

THE HIGH COURT

2005 No. 2747 P.

BETWEEN

MCCOOL CONTROLS AND ENGINEERING LIMITED

PLAINTIFF

AND

HONEYWELL CONTROL SYSTEMS LIMITED

DEFENDANT

JUDGMENT of Mr Justice Garrett Simons delivered on 25 October 2019

INTRODUCTION

1. This matter comes before the High Court by way of an application to substitute a new party as plaintiff to the proceedings. The application seeks to give effect to a purported assignment of the proceedings from the current corporate plaintiff to its sole shareholder, Mr Eugene McCool ("*Mr McCool*"). The application is made in circumstances where the corporate plaintiff has, seemingly, been unable to retain legal representation because of its inability to pay for same.
2. An application in almost precisely the same terms had been made to the High Court (Noonan J.) in March 2018. That application was dismissed by the High Court in a reserved judgment delivered on 10 April 2018, *McCool v. Honeywell Control System Ltd* [2018] IEHC 167. It will be necessary to examine the basis of that judgment in more detail presently, but for introductory purposes it is to be noted that one of the grounds upon which the application was rejected is that it represented a device intended to avoid the requirement that a company be represented in proceedings by qualified lawyers.
3. The judgment and order of the High Court of April 2018 is under appeal to the Court of Appeal, and it is anticipated that the appeal will be heard next year.
4. Notwithstanding this procedural history and the pending appeal, Mr McCool has purported to make a second application to the High Court to be substituted as plaintiff in the proceedings. This application is grounded upon a second assignment said to have been executed on the part of the corporate plaintiff. The shorthand "*the company*" or "*the corporate plaintiff*" is used to refer to McCool Controls and Engineering Ltd.
5. Where convenient to do so, I will use the shorthand "*the first substitution application*" to refer to the application heard and determined in 2018, and the shorthand "*the second substitution application*" to refer to the application the subject-matter of the within judgment.

PROCEDURAL HISTORY

6. Given the nature of the principal objection made on behalf of the defendant to the present application, namely that the 2018 judgment gives rise to an issue estoppel, it is necessary to rehearse the procedural history in some detail.
7. These proceedings were instituted by way of plenary summons on 9 August 2005. Notwithstanding that the pleadings have been closed since 2007, no notice of trial has

ever been served. Instead, it seems that matters became bogged down in disputes in respect of replies to particulars and the discovery of documents.

8. The corporate plaintiff has been represented by a number of different firms of solicitors. The last of these firms of solicitors, O'Grady Solicitors, had brought a motion to come off record on 22 September 2017, and that application was acceded to by order of the High Court (Noonan J.) on 21 March 2018.
9. In anticipation of the company's solicitors applying to come off record, Mr McCool, who is the sole shareholder of the corporate plaintiff, issued a motion on 10 July 2017 seeking to be joined as a co-plaintiff. This motion was listed before the Master of the High Court.
10. It is said on affidavit that the Master, at a hearing before him on 28 July 2017, ventilated the possibility of the cause of action being assigned by the corporate plaintiff to Mr McCool personally. Prior to the next listing before the Master, the corporate plaintiff executed a document on 28 September 2017 entitled "Assignment of Claim Agreement" which purported to assign its interest in the proceedings to Mr McCool. In reliance on this purported assignment, Mr McCool then reoriented his application as one seeking to have him substituted as plaintiff in lieu of the company. This application was successful, at first instance, before the Master on 8 November 2017.
11. The defendant then brought an appeal against the order of the Master. This appeal came on for hearing before the High Court (Noonan J.) sitting in Cork on 21 March 2018. A reserved judgment was delivered shortly thereafter on 10 April 2018, *McCool v. Honeywell Control System Ltd* [2018] IEHC 167 ("*the 2018 judgment*"). The High Court discharged the order of the Master and made an order in lieu dismissing Mr McCool's application.
12. For present purposes, the principal findings of the 2018 judgment can be summarised as follows. First, the High Court held that the assignment of the interest in the proceedings had been entered into for the sole purpose of circumventing the rule in *Battle v. Irish Art Promotion Centre Ltd* [1968] I.R. 252. This rule is to the effect that a corporate entity cannot be represented in court proceedings by its managing director or other officer or servant. Rather, a corporate entity can only be represented by a qualified lawyer with a right of audience. The High Court was satisfied that the assignment was an artifice which, if upheld, would set the rule in *Battle* at naught. The assignment was an abuse of process and invalid.
13. Secondly, the High Court found that the assignment was contrary to public interest in that it savoured of champerty. (The term "champerty" refers to an agreement to support litigation, in which the party providing the support has no legitimate interest, in return for some division of the spoils). This finding was informed, in part at least, by the existence of a clause in the assignment which expressly allowed for the onward assignment of the interest in the proceedings. As explained presently, Mr McCool has since sought to address this aspect of the 2018 judgment by relying on a modified form of assignment which omits the offending provision.

