Neutral Citation: [2014] IEHC 455

THE HIGH COURT

[2014 No. 3717 P]

BETWEEN

DECLAN MCDONALD

PLAINTIFF

AND

MCCAUGHEY DEVELOPMENTS LIMITED AND MARTIN MCCAUGHEY

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 31st day of July, 2014

1. The plaintiff in these proceedings, Declan McDonald, was appointed as receiver over the assets of the first named defendant by deed of appointment of receiver dated 20th December, 2013. As appears from the deed of appointment, the appointment was made by Danske Bank in pursuance of powers contained in the floating charge dated 18th December, 1998, and granted by the first named defendant in favour of National Irish Bank Limited over all of the property of the first named defendant whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. Danske Bank is the successor to National Irish Bank Limited by virtue of a scheme approved by the Minister for Finance.

2. Pursuant to the floating charge it is alleged that facilities in excess of €8m were advanced to the first named defendant, and it is pursuant to this indebtedness that the plaintiff was appointed receiver.

3. The second named defendant contends, *inter alia*, that the floating charge was altered, amended or changed to suit the Bank but only after the appointment of the plaintiff as receiver. It is further alleged that the actual charge registered was a collateral stamped deed and not the original charge.

4. A preliminary issue arises because the second named defendant wishes to represent the first named defendant company on the basis that he is a director and principal shareholder of the first named defendant, but accepting that he is not a solicitor or a barrister instructed by a solicitor. The second named defendant contends that the probity of the Bank is in question and the company is at risk if it has no representation to highlight material facts, and that if the company is not represented it cannot rebut the validity of the appointment of the receiver and the company will lose by default. Neither the company or Martin McCaughey have sufficient funds to retain lawyers to represent the company in the situation that has arisen.

5. The second named defendant in his submission raises the position as set forth in *Battle v. Irish Art Promotion Centre* [1968] I.R. 252, wherein Ó Dálaigh C.J. refused an appeal by a company director who was also majority shareholder for liberty to conduct the defence of the company. In the High Court the company was represented by legal counsel. However, the director applied *ex parte* to the President of the High Court for liberty to conduct the defence of the company on its behalf at the plenary hearing. The director appealed the High Court's refusal to the Supreme Court and argued that the company did not have sufficient assets to engage legal counsel for the hearing. In refusing the appeal the court held:-

> "The creation of the company is the act of its subscribers; the subscribers, in discarding their own 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."

6. The first named defendant refers in submissions to a 2010 case *Secretary of State for Business, Enterprise and Regulatory Reform v. UK Bankruptcy Limited.* The second named defendant refers to three particular paragraphs as follows:-

> "Opinion of Lord Hodge
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> 30. In relation to the first issue, I consider that in exceptional circumstances it may be necessary for the court to ensure a fair hearing to allow a director or other representative appear on behalf of a company, for example, to defend its interests against a winding up application which might result in its dissolution. But the circumstances in which that will be necessary will be very severely circumscribed both because those who trade through registered companies must accept the disadvantages of doing so as well as the benefits and also because the court is entitled to regulate its procedure to ensure that unqualified persons do no misuse its processes or cause avoidable delay. Where a company is pursuing a claim in the ordinary course of business or where the company has sufficient funds to pay for legal representation, it does not appear to me that the requirement of legal representation would breach Article 6.
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> 31. Thus, turning to the second issue, where a company has insufficient funds to employ lawyers to oppose an application to wind it up, a question of the fairness of the proceedings might arise if the court were not to allow the company's position not be articulated by a representative, subject to suitable safeguards to prevent delay, the raising of irrelevant issues or unreasonable behaviour. There may be other occasions when this question of fairness would arise. Those occasions might include analogous insolvency proceedings, such as an application for an administration order, and a hearing in relation to diligence on the dependence of an action."

7. The second named defendant submits that there is a practice in the small claims court in Ireland permitting representation of limited liability companies by officers of the company, and that there are a number of unreported cases where directors have been allowed to represent companies.

8. The second named defendant submits that the current position is that the company does not have sufficient funds to engage a team of lawyers and is doomed to a fate of being dissolved if not allowed to be represented by an officer of the company. Further, it is contended that this is an exceptional set of circumstances and the second named defendant believes it is necessary for the court in order to ensure a fair hearing to allow a director or other representative to appear on behalf of the company and to defend its

interests against a receiver being appointed, which might result in the company's dissolution.

