia and elsewhere. He then stated, in para. [93] on p. 49: -

“It is difficult to explain how public policy in Ireland could therefore be less hostile to assignments savouring of champerty than the public policy of the United Kingdom, where such torts and crimes were abolished half a century ago. It is also difficult in my view to adopt the Court of Appeal judgments in preference to that of the House of Lords in circumstances where the Court of Appeal judgments do not address the component of the transaction considered to be decisive by the House of Lords. Finally, and perhaps most importantly, while I sympathise with the apparent desire of the Court of Appeal to modernise the law, for reasons already touched on, I do not think that the broad approach adopted by Lord Denning M.R. in particular is completely successful even on its own terms, inasmuch that it seeks to explain the decided cases ... I consider in any event that the decision of the House of Lords, inasmuch

that it is different from that of the Court of Appeal, is preferable in a matter of law and logic. It liberalises the law in expanding the circumstances in which an assignment will be permitted, while maintaining a principle that causes of action can be void for considerations of modern public policy. In doing so, it gives, in my view, a clear indicator of the features of an assignment which may make it void and unenforceable. For reasons of comity, policy, and most importantly because I consider that the reasoning is persuasive, I would prefer the analysis of the House of Lords in *Trendtex Trading v Credit Suisse*.”

75. In addressing the public policy underpinning maintenance/champerty, O’Donnell J. said the following: -

“[100] Champerty has always been regarded as more obnoxious than maintenance, because it involves not merely the involvement in the proceedings of a third party, but also the possibility that the party will recover some proportion of any award of damages if the claim is successful. The law has always viewed this with suspicion, primarily because it necessarily involves depriving a successful plaintiff of the full amount calculated by the court as necessary to compensate him or her in the circumstances for a wrong he or she has suffered, and for which it is the function of the administration of justice to provide a remedy. However, the law also considers it suspect because the third party funder recovers a portion of the award not as damages for an injury done or for a right breached, but rather as a profit in a commercial transaction, by definition at the expense of the wronged plaintiff. ...

[101] Viewed in this way, it is clear why assignments of so-called bare rights to litigate were treated by the common law as invalid, at least as a matter of history. Absent some justification, such an assignment offends in at least two ways against important values of the system. First, the litigation loses its character as one brought between parties to vindicate their rights to seek to recover compensation for wrongs done. The original, wronged plaintiff is removed from

the proceedings, and their claim converted into a conduit for financial recovery by the assignee. Furthermore, the structure of the transaction envisages (and in most cases will be driven by) the prospect of a profit being made by the assignee, with the assignor recovering less, on this hypothesis, than they are properly entitled to as a matter of justice.”

Later, in para. [102] at p. 56 O’Donnell J. refers to the circumstances in which an assignment of this nature may be legitimate: -

“[102] The importance of the decision of the House of Lords [in *Trendtex*] was to recognise that, while an assignment of a claim is presumptively undesirable and at risk of invalidity, there could be a legitimate justification for such an assignment of which the decided cases were only illustrations. Thus debts, although enforceable by action, have always been regarded as assignable even if in some cases when contested they can give rise to contentious litigation. Other assignments ancillary to bona fide transactions, particularly in relation to property, have also been regarded as legitimate. Assignments to parties with a pre-existing legitimate interest in the transaction giving rise to the claim (such as the provision of a letter of credit by Credit Suisse to the cement suppliers and the funding of the shipments and demurrage), or even the prior involvement as a shareholder in the company, or the fact that the shareholders and the assignee had been shareholders in the assignor at the time of the transaction giving rise to the claim (see *Massai Aviation v. A-G* [2007] UKPC 12, [2007] 5 L.R.C. 179), can all be seen as examples of a legitimate interest justifying the assignment of a right to litigate. However, the commercial trading of a claim to an unconnected third party with the possibility of profit (e.g. the potential assignment by Credit Suisse to an anonymous third party) was not legitimate and was, and remains, unenforceable.”

76. In my view Mr. McCool cannot bring the first assignment within any of the exceptions contemplated in this passage. It is not an assignment of debt. It is also not an assignment to a party

with a “pre-existing legitimate interest in the transaction giving rise to the claim”. Only the Company has legitimate interest in the claim, which is pleaded as a claim for damages for breach of contract – and there is no pleading or suggestion that Mr. McCool personally was in any contractual relationship with Honeywell.

77. Mr. McCool does rely in his written submission on the decision of the Privy Council in *Massai Aviation v. A-G* [2007] UKPC 12. In that case a company (“CAASL”) began an action against the government of the Bahamas, and Bahamasair, the State airline, for damages for loss of profits caused by an asserted delay in establishing its own operation at the airport at Nassau International Airport. After the proceedings had begun the shareholders in CAASL decided to sell the business for what they could get. However they decided to maintain the lawsuit. As Baroness Hale observed, the purchasers may have been unwilling to buy the lawsuit with the business, or to pay a price for the business which included what the shareholders believed the lawsuit to be worth. Accordingly, a new company Aerostar Limited was formed with a shareholding that exactly mirrored the shareholding in CAASL, and CAASL assigned its entire interest in the claim to Aerostar, its sole shareholder, for US\$ 10. Aerostar then sold its shareholding in CAASL to the intended purchaser. CAASL changed its name to Massai Aviation Services Limited (the first plaintiff) and the pleadings were amended to add Aerostar as the second plaintiff. The first issue which the Judicial Committee of the Privy Council had to consider was whether the assignment of the cause of action was void for champerty. Baroness Hale observed that normally this might make little difference to the outcome – if the assignment was void the assignor could simply continue the action, which had already been begun before the assignment took place. However, in this case, Massai (formerly CAASL) did not wish to continue the action. Accordingly, if the assignment was void, the defendants could, if the cause of action was otherwise good, have had a fortunate escape. This, the court observed, was not an attractive proposition. The court concluded that the identity of interest between the shareholders meant that the

transaction should not be treated as void. Baroness Hale considered that there no wanton or officious intermeddling in another person’s litigation for no good reason, finding: -

“[21] ... It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against these defendants and no good reason why these defendants should be permitted to escape any liability that they may have. This is not, of course, to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company’s claim. To take an extreme example, for a minority shareholder to buy a substantial claim for a nominal sum in the hope of making a substantial profit may well be contrary to public policy. But that is not the case. Aerostar owned all of the shares in CAASL and taken as a whole the transaction was a perfectly sensible business arrangement.”

78. From the foregoing summary it will be apparent that the facts in *Massai Aviation* were significantly different to the facts in the present appeals. This is not a situation in which the Company has disposed of all of its business, other than the claim in these proceedings. Further the first assignment was not made to an entity with an identical shareholding to that of the Company.

79. Commenting on *Massai Aviation* in his judgment in *Osus*, O’Donnell J. stated –

“[88] The significance of this decision is perhaps in its interaction with the law relating to the fact that a limited company is a separate legal entity from its individual shareholders. Here, as a matter of law, it could be said that there was an intermeddling in the proceedings brought by one legal person (CAASL, and subsequently Massai) by another person (Aerostar). Clearly they were connected in the sense that they were at, one time, in common shareholding. However, as a matter of law they were separate legal persons, and by the time of the litigation, had different shareholders. In any event, it is normally a fundamental rule that incorporation

creates a separate legal entity distinct from its shareholders. One question, therefore, is whether this decision should be expanded upon, or whether it represents no more than the pragmatic recognition that the fact that the claim was being pursued by parties who, as a matter of fact, if not strict law, had always been involved in the underlying transaction giving rise to the claim, meant that the assignment should not be treated as void.”