14. Mr McCool has brought an appeal against the 2018 judgment to the Court of Appeal. 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.

EVENTS LEADING TO PRESENT APPLICATION

15. Mr McCool has averred in his affidavit grounding the present application that, following the delivery of the judgment on 10 April 2018, the board of the corporate plaintiff made a *further* assignment of the proceedings to Mr McCool. Minutes of a board meeting dated 29 June 2018 have been exhibited by Mr McCool. No formal board resolution ratifying the assignment has been exhibited.

16. The operative part of the minutes of the board meeting reads as follows.

“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 to act as Honeywell’s exclusive representative in the Irish Market. He personally secured 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 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 to the board and passed unanimously.”

17. As appears from the minutes, the perceived need for a further assignment is linked, in part at least, to the loss of legal representation. It will be recalled that the last firm of solicitors acting on behalf of the corporate plaintiff had been allowed to come off record by order of the High Court on 21 March 2018.
18. A further document headed up “Assignment of Claim Agreement” has been exhibited. This document is dated 29 June 2018 and is signed on behalf of the corporate plaintiff by one of its directors, Mary O’Donnell. Mr McCool has signed it as “assignee”.
19. Mr McCool next issued a notice of motion on 2 July 2018. The principal relief can be summarised as follows: an order allowing Mr McCool to be substituted as plaintiff

following the assignment of the proceedings to him by the corporate plaintiff. The application is grounded upon an affidavit of Mr McCool sworn on 2 July 2018.

20. Mr McCool has sought to explain away the provision in the first assignment for onward assignment as arising from ignorance on his part.

“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 a standard element of assignment. From the courts 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.”

HEARING ON 17 OCTOBER 2019

21. The application came on for hearing before me on 17 October 2019. At the outset of the hearing, Mr McCool applied for an adjournment. The basis of the adjournment application was that he was in discussions with legal firms with a view to their “coming aboard” and taking over the case. It was suggested that if solicitors did come aboard, then both the instant application before the High Court, and the pending appeal before the Court of Appeal in respect of the 2018 judgment, would become unnecessary.
22. I refused the application for an adjournment in circumstances where Mr McCool had previously secured an adjournment in October 2018 on precisely the same basis, i.e. that he was then talking to solicitors with a view to their coming on record. It seems that some twelve months later no progress has been made in this regard.
23. These proceedings were instituted as long ago as 9 August 2005. The motion seeking the substitution of the plaintiff issued in July 2018. In circumstances where Mr McCool and the company have already been afforded a significant period of time within which to seek fresh legal representation, it would be unreasonable to prolong the proceedings further by granting an adjournment. There must be finality to litigation.

SUBMISSIONS OF THE PARTIES

24. Mr McCool, who is the moving party in the substitution application, submits that the terms of the second assignment are different from the first assignment, the subject-matter of the 2018 judgment. In particular, it is said that there is no express provision for the onward assignment of the chose in action to a third party. It is further submitted that the assignment to him is lawful in that he is a “heavily connected” party to the company.
25. Mr McCool is critical of what he perceives as attempts on the part of the defendant to delay the progress of the proceedings.
26. As noted earlier, Mr McCool had applied to adjourn the second substitution application in circumstances where it was hoped that solicitors would come onboard in a matter of weeks. It was suggested that were solicitors to come aboard then the second substitution application and the appeal to the Court of Appeal would become unnecessary and would be withdrawn.

27. In response, leading counsel for the defendant, Mr Declan McGrath, SC, has summarised his client's objection to the application under four broad headings as follows. These submissions were supported by detailed written legal submissions. First, the application is an abuse of process having regard to the pending appeal to the Court of Appeal. Secondly, Mr McCool is estopped from making the second substitution application by the principle of *res judicata* / issue estoppel. Counsel cited a number of authorities including, in particular, the judgment of the Supreme Court in *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576, and the judgment of the High Court (McDonald J.) in *George v. Ava Trade (EU) Ltd.* [2019] IEHC 187. Thirdly, the second assignment suffers from the same invalidity as the first assignment, i.e. it is a device to circumvent the rule in *Battle v. Irish Art Promotion Centre Ltd* [1968] I.R. 252. Fourthly, the second assignment savours of champerty. These third and fourth submissions were made without prejudice to the objection that the matter is *res judicata*, and that accordingly it is not open to this court to revisit issues previously determined by the High Court in the 2018 judgment.
28. Finally, counsel also draws attention to the adverse findings made in the 2018 judgment as to the manner in which Mr McCool has conducted himself to date.

