Neutral Citation: [2015] IEHC 184

THE HIGH COURT

[2012 No. 618 Sp]

BETWEEN

ALLIED IRISH BANKS plc

PLAINTIFF

AND

AQUA FRESH FISH LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 27th March 2015

Introduction

1. This is an application brought by Adrian Flynn ("Mr Flynn"), the managing director of, and principal shareholder in, the defendant company ("the company"), for an order permitting him to legally represent the company in these proceedings, together with certain other interlocutory reliefs.

2. The application arises in proceedings in which the plaintiff bank ("the bank") seeks an order for possession and, if necessary, one for sale of certain lands mortgaged to the bank by the company ("the property").

Background

3. The special summons in this case issued on the 2nd November 2012. In it, the bank claims that the company mortgaged the property by Mortgage Deed, dated the 17th February 2010 ("the mortgage"), and registered it as a burden on the lands in the Land Registry on the 11th March 2010. The property is described as comprising lands at Donagmore, Kilkerley, County Louth.

4. The special summons is grounded upon an affidavit of Robert Amerlynck, sworn on the 28th February 2013. Mr Amerlynck is an assistant manager employed at the insolvency and debt recovery unit of the bank. Mr Amerlynck exhibits a copy of the mortgage, which records on its face that it was given under the common seal of the company in the presence of Adrian Flynn and Patricia Flynn as directors. The mortgage recites that it incorporates the bank's mortgage conditions (2009 Edition) ("the conditions"). The conditions are also exhibited to Mr Amerlynck's affidavit.

5. The mortgage provides that the property is charged in favour of the bank as security for the payment and discharge of the "[t]otal [d]ebt." The "[t]otal [d]ebt" is defined (at clause 2.1. of the conditions) to include all amounts payable in respect of any loans or credits made or granted by the bank to the company "now or at any time in the future."

6. Mr Amerlynck exhibits a copy of the particular Land Registry Folio for County Louth in respect of the property, which records that the company was registered as owner on the 3rd September 2007 and that the bank's mortgage was registered as a burden on the 11th March 2010. Mr Amerlynck further avers that the mortgage was duly registered in the Companies Office on the 25th February 2010 and he exhibits a company report containing a note to that effect.

7. Mr Amerlynck deposes that the company borrowed €155,615 from the bank for working capital on or about the 1st March 2011, which the company failed to repay in accordance with the terms of the said loan. Mr Amerlynck avers that, on the 15th June 2012, the company was indebted to the bank in the sum of €170,880.82, comprising €165,710.16 in respect of the said loan plus interest, together with €5,170.66 in respect of the company's current account with the bank. Mr Amerlynck goes on to aver that a demand for repayment of that sum was made by letter dated the 17th July 2012 but that, despite that demand, the company failed to pay the monies due and, in consequence, the bank became entitled to exercise its powers under the mortgage. Mr Amerlynck further deposes that, while the bank demanded possession of the premises pursuant to the terms of the mortgage by letter dated the 24th July 2012, the company failed to deliver up possession of the property.

The history of the proceedings

8. On the 29th April 2013, while the proceedings were still pending before the Master's Court, Mr Flynn made an application *ex parte* to the High Court for an Order permitting him, as a duly authorised agent of the company, to enter an appearance on behalf of, and to represent and defend, the company in the proceedings, on the ground that the company does not have sufficient funds to appoint a solicitor or counsel to act on its behalf.

9. In the affidavit that he swore on the 26th April 2013 to ground that *ex parte* application, Mr Flynn identified himself as the managing director of the company. Mr Flynn went on to aver that he was seeking to act on the company's behalf in the proceedings as an authorised agent of the company because of the company's lack of funds to engage a solicitor or counsel. At paragraph 9 of his affidavit, Mr Flynn averred as follows: "I further say that we have a strong and valid defence to the plaintiff's claim." Mr Flynn did not disclose what that defence is. Accordingly, insofar as it was material, neither the strength nor the validity (nor, indeed, the existence) of the company's proposed defence could have been assessed by the Court.

10. In a ruling delivered on the 14th May 2013, the High Court (in the person of Peart J.) refused Mr Flynn's application on the basis of the evidence then before it and in reliance upon an established line of judicial authority to which I will return later in this judgment.