80. The circumstances that gave rise to a valid assignment in *Massai Aviation* were very different because of the common shareholding between assignor and assignee. I am not persuaded that in the present appeal Mr. McCool can make the same argument that the whole transaction was “a perfectly sensible business arrangement”. The circumstances in which the first assignment came about do not point to Mr. McCool having a genuine and substantial commercial interest in taking an assignment of the claim. Furthermore, in my view the express provision in the first assignment that allows for onward assignment, or reassignment, points to an “officious intermeddling”, (*per* Baroness Hale) in the Company’s litigation.

81. O’Donnell J. in para.[88] questions whether the decision in *Massai Aviation* should be “expanded upon”, and at the end of his judgment in *Osus*, he states -

“[110] ...Assuming for the moment that *Massai Aviation Services v. Attorney General of the Bahamas* [2007] UKPC 12, [2007] 5 L.R.C. 179 also represents the law in Ireland, it provides for an exception in the case of an assignment of a claim to a party where the shareholding is the same as that in the assignor at the time the cause of action accrued. That rationale would not have been available if the shares in *Massai* had been owned by, or were sold to, an unconnected third party, particularly if done with a view to prosecuting the claim.”

This suggests an inclination on the part of O’Donnell J. to confine *Massai Aviation* to its own facts, and certainly not to extend or apply it in circumstances where there is engagement with an

unconnected third party funder, and provision in the assignment for onward assignment, or indeed where there is a possibility of onward assignment by virtue of s. 28(6) of the Judicature (Ireland) Act, 1877. For all these reasons I am satisfied that at its height the decision in *Massai Aviation* might on identical facts be regarded as a narrow exception to the rule against champerty, but it is one which can have no application to the first assignment in the present appeal.

Conclusions on the first appeal

82. For all of the foregoing reasons I would affirm the order of the High Court discharging the order of the Master made on 8 November 2017 substituting Mr. McCool for the Company.

83. For the same reasons I would also affirm the order of the High Court dismissing the application brought by Mr. McCool pursuant to notice of motion dated 18 July 2017 seeking an order allowing Mr. McCool to be joined as co-plaintiff.

84. It follows that Mr. McCool does not have *locus standii* to pursue the notice of motion dated 22 December 2017 in which he seeks an order striking out Honeywell's pleadings, and I would therefore affirm the order of the High Court dismissing that application.

85. In his Notice of Appeal Mr. McCool also appealed the costs order directing him to pay the costs of Honeywell's motion, and the costs of Mr. McCool's two applications, such costs to be on a "solicitor and own client" basis. Mr. McCool sought instead costs against the defendant. However no specific grounds of appeal addressed why Mr. McCool asserted the costs order should be set aside or varied, and at the appeal hearing no arguments were addressed by Mr. McCool to the issue of costs as awarded in the High Court.

86. The trial judge had a discretion in relation to costs. In awarding costs of the various applications to the successful party, Honeywell, against the unsuccessful party Mr. McCool, the trial judge was

following the normal rule, namely that costs follow the event. I can see no basis for interfering with that order.

87. The court is empowered to order costs on a “solicitor and own client” basis where the court wishes to mark its special disapproval or displeasure at how proceedings had been conducted – see Barrett J. in *Dunnes Stores v An Bord Pleanála* [2016] IEHC 697 and Barniville J. in *Trafalgar Developments Ltd v Mazepin and ors* [2020] IEHC 13, judgments that I refer to in more detail later in this judgment in the context of the cross appeal of Honeywell in the second appeal. Suffice it to say here that I agree with the broad principle as so stated. This was a matter that also fell within the discretion of the High Court judge, and as with all such matters the appellate court should be slow to interfere with the exercise of that discretion.

88. The order does not set out the basis upon which Noonan J. directed that the costs so awarded should be on a solicitor and client basis. However in his judgment Noonan J. expressed his disapproval of the manner in which Mr. McCool had conducted the case in no uncertain terms. It is obvious that what prompted the award of costs on a solicitor and own client basis were his findings in respect of “the conduct of Mr. McCool”, and in particular his findings at para. 40 that “all of the foregoing allegations by Mr. McCool are scurrilous, highly defamatory and without foundation” and in para. 47 that Mr. McCool swore on oath in his affidavit of 2 November 2017 “entirely false” averments refuting that he had engaged with third party litigation funders.

89. In my view Noonan J. was entitled to make such a costs order either on the basis that Mr. McCool made allegations which were “...scurrilous, highly defamatory and without foundation” and/or on the basis that Mr. McCool swore false averments on affidavit. As I have said earlier in this judgment there was ample evidence on affidavit, and from information that Mr. McCool gave to the court, from which the trial judge could make either or both of these findings. He was therefore entitled, in his discretion, to mark his displeasure at the conduct of the proceedings by Mr. McCool

by directing that the costs be solicitor and own client costs. I cannot see any error of principle, and I cannot see any reason to interfere with the exercise by the trial judge of his discretion.

90. Accordingly I would affirm the order of Noonan J. in all respects.

The second appeal

89. Following the dismissal by Noonan J. of the first substitution application, a meeting of the Board of the Company was held on 29 June 2018, and the Minutes of that meeting exhibited by Mr. McCool record discussion in the context of the ruling of Clarke J. in *Thema v HSBC*. The Minutes then state: -

“The Board stated its goal was at all times to act in accordance with the rules of the High Court. It further stated its mission was to protect the company, its employees, creditors and customers, against the activities of the Defendant and to have the Honeywell case finally brought to trial as it is about to enter its 14th year of litigation.

The board further stated that they should make a fresh assignment to Mr. McCool as this was of particular importance at this time, following the withdrawal of its solicitor. Mr. McCool’s involvement with Honeywell dates back to 1998, when he signed the Trade Agreement Act as Honeywell’s exclusive representative in the Irish market. He personally secured the Wyeth contract and brought Honeywell in as McCool’s partner for the Wyeth contract and has led the legal case for 17 years from 2001, when the breaches of contract occurred. In addition, Mr. McCool has successfully protected the company against the aggressive tactics of the defendant during the traumatic years of this litigation, which commenced 13 years ago in August 2005.

Mr. McCool has also reaffirmed his commitment to the success and survival of the company and with his long experience and involvement in this Honeywell matter, he is in the unique

position of being the only person who could effectively see the proceedings finally brought to conclusion.

This proposal to have the proceedings assigned to Mr. McCool was again put the board and was passed unanimously.

Mr. McCool accepted the decision of the board and has agreed to make the application in the Master's Court, listed for Tuesday 10th July 2018, for the Honeywell proceedings to be assigned to Mr. McCool with immediate effect.”

The Minutes are duly signed by attendees, including Mr. McCool, Mary O'Donnell, Eoin McCool and Derry McCool.

90. The Company as assignor and Mr. McCool as assignee then purported to enter into the second assignment entitled “Assignment of Claim Agreement”. The second assignment is dated and purports to be effective from 29th June, 2018, and is duly executed by Mary O'Donnell a director on behalf of the Company and by Mr. McCool as assignee, and witnessed by Eoin McCool and Derry McCool.