DISCUSSION

RES JUDICATA: OVERVIEW

29. 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).
30. There is a public interest in ensuring the finality of litigation, and in preventing parties from relitigating issues which have previously been decided against them. This public interest is advanced by a number of related principles which are often referred to by the umbrella term *res judicata*. The first principle, cause of action estoppel, precludes a party to earlier litigation from asserting the same cause of action against the other party to the earlier litigation in circumstances where that cause of action has already been finally determined against the first party by a court of competent jurisdiction.
31. The second principle, issue estoppel, precludes parties from relitigating a particular issue which has previously been decided against them. The prerequisites to the existence of an issue estoppel have been identified in a number of judgments, including, in particular, the judgment of the Supreme Court 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.”

32. The requirements have been set out, most recently, in the judgment of the High Court (McDonald J.) in *George v. Ava Trade (EU) Ltd.* [2019] IEHC 187. McDonald J. cited with approval the following passage from the judgment of the English Court of Appeal in *Thoday v. Thoday* [1964] 2 W.L.R. 371 at 384/85.

“[...] 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 on one such cause of action any of such separate issues 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 on 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.”

33. I will return to address the precise requirements of an issue estoppel under the next heading below. For present introductory purposes, the key criteria might be summarised as follows: (i) there must be a judgment by a court of competent jurisdiction which involves (ii) a final decision on the merits; (iii) the earlier judgment must have (necessarily) determined the same issue as arises in the second set of proceedings; and (iv) the parties to the two proceedings must be the same or their privies.
34. The third principle, the rule in *Henderson v. Henderson*, operates to extend the principle of res judicata by stipulating that a party is not only estopped from advancing issues which were actually decided against that party in the earlier proceedings, but is also precluded from advancing arguments which were available to the party at that time but were not advanced in the first proceedings. In other words, a party who fails to make a particular argument in the earlier proceedings will be estopped from raising the argument in a second set of proceedings.
35. The present case is concerned with the second of the three species of *res judicata* identified above, i.e. issue estoppel. The dispute between the parties centres largely on whether in making this second application to have himself substituted as plaintiff in the

proceedings, Mr McCool is seeking to relitigate an issue which has already been determined against him by the 2018 judgment. To put the matter another way, in order to succeed in his second application, is Mr McCool driven to say that one or more of the findings of the High Court (Noonan J.) is incorrect and should be revisited.

36. I turn to consider whether the ingredients necessary to establish an issue estoppel have been met under the next heading below.

ISSUE ESTOPPEL

(i) & (ii). Final judgment of court of competent jurisdiction

37. The first two prerequisites to an issue estoppel can conveniently be considered together. There must be a judgment by a court of competent jurisdiction which involves a final decision on the merits.
38. The 2018 judgment self-evidently represents a judgment by a court of competent jurisdiction, i.e. the High Court. The debate before me centred on the separate question of whether it represents a “final” decision.
39. The concept of a “final and conclusive” order has been considered very recently by the High Court (McDonald J.) in *George v. Ava Trade (EU) Ltd.* [2019] IEHC 187. McDonald J. had to consider whether an order of a foreign court could give rise to an issue estoppel. The judgment emphasises that only an adjudication upon a cause where the merits were or could have been tried can give rise to *res judicata*. It also explains, by way of a careful consideration of *M. McC. v. J. McC.* [1994] 1 I.R. 293, that a judgment can still be regarded as “final” even if it is, in principle, subject to being varied if the circumstances have changed.
40. Applying these principles to the present case, I am satisfied that a decision to refuse to allow a third party to be substituted as plaintiff in proceedings constitutes a “final” decision. 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 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.

(iii). Same issue

43. The third prerequisite to the existence of an issue estoppel is that the earlier judgment must have determined the same issue as arises in the second set of proceedings. The determination of that issue must have been *necessary* for the first proceedings, i.e. a finding that is merely collateral or ancillary does not give rise to an issue estoppel.

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.

46. It is necessary, therefore, to consider the 2018 judgment in more detail in order to identify the issues determined therein.