11. Mr Flynn appealed that decision to the Supreme Court. There is very little information before this Court concerning the circumstances in which that occurred. However, the Supreme Court made an Order on the 29th November 2013, reciting that Mr Flynn – as managing director, chairman, company secretary and majority shareholder of the company – had brought a motion ex parte for certain interlocutory orders in respect of his appeal, and ordering that Mr Flynn be allowed to enter an appearance on behalf of the company in the proceedings, before going on to order as follows:

> "In so far as any question of further representing the [c]ompany in these proceedings is concerned, the Court remits that

question to the High Court and DIRECTS that in bringing any further application to the High Court that Notice of Motion be served on [the bank]."

12. On the 19th February 2014, Mr Flynn entered a "conditional appearance" in the action on behalf of the company. I mean no disrespect to Mr Flynn in observing that his reasons for making the company's appearance "conditional" – as subsequently explained in the affidavit that he swore to ground the present application - are legally incoherent, being based upon his understanding that the requirement to enter an appearance (whether in this case or in general) is somehow "contractual", and involves a submission to the jurisdiction of the plaintiff (and, only by extension, to that of the Court), which submission to jurisdiction can be refused or withheld through the entry of a "conditional appearance," which entry acts as a stay on any further step in the proceedings "unless and until some judicial department prosecutor makes all disclosures" and until any other issues raised on behalf of the defendant have been resolved.

13. On the same day that Mr Flynn entered the said "conditional appearance" on behalf of the company, the bank successfully applied to the Master ex parte for an Order, pursuant to the terms of Order 63, rule 1(15) of the Rules of the Superior Courts ("the RSC") permitting it to correct a clerical error on the face of the special summons whereby reference was wrongly made to "an affidavit of Tom O'Reilly to be filed," whereas the grounding affidavit subsequently sworn was actually that of Robert Amerlynck. Order 63, rule 4 of the RSC provides that such applications may be made *ex parte*. The Master gave the bank liberty to amend the special summons by the deletion of the name "Tom O'Reilly" and the insertion in its place of the name "Robert Amerlynck."

The present application

14. In the present application, which Mr Flynn has brought on notice to the bank by motion dated the 23rd April 2014, as required by the Order of the Supreme Court made on the 29th November 2013, he seeks permission – on a variety of different legal grounds - to represent the company as an unqualified advocate for the purpose of the proceedings.

15. In the same notice of motion, Mr Flynn also seeks a number of other reliefs, principal among which is an Order setting aside the Order of the Master already described, permitting the bank to amend its special summons. In seeking that particular relief, Mr Flynn invokes the terms of Order 52, rule 3 of the RSC, although that rule does not appear to cover the case, and does so on two grounds: first, that the bank did not put the company on notice of the application (although Order 63, rule 4 of the RSC clearly states that such applications may be made *ex parte*); and second, that the bank was somehow precluded from making the application because the appearance entered on behalf of the company by Mr Flynn is only a "conditional appearance" (which, as already mentioned, Mr Flynn appears to believe acts as a stay on the proceedings).

16. In any event, it seems to me that I should not proceed to consider Mr Flynn's application for that, or any other, relief on behalf of the company unless and until I am satisfied that he should be permitted to represent the company as an unqualified advocate. Accordingly, that is the issue that I must now consider.

17. Although Mr Flynn complains in the affidavit that he swore on the 23rd April 2014 to ground the present application that its contents may not be complete due to the shortness of time available to him for its preparation, I note that it runs to approximately 55 pages and comprises 175 numbered paragraphs of closely spaced type. No doubt, Mr Flynn would borrow a phrase from Blaise Pascal in submitting that he made his affidavit very long because he did not have the leisure to make it shorter.

18. A significant portion of Mr Flynn's affidavit is devoted to setting out the background to the company's formation and its ill-fated activities. Mr Flynn avers that he incorporated the company as a vehicle for a business that he proposed to establish to engage in the sale of land-based fish farming equipment and, it would seem, to engage directly in the aquaculture of the Australian Barramundi fish species at the company's own premises in Ireland. Mr Flynn further avers that both he and his immediate and extended family invested heavily in the business, and that he and his wife borrowed extensively in order to do so. Mr Flynn blames various state agencies, regulators and planning authorities for the failure of his business and avers that he is preparing a complaint to the Ombudsman, which, he asserts, prevents him from going into detail in that regard.

