THE HIGH COURT

[2005 No. 2747 P.]

BETWEEN

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

PLAINTIFF

AND

HONEYWELL CONTROL SYSTEMS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 10th day of April, 2018

Introduction

1. The plaintiff herein (Mr. McCool) is a director and majority shareholder in McCool Controls and Engineering Limited ("MCC") which was, until the order under challenge herein was made, the sole plaintiff in these proceedings. The case has its genesis in an agreement made between MCC and the defendant ("Honeywell") in 1998. MCC 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.

2. In its original statement of claim, MCC alleged that the 1998 agreement gave MCC exclusive distribution and installation rights to Honeywell products in Ireland, subject to certain exceptions. In or about the year 2000, the Wyeth pharmaceutical company was engaged in a project involving the construction of a very large state of the art plant in Clondalkin, Co. Dublin.

3. MCC alleges that the project engineers invited MCC to become involved in what is suggested to have been a very lucrative project. MCC 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 MCC out in breach of the 1998 agreement and this has resulted in very substantial losses to MCC. Mr. McCool estimates those losses at some €11m.

4. Honeywell delivered a defence in which it 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 the express exceptions therein provided for. Honeywell further pleads that, in any event, MCC is estopped from maintaining the claim because a compromise agreement was entered into between it and Honeywell in November 2002, whereby Honeywell agreed to waive a sum of Stg£143,626 then due by MCC to Honeywell in consideration of MCC waiving any claim it might have. Honeywell has also included a counterclaim in respect of goods sold and delivered against MCC in the amount of Stg£134,052.97.

5. These proceedings commenced by plenary summons issued on 9th August, 2005, and have, to say the least, had a very protracted course. For the purposes of this application, it is not necessary to refer to that course which is dealt with at great length in the affidavits of Mr. McCool, in particular. The pleadings were closed as long ago as 2007, and there has been great controversy between the parties on issues including replies to particulars and discovery. Two particular issues were canvassed in the course of this application, one being an application to refer the matter to mediation in 2012, and in 2013, an unsuccessful application by MCC to have the matter admitted to the Commercial List. MCC has, to date, been represented by four different firms of solicitors. The last firm of solicitors to represent MCC were given liberty by me to come off record immediately prior to the hearing of the within application.

This Application

6. This application commenced life as a motion issued by Mr. McCool in person on 18th July, 2017, seeking the following relief:-

> "(I) 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."

7. The motion came on for hearing before the Master on 28th July, 2017, when it was adjourned to 13th October, 2017. It appears from an affidavit sworn by Colin Monaghan, a solicitor in the firm of Arthur Cox, which represents Honeywell, sworn on 14th November, 2017, that during the course of debate between the Master and Mr. McCool, the Master indicated on the basis of submissions made on behalf of Honeywell that Mr. McCool had no personal claim against Honeywell which he could litigate in his own right. However, the Master ventilated the possibility with Mr. McCool that MCC could assign its cause of action to Mr. McCool.

8. When the matter came before the Master again on 13th October, 2017, the circumstances had changed significantly. Mr. McCool now claimed that MCC had executed an assignment of its claim to Mr. McCool on 28th September, 2017, and Mr. McCool on this basis renewed his application to be joined as a co-plaintiff with MCC. However, it would appear that the Master concluded that since MCC had assigned its interest in the proceedings to Mr. McCool, it could no longer be a plaintiff. When the matter came back before the Master on 13th October, it was adjourned to 27th October, to facilitate further affidavits and ultimately to 8th November, when the Master made an order substituting Mr. McCool as plaintiff in the proceedings for MCC.

9. It is in respect of that order that Honeywell bring this application by which they seek to have it discharged.

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 Assignment

11. On the 28th September 2017, the board of MCC passed a resolution which provided at para. 5:

> "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 timeframe 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 well being of McCool Controls, its staff, customers and suppliers and to bring these legal proceedings to a conclusion."