91. It is in identical terms to the first assignment save that the following clause, which appeared in the first assignment, is now omitted: -

“Assignor hereby acknowledges that the Assignee may at any time reassign any or all, of the transferred rights, together with all right, title and interest of the Assignee in and to this agreement.”

Mr. McCool sought to explain the omission of this clause from the second assignment in his affidavit as follows: -

“4. I had stated in court that my assignment document was a copy of US Court document I found during my research. This document contained the provision for a potential onward transfer of the assignment and I put this in my version, assuming this was the standard element of assignment. From the court’s reaction, this appears to have been an error on my part and hence the necessity to make a second assignment application with that element removed.”

Of note is that both the first and second assignments include the following clause:

“This Assignment shall be binding upon and enure to the benefit of the Assignor and Assignee and their respective affiliates, successors, assigns, heir and devisees and legal representatives.”

92. The second substitution application was brought by Notice of Motion filed on 2 July 2018 and returnable to 10 July 2018, grounded on the affidavit of Mr. McCool sworn on 2 July 2018. Having referred to the circumstances that led to the second assignment, Mr. McCool avers: -

“11. At this point I must emphasise that in this assignment, I am not attempting to circumvent the rule in *Battle v Irish Art Promotion Centre Limited* [1968] I.R. 252, which means that a limited company cannot be represented in court proceedings by its managing director or other officer or servant. However, in my capacity as assignee, I will be the Plaintiff in the proceedings, not McCool Controls, hence my role will not fall within the rule in *Battle*. Furthermore, I acknowledge that I will be liable for the legal costs of the defendant in the event that the defendant is successful at trial...”

In para. 12 Mr. McCool expresses his belief that the assignment “is both appropriate and lawful, and I base this on the ruling of Clarke J. ...” in the *Thema* case. Mr. McCool then proceeds to set out the

basis for the Company claim for breach of contract, and refers to the delays in the litigation, and revisits matters, many of which were the subject of criticism by Noonan J. in his judgment. In para. 23 he calls in aid s. 228(1)(a) of the Companies Act, 2014 which states that “a director must act in good faith in what the Director considers to be the interests of the company”. Mr. McCool in that paragraph then proceeds to state –

“In the case of a small limited company, such as the Plaintiff in this case, the problem is that when it comes to litigation, the company’s directors cannot fulfil that obligation, by the fact that the current law does not allow the limited company to borrow funds to run its case, nor it does not [*sic*] allow the company’s owners or directors to represent their company in court, thereby leaving the small limited company with no legal solution to correct a wrong it has suffered.”

93. In para. 24 Mr. McCool noted that the decision of Noonan J. had been appealed to the Court of Appeal, and that likely delay in the hearing of that appeal would result in a further delay in the litigation. Simons J. at para. 14 of his judgment delivered on 25 October, 2019 notes the inconsistency in Mr. McCool pursuing that appeal, yet also seeking to rely on the second assignment, stating –

“14. ... Relevantly, the appeal asserts that the first assignment is valid. This presents an obvious difficulty for the second substitution application in that the logic of the stance adopted in the appeal is the company had divested itself of any interest in the proceedings by virtue of the first assignment. On this logic, as and from 22 September, 2017, the company no longer had any interest in the proceedings capable of being assigned. Yet for the purposes of the second substitution application, Mr. McCool seeks to rely on a subsequent assignment dated 29 June 2018.”

The inconsistency of Mr. McCool's position is further underlined by the clause at the end of the second assignment that –

“This Assignment supersedes all prior and contemporaneous agreements and discussions of the parties hereto regarding the subject matter hereof and the Legal case/contract(s) assigned hereby and, as written, constitutes the entire agreement of the parties.”

If that clause is operative the Company/Mr. McCool had no basis for pursuing the appeal in respect of the first substitution motion dismissal. This demonstrates a lack of insight on the part of Mr. McCool in pursuing the first appeal. However in my judgment this now becomes academic as I would affirm the decision of Noonan J. finding the first assignment to be void, and on that basis the Company continued to have an interest in the proceedings capable of being assigned at the date of execution of the second assignment.

94. In para. 26 of his affidavit Mr. McCool avers –

“It is this scenario that has led to the company's decision to make a further application for the proceedings against the defendant to be assigned to Mr. Eugene McCool, as the only option available ... [Mr. McCool then exhibits the Board Minutes of 29 June 2018] ... As a result of the limitations of the current legal system, the position of a small limited company as a Plaintiff in litigation is easily targeted and as this case has shown, can be subsequently damaged by delays, leading to high costs, to such an extent that its case and the limited company itself, is put at risk of collapse. In [*sic*] is under these circumstances that the company has Assigned the case to Mr. Eugene McCool.

27. Mr. McCool has a detailed knowledge of this case from the time he introduced the Wyeth project to the then CEO of Honeywell, Mr. Leo Quinn, when he came to visit McCool's in Dublin on the 20th June 2000. As the only person who can protect [the Company], its

employees, creditors and customers, the Plaintiff is dependent on Mr. McCool for its survival and it is on that basis that the board of McCool Controls, has agreed to assign these proceedings to Mr. Eugene McCool.

28. McCool Controls have a right of access to a hearing within a reasonable time frame. That right has been denied to [the Company] by the actions of the Defendant and the Courts system's failure to deal with such activities. There is no other alternative for McCool Controls at this time and hence the company is dependent on Mr. McCool to bring this case for trial. Mr. McCool is a heavily connected party to this case and in order to protect the company and to advance the case to trial, Mr. McCool has agreed to this request of Assignment and we now beg this court to amend these pleadings to substitute Mr. McCool, as a Plaintiff ... with immediate effect.”

95. A replying affidavit was sworn by Mr. Michael Twomey on 23 July 2018 on behalf of Honeywell. It is not necessary to go through this in any detail. Suffice it to say that in para. 29 and the ensuing paragraphs Mr. Twomey argues that the second assignment is invalid on the same two grounds upon which Noonan J. found the first assignment to be invalid, and raises as issue as to whether the assignment of the Company's cause of action as a device to circumvent *Battle* is an issue that is now *res judicata*. In para. 30 Mr. Twomey asserts that –

“... there is *nothing* about the Second Purported Assignment which differentiates it from the previous assignment such that it is rendered any less of an attempt to circumvent the rule in *Battle*.”

96. Later in his affidavit Mr. Twomey sets out Honeywell's position in the event that the court decides it is necessary to conduct a fresh assessment as to whether the second assignment constitutes an attempt to circumvent the rule in *Battle*, and/or whether it savours of champerty and is therefore

contrary to public policy and invalid. It is not necessary for the purposes of this judgment to go into these averments, because Simons J. decided the second substitution application against Mr. McCool on the basis that an issue estoppel arose by reason of the finding of Noonan J. that the purported assignment of the chose in action to Mr. McCool is merely a device intended to avoid the requirement that a company be legally represented in proceedings.

The judgment of Simons J.

97. Simons J. introduces his discussion of the issue of *res judicata* in para. 29 of his judgment: -

“The first matter to be addressed is whether the making of this (second) application to substitute Mr. McCool as plaintiff in the proceedings represents an abuse of process. More specifically, it is necessary to consider whether, having failed in his first application in April 2018, Mr. McCool is estopped from making a second application to the High Court seeking what is, in effect, the same relief again. To put the matter another way, is Mr. McCool entitled to revisit this issue by way of a second application to the High Court, or is he confined, instead, to pursuing the issue by way of his appeal to the Court of Appeal (Appeal No. 2018 No. 213).”

