THE HIGH COURT

2017 No. 281 COS

BETWEEN

PATRICK O'SULLIVAN

PLAINTIFF

– AND –

CONROY GOLD AND NATURAL RESOURCES PLC

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 10th October, 2017.

1. The court gave its principal judgment in this matter on 26th September last. On 4th October, there was a hearing as to costs. Two reasons were offered by Mr O'Sullivan as to why, despite his having unequivocally lost the application which led to the judgment of 26th September, the court should make no order as to costs, so leaving each of the parties to bear his or its own costs. The usual rule as to costs is, of course, that costs follow the event. Two reasons were offered by Mr Sullivan as to why the court should depart from this usual rule. These are outlined and considered below.

1. The Subscription Announcement

2. Early on in the course of the within proceedings, Mr O'Sullivan expressed a concern that Conroy Gold might seek a subscription for shares, ostensibly to acquire an asset, but with the true intended objective being so to dilute Mr O'Sullivan's shareholding as to render futile his ongoing efforts to push through certain shareholder resolutions. n this regard, the solicitors for the company wrote to Mr O'Sullivan's solicitors on 9th August last, indicating (without giving an undertaking) that "[T]*he company can confirm that no measure will be taken by it which the Board does not consider to be in the best interests of its shareholders taken as a whole.*" On 29th September, three days after this Court delivered its principal judgment in the within proceedings, Conroy Gold announced a subscription for 700,000 new ordinary shares at €0.30 (UK£0.26) per share, with a view to raising €210k for the company. It is not clear on the evidence before the court whether this subscription has anything to do with the acquisition of an asset or is simply the raising of funds for perceived cash-flow reasons. But either way it does not matter, because there is no authority, and no case put up for the proposition, that a completely different course of action – the announcement of a share subscription – done subsequent to a judgment concerning a failed shareholder application regarding the conduct and consequences of a past EGM, should affect the order for costs that is made consequent upon that failed application. And to the extent that it is suggested that there is any wrong-doing in the timing of the announcement of the said share subscription, the court notes (i) the acknowledgement by counsel for Mr O'Sullivan that any such allegation "*is not an issue before the court*", and (ii) the related submission by counsel for Conroy Gold that any allegation of wrong-doing in this regard is entirely rejected by his client.

2. Failure to 'Nudge'.

3. The second line of contention advanced by Mr O'Sullivan as to why the court should depart from the usual rule as to costs is that if Conroy Gold had but advised Mr O'Sullivan in advance of the EGM of the deficiencies presenting under Art.85, the within litigation, or much of it, could have been avoided. The court must admit that it struggles to see how this point can properly be raised in a costs application that follows a judgment in which the court expressly found, *inter alia,* as follows, at para. 101

> *"There is no fiduciary duty extant at law whereby company directors are obliged to 'nudge' shareholders who are minded not to conform with (or who forget or overlook that they have to comply with) contractual obligations arising in the relevant company's articles of association (by which those shareholders have previously freely agreed to be bound) so that those shareholders instead place themselves in a position where they do or will so comply. And it is contractual obligations, and compliance or want of compliance with contractual obligations, that are in play".*

4. How can it successfully be advanced as a contention of relevance in a costs application which follows on a judgment in which the court expressly found that there is no duty to 'nudge' a shareholder in the manner argued for by Mr O'Sullivan, that if Mr O'Sullivan had but been so 'nudged' much or all of the within litigation would not have ensued? The respectful but brief answer to the question just posed is that such a contention cannot successfully be advanced at this time. Mr O'Sullivan cannot carry through the back door of a costs application the argument that he failed to carry through to victory in the related substantive application.

5. The court has been referred to the *ex tempore* judgment of Costello P. in *Flannery v. Dean* [1995] 2 ILRM 393 as offering a basis in which no order as to costs might issue in the within matter. *Flannery* was a case in which Costello P., ruled partly in favour of a plaintiff but declined to make any order of costs in her favour, having found her (at 399) to be, *inter alia*, "*a completely unreliable witness*", "*not capable of telling the truth*", a person of whom he stated "*I cannot accept a word of the plaintiff's evidence on the loss claimed by her*", and someone who had presented one claim comprising "*pure fantasy*" and another comprising "*pure nonsense and fantasy*". Costello P. then moved on to conclude, at 400, as regards costs, "*I do not think that I should award the plaintiff any costs….Had the plaintiff behaved in a reasonable way when District Judge Brophy was attempting to settle the case between the parties, this case need never have come on*".

6. The type of behaviour described in the first five of the just-mentioned quotes comprises precisely the type of behaviour that would likely incline any judge, in the proper exercise of her or his functions, to pay the most assiduous attention to a contention that there might be some departure from the usual rule as to costs; however, nothing of the like presents here. As regards the last-mentioned quote above, Costello P. is expressly touching there on Ms Flannery's conduct at the outset of the proceedings as a causative factor in prolonging the continuation of what he clearly considered were to a very great extent absurd proceedings. That, with respect, does not afford even the beginnings of a basis on which to construct the altogether novel, and entirely rejected, proposition that (1) if a winning party had but done what the court has expressly found that that winning party did not have to do, then (2) no order as to costs should issue in the court proceedings in which that finding was reached, even though (3) those were court proceedings which (i) that winning party did not bring, (ii) throughout which it conducted itself in an entirely proper manner, and (iii) which it successfully defended in every material respect.

7. The foregoing suffices to deal with the contention raised by Mr O'Sullivan under the 'failure to 'nudge'' heading. However, the court cannot but also note that the evidence before the court is that Conroy Gold did not itself have a clear understanding until the day of the EGM of 4th August that Art.85 of the company's articles of association definitely had not been complied with by Mr O'Sullivan. So

what in truth is being contended by Mr O'Sullivan at this time? Is it that rather than (a) maintaining (as he subsequently in fact maintained) that Conroy Gold was wrong in invoking Article 85 and (b) proceeding with the tabled motions, that he (Mr O'Sullivan) would in fact have withdrawn the motions had he been advised of what the company itself only realised for definite on the day of the EGM? If so, suffice it to note in this regard that Mr. O'Sullivan has never said in the evidence put before the court, that he would not have proceeded with the within (unsuccessful) proceedings if he had but been told anytime previous to the EGM about his non-compliance with Article 85 of the articles of association.

Conclusion

8. Mr O'Sullivan has, unfortunately for him, been entirely unsuccessful in the within proceedings. For the reasons aforesaid, the court sees no reason why it ought now to depart from the usual rule that 'costs follow the event'. The court will therefore make an order for costs against Mr O'Sullivan.