12. The resolution was signed by Mr. McCool as chairman and secretary of MCC. In its terms, the resolution appears to suggest that the assignment is for the purpose of enabling Mr. McCool to pursue the litigation thereby conferring some benefit on MCC.

13. The "Assignment of Claim Agreement" is dated the same date. In argument before the court, Mr. McCool indicated that it follows the form of a document he discovered on the internet by using the Google search engine. The assignment provides that it is made "for good and valuable consideration" but does not specify what the consideration is. It ultimately transpired that the consideration was €1. The assignment further contains the following clause:

> "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."

14. This latter provision is of significance in the context of Honeywell's argument that the agreement savours of champerty.

15. It is important to understand the context within which this assignment was created. This motion commenced life as a motion brought by Mr. McCool to be joined as a co-plaintiff but as I have explained, ended up in him being substituted as plaintiff. In this regard, it is instructive to consider some of the assertions made to date by Mr. McCool on affidavit. In an affidavit sworn on the 10th June, 2017 grounding the original application, Mr. McCool averred at para. 13:

> "13. Section 228(1)A of the 2014 Companies Act states that 'A director must
>
> act in good faith and what the director considers to be the interests of the company'. I believe 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, as I believe that I am uniquely placed, as the only person who can effectively handle these proceedings, and have this matter brought to trial."

16. At para. 15 of the same affidavit, Mr. McCool says:

> "15. As MCC cannot repay my loan, I was forced to write a letter of complaint to Mary O'Donnell, a director of MCC, about the company's position and the fact that the HW case had been blocked from proceeding to trial. The outcome of this was that MCC 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 MCC from the aggressive activities of the defendant, that the only way to protect MCC 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 was passed unanimously…"

17. The Mary O'Donnell above referred to is Mr. McCool's wife. The following passages from the same affidavit are also relevant:

> "41. …I am the only person who can protect MCC, its employees, creditors and customers. MCC is dependent on me for its survival and it is on that basis that the board of MCC has agreed for me to act as a co-plaintiff in these proceedings…
>
> 42. …the company is dependant 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 co-plaintiff."

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

19. In an affidavit sworn on the 11th October, 2017, subsequent to the date of the assignment, 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 as 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 the collapse of the plaintiff, in view of a defence in the proceedings."

20. If, notwithstanding the foregoing, there was any doubt as to the true intent of the assignment, it is entirely dispelled by the content of Mr. McCool's fourth affidavit sworn on the 24th October, 2017:

> "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 were (*sic*) 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 McCools 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 McCool 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 time frame. That right has been denied to MCC by the actions of the defendant and the court system's failure to deal with such activities. There is no other alternative for McCool Controls at this time and hence the company is dependant 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."

21. It will readily be seen that all of these averments are entirely inconsistent with a purported absolute assignment of MCC'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 MCC'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 MCC.

The Rule in *Battle*

22. Although Mr. McCool does not contest the application of the rule in these proceedings, it appears to me to be of relevance to briefly examine it in the context of the alleged effect of the purported assignment. The plaintiff in *Battle*, like Mr. McCool, was the managing director and major shareholder in a company which he sought to represent in proceedings before the High Court. As in the present case, the company had insufficient assets to enable lawyers to be instructed to represent it in the claim. Mr. Battle argued that the company had a good defence and if it were to be decreed without being able to advance that defence, it would have an effect on his reputation and standing as a businessman. The claim was unsuccessful in both the High and Supreme Courts. Giving the unanimous judgment of the Supreme Court, O'Dálaigh C.J. said (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."

23. *A.I.B. v. Aqua Fresh Fish Ltd* [2017] IECA 77 was another case in which the managing director and principle shareholder of the defendant company sought to represent the company in proceedings before the High Court. Unlike in the present case, the managing director, Mr. Quinn, sought to challenge the rule in *Battle* on various grounds alluded to in the judgment of the Court of Appeal delivered by McKechnie J. Having cited the above passage from *Battle*, McKechnie J. observed (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".