9. In reply counsel for the plaintiff contends that as appears from *Battle*, the court expresses the view that the only course open to a company director in this scenario, is to personally put funds into the company in order to allow it to fund litigation. Mr. McCaughey states that he attempted to engage previous solicitors who acted for the company but they refused to act in circumstances where the company had failed to discharge previous invoices. Clearly, it is open to Mr. McCaughey to rectify this situation by discharging the outstanding invoices owed to that firm of solicitors. Alternatively, he can personally put funds into the company which would enable it to engage a new legal team.

10. That position was approved in the High Court in *Dublin City Council v. Marble & Granite Tiles Ltd* [2009] IEHC 455, wherein Laffoy J. held that the company director could not represent the Company in the proceedings. She stated:

> "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 ensure that no injustice would be perpetrated."

11. In *Coffey v. Tara Mines Limited* [2008] 1 I.R. 436, O'Neill J. was of the view that *Battle v Irish Art Promotion Centre Ltd* did not preclude him from exercising an inherent jurisdiction where, in his view, there was in existence "a combination of circumstances that are so exceptional or rare as to probably, be unique".

12. The court permitted the plaintiff to be represented by his wife because he had formed the view that without said permission, the action would "proceed no further, and that is an outcome or consequence that would be destructive of the interests of justice".

13. The court, in exercising its inherent jurisdiction, appeared to deviate from the strict position that a litigant must obtain legal representation or represent his own interests in court, by adopting an "exceptional circumstances" test.

14. The issue has most recently been examined by Fennelly J. in the Supreme Court in *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Stella Coffey & Ors.* [2013] IESC 11. In that case, 13 Applicants sought leave of the court to allow a nominated individual, Mr. Podger, to represent their interests in potential judicial review proceedings arising out of a decision of the Environment Protection Agency and Teagasc. Mr. Podger, who admitted to having no legal qualifications, became a member of the second named Appellant (a limited company) during the course of the application. The court, in refusing the application, noted that there may exist exceptional circumstances which would enable a third party to represent a litigant, however, Mr. Podger had not demonstrated any such circumstances. The relevant paragraphs of the judgment appear at 37 and 38 and state as follows:

> "37. In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making of an exception. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of thirteen litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons.
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> 38. Nor do I think that the attempt to represent the company No2GM Ltd gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance 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."

15. The Supreme Court has thus accepted that there may be some exceptional circumstances whereby an unqualified person may speak for a litigant in court, however, the recent *Coffey* case can be distinguished on its facts from the seminal case on this issue, *Battle*.

16. In *Coffey*, Mr. Podger was not a company director, but merely became a member of the company during a brief adjournment of the motion. The Supreme Court was very clear in stating that this action was one without merit.

17. *Battle*, on the other hand, involved an almost identical set of facts as in the *McCaughey* case- a company director, who claims the company cannot afford to engage a legal representative, and so, wishes to represent the company himself. In *Battle*, the Supreme Court were of the view that as a company director, in setting up the company, availed of a separate legal persona from the company, one cannot then come before the court and seek to reverse that and speak on the company's behalf. Fennelly J. stated that in such circumstances, the only option available to a company director was to use his own funds to place the company in a position whereby it could engage legal representation.

18. Counsel refers to the position in a number of other jurisdictions as follows.

The Position in England and Wales

19. The English Courts have adopted a more flexible approach in relation to rights of audience and the right to conduct litigation on behalf of a company. The English courts have a discretion, as part of the inherent power, to permit a representative to appear ad hoc on behalf of a litigant in person. That discretion was first established in *Ali Finance Ltd v. Havelet Leasing Ltd* [1992] 1 WLR 455. There is also a statutory power to that effect pursuant to schedule 3, para. 1(2) of the Legal Services Act 2007, (formerly s. 27(2)(c) of the Courts and Legal Services Act 1990).

20. The notion that an unqualified person could represent a company had its origins in Lord Woolf's 1996 Report, *Access to Justice*. Lord Woolf recommended that a duly authorised employee of a company should normally be permitted to take any steps on behalf of the company that a litigant in person could take on his own behalf. At page 136, Lord Woolf stated that this would be subject to the court's being satisfied that the representative was duly authorised to act, and to the right of the court to prevent any person abusing the process to act.