Simons J. then sets out the principles applicable to issue estoppel, and relevant case law. No issue is raised by Mr. McCool in his Notice of Appeal or written submissions suggesting that Simons J. failed to identify the correct principles, and Mr. McCool did not address this subject at all in his oral submissions.

98. Simons J. noted that the prerequisites to the existence of an issue estoppel had been identified in a number of judgments including the judgment of the Supreme Court (Keane C.J.) in *Sweeney v Bus Átha Cliath* [2004] 1 I.R. 576, at 589: -

“There is no doubt as to what the requirements of the plea of *res judicata* are. They are set out carefully and accurately by the learned High Court Judge and they are, to use the other

name of issue estoppel, firstly, that the same question has been decided, secondly, that the judicial decision which is said to create the estoppel was final and finally, that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. If there was indeed a determination of the same question as has arisen in these proceedings, that is, if there was a judicial determination, then, undoubtedly, the other requirements are met because the judicial decision was final and the parties were the same.”

99. Simons J. also referred with approval to a passage from the judgment of the English Court of Appeal in *Thoday v Thoday* [1964] 2 W.L.R. 371, at p. 384/85, which he noted had recently been cited with approval by McDonald J. in *George v AVA Trade (EU) Limited* [2019] IEHC 187, where Diplock L.J. stated: -

“[...] The second species, which I will call ‘issue estoppel’, is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.”

100. Addressing the first two requirements that there must be a judgment by a court of competent jurisdiction, which involves a final decision on the merits, Simons J. found that the judgment of Noonan J. self-evidently represented a judgment by a court of competent jurisdiction, viz. the High Court. As to whether it represented a “final” decision Simons J. referred again to the decision of *George v AVA Trade*, in which McDonald J. considered whether an order of a foreign court could give rise to an issue estoppel. He noted that the judgment of McDonald J. emphasises that only an adjudication upon a cause where the *merits* were or could have been tried could give rise to *res judicata*. Simons J. therefore expressed himself satisfied that a decision to refuse to allow a third party to be substituted as plaintiff in proceedings constituted a “final” decision. He held, in para. 40

—

“40. ... The ‘right’ asserted by the third party to be substituted as plaintiff will have been adjudicated upon on its merits. The decision is ‘final’ notwithstanding that such an application is brought by way of motion within existing proceedings, and thus might be described as an ‘interlocutory’ application, i.e. in the strict sense of an application heard and determined prior to the full hearing of the proceedings. For the purposes of issue estoppel, however, the decision is a ‘final’ decision as against the third party. An order refusing to allow the substitution involves a final determination of rights as between the third party and defendant *inter se*. The third party is not allowed participate in the proceedings, and thus the matter has been brought to a conclusion insofar as he or she is concerned. This legal analysis is not affected by the fact that the substantive proceedings as between the existing plaintiff and the defendant remain live. The 2018 judgment [of Noonan J.] thus represents a final judgment of a court of competent jurisdiction.

41. The fact that the 2018 judgment is under appeal to the Court of Appeal does not deprive it of its quality of a ‘final’ judgment for the purposes of *res judicata*. See, by analogy, *M. McC. v J.McC.*[1994] 1 I.R. 293 (at 301).

42. Indeed, Mr. McCool’s conduct in maintaining an appeal against the 2018 judgment highlights the procedural impropriety of his seeking to rerun the substitution application before the High Court pending the appeal to the Court of Appeal. His taking the appeal is a tacit recognition on the part of Mr. McCool that the existence of the judgment and order of April 2018 is a bar to his being substituted as plaintiff in the proceedings. Mr. McCool will only ever be entitled to be substituted as plaintiff if his appeal succeeds. He cannot seek to short-circuit the appeal process by, in effect, inviting another judge of the High Court to overturn the 2018 judgment.”

101. Simons J. then addressed the third prerequisite to the existence of an issue estoppel namely that the earlier judgment determined the same issue as arises in the second set of proceedings. He noted the opposing arguments: -

“44. If one defines the issue as whether Mr McCool is entitled to be substituted as the plaintiff in the proceedings, then this precise issue has been determined by the 2018 judgment. However, Mr McCool seeks to formulate the issue in narrower terms. On his formulation, the issue determined by the 2018 judgment was confined to the question of whether the assignment of 28 September 2017 was effective to assign the proceedings to Mr McCool. The issue for determination on the present application is said to be different, namely whether the *subsequent* assignment of 29 June 2018 is effective. Mr McCool attaches much significance to the fact that the subsequent assignment is worded differently from the assignment considered by the 2018 judgment. In particular, no express provision is made for the onward

assignment of the proceedings. The existence of such a provision in the assignment of 28 September 2017 had informed the finding that the assignment was champertous.

45. In principle, a material change in circumstances is something which could prevent an issue estoppel arising. The rationale underlying the principle of issue estoppel is that a party should not be permitted to relitigate an issue which has already been determined against them in earlier proceedings involving the same parties or their privies. If there has been a material change in circumstance, then the issue to be determined in the second or subsequent proceedings may not actually be the same issue as has previously been determined.”

102. Simons J. then considered the judgment of Noonan J. in more detail, in order to identify the issues determined therein, and made the following findings: -

“48. First, the judgment found that the assignment of 28 September 2017 represented a ‘device’ intended to avoid the requirement that a company be legally represented in proceedings. The assignment was held to be invalid on this basis.

49. To put this finding in context, it should be explained that whereas an individual is entitled to represent him or herself in legal proceedings, a company may only be represented by qualified lawyers who have a right of audience before the courts. Neither a company’s shareholders nor directors can represent it in legal proceedings. This is a consequence of the company having separate legal personality. This principle is long since established, having been first stated by the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252.”

103. Simons J. went on to quote from the judgment of Finlay Geoghegan J. in the Supreme Court in *Allied Irish Banks plc v Aqua Fresh Fish Ltd* [2018] IESC 49, delivered after the decision of Noonan J. in the present case. The Supreme Court affirmed the decision of the Court of Appeal, and confirmed

the principle in *Battle*, and the principle that neither the impecuniosity of a company, nor the fact that the person seeking to represent a company is a principal shareholder and director, constitute “exceptional circumstances” that would justify departure from the rule. Simons J. noted that while Noonan J.’s judgment had been delivered prior to the judgment of the Supreme Court in *Aqua Fresh Fish*, his judgment did rely on the judgment of McKechnie J. in the Court of Appeal which was subsequently upheld by the Supreme Court. Simons J. then observed: -

“53. The finding that the 2018 judgment represented a ‘device’ intended to avoid the requirement that a company be legally represented was predicated upon a careful analysis of the assignment itself and of the manner in which it had been described in the affidavits sworn by Mr McCool. These affidavits included averments to the effect that Mr McCool had undertaken to continue the proceedings ‘solely for the benefit of the company’ and ‘at no cost to the company’. It was also averred that the company was dependant on Mr. McCool to bring the case to trial. These averments were held by the High Court to be ‘entirely inconsistent’ with the purported absolute assignment of the cause of action to Mr McCool, whereby the corporate plaintiff would retain no residual interest in the proceedings.