19. Elsewhere in his affidavit, Mr Flynn repeats his earlier averments that the company no longer has sufficient funds to engage a solicitor or counsel and goes on to refer to, and exhibit, various e-mail requests for legal advice or assistance that he has made to certain university law faculties, two voluntary organisations and the Legal Aid Board without success. Mr Flynn also repeats his earlier averment that the company has "a strong and valid defence" to the bank's claim, although, once again, he does not identify, much less explain, what that defence is.

20. The preponderance of Mr Flynn's lengthy affidavit comprises, in effect, legal submissions in support of his application for permission to represent the company as an unqualified advocate for the purpose of the proceedings.

21. By Order made on the 24th June 2014, Gilligan J. gave directions for the hearing of the application, including directions governing the exchange of written submissions.

22. I heard the application on the 12th and 13th November 2014. For reasons that will become evident later in this judgment, in the course of the hearing I asked Mr Flynn if he was in a position to identify the "strong and valid" defence upon which the company intends to rely in answer to the bank's claim for possession of the mortgaged lands. In response, Mr Flynn subsequently produced a written document that sets out 33 purported separate grounds of defence. It is noteworthy that nowhere in that document, or in either of the two affidavits Mr Flynn has sworn on the company's behalf for the purpose of the present application, does the company deny that it borrowed the monies now in dispute from the bank, that it mortgaged the lands at issue to the bank as security for its borrowings, or that it has failed to repay those monies. Instead, in broad terms the defence comprises: first, a series of complaints alleging procedural unfairness and a want of form in the progress of the proceedings to date; second a series of technical objections to the validity of the mortgage deed upon which the bank relies; third, a series of technical objections to the validity of the loan agreement between the company and the bank; fourth, a series of technical objections to the validity of the demand for repayment of the loan made by the bank; fifth, a bare assertion that the bank's solicitors acted for both the bank and the company in the relevant transactions, thereby creating a conflict of interest; sixth, a bare assertion that the company had a collateral agreement with the bank whereby it was only required to make repayments on its indebtedness for a period of one year; seventh, a bare assertion that the bank was negligent in lending to the company; eighth, a series of technical objections to the bank's locus standi to bring or maintain the proceedings; and ninth, a bare assertion that "Land and Conveyancing Act 2009 unconstitutional." Mr Flynn submitted that this was only an outline defence and sought to reserve the company's right to enter a full and proper defence if he is granted permission to act as the company's legal representative.

23. I propose to deal with Mr Flynn's application in two stages. First, I must consider on what basis, if any, in principle a director of a company, who is neither a solicitor nor a barrister, may be permitted to represent that company in legal proceedings. Second, should I

conclude that some basis exists upon which I may accede to such an application in principle, I must decide whether Mr. Flynn's application for permission to represent the company as an unqualified legal advocate in this case should be granted or refused.

Applicable principles

24. The fons et origo of the modern jurisprudence on the first question is the decision of the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd.* [1968] 1 I.R. 252. In his ruling of the 14th May 2013 on Mr. Flynn's *ex parte* application, Peart J. cited, and relied upon, the following passage from the judgment of Ó Dálaigh C.J. (with whom Haugh and Walsh JJ. concurred) in that case (at 254):

> "…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."

25. On being confronted with the legal principle just described and having been informed of its binding effect on this Court under the doctrine of *stare decisis*, Mr Flynn's response was to submit that the law has developed in a number of significant respects since that judgment was delivered such that it is nevertheless permissible for him to represent the company in the proceedings. Accordingly, I propose to trace subsequent legal developments, paying particular attention to those that Mr Flynn considers especially significant.

26. Mr Flynn did not cite the subsequent decision of the Supreme Court in *Abbey Films v. The Attorney General* [1981] I.R. 158, a case that involved a constitutional challenge to s. 15 of the Restrictive Practices Act 1972. In delivering judgment for the Court in that case, Kenny J. stated (at p. 172 of the report):

> "It was argued that s. 15 of the Act of 1972 was repugnant to the Constitution because its operation requires a company to retain a solicitor to act for it in proceedings under the section, while a citizen may appear in person. It was contended that this was in breach of the principle of equality before the law (Article 40, s.1). Even if Artice 40, s. 1, were to be held to be applicable to a company (which the Court refrains from deciding), the nature of a company, and its difference of capacity from that of an individual are such as would justify the implied requirement in the section that it should retain a solicitor to act for it."