21. The Civil Procedure Act 1997, provided for the making of Civil Procedure Rules and established a Civil Procedure Rules Committee to make them by way of a statutory instrument. Section 5(1) also infers certain powers to make related practice directions. Rule 39.6 of the Civil Procedure Rules 1998 (SI No 3132) implements Lord Woolf's recommendation. It provides that:

"A company or other corporation may be represented at trial by an employee if

(a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and

(b) the court gives permission. "

22. The ancillary Practice Direction provides that:

> "Rule 39.6 is intended to enable a company or other corporation to represent itself as a litigant in person. Permission under rule 39.6(b) should therefore be given by the court unless there is some particular and sufficient reason why it should be withheld. In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative. "

The Scottish Position

23. The Courts of Scotland appear to favour the strict rule that a company director does not enjoy a right of audience to represent the Company. Lord Justice Clerk closely examined the issue in 2010 and gave a detailed opinion in which he states that a company director ought not be entitled to do so.

24. The leading case in Scotland is the House of Lords decision in *Tritonia Limited v. Equity and Law Life Assurance Society* (1943 SC (HL) 88), wherein the House of Lords held a corporation cannot be heard otherwise than by counsel.

25. In considering this strict rule, Article 6 of the European Convention and the flexible approach adopted in England and Wales, Lord Clerk concluded as follows:

> "[38] Even if it could be said that the Act of 1532 was in desuetude or that it could not reasonably be interpreted to apply to joint stock companies, there would nevertheless remain the specific rule established in 1943 (*Equity and Law Life Ass Soc v Tritonia Ltd, supra*) that a company cannot be represented in civil proceedings other than by counsel or, where competent, by a solicitor. Quite independently of the Act of 1532, that rule is rooted in cogent considerations. I need not rehearse them in detail. It is sufficient to say that the extension of rights of audience on behalf of companies to unqualified persons would bring all of the risks to the due performance of the justice system that are notorious in the case of party litigants. It would involve the conferment of rights of audience on persons who had received no training in law or in legal procedure and who were not subject to any code of conduct or to any form of professional discipline (*cf Izzo v. Philip Ross and Co* [2002] BPIR 310).
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> [39] In my view, it is not open to this court to modify the rule, whether by the use of its inherent power or by act of sederunt, no matter what conditions or safeguards it might impose.
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> [40] In any event, 1 consider that even if it were open to this court to modify the rule, it should not do so. The proposal raises questions of social policy relating to rights of audience in the civil courts. Such questions are not for us to decide. From the brief review of the legislation that I have given, it is clear that every extension of rights of audience in the courts has been brought about by express legislation. If there were to be an extension of rights of audience in relation to artificial legal persons, that, in my opinion, should be effected only by legislation after the normal consultative processes of law reform.
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> [41] This court cannot foresee all the wider implications of an ad hoc judicial decision to relax the present rule; nor the practical difficulties that might follow from it. However, certain practical problems at once come to mind. In a company liquidation or in a compulsory winding up of the kind with which this case is concerned, 1 can think of good reasons why a company should not be represented by a director whose own actions may have caused the litigation.
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> [42] Furthermore, the experience of this court over the last ten years or so has shown that certain indefatigable party litigants, of whom we have no shortage, in due course make their services available to other party litigants, either by acting as their lay assistants (*Frost and Parkes v. Cintec International Ltd*, 9th September, 2005, unrepd) or by taking assignations of their interests (*cf Tods Murray WS v. Arakin Ltd*, 31 October 2003, unrepd). If lay representation of companies were to be allowed, it would not be long before such persons would make their services available for that purpose, as has happened in England (*cf Paragon Finance plc v. Noueiri, supra*). In *POW Trust and Anor v. Chief Executive and Registrar of Companies* ([2002] EWHC 72783 (Admin)) the company was represented by a director, Mr. Terence Ewing, who was a serial party litigant in his own right (*cf Ewing v. Times Newspapers Ltd*, 2010 CSIH 67). In *Bournemouth and Boscombe Athletic Football Club Ltd v. Lloyds TSB Bank plc* [20047 EWCA Civ 935) the claimant company was represented by a person who had been appointed as a director for the purpose of conducting the litigation (*cf* paras 27 and 40).
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> [43] 1 am also of the view that the granting of this proposal would inevitably lead to wider questions of rights of audience in relation to unqualified persons; for example, in the representation of a trust by one of its trustees; or the representation of a commercial partnership by one of its partners.
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> [44] Even if it were open to us to allow representation of a company by an unqualified person, these considerations would persuade me of the unwisdom of our taking that step.