54. The determination on this first issue is set out as follows at paragraph [30] of the 2018 judgment.

‘I think it is clear beyond any real doubt that the assignment in this case was entered into for the sole purpose of circumventing the rule in *Battle*. As such, it cannot be regarded as other than an artifice which, if upheld, would set the rule at nought. I am therefore satisfied that it is an abuse of process and invalid.’ ”

Simons J. then went on to consider the second issue determined by Noonan J., namely that the first assignment was invalid in that it savoured of champerty.

104. Simons J. proceeds then to make his findings on the question of whether the same issue is involved. He states, at para. 57 –

“57. There has been no material change in circumstances as between the first and the second substitution applications such as to preclude an issue estoppel arising as against Mr McCool. The evidence before the court indicates that the circumstances surrounding the execution of the second assignment on 29 June 2019 were almost identical to those obtaining at the time of the execution of the first assignment.”

In reaching this conclusion Simons J. reviews the evidence, starting with the Minutes of the Board of 29 June 2018. He notes from these that “the perceived need for a further assignment is linked, in part at least, to the loss of legal representation” (para. 59). He notes in the Minutes that the Board’s stated “mission” is to protect the Company, its employees, creditors and customers against the activities of Honeywell, and to bring the case to trial, and that Mr. McCool is described as being in a unique position as the only person who could effectively see the proceedings finally brought to conclusion. He notes that there is no reference in the Minutes to any payment being made by Mr. McCool for the transfer to him of the claim, said to be valued in the order of 11M euros, and in respect of which Mr. McCool insists there is no stateable defence. Simons J. states –

“62. All of this tends to support the inference that the primary objective was to put in place a mechanism whereby the company would be represented, rather than to effect an absolute assignment of the proceedings to Mr McCool.”

105. Simons J. then refers to the second assignment, where there is reference to “good and valuable” consideration, but the nature of the payment made by Mr. McCool is not stated. He then refers to an email dated 15 June 2018 sent by Mr. McCool to Honeywell directly, which was exhibited by Mr. Twomey, and the relevant part of which he quotes: -

“We assume that Honeywell [the defendant to the proceedings] are aware that McCool’s have an application before the Courts to have the proceedings assigned to its founder, 100% shareholder and Managing Director, Mr. Eugene McCool.

We believe that at this time it is appropriate for *McCool’s* to take a further initiative to bring these proceedings to a conclusion and hence we now invite Honeywell to enter into settlement talks with *McCool’s*. As before these talks will take place in Dublin and as before we will have to insist that the Honeywell team will come to the settlement talks with a full brief, the authority from Honeywell to reach an agreement and will stay in Dublin until the process is concluded.” [Emphasis added].

106. Simons J. found –

“65. Again, the content of this email tends to support the inference that Mr McCool is, in truth, pursuing the proceedings *on behalf of* the company and that the company continues to have an interest in the proceedings. If the chose in action had genuinely been assigned to Mr McCool, then the company would have no further interest in the outcome of the proceedings and would have no role in settlement talks.”

He rejected Mr. McCool’s attempt to resist that inference by saying that until such time as the court had “approved” the second assignment, the company continued to retain an interest in the proceedings – an analysis which Simons J. considered was not correct, because the assignment, if it were valid, would be effective from 29 June 2018 – it did not require a formal order of the court to approve it (para. 66). Simons J. then considered averments in Mr. McCool’s grounding affidavit which he considered were inconsistent with Mr. McCool’s approach to the second assignment, quoting paras. 27 and 28 of that affidavit, and making the following findings: -

“68. Again, if the benefit of the proceedings had been assigned absolutely to Mr McCool, then the company would have divested itself of any further interest in the legal proceedings. The references to Mr McCool *protecting* the company are only consistent with its continuing to have an interest in the outcome of the litigation.

69. Crucially, these averments are in almost identical terms to those set out in the affidavit grounding the first substitution application. ...

70. The coincidence in the language between the two affidavits grounding the first and second substitution applications respectively is indicative of the same ambivalence on the part of Mr McCool as to the supposed legal effect of the assignment. In each instance, the company is treated by Mr McCool as continuing to have a role in, and an interest in the outcome of, the proceedings.”

107. Simons J. then referred to Mr. McCool’s application before him to adjourn the second substitution application, in the hope that solicitors would come on board in a matter of weeks, whereupon the second substitution application and the appeal of Noonan J.’s decision would both become unnecessary and would be withdrawn. Simons J. observed –

“71. ... In effect, Mr McCool was saying that he would relinquish the purported assignment to him of the benefit of the proceedings provided that the company were to secure legal representation. In other words, Mr McCool would willingly forgo his supposed entitlement to pursue for his sole benefit a claim which he values at some eleven million euro, and in respect of which he says there is no stateable defence. If Mr McCool genuinely believed he had taken the benefit of an assignment, then this would be an extraordinary act of generosity on his part.

72. The more logical inference to be drawn from these submissions is that neither Mr McCool nor the company regard either of the two assignments as binding. Rather, same can be

dispensed with whenever it is convenient to do so. The overriding objective is to ensure that the company is represented in the proceedings. This tends to reinforce the finding of the 2018 judgment that the first assignment was a mere ‘device’.”

108. Simons J. therefore concludes that it cannot be said that the issue arising for determination on the second substitution application is materially different from that decided by Noonan J. He concludes –

“74. ... The finding in the 2018 judgment that the purported assignment of the chose in action to Mr McCool is merely a ‘device’ intended to avoid the requirement that a company be legally represented in proceedings is determinative of that issue.

75. What Mr McCool seeks to do in making this second substitution application is to reagitate an issue which has previously been decided against him by the High Court. The finding that the purported assignment was a mere device was fundamental to the outcome of the first substitution application. Mr McCool could only ever succeed in this second application by persuading another judge of the High Court to make a finding on this issue entirely contrary to that made by the High Court on 10 April 2018. This is precisely the type of thing which the principle of issue estoppel is intended to prevent. Mr McCool, as any other litigant, is bound by a judicial determination made against him in litigation between the same parties or their privies. The earlier determination may only be challenged by way of appeal to a higher court. Mr McCool has chosen to exercise his right of appeal, and is confined to that remedy.

76. The only tangible difference between the two purported assignments which Mr McCool has been able to point to is the absence of an express provision for the onward assignment of the proceedings. Whereas this difference might potentially be relevant to the finding of the 2018 judgment to the effect that the assignment savoured of champerty, it is irrelevant to the

first finding, namely that the assignment was a mere ‘device’ intended to avoid the requirement that a company be legally represented in proceedings. It does not address – still less negate – the findings made by the High Court in the 2018 judgment.

77. As Mr McCool cannot succeed in his application without overturning this first finding, the application must be refused on the basis that it involves an impermissible attempt to reopen an issue which Mr McCool is estopped from reagitating before the High Court.”

109. Simons J. did not therefore regard it as necessary to consider whether there was a change in circumstance which might mean that Mr. McCool was not bound by the second finding that the assignment savours of champerty. He does however comment that the clause in the second assignment (which also appears in the first assignment) which I have quoted earlier, and which provides that the assignment “shall be binding upon and inure for the benefit of Assignor and Assignee and their respective affiliates, successors, assigns, heir and devisees and legal representatives”, envisages that the chose in action may be further assigned, and that the second finding of Noonan J. would apply equally to the second assignment.

