THE HIGH COURT

[2023] IEHC 558

[2023] 1818 P

BETWEEN

ARNAUD GAULTIER

AND

SUP PLIABLE LIMITED

PLAINTIFFS

AND

MARK REILLY

AND

ÁINE McGUIGAN

AND

LOUISE SWORDS

DEFENDANTS

JUDGMENT (No.1) of Mr. Justice Cregan delivered on the 28 day of July, 2023.

Introduction

1. This is an unusual application in which Mr. Gaultier has asked me to revisit an *ex tempore* judgment I gave in this matter. On 16th May 2023, I heard an application for an interlocutory injunction brought by the first and second named plaintiffs against all three defendants. The hearing lasted most of the day. The first and second named defendants objected that the first named plaintiff, Mr. Gaultier, had no legal authority to represent the second named plaintiff, Sup Pliable Limited, a company owned and/or controlled by him. Mr. Gaultier said that he did. I delivered an *ex tempore* judgment on that issue holding against Mr. Gaultier. As most of the interlocutory reliefs sought in the Notice of Motion were sought

by the company, I struck out those reliefs as against all defendants. That left three interlocutory reliefs which Mr. Gaultier was seeking against the third defendant. I refused those reliefs in a second *ex tempore* judgment. I also decided the issue of costs. I thought that was end of the matter – as far as the High Court was concerned.

2. However, a few days later, Mr. Gaultier appeared in court before me on an *ex parte* basis with an application to ask me to revisit my *ex tempore* judgment. As the order had not yet been perfected, I directed Mr. Gaultier to put all parties on notice of this application and fixed a date for the hearing of this application for Tuesday 20th June, 2023.

3. I also directed that a copy of the DAR of the hearing of the matter on 4 May, 2023 (when the matter was in the Chancery call-over list) and of the hearing of 16th May, 2023 be transcribed and a copy of the transcript be made available to all parties. This was, in part, because Mr. Gaultier had made certain criticisms of the manner in which the case had been heard and made an application to ask me to recuse myself.

4. However at the hearing on 20 June, 2023, when I explained how the case had come to be listed before me, and related matters, Mr. Gaultier withdrew his application that I should recuse myself.

5. That left only the substantive issue of whether this court should revisit its judgment of 16 May, 2023. This judgment deals with that application.

6. In this judgment, I will

(i) set out in full my *ex tempore* judgment of 16 May, 2023;

(ii) set out the legal principles governing applications on this nature; and

(iii) consider the grounds upon which Mr. Gaultier has requested the Court to revisit its judgment.

7. I will therefore first set out below my *ex tempore* judgment. This is drawn from the transcript with minor edits for clarity.

***Ex Tempore* Judgment delivered on 16 May 2023**

Introduction

1. *This is my* ex tempore *decision in relation to a preliminary issue which has arisen in relation to this matter.*
2. *The first named plaintiff in this case is Mr. Gaultier. The second-named plaintiff is a single member company called Sup Pliable Limited with a registered address in Dundalk, County Louth.*
3. *The first-named defendant is a financial advisor who advises the third-named defendant Ms Swords.*
4. *The second-named defendant is a solicitor who also previously advised the third-named defendant, Ms. Swords, until the commencement of these proceedings.*
5. *The third defendant is the wife of the first-named plaintiff and originally was the director and sole member of the second plaintiff company. She has since transferred her shares to the first plaintiff and resigned as a director.*
6. *The plenary summons in this case issued on 24th of April 2023. In it the plaintiffs (i.e. the first and second-named plaintiffs), make a number of claims against the three defendants as follows.*
    - *(i) an order for damages against the first and second defendants to the first plaintiff of €10,000 each for the complicit role, by action or omission, in the breach of contract between the first plaintiff and the third defendant;*
    - *(ii) an order for damages against the first and second defendants to the second plaintiff of €40,000 each for their complicit role, by action or*

omission, in the misuse and/or embezzlement of the assets of the second plaintiff;

(iii) a permanent injunction ordering the third defendant to make a payment on account to the second plaintiff for a sum sufficient to bring the bank account within the limits of its overdraft;

(iv) a permanent injunction requesting the third defendant to give the first plaintiff full and immediate access to the stock of the second plaintiff, to allow him to make a full stock-take of the remaining stock and to invoice all stock not accounted for. There are also various other injunctions and reliefs sought in paragraphs 5-14 of the plenary summons;