27. In submitting that the law has significantly evolved since the decision in *Battle*, Mr Flynn places particular reliance on the decision of the High Court in *Coffey v. Tara Mines Limited* [2008] 1 I.R. 437. In that case, a serious breakdown occurred in the relationship between a personal injuries plaintiff and his solicitor. The plaintiff suffered from specific communication difficulties due to illness and, in consequence, was incapable of representing himself. Despite his best efforts he was unable to secure alternative legal representation. The plaintiff sought to discharge his solicitor and to be represented for the purposes of the trial of the action by his wife. The question that the Court was required to address, as identified by O'Neill J., was whether a lay person can represent a litigant in proceedings. The Attorney General, who appeared as amicus curiae, submitted that the High Court had an inherent jurisdiction to control and manage its own proceedings and in very rare and exceptional cases could, in its discretion, permit a litigant to be represented by an unqualified advocate.

28. In answering the question posed, O'Neill J. had particular regard to the following passage from the judgment of Somers J. in the New Zealand Court of Appeal decision in *G.J. Mannix Limited* [1984] 1 N.Z.L.R. 309 (at 316):

> "But I consider the superior courts to have a residual discretion in this matter arising from the inherent power to regulate their own proceedings. Cases will arise where the due administration of justice may require some relaxation of the general rule. Their occurrence is likely to be rare, their circumstances exceptional or at least unusual and their content modest. Such cases can confidently be left to the good sense of the judges."

29. Considering the decision of the Supreme Court in *Battle* against the background of the inherent jurisdiction just described, O'Neill J. concluded:

> "**[31]** As noted, the appellant in that case Mr. Battle appeared in person and the issue as to whether or not this court had an inherent jurisdiction of the kind described by Somers J. above was not raised or argued. Neither was the issue referred to at all in any of the cases considered by the Supreme Court.
>
> **[32]** It is a well settled principle of our system of jurisprudence that what is not argued is not decided. In my view the judgment of the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd* [1968] I.R. 252 is not to be seen as an authority which excludes an inherent jurisdiction in this court to manage and control it own proceedings and in rare and exceptional cases to permit an unqualified advocate to represent another litigant.
>
> **[33]** I am satisfied that this court does possess such an inherent jursidiction and that I should deal with the application of Mrs. Coffey accordingly."

30. In the recent case of *Coffey, NO2GM Ltd & Ors* [2013] IESC 11, the Supreme Court was presented with an application on the part of various personal litigants and the company NO2GM Ltd for permission to have another lay person represent each of them in the role of advocate without restriction, whether in the guise of "McKenzie friend" or otherwise.

31. In giving judgment for the Court, Fennelly J. considered that the representation of companies may well present a particular aspect of the question of whether a lay person should be permitted to exercise a right of audience in respect of another person before the courts. Having considered the extract from the judgment of Ó Dálaigh C.J. in *Battle* already quoted above, Fennelly J stated:

> "33. In the course of his judgment, the Chief Justice cited with approval the statement of Viscount Simon L.C. in his speech in *Tritonia Ltd. v. Equity and Law Life Assurance Society* [1943] 1 A.C. 584, where he said at p. 586 of the report:- "*In the case of a corporation, inasmuch as the artifical entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf*."

> 34. This ruling proceeds from the fact that the incorporated company is, as a strict matter of law, a legal person separate from its members and from its directors and management. Nonetheless, in practice, the courts have to deal on a daily basis with difficult cases involving unrepresented companies, frequently because there are simply no funds to provide for legal representation. The company, being a purely legal or notional person, cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although that is far from ideal, it represents the present law."

32. Fennelly J. then went on to deal with what he described as the slight modification of the strict rule in the New Zealand case of *Re G. J. Mannix*, referred to above, pointing out that Cooke J. had expressed the view that the court's residual discretion to hear unqualified advocates should be "*a reserve or rare expedient*." Finally, Fennelly J. noted the view expressed by O'Neill J. in *Coffey v. Tara Mines Limited*, considered above, that the decision of the Supreme Court in Battle did not preclude him from exercising an inherent jursidiction where, in his view, there was in existence "*a combination of circumstances that are so exceptional or rare as to be probably unique*."