The Position in Northern Ireland

26. The position in Northern Ireland reflects the more flexible approach adopted in England and Wales. In *Ulster Weavers Home Fashions Limited v. Waterfall NI Limited* [2013] NIMaster 2, Master Bell opined that to apply a test which only allows an employee of the Company to represent the Company in exceptional circumstances would be incorrect. He states that the test must be broader than that.

27. At paragraph 15, Lord Bell lists a number of factors which he considered to be important in deciding that the director ought to be allowed represent the Company. Said factors included:

(i) The general rule is that a corporate body ought to be represented by legal advisors and that there is a strong public

policy reason for that general rule;

(ii) The Company was not in a financial position to fund legal representation;

(iii) In the event the Court refused to allow the director to represent the company, it would be barred from offering any defence in the litigation;

(iv) The Court took into account the legal submissions of the director, which indicated that the company had a strong defence and counterclaim which could not be advanced unless he represented the company. The director argued that this would deny the company the right to a fair trial, and the Court agreed that the role of the court in ensuring a fair trial is a fundamental obligation.

The High Court of Justice therefore held that in the interests of justice, the director must be permitted to represent the company in the litigation.

Other Jurisdictions

28. The Court of Appeal in Hong Kong in *Wing Hang Bank Limited v. Kit Choy Development Limited & Choy Bing Wing* [2005] HKCA 287, refused to allow a director represent the company at an appeal of a decision to strike out proceedings, even in circumstances where he was also personally named as a defendant in the proceedings. The court held that the company was treated as having been absent at the hearing, as Mr. Choy could not make submissions on its behalf.

29. In South Africa's Supreme Court of Appeal in *Manong & Associates (Pty) Ltd v. Minister of Public Works & Anr* (518/2008) [2009] ZASCA 110 (23 September 2009), Ponnan JA held that there are exceptional circumstances whereby the general rule that a company must be legally represented is relaxed. At paragraphs 9 and 10 he held:

> "[9] The main reasons for relaxing the rule are, I suppose, obvious enough: a person in the position of the controlling mind of a small corporate entity can be expected to have as much knowledge of the company's business and financial affairs as an individual would have of his own. It thus seems somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings, but deny it to him when he is the governing mind of a small company which is in reality no more than his business alter ego. In those circumstances the principle that a company is a separate entity would suffer no erosion if he were to be granted that right. There may also be the cost of litigation which the director of a small company, as well acquainted with the facts as would be the case if a party to the dispute personally, might wish to avoid. Such companies are far removed from the images of gigantic industrial corporations which references to company law may conjure up.
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> [10] It follows that cases will arise where the administration of justice may require some relaxation of the general rule. Their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. I thus consider that our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings. After all it seems to me that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative is of necessity an integral part of the rule itself."

30. 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 clarification 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 the court was satisfied that the point was at least arguable on the known facts and the applicable law.

31. However, this Court is constrained to follow the decision in *Battle v. Irish Art Promotion Centre Limited* and also to follow the views as expressed by Fennelly J. in the Supreme Court *in the Matter of the Application for Orders in relation to Costs in Intended Proceedings by Stella Coffey & Ors*, wherein at paras. 32, 33 and 34 Fennelly J. refers the judgment in *Battle* and further, the reference by Ó Dálaigh J. to the statement of Viscount Simon L.C. in his speech in *Tritonia Limited 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 in as much as the artificial entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf."

And further, at para. 34 Fennelly J. states:-

> "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 they 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. refers to the slight modification of the strict rule regarding companies as adopted in the New Zealand case of *Re J G Mannix Limited* [1984] 1 NZLR 309 as considered by Budd J. in *PMLB v. PHG* (Unreported, High Court, Budd J., 5th May, 1992). Cooke J. in the New Zealand Court of Appeal had thought that the court should retain a residual discretion to hear unqualified advocates, but considered that it would be a reserve of rare expedient.

33. Fennelly J. also considered the judgment of this Court (O'Neill J.) in *Coffey v. Tara Mines Limited* [2008] 1 I.R. where the trial judge permitted the plaintiff to be represented by his wife because he formed the view that the action would proceed no further and that is an outcome or consequence that would be destructive of the interests of justice.

34. In the overall circumstances of this application, I take the view that I am obliged to refuse the application to enable Martin McCaughey, as a majority shareholder and director of the first named defendant company (in receivership), to represent the company

in these proceedings.