7. *The plaintiff is a lay litigant, and he represents himself. However, the plaintiff is also representing the second-named plaintiff in these proceedings, the company, Sup Pliable Limited.*

The application for an injunction

8. *Both plaintiffs, in addition to issuing a plenary summons, also brought an application for an interlocutory injunction against all three defendants seeking various interlocutory reliefs most of which were also sought in the plenary summons.*
9. *The first and second-named defendants filed replying affidavits contesting the plaintiffs' claims.*
10. *The third defendant, who was originally represented by a firm of solicitors, including the second defendant, found herself, through no fault of her own, without legal representation today as her solicitors felt that they had to withdraw from the*

proceedings – understandably given that they are a named defendant in these proceedings.

11. *The plaintiffs brought an ex parte application before the High Court on 25th of April 2023 seeking short service of a motion for an interlocutory injunction to be made returnable to 25th April 2023. The High Court (O'Moore J.) made an order granting short service to the plaintiffs and granting liberty to the plaintiffs to bring their motion seeking an interlocutory injunction on 27th April 2023.*
12. *The matter came before the Court on 27th April 2023 and the High Court (Ms. Justice Roberts) also permitted the plaintiffs liberty to issue and serve a notice of motion returnable for 4th May 2023. The High Court (Roberts J.) also ordered that the first-named plaintiff file an affidavit within one week setting out the first named plaintiff's relationship with the second plaintiff and "Any basis on which the first-named plaintiff claims to be entitled to bring any application on behalf of the second plaintiff.*
13. *The first named plaintiff, Mr. Gaultier, then swore a supplemental affidavit on 3rd of May 2023 setting out these matters. I will come back to this affidavit later in the judgment.*

Preliminary objection

14. *The first and second defendants make a preliminary objection in their affidavits to state that the first-named plaintiff was purporting to represent the second-named plaintiff company and that the company was not permitted to appear before this court as a plaintiff except through a solicitor or counsel. It was agreed between the parties that I should consider this matter first. Accordingly, I heard all parties on this matter.*

The legal principles applicable to this issue

15. *Counsel for the first defendant referred to the Supreme Court decision in* Battle v Irish Art Promotion Centre Limited *[1968] IR 252, the decision of the Supreme Court in* Allied Irish Bank v Aqua Fresh Fish Limited *[2019] 1 IR 517 and the third decision of the Supreme Court* in Gaultier v The Registrar of Companies and Others *[2019] IESC 89.*

16. *There are therefore no less than three decisions of the Supreme Court on this matter.*

17. *The relevant passages of* Gaultier v The Registrar of Companies *are set out at paragraphs 54 (and following) of the judgment of O'Donnell J. (as he then was) giving judgment on behalf of the Supreme Court. At paragraph 54 Mr. Justice O'Donnell states as follows:*

> *"54. The decision in Battle has loomed large in these appeals. Mr. Gaultier has strongly criticised the decision and must, I think, be taken as inviting the Court to reverse it. It is true as he says that it is a short judgment taking no more than two pages of the Irish reports and is moreover a decision given a relatively long time ago.*
>
> *55. However any such argument faces a much more formidable hurdle in that the decision was recently considered by this Court in AIB v. Aqua Fresh Fish Limited [2018] IESC 49 and in a unanimous judgment of the Court, Finlay Geoghegan J upheld a decision of McKechnie J sitting in the Court of Appeal (Ryan P and Hogan J concurring), that the rule in Battle continued to apply, subject, however, to an exception that it was acknowledged that the Court had a discretion to be exercised in exceptional circumstances to permit a legal person to be represented by a natural person other than a barrister or solicitor with a right of audience in the courts. This conclusion of law, it*

should be said, also accords with the general practice of the courts discussed in that judgment. Finlay Geoghegan J considered the jurisprudence of the courts and the practice of permitting representations in cases to avoid injustice. She also carried out a careful survey of the law and concluded that it was more appropriate to speak merely of exceptional circumstances rather than rare and exceptional circumstances which had been a term hitherto employed" (paragraph 42).