24. In the course of his judgment, McKechnie J. also dealt with potential exceptions to the rule in Battle such as discussed by the Supreme Court in Stella Coffey No. 2 GM Ltd and Others v. The Environmental Protection Agency [2014] 2 I.R. 125. Dealing with latter case, McKechnie J. said:

"35. As explained above, there were both personal applicants and a corporate applicant in the Stella Coffey case (para. 22, supra). In the context of the company, No2GM Ltd, Fennelly J., referring to Battle, said the following at para. 35 of the judgment:-

'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 this is far from ideal, it represents the present law.'

36. As noted above, the learned judge cited from the judgment of Somers J. in G.J. Mannix Ltd , itself a corporate case, and endorsed what he described as 'a slight modification' of the strict rule regarding companies thereby created. Fennelly J. then continued:-

'39. Nor do I think that the attempt to represent the company No2GM Limited gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstances 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.' "

25. McKechnie J. then 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."

26. Treating of the exceptions referred to in this passage, McKechnie J. noted (at p.32):

"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)."

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 of perhaps the Supreme Court, the rule in *Battle* remains the law and I am bound to apply it.

Application of *Battle* in this Case

29. Mr. McCool, as I have said, does not cavil with the rule in *Battle* nor does he suggest that he comes within any exception to that rule, nor do I believe could he. In *Stella Coffey*, Mr. Podger sought to circumvent the rule by making himself a member of the company which Fennelly J. described as a "stratagem" and "a device..without merit".

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 nought. I am therefore satisfied that it is an abuse of process and invalid.

The Conduct of Mr. McCool

31. Insofar as it has been suggested by Mr. McCool on affidavit and in argument that the justice of the case requires that he should be in effect allowed represent MCC in these proceedings by one means or another, I believe it is relevant in that context to comment on the conduct of Mr. McCool and in particular the ever more serious allegations he has made against all and sundry throughout the protracted course of these proceedings.

32. Honeywell, through its counsel, has articulated a serious concern about these matters in the context of Mr. McCool being given what was described as a "free run" in this case. I do not propose to exhaustively enumerate all of the many unsubstantiated allegations made by Mr. McCool to date. They include an allegation that a named officer of Honeywell committed perjury by swearing a false affidavit (para. 46 of Mr. McCool's affidavit of the 10th June, 2017) and of accusing Honeywell separately of swearing false affidavits and issuing false documentation through MCC's legal team and to the court (para. 54). Mr. McCool has made 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. 13 of his affidavit of the 24th October, 2017) and furthermore of committing criminal offences with impunity (para. 18).

33. Mr. McCool in the same affidavit further suggests that in MCC's application to be admitted to the Commercial List in 2013, the application was unsuccessful because of pressure exerted by MCC's own legal team on him and others to withdraw what were obviously unfounded allegations in affidavits submitted in support of the application which subsequently failed (para. 23 and 24 of Mr. McCool's fourth affidavit sworn on the 24th October, 2017). In the same affidavit, he accuses MCC's own solicitor of "an act of great negligence" (para. 7) and of failing "to protect their client as costs escalate" (para. 13) and of "failing to professionally and diligently advocate the plaintiff's position in these proceedings" (para. 34).

34. The content of an email from Mr. McCool sent on the 25th October, 2017 during the currency of the within application is worthy of comment. This very lengthy email was sent by Mr. McCool to a variety of Honeywell personnel and copied to, inter alia, solicitors in

Arthur Cox including Mr. Monaghan. The ostensible subject matter of the email relates to the costs awarded in favour of Honeywell arising from the failed application for admission to the Commercial List.