33. In a lengthy earlier passage in the judgment (at paragraphs 23 to 30), Fennelly J. had explained, and set out the rationale underpinning, the fundamental rule that the only persons who enjoy a right of audience before our courts are the parties themselves (when not legally represented), a solicitor duly and properly instructed by a party, and counsel duly instructed by a solicitor to appear for a party. Without reproducing that passage in its entirety, the pertinent propositions that I distill from it include the following:

> (i) The rule does not exist for the purpose of protecting a monopoly of the legal profession, but rather is designed to serve the interests of the administration of justice and thus the public interest.
>
> (ii) The right of audience is regulated by law in respect of professional advocates.
>
> (iii) The right of a party to appear for him or herself and to plead his or her own case is a matter of necessity as well as of right. That it is sometimes unavoidable is not to say that it is desirable. The courts are better able to administer justice fairly and efficiently when parties are represented.
>
> (iv) Professional advocates are required to be familiar with the rules of procedure and practice which must be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants.
>
> (v) Professional advocates are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition. The same cannot be expected of lay litigants.
>
> (vi) The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. The absence of such skills will inevitably extend the process of litigation, and in particular the duration of a trial, thereby adversely affecting other members of the public who seek access to justice in a world of finite judicial resources, adding to the cost of litigation, and - in a worst case scenario - increasing the risk that a court may reach the wrong decision.
>
> (vii) To grant unqualified persons the same rights of audience and representation as are granted to qualified professional advocates would be inimical to the integrity of the justice system, in which the public interest requires that judges should have absolute trust in the general standard of probity and high professional standards of the advocates appearing before them.
>
> (viii) Professional advocates undergo an extended and rigorous period of legal and professional training and are bound by extensive and detailed codes of professional conduct, subject to an active system of professional discipline. The grant of parallel rights of audience in the courts to unqualified persons would defeat the purpose of implementing these standards.

34. As Cregan J. observed in the recent High Court case of *Tougher v. Tougher's Oil Distributors Ltd. & Anor. (No. 1)* [2014] IEHC, this Court is plainly bound by the Supreme Court decision in *Coffey, NO2GM Ltd.& Ors*.

35. Of course, another pertinent authority is the decision already delivered by Peart J. on the 14th May 2013 in these proceedings on Mr Flynn's prior *ex parte* application for permission to represent the company as an unqualified advocate. In that decision, Peart J considered the principle enunciated in *Battle*; the reaffirmation of that principle in *Reynolds v. Malocco* [1999] 2 I.R. 203 and in *Friends of the Curragh Environment Ltd. v. An Bord Pleanála* [2009] 4 I.R.; the decision of O'Neill J. in *Coffey v. Tara Mines Ltd, supra*, which Peart J. considered to be confined to its own facts; and the decision of the Supreme Court in *Coffey, NO2GM Ltd & Ors*, *supra*, before concluding that, subject to the limited exception identified in *Coffey v. Tara Mines Ltd*, the rule established in *Battle* still applies, which is to say 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.

36. The most recent case that I have been invited to consider, is the concise though very thorough decision of Gilligan J. in *McDonald v. McCaughey* [2014] IEHC 455. In that case, Gilligan J. considered all of the key authorities I have already mentioned but, in addition, noted the decision of the High Court in *Dublin City Council v. Marble & Granite Tiles Ltd* [2009] IEHC 455, in which Laffoy J. held that a company director could not represent that company in those proceedings, observing:

> "The legal position, accordingly, is that Mr. O'Gara is not, as a matter of law, entitled to represent the company in these proceedings. However, as frequently happens on the hearing of a winding up petition when a director or a member of the company appears in court without legal representation, he was listened to, to ensure that no injustice would be perpetrated."

37. Gilligan J. went on to consider the position in England and Wales; Scotland, Northern Ireland; and in a range of other common law jurisdictions. In a significant passage towards the end of that judgment, he expressed the following view:

> "This Court has a degree of sympathy with the position in which both defendants find themselves and in the absence of available funding, it may not be possible to retain the services of a legal team and thus, in the absence of the second named defendant representing the first named defendant in his capacity as a director and majority shareholder, the first named defendant company's challenge to the appointment of the liquidator may never be considered by a court which may result in an injustice. The reality of the situation is that clarity is needed in respect of the particular circumstances that arise herein, because due to the collapse of the property market and of so many limited liability companies involved in

> all aspects of the construction/property industry, there are a large number of ongoing claims by the banking industry against defaulting companies and guarantors. *It may be that the situation can be resolved whereby in certain exceptional circumstances a company director and significant shareholder on a valid bona fide arguable point at the discretion of the court could be allowed to represent the company's interests, provided that the court was satisfied that the point was at least arguable on the known facts and the applicable law*." (emphasis added)

38. Nevertheless, Gilligan J. ultimately applied the conventional rule set out in *Battle* and reaffirmed in *Coffey, NO2GM Ltd & Ors*, with due regard to the residual discretion identified in *Coffey v. Tara Mines Limited*, in refusing the application of the majority shareholder and director of the company concerned to represent the company in that case.