"56. The judgment in Aqua Fresh also reviewed the law in other common law jurisdictions and noted that an approach similar to that in Battle appeared to have been adopted in most other common law jurisdictions. In particular in the United Kingdom it had been reaffirmed relatively recently in a decision of the Court of Appeal in England and Wales in Radford v. Freeway Classics Limited [1994] 1 BCLC 445. Sir Thomas Bingham MR. (as he then was) explained that the practice was not a freestanding rule designed to buttress the right of audience of members of the legal profession. It was instead a corollary of the fundamental feature of company law that a company has a separate legal entity from its shareholders. It followed that whereas a natural person could appear in court either through a lawyer with a right of audience or by himself or herself, an artificial legal person does not have the option of appearing personally and, rather, can only therefore appear through a solicitor or barrister with a right of audience.

57. Furthermore the capacity to limit the liability of a company, which is one of the very valuable benefits of the capacity to incorporate has consequences as well as advantages. As Sir Thomas Bingham MR (as he then was) put it,

the rule rested on a "basis of fairness and good sense". In a passage cited with approval by Finlay Geoghegan J, he said,

"A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owned money by it, or obtain orders against it, must go away empty if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company, but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual and another part of the price is the rule that I've already referred to, that a corporation cannot act without legal advisors. The sense of these rules plainly, is that limited companies, which may not be able to compensate parties who litigated with them, should be subject to certain constraints in the interests of their potential creditors."

58. In any event, whatever justification is to be found for the rule, it is clear that it has recently been reaffirmed in a number of jurisdictions and most recently in this court. Accordingly any contention that it should be overruled cannot possibly succeed.

59. The argument that the law could not apply or perhaps should not be applied, to single member companies has no greater merit. It is clear that this does not distinguish the company from those companies discussed in the Aqua Fresh and Battle cases. Any such company has the two essential features of separate corporate identity and capacity to limit liability that were identified as underpinning the rule. There is no suggestion in Aqua Fresh that the principle set out there is not of general application to all corporate entities."

18. *It is therefore crystal clear from this judgment that a company can only be represented by a solicitor and barrister with a right of audience in court except in exceptional circumstances.*

Exceptional circumstances

19. *The question then arises as to whether or not these exceptional circumstances arise in this case. Counsel for the first defendant has analysed the affidavit of the first-named plaintiff (filed pursuant to the order of Ms. Justice Roberts) setting out his relationship with the company and the basis on which the first named plaintiff claims to be entitled to bring any application on behalf of the second-named plaintiff.*

20. *The plaintiff's first ground is that, as he says at paragraph five of his affidavit, (sworn on 3rd May 2023), that his entitlement to bring this application has been "de facto asserted by O'Moore J. given his order dated 25th of April 2023." This is not correct. The order of O'Moore J. on that date was simply an order granting short service to the first and second plaintiffs to enable them to bring their applications before the court on 27th April 2023. It certainly did not amount to a decision of the High Court to allow the first plaintiff to bring an application on behalf of the second plaintiff.*

21. *The first plaintiff's second argument is set out at paragraph six of his affidavit in which he says that the Battle rule is not applicable to single member companies.*

22. *Again, the first named plaintiff's submission on this issue is clearly wrong. O'Donnell J. (as he then was) stated explicitly at paragraph 59 of his judgment that "the argument that the law could not apply or perhaps should not be applied to single member companies has no greater merit. It is clear that the law does not*

distinguish single member companies from those companies discussed in the Aqua Fresh and Battle cases."

23. *The plaintiff's third argument is set out at paragraphs 10 to 14 of his affidavit. These are arguments which were considered before the Supreme Court in* Gaultier v Registrar of Companies *set out above. They are therefore a collateral attack on a Supreme Court decision which is impermissible. In any event, these arguments do not establish any exceptional circumstances, in my view, such as to allow the first-named plaintiff to bring an action on behalf of the second-named plaintiff and to represent the second-named plaintiff in these proceedings.*

24. *The plaintiff's fourth argument is that certain arguments were not addressed by the Supreme Court in* Gaultier v Registrar of Companies. *However, it is not a matter for this Court to consider that submission. The High Court is clearly bound by the decisions of the Supreme Court in this matter.*

25. *The plaintiff's fifth argument is, apparently, that all judges in Ireland only follow the rule in* Battle *because of unconscious bias because such a rule benefits the members of the legal profession. Again, in my view, this argument is not well founded. This very argument was considered by Bingham M.R. (as he then was) in* Radford *set out above, and at paragraph 56 of the judgment of O'Donnell J. where O'Donnell J. stated that the practice was not a freestanding rule designed to buttress the right of audience of members of the legal profession but was instead a corollary of a fundamental feature of company law that a company is a separate legal entity from its shareholders.*