47. The 2018 judgment is a *tour de force*, and addresses a number of complex legal issues with admirable clarity. For present purposes, there are two principal determinations which are potentially dispositive of the substitution application now before the court, as follows.

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.
50. The principle has been more recently confirmed in *Allied Irish Banks plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49; [2019] 1 I.L.R.M. 19 (“*Aqua Fresh Fish*”). See paragraphs [30] to [33].

“The inability of a company to appear in person to pursue or defend a claim is because it is an artificial person with a separate legal personality from its shareholders and directors, as unequivocally stated by the House of Lords in *Salomon v. Salomon & Co. Limited* [1897] A.C. 22. One of the disadvantages of being an artificial person is that the company can only act through or by a natural person. Should that fact give it a right to be represented by a lay person?

It is a regrettable fact that legal proceedings may be costly to pursue or defend; legal representation may be expensive and proceedings may expose a party to a significant risk of an adverse costs order. A human person who cannot afford or otherwise procure legal representation or does not wish to do so undoubtedly has the option of representing him or herself. However, he does not have a right to be represented by any third party other than a qualified lawyer. Also, as a party to the litigation, he or she exposes him or herself to the risk of an adverse costs order. That fact may be a deterrent in the pursuit of certain unmeritorious claims or defences. It may also, however, preclude the pursuit of potentially successful claims or defences.

The potential costs of litigation or risks of adverse orders for costs may be seen as a practical restriction or obstacle to the exercise of a right of access to the courts guaranteed by the Constitution. It must be recalled that the constitutional right of access to the courts cannot be considered in isolation. It must also be considered in the context of the constitutional guarantees of fair procedures and the administration of justice in accordance with fair procedures. Almost all litigation is between at least two parties. Representation of litigants by unqualified persons creates challenges and quite often difficulties for the administration of justice in accordance with fair procedures. Some restriction to the right of access to the courts of persons who, as in the case of companies are unable to represent themselves, or in the case of human persons are unwilling to do so and either choose not to instruct a lawyer or are unable to do so, may be inevitable. Provided

that there is an inherent jurisdiction to make exceptions to the general rule in *Battle*, justified in the interests of the due administration of justice, such a restriction is not then, in my view, prohibited by the Constitution.

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'."

51. The judgment in *Aqua Fresh Fish* goes on to explain that this rule is complemented by the inherent jurisdiction and discretion of a court to permit, in exceptional circumstances, the representation of a company by a person who is not a lawyer with a right of audience. 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.
52. The 2018 judgment had been delivered prior to the judgment of the Supreme Court in *Aqua Fresh Fish*. The 2018 judgment does, however, rely on the Court of Appeal judgment in the same case (*Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2017] IECA 77) which judgment was subsequently upheld by the Supreme Court.
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 naught. I am therefore satisfied that it is an abuse of process and invalid."

55. The second issue determined by the 2018 judgment was to the effect that the assignment of 28 September 2017 was invalid in that it savoured of champerty. The finding was informed, in part at least, by the presence of the following provision in the assignment.

“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.”

56. The 2018 judgment indicated that whereas an assignment to a person, such as a shareholder, who has a legitimate interest in the litigation of the company, might be valid, this exception could not be relied upon in circumstances where the assignment expressly provided for the onward transfer of the chose in action to a third party. See paragraphs [56] to [58] of the 2018 judgment as follows.

“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.

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.

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.”

Findings of the court on question of whether the same issue is involved

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.
58. Before turning to summarise this evidence, it should be emphasised that the exercise which this court is required to carry out in order to determine whether Mr McCool is estopped is confined to a consideration of whether there has been a material change in circumstances. It is no part of this exercise to review the *correctness* or otherwise of the findings in the 2018 judgment. This is a matter which can only be addressed in the pending appeal to the Court of Appeal.
59. I turn now to review the evidence. The first document in time is the minutes of the board meeting of 29 June 2018. The operative part of the minutes has been set out at paragraph 16 above. As appears therefrom, the perceived need for a further assignment is linked, in part at least, to the loss of legal representation. It will be recalled that the last firm of solicitors acting on behalf of the corporate plaintiff had been allowed to come off record by order of the High Court on 21 March 2018.