The arguments

39. Mr Flynn made extensive legal submissions to the court, citing decisions from a large number of jurisdictions, both national and supranational, and quoting extensively from them, as well as from a wide range of legal materials. While those submissions were a testament to his indefatigable zeal and industry in pursuing the company's interests, I do not mean to be unkind in suggesting that they fell significantly short of the standards of concision and logical presentation, and of examination of the relevant law, expected of an appropriately skilled advocate, which, in itself, illustrates the point that was made by Sir John Donaldson M.R. in *Abse and Others v. Smith* [1986] 2 W.L.R. 322 (at 326-7) and quoted with approval by Fennelly J. at paragraph 27 of his judgment in *Coffey, NO2GM Ltd & Ors, supra.*

40. Doing the best I can, in the hope that I do not fundamentally misrepresent the essence of Mr. Flynn's case, I understand him to be making two broad arguments in those submissions. The first is that the rule in *Battle* has not survived the entry into force of the Lisbon Treaty of the European Union on the 1st December 2009. The second argument is that, if the rule in *Battle* has survived the entry into force of the Lisbon Treaty, Mr Flynn's application to represent the company falls within that category of rare and exceptional circumstances that mandates a departure from that rule in the exercise of the Court's inherent jurisdiction, as recognised by O'Neill J in *Coffey v. Tara Mines Ltd*. I propose to address each of those arguments in turn.

41. In arguing that the coming into force of the Lisbon Treaty has altered the position in Irish law, Mr Flynn is evidently referring to the fact that it enshrines in European Union law the European Charter of Fundamental Rights ("the Charter") proclaimed on the 7th December 2000. Article 52(3) of the Charter provides that, in so far as it contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), the meaning and scope of those rights shall be the same as those laid down by the Convention.

42. Accordingly, Mr Flynn points to, amongst others, the right to a fair trial under Article 47 of the Charter and Article 6 of the Convention; the right to property under Article 17 of the Charter and Article 1 of the Protocol to the Convention; privacy rights under Article 7 of the Charter and Article 8 of the Convention; the right to freedom from discrimination under Article 21 of the Charter and Article 14 of the Convention; the right to equality before the law under Article 20 of the Charter; and the right to an effective remedy for the violation of any Convention right under Article 47 of the Charter and Article 13 of the Convention.

43. As I understand the argument he makes, Mr Flynn appears to be saying that, in so far as the company is entitled to avail of the rights just described, those rights, whether considered individually or in combination, either prevent the application of the rule in Battle by this Court or, differently put, operate to confer an entitlement on Mr Flynn to represent the company as an unqualified advocate. There are two fundamental problems with that submission.

44. The first problem is that the Charter does not apply to the Member States of the European Union (EU) in all circumstances. Article 51 thereof provides in relevant part as follows:

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law…"

It is unnecessary in the context of the present judgment to express a detailed view as to the meaning or proper interpretation of Article 51. Suffice it to state that, in order for the Charter to apply, some connection between the relevant legal proceedings and the implementation of EU law must be established. For that reason, in the course of the hearing of Mr Flynn's application, I asked him to identify any EU law element in the controversy between the bank and the company. Mr Flynn did not do so.

45. In the case of C 206/13 *Cruciano Siragusa v Regione Sicilia*, a judgment delivered on the 6th March 2014, the Court of Justice of the European Union (CJEU) identified the following framework for determining whether any national law involves the implementation of EU law (at paragraph 25 of its judgment):

> "In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it…"

46. In *Cruciano Siragusa*, the plaintiff in the domestic Italian proceedings had sought to quash a decision of the planning authorities, which required him to demolish certain alterations he had made to his property that had been found to violate landscape conservation rules. The referring court had noted that various provisions of EU law sought to protect the environment. The court also noted that the EU had legislative competence in the area of environmental protection.