26. *The plaintiff's final argument was that section 41 of the Companies Act 2014 invalidates the rule in* Battle *because it enables the company to empower any person as its attorney to do any matter.*

27. *Section 41 of the Companies Act 2014 provides as follows:*

"Powers of attorney

(1) Notwithstanding anything in its constitution, a company may empower any person either generally or in respect of any specified matters as its attorney to execute deeds or do any other matter on its behalf in any place whether inside or outside the State."

28. *The first-named plaintiff said in his submissions that as he now controlled the second-named plaintiff, he could give an undertaking on his feet that he could obtain such a power of attorney from the company to bring such proceedings on its behalf and to represent it in court.*

29. *However, this submission was opposed by counsel for the first and second defendants who made the following submissions. Firstly, it was submitted that as a matter of fact there was no power of attorney before the Court and therefore the Court should strike out the plaintiff's injunction application on that ground alone. I agree with this submission.*

30. *Their second submission was that the 2014 Act simply re-enacted, with minor modifications, section 40 of the 1963 Act. I agree with this submission also.*

31. *Thirdly, the first and second defendants submitted that if the Oireachtas intended section 41 of the 2014 Act to have overturned the decision in* Battle, *it would have done so in clear and unambiguous statutory language and that the wording in section 41 could not, and should not, be interpreted in such a manner as to overturn the decision in* Battle. *I agree with this submission also.*

32. *The fourth argument of the first and second defendants was that a company cannot grant a power of attorney to a person which allows that person carry out an activity*

which infringes a rule of law, i.e. to infringe the rule in Battle. *I agree with that submission also.*

33. *The fifth argument put forward by the first and second defendants was that the first-named plaintiff's submission was entirely circular and would drive "a coach and four" through the Supreme Court decisions in* Battle *and* Aqua Fresh. *I agree with that submission also.*

34. *The sixth submission by the first and second defendants was that it was clear from the Supreme Court decision in* Aqua Fresh *that the Companies Act 2014 did not abolish the rule in* Battle*'s case. Indeed, as Finlay Geoghegan J. stated at paragraph 28 of her decision,*

"The Companies Act 2014 is the most significant legislative restatement and amendment to companies legislation since the Companies Act 1963. It does not provide for a right of a company to be represented by lay persons in court proceedings other than as was already provided in section 382 of the 1963 Act and repeated in section 868 of the 2014 Act in relation to proceedings on indictment. This permits a company charged with an indictable offence to appear by a "Representative" which is defined in section 868(5) as being, "A person duly appointed by the company to represent it for the purpose of doing any act or thing which the representative of a company is authorised by this section to do. It appears that section 382 of the 1963 Act may have been introduced to remedy an issue brought to light in the case of the State (Batchelor) & Co. Ireland Limited v Ó Leannain [1957] 1 IR 1. See Company Law Review Group Report on the Representation of Companies in Court March 2016 at para 2.8. Notwithstanding the Supreme Court decision in Battle v. Irish Art Promotion Centre Limited [1968] IR 252 reported and applied since 1968, albeit with acknowledgment of the

possibility of exception in Coffey v. EPA [2013] IESC 11 and 31, the Oireachtas did not legislate for a right to lay representation other than in proceedings on indictment. This is made clear by section 868(6) which states that "A representative of the company shall not, by virtue only of being appointed for the purpose referred to subsection (5), be qualified to act on behalf of the company before any court for any other purpose."

35. *At paragraph 29 Finlay Geoghegan J. states as follows,*

"It is also of some relevance to note that the Companies Act 2014 provides for the possibility that a company have a single member and/or only one director (sections 11, 128 and 196) but without providing any special rules in relation to representation even of such companies in court." ... I draw attention to this by reason of the reliance placed by Mr. Flynn on a judgment of Gubbay CJ in the Supreme Court of Zimbabwe in Lees Import and Export v Zimbabwe Banking Corporation [2000] 3 LRC 485 in relation to representation of a company by a person who is considered to be the "alter ego of the company.""