35. In the course of this email, Mr. McCool alleges that in the aftermath of the application, he was informed by MCC's then solicitor that he had been offered €100,000 but would not reveal the source of the offer or why it was made. The inference appears to be that Honeywell was responsible for trying to bribe the plaintiff's solicitor. Not content with that, Mr. McCool further suggests that the Queen's Counsel who represented MCC in the application had worked for Honeywell in the United Kingdom, manifestly an allegation of conflict of interest and unethical behaviour by the counsel involved. The email goes on to detail "a further sinister event" whereby MCC's solicitor's offices in Lucan were burgled and his computers and files stolen while no other solicitor's belongings were disturbed or stolen. He says "it would appear that our solicitor's property was deliberately targeted". Here again, the inference Mr. McCool is inviting the reader to draw is that Honeywell was responsible for arranging a burglary of the offices of the solicitor acting for the plaintiff.

36. Mr. McCool then turns to another theme which concerns the application made by MCC in July 2012 to the High Court to have the case referred to mediation. That application was unsuccessful for the simple reason that Honeywell, as was their right, declined to enter into mediation. After a number of adjournments, the application was heard on the 31st July, 2012. At the hearing of the application, both sides were represented by senior counsel. Mr. McCool however subsequently alleged that there was some irregularity about the manner in which the case was listed and the time at which it was due to be heard. What the relevance of this was is unclear in circumstances where both parties were fully represented. However, arising from the outcome, Mr. McCool determined to make a complaint to the Solicitors' Disciplinary Tribunal about the conduct of Mr. Monaghan in the context of the listing of the matter.

37. The Tribunal held that there was no prima facia complaint disclosed and dismissed it. Mr. McCool appealed to the President of the High Court who also dismissed the appeal. From there, Mr. McCool appealed to the Court of Appeal who dismissed the appeal on the 4th May, 2007 in a comprehensive written judgment delivered by Hogan J. ([2017] IECA 129). In his conclusions, Hogan J. referred to the allegations made against Mr. Monaghan in the following terms (at p.9):

> "Very serious allegations have been made against him and it is only fair that I should make the point – if needs be with some emphasis – that there is 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."

38. Mr. McCool attempted to appeal this determination further to the Supreme Court. The Supreme Court issued its determination on the 24th November, 2017 ([2017] IESCDET 118) declining to admit the case and noting (at para. 4):

> "There is no evidence that any incorrect information communicated to the plaintiff company's solicitor was deliberate, and it had absolutely no consequences adverse or otherwise. It is hardly surprising therefore that the Tribunal came to the conclusion that it did not appear that the facts did not disclose a prima facie case of misconduct, or that the appeal therefrom was dismissed by the President of the High Court and the Court of Appeal."

39. Despite all of these determinations that Mr. McCool's complaint against Mr. Monaghan was absolutely groundless, in the email under consideration Mr. McCool persists in perpetuating the same highly defamatory allegations against Mr. Monaghan. As if that were not enough, Mr. McCool continues in the same email to allege collusion between the solicitors on both sides of the case to prevent the matter going to mediation because this might reduce the level of fees they could charge. Mr. McCool alleges that MCC's own solicitors "cooperated with Cox to defeat McCool's ADR application."

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

41. Although I deal with the issue of champerty below, it is appropriate in considering Mr. McCool's conduct to refer to a further matter that arises in that context.

42. Following receipt of the assignment, Honeywell's solicitors Arthur Cox wrote to both MCC and Mr. McCool seeking information about both the consideration and also concerning the intentions of Mr. McCool as regards any onward assignment to a third party. Mr. McCool responded to this query by email on the 23rd November, 2017 saying:

> "The ability to assign the proceedings in future is a right reserved which is a normal condition of such issues. I am aware of a current case where a matter has been assigned on four occasions.
>
> 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 we are legally entitled to do. This would include assigning these proceedings to a third party, who may see a financial benefit of such an assignment, as has occurred regularly in this country over recent years."

43. Mr. Monaghan responded in an email of the 24th October, 2017 saying:

> "Please furnish us with full details of the proposed further assignment of the claim to another party 'who may see a financial benefit of such an assignment'…"

Mr. McCool replied by email on the same day. In it, he said:

> "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. This is something that we must give careful consideration to at this time, given the level of damage and loss we have suffered since 2001…
>
> If such an assignment does occur, then I have undertaken to continue my role in the case and to hand over all files and original documents and records on the case to the assignee and act as a witness, in conjunction with the witnesses that I have already lined up to testify…

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 have been subjected to over so many years."

