[2019 IEHC 749

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 11 November 2019

INTRODUCTION

1. This supplemental judgment addresses the question of the appropriate costs order to be made in respect of an unsuccessful application by a non-party to be substituted as plaintiff in the proceedings ("*the substitution application*"). The substitution application had sought to give effect to a purported assignment of the proceedings from the current corporate plaintiff to its sole shareholder, Mr Eugene McCool ("*Mr McCool").*

2. The substitution application was refused for reasons set out in a reserved judgment delivered on 25 October 2018, *McCool Controls and Engineering Ltd. v. Honeywell Control Systems Ltd.* [2019] IEHC 695 ("*the principal judgment").*

3. As appears from the principal judgment, one of the unusual features of this case is that an application in almost identical terms to have Mr McCool substituted as plaintiff had been dismissed by the High Court on 10 April 2018, and this dismissal is the subject of an appeal on behalf of Mr McCool to the Court of Appeal. Relevantly, the High Court had found that Mr McCool had been engaged in an abuse of the court process. The High Court made an order for costs in respect of the first substitution application on a "solicitor and client" basis. (The execution of that costs order was stayed pending the directions hearing in the Court of Appeal). As discussed immediately below, counsel on behalf of the defendant submits that a similar order should be made on the facts of the present case.

SUBMISSIONS OF THE PARTIES

4. The proceedings were adjourned for a period of two weeks subsequent to the delivery of the principal judgment to allow the parties time to consider same. The issue of costs was adjourned to Friday, 8 November 2019.

5. Leading counsel on behalf of the defendant, Mr Declan McGrath, SC, made an application for costs in favour of his client. Counsel submitted that costs should follow the event, and that Mr McCool, as the unsuccessful applicant, should be liable for the costs of the defendant. Counsel emphasised that the application had been made by Mr McCool personally, and not by the corporate plaintiff. It was further submitted that costs should be awarded on a "solicitor and client" basis.

6. It is necessary to pause briefly to explain what is meant by this term. Generally, when an order for costs is made in favour of a party, the court will direct that the costs be taxed or

measured in default of agreement. The function of measuring costs has, very recently, been transferred to the Office of the Legal Costs Adjudicator.

7. The default position is that costs are measured on what is known as a "party and party" basis. On this basis, the party whose costs are being measured will be allowed to recover all such costs as were "necessary or proper" for the attainment of justice or for enforcing or defending the rights of that party. The costs are measured objectively, and the costs allowed may be less than those actually incurred. For example, a party may have chosen to retain both senior and junior counsel for a case, but would only be allowed to recover the costs of one of the barristers from the other side if the Legal Costs Adjudicator were to decide that it was not "necessary or proper" to retain more than one counsel. That party would have to pay the costs of the second barrister itself.

8. The courts have, however, a discretion to award costs on a different basis, namely, a "solicitor and client" basis. On this basis, the party whose costs are being measured will be allowed to recover all costs except in so far as they are of an "unreasonable amount" or have been "unreasonably incurred". An order on a "solicitor and client" basis comes closer to providing a full indemnity in respect of the costs actually incurred than does an order on a "party and party" basis.

9. Returning to the submission of counsel on behalf of the defendant, Mr McGrath submits that just as the making of the first application for substitution represented an abuse of process, so too did the making of the second application. If anything, it is said, the abuse is greater in that the second application was made in circumstances where Mr McCool was on notice from the judgment of 10 April 2018 that he was not entitled to make such an application. This court is invited to adopt the same approach to costs as had been adopted by the High Court in respect of the first substitution application.

10. Counsel cites the judgment of the High Court (Barrett J.) in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697, which, in turn, relies on the judgment of the High Court (Kelly J.) in *Geaney v. Elan Corporation plc* [2005] IEHC 111.

11. In response, Mr McCool submits that any abuse on his part was not deliberate and that he is a lay litigant unversed in legal procedure. It is further submitted that the court should have regard to what he alleges has been an abuse of process on behalf of the defendant in terms of its overall conduct of the litigation. Reference is made to the relevant extracts in relation to legal costs in *Delany and McGrath on Civil Procedure* (Round Hall, Dublin, 4th ed., 2018).