Conclusion

36. *For all of these reasons, I would conclude that the first-named plaintiff has no legal right to bring the application for an injunction in the name of the second-named plaintiff and/or to represent the second-named plaintiff in these proceedings. I will accordingly dismiss the injunction application insofar as the second-named plaintiff has sought any interlocutory relief before the Court.*

Balance of my *ex tempore* decision on other matters before the Court on 16th May, 2023

8. I then heard further submissions from the first-named plaintiff and the third-named defendant in relation to various injunctions sought by the first-named plaintiff against the third defendant and I gave a further *ex tempore* judgment as follows:

"1. This is the balance of my judgment in respect of the balance of the matters in relation to the notice of motion which is before the Court today. I have already given my judgment in relation to matters between the plaintiffs and the first and second defendants. The first plaintiff has accepted that the only remaining matters in the notice of motion as against the third defendant are paragraphs three, eight and ten.

2. *In relation to paragraph three, I am of the view that this also in fact should be struck out because it really is an application for an injunction relating to the stock of the second-named plaintiff and it is not clear that the second-named plaintiff would ever request such an application and on that basis, I do not think that the first plaintiff has locus standi to make that argument on his own behalf. It is an application that should be made, if at all, by the second plaintiff.*

3. *I also note that Ms. Swords, the third defendant, has today in a very reasonable manner put forward an offer that she would voluntarily prepare an inventory of the said goods. Mr. Gaultier, for his own reasons, simply refused to engage or address that issue in a reasonable manner. Instead, he reiterated his arguments about embezzlement and sought to aggravate those allegations by saying that in fact it is bordering on criminality. Ms. Swords countered that by saying that she had already gone to the relevant garda station in Cavan to tell them that she had removed those goods and that they were in her farm, in her home. So, that reasonable offer having been made by Ms. Swords and effectively not accepted by Mr. Gaultier, I am refusing the application in paragraph three of the notice of motion. It is a matter for Ms. Swords if she wishes to*

voluntarily prepare that inventory but she is certainly not going to be ordered to do it by the Court.

4. *The second matter that is outstanding in the injunction application is at paragraph eight where Mr. Gaultier seeks an injunction requesting Ms. Swords to agree to organise and attend a directors' meeting of the second plaintiff to address all issues in compliance with Part 5. However, it is clear from the affidavit evidence that Ms. Swords has resigned as a director. If that causes problems for Mr. Gaultier and the company, those are matters for Mr. Gaultier and the company to resolve. However, I am certainly not going to order Ms. Swords to attend a directors' meeting circumstances where she has resigned.*
5. *The third issue is that Mr. Gaultier is seeking an interlocutory order prohibiting the third defendant, Ms. Swords, from selling the property in Belfast, Northern Ireland. I am going to refuse that application also for a number of reasons. First of all, following the decision of the Supreme Court in* Merck Sharp and Dohme, *I am not satisfied that the plaintiff would obtain such a permanent injunction at the trial of the action.*
6. *Secondly, I am not satisfied that the first-named plaintiff in this case has set out a serious issue to be tried on this matter. There is an absolute dearth of evidence in the affidavit evidence before the Court as to the grounds on which Mr. Gaultier is seeking that application.*
7. *Thirdly, in relation to the balance of convenience, in relation to whether damages are an adequate remedy, again, it appears to me that damages could be an adequate remedy in relation to this matter. I understand that the property is in the name of Ms. Swords herself.*

8. *Finally, in relation to the balance of convenience, I am not satisfied that the balance of convenience – in fact, I am quite satisfied that the balance of convenience is in favour of not granting an order directing Ms. Swords not to sell that property. The plaintiff himself has also indicated that he is doubtful whether the Court even has jurisdiction in relation to this matter but I am not deciding that issue.*
9. *So, therefore, that deals with all of the matters that Mr. Gaultier has brought before the Court."*

Legal principles governing current application.

9. Mr. Gaultier's application today is an application by him that I would revisit my *ex tempore* judgment of 16 May, 2023 set out above.

10. Before I consider the grounds of his application, I will set out the legal principles governing such an application.

11. The legal test is set out in the decision of Clarke J. in *Re McInerney Homes Limited* [2011] IEHC 25 at paragraph [3.7] where he stated:

> *"In order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be "strong reasons" for so doing."*

12. In that case, Clarke J. approved a passage from the decision of the English Court of Appeal in *Paulin v Paulin* [2010] 1 WLR 1057 ("*Paulin*") as representing the law in Ireland. He considered the words "*strong reasons"* were an acceptable alternative to "*exceptional circumstances"* as used in some of the English case law.