60. The minutes refer to the board's stated "mission" to protect the company, its employees, creditors and customers against the activities of the defendant, and to have the case finally brought to trial. Mr McCool is described as being in the "unique position of being the only person who could effectively see the proceedings finally brought to conclusion".
61. There is no reference in the board minutes to any payment being made by Mr McCool for the transfer to him of a claim which is said to be valued in the order of 11 million euro, and in respect of which Mr McCool insists there is no stateable defence.
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.
63. The next document is the assignment of 29 June 2018 itself. Although there is reference to the assignment being for "good and valuable" consideration, the nature of the payment made by Mr McCool is not stated.
64. The third document of relevance is an email dated 15 July 2018 sent by Mr McCool to the defendant directly. (This email has been exhibited as part of the replying affidavit filed on behalf of the defendant by Michael Twomey, Solicitor). The relevant portion of the email reads as follows.

"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."

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.
66. In argument before me, Mr McCool sought to resist this inference by saying that until such time as the court had "approved" the assignment, the company continued to retain an interest in the proceedings. This analysis is not, strictly speaking, correct. The assignment, if it were valid, would be effective from 29 June 2018. It does not require a formal order of the court to approve it.
67. The same inconsistency of approach on the part of Mr McCool to the assignment is evident in his affidavit of 2 July 2019. See, for example, paragraphs 27 to 28 as follows.

- “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 MCC, 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 Mc Cool 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 timeframe. That right has been denied to MCC by the actions of the Defendant and the Courts systems 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 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 of Assignment and we now beg this court to amend the pleadings, to substitute Mr. Eugene McCool, as a Plaintiff in the proceedings, Case No. 2005/2747P with immediate effect.”
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. See paragraphs 34 to 36 of Mr McCool’s affidavit of 24 October 2017, as follows.

“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 it’s 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 the 20th June 2000. As the only person who can protect MCC, 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 Mc Cool Controls, has agreed to Assign these proceedings to Mr Eugene McCool.
36. McCool controls have a right of access to a hearing within a reasonable timeframe. That right has been denied to MCC by the actions of the Defendant and the Courts systems failure to deal with such activities. There is no alternative for McCool controls 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 in the proceedings, Case No. 2005/2747P, with immediate effect.”

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.
71. As noted earlier, Mr McCool had applied to adjourn the second substitution application in circumstances where it was hoped that solicitors would come aboard in a matter of weeks. It was suggested that were solicitors to come aboard, then the second substitution application and the appeal to the Court of Appeal would both become unnecessary and would be withdrawn. 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 believe 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”.
73. As appears from the foregoing review of the evidence and the submissions made by Mr McCool at the hearing on 17 October 2019, the circumstances surrounding the second assignment are almost identical to those obtaining at the time of the first assignment in 28 September 2017.
74. Against this background, it cannot be said that the issue which arises for determination on this second substitution application is materially different from that which has previously been determined by the 2018 judgment. 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 reargue 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.
78. Given my conclusion on this point, it is not necessary for the purposes of this application for this court to consider whether there has been a change in circumstances which might mean that Mr McCool is not bound by the second finding of the 2018 judgment, i.e. the finding that the assignment savours of champerty. For the sake of completeness, however, it should be noted that even allowing for the omission of the express provision for onward assignment, it is clear from the following clause that the second assignment envisages that the chose in action may be further assigned.

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

79. It seems, therefore, that the second finding of the 2018 judgment would apply equally to the second assignment.

(iv) Same parties or privies

80. The fourth prerequisite to the existence of an issue estoppel, i.e. that the parties to the two sets of litigation be the same or their privies, is met on the facts. The parties to the first and second substitution applications are the same, i.e. Mr McCool and the defendant to the proceedings, Honeywell Control Systems Ltd.

CONCLUSION

81. The High Court has previously found that the purported assignment of the benefit of the within proceedings from the corporate plaintiff to its sole shareholder, Mr Eugene McCool, is merely a “device” intended to avoid the requirement that a company be legally

represented in proceedings. This finding in the judgment of 10 April 2018 is binding on Mr McCool, and is dispositive of the within application, given that there has been no material change in circumstances between the first and second substitution applications.

82. The existence of this issue estoppel does not, of course, prevent Mr McCool from seeking to challenge the judgment and order of the High Court of April 2018 by way of his pending appeal to the Court of Appeal. Mr McCool is, however, confined to that remedy, and cannot seek to short-circuit the appeal process by, in effect, inviting another judge of the High Court to overturn the 2018 judgment.
83. In light of this finding that the application cannot succeed because the matter is *res judicata*, it is not necessary—nor indeed appropriate—for this court to consider the other objections to the application raised by the defendant. This court should not embark upon a review of the correctness or otherwise of the findings made in the 2018 judgment.
84. The relief sought in the notice of motion of 2 July 2018 is refused and the application dismissed.