44. Mr. Monaghan, in an affidavit sworn in these proceedings on the 27th October, 2017, deals with these various emails and avers as follows at para. 25:

> "The extract from the email of the 24th October, 2017 recited at subpara. (c) of the preceding para. of this affidavit constitutes a direct and unambiguous statement on the part of Mr. McCool of engagement with third party litigation funders. At subpara. (e) he refers to the 'attractiveness of a further assignment'. Mr. McCool, on his own admission, is engaged in a process, arising directly from and envisaged by the purported assignment, which contemplates an outcome that is a demonstrably impermissible means by which to prosecute litigation in this jurisdiction. On this basis, I say that the purported assignment is both contrary to public policy and invalid."

45. Mr. McCool replied to this affidavit in his fifth affidavit sworn on the 2nd November, 2017. At para. 7 of that affidavit, Mr. McCool avers:

> "7. The claim by Mr. Monaghan that the assignment of the proceedings to myself was contrived to circumvent the legal principle that a company director may not represent a company in legal proceedings has no basis in fact and I strongly refute this suggestion. *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*." (My emphasis).

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 that 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 the 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.

Champerty

49. In *Trendtex Trading Corporation v. Credit Suisse* [1982] AC 679, the House of Lords, in a judgment subsequently approved in this jurisdiction, considered the law of maintenance and champerty. Credit Suisse had taken an assignment of a cause of action in which it had an interest but subsequently purported to assign that interest onwards to a disinterested third party. In the course of his judgment, Lord Wilberforce said (at 694):

> "If no party had been involved in the agreement of January 4, 1978, but Trendtex and Credit Suisse, I think that it would have been difficult to contend that the agreement, even if it involved (as I think it did) an assignment of Trendtex's residual interest in the C.B.N. case, offended against the law of maintenance or champerty. As I have already shown, Credit Suisse had a genuine and substantial interest in the success of the C.B.N. litigation …
>
> 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 U.S. $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. I take the definition of 'champerty' (etymologically derived from '*campi partitio*') 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.' "

50. Lord Roskill in his judgment in the same case observed (at 703):

> "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 today 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."

Lord Roskill continued (at 704):

> "Such an agreement, in my opinion, offends for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils,…"

51. *Trendtex* was considered and followed in *SPV Osus Ltd v. HSBC & Ors* [2015] IEHC 602, a case arising out of the Bernard Madoff litigation. In her judgment, Costello J. analysed the authorities including *Trendtex* and summarised the relevant principles (at p.20-21):

"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 flinders 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 if offends the law of maintenance and/or champerty."

52. Costello J.'s judgment was upheld on appeal by the Court of Appeal in a unanimous judgment delivered by the President [2017] IECA 56 where he said (at p.25):

> "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. Broadly speaking, maintenance is interfering in litigation by supporting it financially without having any legitimate interest in the case which could justify the interference. Champerty is taking a share in the outcome of the case in return for funding it. Neither of those descriptions – 'definitions' is too precise a word – is apt to cover the issue that arises in this present case. That is not to say that this is unique because the situation has arisen previously. 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."

53. The President noted further (at p.27):

> "There is no doubt that the courts do not countenance trading in litigation, whereby one party not otherwise connected becomes involved for the purpose of profit. Litigation is not a commodity to be traded or discounted and so a simple or bare cause of action may not be the subject of an assignment."

54. The President continued (at p.31):

> "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."

55. These authorities were approved by the Supreme Court in *Persona Digital Telephony & Anor v. Minister for Public Enterprise & Ors* [2017] IESC 27.

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.

Conclusion

59. For the reasons I have outlined therefore, I propose to discharge the order of the Master and to substitute in its place an order dismissing Mr. McCool's application.