47. However, the CJEU found that the case did not come within the scope of application of the Charter. In this regard the court noted that EU law imposed no obligations to protect the landscape akin to those laid down by Italian law. The court further noted, at paras. 27-33, that the objectives pursued by the Italian law concerned were not the same as those pursued by the various provisions of EU environmental law. The court also stated, at paragraph 29 of its judgment, that the fact that a particular provision of national law "is capable of indirectly affecting the operation of a common organisation of the agricultural markets cannot in itself constitute a sufficient connection between that legislation and EU law" to bring a particular situation within the scope of the Charter.

48. The present proceedings are a mortgage suit for possession of lands brought by a bank against a company. No attempt has been made on behalf of the company to demonstrate that the legislation under which they have been brought, the Land and Conveyancing Law Reform Act 2009, is intended to implement a provision of EU law, or to demonstrate that there are specific rules of EU law on the relevant matters governed by that legislation or capable of affecting them.

49. In the circumstances, Mr Flynn has failed to satisfy me that the present case is capable of coming within the scope of the Charter and, in consequence, has failed to satisfy me that the company is entitled to invoke its provisions for the purpose of the present application.

50. Even if that were not so, it has frequently been observed that the Charter largely represents a re-affirmation of rights already protected both by EU law and by the domestic law of the Member States. In the case of *J. McB. v. L.E.* [2010] 4 I.R. 433, Mc Menamin J. stated as follows (at p. 476):

> "I am unable to find in any provision of the Charter of Fundamental Rights an indication that it carries with it any radical change to the existing sources of law in this area. The Preamble to the Charter specifically recites that the rights contained therein are "reaffirmed". Furthermore, it will be recollected that the E.C. has not yet acceded to the ECHR. An indicator of the cautious approach adopted by the Court of Justice is to be found in the European Parliament v. Council of the European Union where the court was careful to indicate that Article 7 of the Charter of Fundamental Rights, which recognises respect for private and family life, did not confer entitlements any more extensive than those which might be enjoyed under Article 8 of the European Convention of Human Rights."

51. For the avoidance of doubt, I am satisfied that the coming into force of the Lisbon Treaty has not in any way affected the validity of the rule in *Battle* or the binding effect of that rule upon this Court in the present case.

52. For the sake of completeness in this context, I should also say that I reject as unstateable the various other arguments put forward by Mr Flynn in support of his asserted entitlement to represent the company, to wit: that the company is a minor since it is less than eighteen years old and, therefore, has an entitlement to be represented by a next friend in accordance with the applicable statutory provisions, or that the company has a disability, on the basis that it cannot think or speak for itself and should for that reason be afforded the protection of Mr Flynn as its next friend. Suffice it to say that the statutory provisions enacted to provide special protection to the vulnerable categories of disabled and minor persons self-evidently have no application to artificial persons such as the defendant company. I reject, as similarly unstateable, Mr Flynn's submission that he should be permitted to appear as legal representative of the company in its defence of the present mortgage suit by reference to a strained analogy with the right of a minority shareholder to seek leave to bring a derivative action on the company's behalf.

Conclusion

53. The final matter I have to consider is whether, on the evidence before me, Mr Flynn's application to represent the company comes within that category of rare and exceptional circumstances that warrants the Court, in the exercise of its inherent jurisidiction, making a departure from the rule in *Battle*.

54. Mr Flynn has several times averred that the company lacks the funds to instruct solicitor or counsel. He has also asserted, more obviously in argument than in evidence, that neither the company's directors nor its shareholders are in a position to put it in funds for that purpose. Mr Flynn produced various bank statements and company accounts at the hearing of the application that he sought to rely upon in support of those propositions, although they had not been put in evidence. Nevertheless, I am prepared to accept for the purpose of argument, that neither the company nor any of its directors or shareholders has the funds to retain legal representation on the company's behalf.

55. However, corporate and personal impecuniosity has never been rare and, sadly, is at present very common.

56. Moreover, in accepting the impecuniosity of the company and of Mr Flynn, I must also take into account the implications for others of the privilege he seeks, that of mounting a defence on behalf of the company as a lay advocate. Since Mr Flynn is not himself a defendant to the action, he would have no potential exposure in costs, regardless of the manner in which the defence may be conducted. Similarly, Mr. Flynn would not be subject to professional oversight or discipline in relation to his conduct of the defence. The bank, on the other hand, faces every prospect of incurring irrecoverable costs in meeting any such defence, should it be successful in doing so.