Discussion

110. While Mr. McCool raises some 36 grounds in his Notice of Appeal, most of these are not relevant to the trial judge’s reasoning in respect of issue estoppel, and I propose to identify and address only those grounds that are or might be considered relevant to this issue which was clearly determinative in the High Court.

111. Mr. McCool pleads at ground 14 that the Company was not attempting to re-litigate a previous decision of the High Court. In grounds 17 – 19 he refers to the decision in *Carney v Bank of Scotland Plc. and Costelloe* [2017] IECA 295, in which this court affirmed a decision of Binchy J. striking out

Mr. Carney’s claim under the rule in *Henderson v Henderson*, having regard to the similarity of pleas in the two cases under consideration. Mr. McCool then pleads in Ground 20 –

“20. In this regard, the Court reiterated the principles that it had previously set out in the case of *Vico Limited & Ors. v Bank of Ireland* [2016] IECA 273. The court found it should not adopt too dogmatic an approach in determining what pleas were and were not captured by the *res judicata/Henderson* principles but instead should adopt a broad, merits based, judgment taking account of public and private interests. Specifically, the Court should ask ‘whether in all of the circumstances a party’s conduct is an abuse [of process]’.” [sic]

112. Mr. McCool did not seek to develop this point in any way in his oral submissions. In his written submissions at para. 34 he argues that the second assignment “... wasn’t trying to relitigate issues already decided by Noonan J., but correcting procedural errors identified by Noonan J.”, and that he believed it was a ‘reasonable solution’ ”. He argues –

“I believe that justice must be superior to procedures and I remind the Court that I was a layman acting without legal advice, my action was a urgent response to prevent the collapse of a nineteen year old dispute. **VIP NOTE I would remind the Court that my Assignment documents were qualified by the term ‘I would only do what I was legally entitled to do’**”[sic]

- and in the ensuing paragraph he argues that “my second assignment was made on the basis of correcting the procedural defect, to ensure litigation continued ...”.

113. Unfortunately these submissions do not engage with the carefully considered reasoning of Simons J. Mr. McCool does not dispute that the legal principles relating to issue estoppel are correctly identified by the trial judge, and he does not in any meaningful way engage how he asserts the trial judge may have erred in his application of the law to the facts.

114. Turning to the criteria to be satisfied for a plea of issue estoppel, it is beyond dispute that the first judgment was given by a court of competent jurisdiction, namely by Noonan J. in the High Court.

115. Secondly, Simons J. was correct to find that Noonan J. gave a final decision on the merits of the issue, notwithstanding that the decision was made at an interlocutory stage. This is because, unlike the decision that a court makes when granting an interlocutory injunction, the decision of Noonan J. was clearly intended to be a final determination of Mr. McCool's application to be substituted as plaintiff.

116. In Honeywell's written submission counsel brings to the court's attention the decision of the Supreme Court made as long ago as 1953 in *McDaid v O'Connor and Bailey Limited* [1954] I.R. 25. That concerned a claim brought under the Workman's Compensation Acts, 1934 – 1948. Mr. McDaid was awarded compensation in the Circuit Court, and that was duly paid until 13 November 1951, when on an application to review brought by the respondent the Circuit Court Judge found that the incapacity as a result of the injury arising in the course of the employment ceased on that date, and the award of compensation was terminated. Mr. McDaid subsequently issued a further originating summons, claiming compensation in respect of the accident, together with an application to review. On the hearing of the applications, which were heard together, the Circuit Court Judge found that the matters in issue in the proceedings before him were *res judicata*, and that he had no jurisdiction to entertain the applications. This is upheld in the Supreme Court. Kingsmill Moore J. rejected the argument that Mr. McDaid was entitled to bring a new originating application because that was the only method for protecting his rights as a workman. At p. 32 he stated –

“The whole of this elaborate argument fails if an order on review can be intended to be, and can actually be, a final order, and if the order in this case was so intended and did so operate.”

I agree with the trial judge that for the purposes of issue estoppel the decision of Noonan J. was a “final” decision as against a third party, namely Mr. McCool, and that an order refusing to allow a substitution involves a final determination of rights as between Mr. McCool and Honeywell.

117. I am also satisfied that Simons J. was correct in concluding that the fact that the order of Noonan J. was under appeal did not deprive it of its quality of finality. The trial judge relied on the authority of *M. McC v J. McC* [1994] 1 I.R. 293. The argument there was that a maintenance decree given in a court in Hong Kong in favour of the plaintiff was not final in the sense that it could be subjected to review or appeal. Costello J. (as he then was) stated, at p. 301 –

“The finality and conclusiveness of the order is to be determined by the nature of the proceedings before the foreign court and the effect of the court's order. If the nature of the proceedings permit an adjudication on all the issues between the parties and if an order is made so that the principle of *res judicata* applies to it then it is clear (a) that the court's order is a ‘final and conclusive’ one, and this is so even though (b) the order may later be varied or set aside on appeal.”

Simons J. was also entitled to find that Mr. McCool’s appeal of the dismissal of the first substitution application was “a tacit recognition on the part of Mr. McCool that the existence of the judgment and order of April 2018 is a bar to him being substituted as plaintiff in the proceedings... [And] He cannot seek to short-circuit the appeal process by, in effect, inviting another judge of the High Court to overturn the 2018 judgment.” (para. 42)

118. Earlier in this judgment I have concluded that Mr. McCool’s appeal of the first substitution application dismissal must fail. This brings a further layer of finality to the decision made at first instance by Noonan J. Mr. McCool chose to pursue his appeal in respect of the decision of Noonan

J., and that choice further underscores his tacit acceptance that the order of Noonan J. was “final” in the sense under discussion.

119. In Ground 28 of his Notice of Appeal, Mr. McCool pleads –

“28. If the Court finds that only one appeal is necessary, then I will withdraw the appropriate appeal which will allow me to appeal the refusal of my legitimate assignment application and appeal the costs order ...”

This plea makes it clear that Mr. McCool has at all times been attempting to ride two horses. He has failed to understand, despite the clear reasoning in the judgment of Simons J., that the judgment of Noonan J. had finality, and he could only appeal that judgment, and that it is entirely inconsistent with the first appeal that the Company and Mr. McCool should execute the second purported assignment, and make the second substitution application, while at the same time appealing pursuing the first appeal. The argument that his second assignment was not trying to re-litigate issues already decided by Noonan J., but merely “correcting procedural errors identified by Noonan J.” is misconceived and untenable. It is contrary to the principle of finality of litigation that Mr. McCool should run the first substitution application, lose on specified grounds, and then use the judgment as some sort of “procedural” advice to obtain the second assignment and mount the second substitution application.

120. Turning then to the requirement that the judgment of Noonan J. must have determined a question raised in the second substitution application, that is to say that there must be an identity of issues, I am satisfied that Simons J. correctly concluded that Mr. McCool cannot point to any material difference between the two substitution applications, even though they are based on two slightly different purported assignments. Noonan J., in what I have earlier in this judgment characterised as his primary determination, found that the first assignment was a device intended to circumvent the

rule in *Battle*. Simons J. correctly addressed himself to the question of whether there had been any material change in circumstance such that it became necessary for him to examine the second assignment.