12. In conclusion, Mr McCool submits that the appropriate order is that the costs of the unsuccessful substitution application should be made "costs in the cause".

DISCUSSION

13. This judgment will address first the threshold issue of which party is to bear the costs before considering, if necessary, the application that the costs be awarded on a "solicitor and client" basis.

(1). WHICH PARTY SHOULD BEAR THE COSTS

14. The ordinary rule in relation to costs under Order 99 of the Rules of the Superior Courts is that the losing side must pay the winning side's costs. This is described in legalese as "costs follow the event". The rationale underlying this rule is that a party who has been put to the expense of either pursuing or defending legal proceedings in respect of which that party is ultimately successful should be able to recover a contribution towards their costs from the other side. The logic being that had the other side either conceded the proceedings (if a defendant) or had not pursued the proceedings (if a plaintiff), then the successful party would not have had to incur the legal costs. See, generally, *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535, [19] and [20] as follows.

> "*Inter partes* litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.
> A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the 'costs follow the event' rule, designed for this purpose.
> A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

15. Order 99, rule 1(4A) provides that a court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

16. Applying these principles to the facts of the present case, there is no doubt as to which side was successful in respect of the substitution application. Mr McCool failed entirely in his application. The "event" went in favour of the defendant. Mr McCool has not put forward any cogent argument as to why the ordinary rule, i.e. that costs follow the event, should not apply. It has not been suggested, for example, that the application represented a "test case".

17. The most that Mr McCool does is to suggest that costs should be made "costs in the cause". In effect, this would mean that the costs of the substitution application would be awarded to whichever one of the *existing parties* to the proceedings is successful at the ultimate trial of the proceedings. For the reasons which follow, this would not be an appropriate order to make.

18. First, such an order would involve deferring any decision in relation to the costs of the substitution application to the trial of the action. This runs counter to the general obligation on a court, under Order 99, rule 1(4A), to attempt to adjudicate upon the costs of an interlocutory application. Secondly, Mr McCool is not, of course, a party to the proceedings. His application to be substituted as plaintiff failed. The plaintiff continues to be McCool Controls and Engineering Ltd. The practical effect of making an order that the costs be costs in the cause would be to absolve Mr McCool personally from any potential liability in relation to the costs which he incurred in making an application to be substituted as plaintiff in the proceedings. This runs contrary to the principles governing costs applications as set out in *Godsil v. Ireland* (above). Mr McCool by making an application for substitution, on not just one, but two occasions, put himself on hazard in relation to legal costs. Mr McCool cannot sidestep that by seeking to restrict any costs order to the existing parties. In particular, he cannot transfer his personal costs exposure to the corporate plaintiff.

(2). BASIS ON WHICH COSTS SHOULD BE MEASURED

19. Having decided, for the reasons above, that the defendant is entitled to an order for costs as against Mr McCool in relation to the second substitution application, it is necessary to consider the argument that costs should be awarded on a "solicitor and client" basis.

20. Counsel for the defendant cited the judgment of the High Court in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697. The principles governing the making of an order on a "solicitor and client" basis were summarised as follows by Barrett J.

> "It seems to the court that the principles applicable to making an order of costs on a solicitor and client basis might be summarised as follows. First, in making such an 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."

21. I respectfully adopt this as a correct statement of the principles.

22. The substitution application was dismissed in the principal judgment primarily on the basis that the matter was res *judicata* and gave rise to an issue estoppel against Mr McCool in the absence of any material change in circumstances. It became unnecessary, in light of this finding, for the court to consider other issues which had been canvassed in the judgment of 10 April 2018. In particular, it was unnecessary for this court to reach

any conclusion as to the manner in which Mr McCool had conducted himself during the litigation generally.

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 a second substitution application was certainly 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.

CONCLUSION AND FORM OF ORDER

25. I propose to make an order that the defendant do recover its costs of and incidental to the (second) substitution application as against Mr McCool personally, i.e. as opposed to as against the corporate plaintiff. Such costs are to be adjudicated upon by the Office of the Legal Costs Adjudicator in default of agreement between the parties. Costs are to be measured on a "party and party" basis.

26. A stay, in the usual terms, will be imposed on the costs order in the event of an appeal to the Court of Appeal and/or an application for leave to appeal to the Supreme Court.