13. In the Supreme Court, in the *McInerney* case [2011] IESC 31, O'Donnell J. (as he then was) upheld the decision of Clarke J. to revisit his judgment. O'Donnell J. did not

express a view on the criteria set out in *Paulin,* but as a matter of fact, applied an *"exceptional circumstances"* test (see paragraph 74 of his judgment).

14. Likewise in *SZ (Pakistan) v Minister for Justice and Law Reform* [2013] IEHC 95, Hogan J. held that *McInerney* is "*authority for the proposition that the courts cannot lightly and without grave reason re-open a final judgment".*

15. These matters have also been most recently considered by Simons J. in *G. v A Judge of the District Court and Others* [2023] IEHC 386. This judgment was delivered on 10 July, 2023.

16. In the course of his judgment, Simons J. stated as follows:

> *"4. Much of the case law on the jurisdiction to revisit a written judgment is concerned with appellate courts, rather than courts of first instance. (See, generally, In the matter of Greendale Developments Ltd (No. 3) [2000] 2 I.R. 514 and subsequent case law). This is because a party who is dissatisfied with a judgment of first instance will typically have a right of appeal against that decision. This right of appeal will generally provide a party, who is aggrieved by a first instance judgment, with an effective remedy. The grounds upon which a judgment may be appealed are much broader than the grounds upon which a court of first instance can revisit its own judgment.*
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> *5. It is only at appellate stage that the jurisdiction to revisit a written judgment assumes an especial significance. This is because an application to revisit the written judgment may be the only avenue open to a party dissatisfied with a decision of an appellate court. In practice, such applications are rare, and even more rarely successful.*
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> *6. The Court of Appeal has confirmed, in Bailey v. Commissioner of An Garda Síochána [2018] IECA 63, that a court of first instance has jurisdiction, prior to the*

order envisaged by the judgment having been drawn up and perfected, to revisit an issue decided in a written judgment. The Court of Appeal posited the following test. The High Court, if asked to revisit an issue already decided in a written judgment, must be satisfied that there are " exceptional circumstances" or " strong reasons" which warrant it doing so. The principle of legal certainty and the public interest in the finality of litigation dictate that such a jurisdiction must be exercised sparingly. The Court of Appeal went on to explain that these considerations apply with even greater force to the decision of an appellate court, which is normally to be regarded as final and conclusive.

7. A very useful summary of the principles is to be found in the judgment of the High Court (McDonald J.) in HKR Middle East Architects Engineering LL v. English [2021] IEHC 376.

8.The following considerations appear to me to be relevant to an application to revisit a decision of first instance in respect of which there is an unrestricted right of appeal. The judge who is asked to revisit their own judgment should have regard to the fact that, on most occasions, the appropriate avenue of redress for a person aggrieved by a judgment is to exercise their right of appeal. The parties to litigation are entitled to assume that, absent an appeal, a written judgment, which has been approved by the judge and has been published, is conclusive.

9. A party who is dissatisfied with a written judgment should not normally be entitled to reagitate their proceedings before the court of first instance. Were this to be allowed to happen, it would, in effect, insert an additional layer of judicial decision-making, whereby a party would seek to have the judgment revisited by the trial judge, as a prelude to an appeal if unsuccessful. This would add to delay and involve the parties incurring further costs. The proceedings would, in effect, be subject to three

hearings: (i) the initial hearing; (ii) the hearing of the application to the court of first instance to reopen its judgment; and (iii) the hearing of the appeal.

10. There will, however, be limited circumstances in which it may be appropriate to invite a court of first instance to review its own judgment. Perhaps paradoxically, an application to reopen a judgment may be appropriate where the alleged error falls at either end of a spectrum of significance. If the error is minor, and relates to a matter peripheral to the rationale of the judgment—such as, say, a mistake in the narration of events—then this is something which might legitimately be corrected by way of revision of the judgment. If the error is obvious and is very serious, and would inevitably result in a successful appeal and a remittal to the court of first instance for rehearing, then again there might be something to be said for the judgment being revisited by the court of first instance. The parties might, for example, have failed to bring a crucial statutory provision or precedent to the attention of the judge at the initial hearing, only to do so post-judgment. It might be preferable for the court of first instance to reopen the judgment to ensure that all relevant legal principles have been addressed.