121. I am satisfied that in his examination of the relevant evidence Simons J. appropriately highlights portions of the Board Minutes recording the resolutions authorising the Board to execute the first and the second assignment, and correctly highlights matters such as the mission being to “protect the company”, and Mr. McCool’s “commitment to the success and survival of the company”. Simons J. was also entitled to note the absence of any record of consideration, and the email to Honeywell dated 15 July 2018 suggesting that it was at that time appropriate for the Company to take further initiatives to bring the proceedings to a conclusion by inviting Honeywell to settlement talks with the Company.

122. I am satisfied that there was ample evidence before the court on which Simons J. could conclude that the issue which arose for determination on the second substitution application was not materially different from that which had been determined by Noonan J.

123. That being the case it is not necessary to further consider whether the second substitution application is in itself an abuse of the process, being an attempt to circumvent the judgment of Noonan J. and to re-litigate issues previously decided by him. Nor is it necessary for this court to consider whether the second assignment, omitting as it does the clause expressly permitting onward assignment/reassignment that appears in the first assignment, savours of champerty. Simons J. in paras 78 and 79 does venture to suggest that the second assignment savours of champerty, but it is clear that he decides the second substitution application against Mr. McCool on the basis of an issue estoppel in respect of the use of an assignment to circumvent the ruling in *Battle*, and in my view his dicta in these paragraphs in respect of the champerty issue are *obiter*.

124. I would therefore dismiss the second appeal.

The cross appeal

125. In the cross appeal Honeywell appeal against the refusal of Simons J., for reasons given in his supplemental judgment delivered on 11 November, 2019, to grant costs on a “solicitor and own client” basis, and to award them to Honeywell against Mr. McCool only on the more usual “party and party” basis.

126. It will be recalled that Noonan J. had granted Honeywell its costs against Mr. McCool on a “solicitor and own client” basis. Honeywell had sought a similar costs order from Simons J. on the basis that the second substitution application was a further abuse of process, and indeed a greater one in that it was made when Mr. McCool was on notice of the judgment of Noonan J. delivered on 10 April, 2018. It appears that in response Mr. McCool asked that costs be “costs in the cause” and submitted “that any abuse on his part was not deliberate, and that he is a lay litigant unversed in legal procedure” (para.11 of supplemental judgment), and that the court should have regard to what he alleges was abuse of the process by Honeywell in its overall conduct of the proceedings.

127. Simons J. had no difficulty concluding firstly that notwithstanding that it was an interlocutory application he should under O.99 r.4(A) make an award of costs, and secondly that he should apply the ordinary rule in relation to costs should apply, namely that costs should follow the event and should be borne by Mr. McCool as he had failed in his second substitution application.

128. In relation to Honeywell’s application for costs on a “solicitor and client” basis Simons J. adopted the summary of applicable principles set out by Barrett J. in *“Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697 where he stated at para.15:

“15....First, in making such a costs order the court departs from the normal measure of costs. Second, this being so, there has to be a reason why the court departs from the usual order. Third, as indicated in *Geaney*, and accepted by the court as correct, the court will order costs on a solicitor and client basis when the court wishes to mark its especial disapproval and/or

displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought.”

129. Simons J. then observed in para. 22 that as he dismissed the second substitution application “primarily on the basis that the matter was *res judicata* and gave rise to an issue estoppel”. It was unnecessary for the court to consider other issues canvassed by Noonan J., or to “reach any conclusion as to the manner in which Mr. McCool had conducted himself during the litigation generally”. He proceeded:

“23. Whereas the making of a second substitution application, in circumstances where an application in almost identical terms had been refused by the High Court and was the subject of a pending appeal, can be characterised as an abuse of process, I am not satisfied that the abuse is of a scale which would justify the making of what is an exceptional order, namely, an order that the costs be measured on a “solicitor and client” basis. The compass of the principal judgment is narrow, and whereas I can readily understand the approach adopted by the High Court in relation to the costs of the first substitution application, most of the issues informing the exercise of the court’s discretion on that occasion are not before me. For example, I did not have to consider the complaint that Mr. McCool had included material in an affidavit which was false. Any costs order which I make is confined to that segment of the proceedings which came before me, and must equally be confined to the conduct of that segment.

24. In summary, whereas the bringing of the second substitution application was entirely wrongheaded, I do not think that it entailed the level of unreasonableness or moral culpability necessary to justify directing that the costs be assessed on a “solicitor and client” basis.”

129. At the appeal hearing Counsel for Honeywell 1 relied on the recent decision of Barniville J. in *Trafalgar Developments Ltd v Mazepin* [2020] IEHC 13 where after a review of the authorities he sets out in para.54 seven principles that should inform the court when exercising its jurisdiction in

relation to costs and the exercise of its discretion to order costs on the “solicitor and client” basis, including the more severe “solicitor and own client” basis, which is what Honeywell seeks here:

“54. It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -

- (1) The normal position is that where costs are awarded against one party in favour of one other, those costs will be taxed or adjudicated on the party and party basis.
- (2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.
- (3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).
- (4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.
- (5) The conduct in question can include: -
 - (a) A particularly serious breach of the party’s discovery obligations;
 - (b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;
 - (c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there

exists clear evidence supporting a *prima facie* case in relation to such claims;

- (d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.
- (6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -
- (a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;
 - (b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;
 - (c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;
 - (d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).
- (7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be

justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis).”

130. Counsel argued that Simons J. should have awarded solicitor and own client costs to mark the court’s disapproval on the basis that the second substitution application was a repeat abuse of the process, particularly in light of the fact that the first appeal was pending at the time Mr. McCool brought the second substitution application, and that he repeated the allegations of wrongdoing, which Noonan J. had held were unfounded. Counsel submitted that the finding that the purpose of the assignment was to circumvent the rule in *Battle* was itself sufficient to warrant the costs order sought.

131. In response Mr. McCool asserted that what was suggested by Honeywell as being “bad behaviour” was born out as being factually correct. He submitted that “we” have suffered with 19 years of dispute and delay, and that the Company and his family have suffered “horrendous loss”, and that he was “doing it to protect the Company...and also to protect my family”.

Discussion

132. It is first appropriate to address the standard of review to be applied by an appellate court when considering an appeal in respect of a costs order. This was recently discussed by this court in *O’Connell v BATU and ors* [2021] IECA 265, where Power J. in giving the judgment of the court stated:

“122. Whilst it is well settled law that an appellate court will be slow, or indeed ‘very reluctant’ to interfere with a trial judge’s discretion in awarding costs (see *M.D v. N.D* [2016] 2 I.R. 438, p. 458 and *W.Y.Y.P v. P.C.* [2013] IESC 12, para. 39), such a discretion must be exercised ‘within jurisdictional criteria established in law’ (see *MacMenamin J. in Child and Family Agency v. O.A.* [2015] 2 I.R. 718, p. 721). An appellate court may determine or overturn a costs order where it considers that the trial judge failed to take into account relevant

factors (see *Dunne v. Minister for the Environment & Ors* [2008] 2 I.R. 775, p. 783). A trial judge is not completely at large in exercising the discretion on costs.”

133. It would seem to follow that the *weight* that the trial judge chooses to attach to relevant factors in coming to a decision on costs is very much a matter for that judge’s discretion, and is something with which the appellate court should be very slow to interfere.