57. As noted earlier in this judgment, Mr Flynn has several times averred that the company has "a strong and valid defence" to the bank's claim, although that defence was not identified until, in the course of the hearing, he produced the "points for a defence" document already referred to, which purports to set out, non-exhaustively, 33 separate grounds of defence. Of course, the assertion by a corporate defendant that it has a good defence to a claim against it is, in itself, neither rare nor exceptional. As I understand it, Mr Flynn makes two points in that regard. First, he does not accept that the company should have to establish anything akin to a fair or reasonable probability of having a real or *bona fide* defence defence as part of the Court's consideration of whether rare and exceptional circumstances have been made out. In the alternative, he contends that, by reference to the contents of the document concerned, the company has met that test.

58. I am satisfied that it is appropriate to consider whether the company has made out a fair or reasonable probability of having a real or *bona fide* defence as part of the broader consideration of whether rare and exceptional circumstances have been established. In that regard, I am in complete agreement with the views expressed by Gilligan J. in *McDonald v. McCaughey, supra*. To hold otherwise would be to disregard both the fair trial rights of other litigants and the requirements of the proper administration of justice.

59. I draw support for that conclusion from the judgment of CJEU in the case of *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, Case C-279/09, 22nd December 2010. In that case, the CJEU was concerned with a question arising from the refusal of the German courts to grant legal aid to a company that wished to sue that Member State for an alleged delay in the transposition of certain Directives establishing common rules for the internal market in natural gas as a result of which that company claimed it had suffered substantial losses and had been rendered impecunious. The CJEU was asked to consider whether EU law and, in particular, the principle of effectiveness precludes a national rule under which a person does not qualify for legal aid. In concluding that it was not impossible for legal persons to rely on the principle of effectiveness, which may cover the assistance of a lawyer, the CJEU pointed out that it was for the national court to ascertain whether the conditions for granting legal aid pass the test of proportionality in so far as they constitute a limitation on the right of access to the courts, and that, in making that assessment, the national court must take into consideration, *inter alia*, "*whether the applicant has a reasonable chance of success*."

60. I cite the foregoing authority merely as an example of what I consider to be the well-established principle in both domestic and European Union law that, in considering matters such as civil legal aid or the lay representation of a corporate litigant in civil proceedings, it is perfectly appropriate, indeed necessary, that some regard should be had to the arguability of the case that the party concerned is seeking to make with the benefit of that assistance.

61. In whatever way the appropriate test is precisely formulated, the company in this case has failed to satisfy me that it has made

out a fair or reasonable probability of having a real or *bona fide* defence, or that it has a valid *bona fide* arguable point on the known facts and the applicable law, or that it has raised any defence with a reasonable chance of success. Bearing in mind the established proposition that mere assertion on affidavit is insufficient to make out an arguable defence, I can find no evidence in the case to support those defences that rely on assertions of fact, such as the alleged existence of a collateral contract, the alleged negligence on the part of the bank, or the alleged conflict of interest on the part of the bank's solicitors. Nor am I satisfied that any of the legal issues raised in the "points for a defence" document is sufficient to establish a fair or reasonable probability of the company having a real or *bona fide* defence. It seems to me that it would be entirely wrong to accept that a bald assertion, such as "Land and Conveyancing Act 2009 unconstitutional," at least without some significant elaboration or explanation, could ever form the basis for a conclusion that a fair or reasonable probability of a real or *bona fide* defence has been made out.

62. To the finding I have just made I would add that I know of no reason why the undoubted industry and energy that Mr Flynn has brought to bear in arguing for the company's right to be represented by him as lay advocate, could not have been applied instead, or in addition, to the task of putting on affidavit the evidence (as opposed to legal argument) necessary to support any defence the company would wish to make. Nor do I see any reason why that could not still be done. It would then be for the appropriate court to consider that evidence as part of the overall evidence in the proceedings in light of both the applicable law and the matters that it is necessary for the bank to prove in order to obtain the relief that it seeks against the company.

63. I therefore conclude that this case does not come within the category of rare and exceptional circumstances that would warrant a departure from the rule in *Battle*. Accordingly, the application must be refused.