11. Between these two extremes, however, an aggrieved party will normally be expected to avail of their right of appeal rather than seek to have the judgment revisited by the court of first instance.

12. It should be emphasised that the placing of limitations on the jurisdiction of a court of first instance to reopen its own judgment is not informed by a naïve belief that judges do not make mistakes. As explained by O'Donnell J. in Nash v. Director of Public Prosecutions [2017] IESC 51 (at paragraphs 6 and 7), errors can and do occur. The limitations on the jurisdiction to reopen a first instance judgment are not designed to deny an aggrieved party a remedy; rather they simply restrict that

remedy, in most cases, to a right of appeal. The rationale for so doing is that parties to litigation are entitled to assume that a written judgment, which has been approved by the judge and has been published, is conclusive, subject only to the invocation of a right of appeal within time."

17. I turn now to consider Mr. Gaultier's arguments in the light of these principles.

Mr. Gaultier's submissions in relation to re-opening the decision.

Section 41 of the Companies Act 2014

18. The first argument of Mr. Gaultier is that I should "amplify" my reasoning as to why Section 41 of the Companies Act, 2014 does not apply.

19. First, he submits that because Section 41 is not specifically mentioned in the *Aqua Fresh* judgment, that means the court in *Aqua Fresh* must not have considered Section 41. I must respectfully disagree. It is clear that the Supreme Court in *Aqua Fresh* considered the principle "that the Oireachtas did not legislate for a right to lay representation other than in proceedings on indictment." Thus Section 41 of the Companies Act, 2014 must be interpreted in the context that it is a rule of long-standing that a lay person cannot represent a limited company and there are good reasons for that rule. Section 41 cannot be interpreted in such a manner as to allow a company to circumvent such a well-established – and fully justified – rule – by signing a power of attorney to empower a person to circumvent such a rule. This would be not only a strained interpretation of Section 41, but an impermissible one. The fact that the Supreme Court in *Aqua Fresh* did not specifically mention Section 41 is not relevant. No doubt there are many other statutory sections it did not refer to either. The point is that it was considering the principle of lay representation of limited companies and setting out the justification for the rule. It was not necessary in that context for it to trawl through the Companies Act and deal with any argument which might be made in future in respect of this.

The rule – and the reasons for the rule – were clearly set out – and there was no necessity to consider Section 41 specifically in that context.

20. Secondly, Mr. Gaultier says that for the defendants to argue that Section 41 could not authorise an illegal act and to compare a construction of the rule in *Battle* to a serious criminal offence is ludicrous. However, in my view, Mr. Gaultier has over-stated the defendants' objections on this issue. The essence of the defendants' objections is that Section 41 must be read in the context of the Companies Act, 2014 – and judgments interpreting that Act – as a whole and that the courts should not interpret s. 41 in a way which allows a company to empower a person, by way of a power of attorney, to carry out any acts which would breach a rule of law – any rule of law but in this case, a clear rule of law, which provides that no lay person can represent a company. In my view, the defendants are correct in this submission.

21. Mr. Gaultier also submits that the rule in *Battle* could be overturned by "statutory exception". That is of course true. The Oireachtas could pass a law tomorrow permitting a lay person to represent limited companies. However, to date the Oireachtas has not done so. Indeed, the analysis of the Supreme Court in *Aqua Fresh* shows that, on the contrary, the Oireachtas must be taken not to have overturned the rule in *Battle* in the 2014 Companies Act, and the Act must be interpreted in that context.

The Article 7 argument

22. Mr. Gaultier also relied on Article 7 of EU Directive 2009/102 EC Company Law on Single Member Private Limited Liability Companies.

23. Article 7 provides that:

> *"A Member State need not allow the formation of single-member companies where its legislation provides that an individual entrepreneur may set up an undertaking the liability of which is limited to a sum dedicated to a stated activity, on condition that*

safeguards are laid down for such undertakings which are equivalent to those imposed by this Directive or by any other Community provisions applicable to the companies referred to in Article 1."