134. I cannot see any reason in principle why this standard of review should not apply to a trial judge’s ancillary decision as to the basis upon which the costs which are awarded should be taxed/adjudicated. The primary question is therefore whether Simons J. failed to take into account relevant factors in declining to award costs “solicitor and client” basis.

135. It is unquestionably the case that a trial judge retains a discretion in relation to the awarding of costs, and that it must be exercised judicially. Thus, for example, a trial judge should not depart from the general principle that costs should follow the event i.e. that the successful party should be entitled to their costs unless there is good reason to do so after appropriate consideration of relevant factors. The discretion in the award of costs where a party is “entirely successful” is now constrained by s.169(1) of the Legal Services Regulation Act, 2015.

136. Separately it is clear that a trial judge enjoys a discretion as to the basis upon which the costs should be taxed/adjudicated. This was expressly provided for in O.99 r.10 R.S.C., headed “Amount of Costs”. Sub-rule (2) provided that costs are to be taxed on a party and party basis. Sub-rule (3) then provided –

“(3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be adjudicated on a solicitor and client basis.”

Order 99 was amended by S.I. 584/2019, so that O.99 r.10 (2) now reads –

“(2) Subject to sub-rule (3), costs to which this Part applies shall be adjudicated on a party and party basis in accordance with s.155 [of the Legal Services Regulation Act, 2015] and Sch.1 to the 2015 Act.”

Sub-rule (3) is amended, but only by replacing “the solicitor and client basis” with “a legal practitioner and client basis”.

137. The effect of this is to make the ‘party and party basis’ the default basis, or “normal basis” (per Barniville J. in *Trafalgar*) for taxing/adjudication costs, and sub-rule (3) affords the court a wide discretion “if it thinks fit” to award costs on the higher basis. In my view the overriding objective in the exercise of the discretion under sub-rule (3) must be to attempt to do justice between the parties in all the circumstances, but where the trial judge considers an application for costs on the higher scale, and gives reasons for refusing to order costs on a higher scale, the appellate court should be very reluctant to intervene.

138. Whilst the principles carefully enunciated by Barniville J. in *Trafalgar* in relation to a court considering ordering costs on a “solicitor and client” basis seem reasonable, it is not necessary to subject them to any detailed analysis in this judgment because it is clear that counsel for Honeywell was relying on the broad principle at (4), namely that the court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made. That principle was not disputed by Mr. McCool. The further principles enunciated by Barniville J suggest the need to identify and consider the conduct complained of, and any explanations for and consequences of that conduct. For reasons that I give below, in my view these further considerations had limited (if any) application to the second substitution application as it proceeded before Simons J.

139. The real difficulty with Honeywell’s cross appeal is that the trial judge decided the second substitution application on the narrow ground of *res judicata*/issue estoppel. He did not therefore have to embark of a more detailed consideration of the issues of improper purpose of the second

assignment, or champerty, and did not have to reconsider aspects of Mr. McCool's affidavit evidence previously found to be false, or allegations in relation to the conduct of the proceedings by Honeywell that Noonan J. found to be "scurrilous, highly defamatory and without foundation". As Simons J. observes, it was unnecessary for him to reach any conclusion as to the manner in which Mr. McCool had conducted himself during the litigation generally. This was the critically relevant factor in refusing Honeywell's application.

140. The trial judge considered that any costs order that he might make should be "confined to that segment of the proceedings which came before me, and must equally be confined to the conduct of that segment." I am not convinced that Simons J. was *obliged* to be so constrained in his approach to the measurement of costs, because much of the material that Noonan J. held to be unfounded was also put before him in Mr. McCool's grounding affidavit. Nevertheless it seems to me perfectly reasonable for Simons J., as the judge hearing the second substitution application, to have made the point that the limits of the application as it ran, and as it fell to be determined, should be a primary consideration when deciding the measure of costs.

141. I am also of the view that a relevant factor is that Mr. McCool is not legally trained in the particular context of this appeal. Although at this point he may have considerable practical experience of court practice and procedure and representing himself in court, he is nonetheless a lay litigant who would not be expected to have any real familiarity with the concepts of issue estoppel/*res judicata*, or the relevant caselaw, or how it might apply to the second substitution application. That said, it was held by both Noonan and Simons JJ. that he was knowingly engaged in an attempt to circumvent a legal rule of which he was aware. This he must know was legally impermissible regardless of whether the court might be inclined to overlook his ignorance of the law on *res judicata* when considering an order of costs. It is perhaps the reality of the technical difficulties involved in a plea of *res judicata* that prompted Simons J. to comment that bringing the second substitution application did not entail "the level of unreasonableness or moral culpability necessary to justify directing that

the costs be assessed on a ‘solicitor and client’ basis.” (para. 24). In any event this statement demonstrates that Simons J. did have regard to the conduct identified and complained of by Honeywell, but shows that he did not attach such weight to it as would persuade him that costs should be awarded on the higher scale. That was a view that Simons J. was entitled to take in the exercise of his discretion.

142. Accordingly having regard to circumstances peculiar to the hearing and determination of the second substitution application, and in particular the fact that Simons J chose to address it (and dismiss it) on the narrow ground of issue estoppel/*res judicata*, I am of the view that when it came to considering Honeywell’s application for costs on the higher scale, Simons J took into account all relevant matters. In my view he exercised his discretion judicially, and it cannot be said that he erred in principle or in any way in the exercise of that discretion in rejecting Honeywell’s application, and instead granting costs on the normal party and party basis. I would therefore affirm his order on costs.

Costs of the appeals

143. As has become usual, I will indicate on a provisional basis the orders that I propose should be made in relation to the costs of these appeals. This issue is now governed by s.169(1) of the Legal Services Regulation Act, 2015 and Order 99 of the Rules of the Superior Courts as amended by S.I. 584 of 2019.

144. In relation to the first appeal, the respondent was successful and the normal rule that costs follow the event should apply and I would propose that Honeywell should be awarded its costs against Mr. McCool personally, to be adjudicated by a legal costs adjudicator on a party and party basis.

145. In relation to the second appeal the respondent was again successful and I would propose that Honeywell should be awarded its costs against Mr. McCool personally, to be adjudicated by a legal costs adjudicator on a party and party basis.

146. Honeywell did not succeed in its cross appeal. However, in my view the time taken to hear the cross appeal was minimal, and did not add materially to the overall length of the hearing before this court. Moreover, as Mr. McCool is a lay litigant he cannot be awarded any costs, and could, at best, only entitled be to recover his expenses. As he made very limited, if any, submissions in relation to the cross appeal, it is hard to see how he could have incurred any expenses over and above those incurred by him in pursuing his own appeals. For these reasons I would propose that ‘no order’ be made in relation to the costs and expenses of the cross appeal.

147. I would further direct that should either party seek a different order(s) in relation to costs in either appeal or the cross appeal, or seek that costs be measured on a different basis, then they should so indicate in writing or by email to the Court of Appeal Office, setting out the alternative orders sought, within 14 days from the electronic delivery of this judgment, and in that event the court will schedule a short costs hearing. In the event that either party so indicating ultimately does not succeed in securing a different costs order they will be at risk of incurring the costs of such hearing

Costello J. and Power J. having read this judgment and the orders proposed to be made have indicated their agreement with same.