24. Mr. Gaultier submits that Article 7 was not addressed in the Supreme Court decisions and that it *"is debateable whether the application of the rule in Battle is compatible with the said provisions"* (see para. 7, Mr. Gaultier's submissions).

25. Mr. Gaultier also submits that, if necessary, a reference should be made to the CJEU for a preliminary ruling to decide whether the rule in *Battle* is compatible with Article 7.

26. However, if Article 7 was not considered in the Supreme Court decision of *Gaultier v Registrar of Companies*, then that is a matter for the Supreme Court. However for Mr. Gaultier to raise this issue now is an impermissible collateral attack on the Supreme Court decision in *Gaultier v Registrar of Companies*.

27. Moreover, as a matter of fact, it appears that the Supreme Court did consider Directive 2009/102/EC and in particular Recital 5 thereof, (which appears to be a Recital linked to Article 7 of the Directive) in para. 36 of its decision in *Gaultier v Registrar of Companies*. It appears that this argument was, in substance, considered and rejected as "misconceived" by the Supreme Court (see para. 38 of the judgment).

28. As O'Donnell J. (as he then was) stated at para. 38: "*Nothing in the Recital supports the contention advanced by Mr. Gaultier and accordingly, I am satisfied that there is no issue of European law which would require a reference to the CJEU*".

29. For similar reasons, I am of the view that there is nothing in Article 7 of the Directive which supports the contention advanced by Mr. Gaultier and I am of the view that there is no issue of European law on this matter which would require a reference to the CJEU.

The fiduciary duty argument

30. Mr. Gaultier also submitted that my *ex tempore* judgment did not address an argument which he had advanced which was that he had a fiduciary duty to the company.

31. However a court is not required to answer every point made or issue canvassed in a case (see *O'Reilly v Lee* [2008] 4 IR 269). As Clarke J. said in *Doyle v Banville* [2012] 1 IR 505, 509, the obligation on the trial judge is to analyse the broad case made on both sides. I did not address this argument because it was only mentioned in passing, and in any event, I did not regard it as a good point for reasons set out below.

32. As I understand his argument, it is that because he has a fiduciary duty to the company as a director, he has therefore a duty to bring proceedings in the name of the company and to represent it in these proceedings, to make claims which he believes, as a director, are in the best interests of the company.

33. In my view, this argument is also misconceived. It is of course true that directors have a fiduciary duty to the company of which they are a director. But one of those fiduciary duties is to ensure that the company is in compliance with all appropriate legislation and legal rules. One of those rules – for reasons which are well-founded – is that a company cannot be represented by a lay person including a director – but must be represented by a solicitor or counsel with a right of audience.

34. It is no part of Mr. Gaultier's fiduciary duties to the company to seek to represent it in litigation such as this.

The Article 19 TEU argument

35. Mr. Gaultier also sought to submit that the rule in *Battle* was incompatible with Article 19 TEU which provides that:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law."

36. In support of this argument, Mr. Gaultier referred to para. 22 of *Aqua Fresh* where Finlay Geoghegan J. referred to the decision of Fennelly J. in *Coffey v EPA* [2014] 2 IR 125 (where Fennelly J. considered submissions relating to the rules relating to the representation before the CJEU and the European Court of Human Rights).

37. Mr. Gaultier submitted that member states have an obligation to give an effective remedy even to incorporated bodies.

38. However, the argument that the first named plaintiff or the second named plaintiff are deprived of remedies sufficient to ensure effective legal protection is also, in my view, misconceived. The rule in *Battle* is a rule of representation. The second named plaintiff can appoint its own solicitor. There is nothing in the papers provided to this court to suggest it cannot do so. However Mr. Gaultier cannot represent it for reasons set out in *Battle, Aqua Fresh* and *Gaultier.* A company has separate legal personality. It is not Mr. Gaultier and Mr. Gaultier is not the company. He has the benefit of running his business through a limited liability company – but it comes at a cost that he cannot represent it in court.

The obligation to disapply any rule of national law which contravenes EU law.

39. Mr. Gaultier also submits that the National Court (in this case, the High Court) has an obligation to disapply any rule of national law which contravenes EU law.

40. Mr. Gaultier also relied on C-378/17 *An Garda Siochana v WRC* ECLI EU C [2018] 979 which held that:

> *"EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, … under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law".*

41. However the Supreme Court has, in substance, held in *Gaultier v. Registrar of Companies*, that the rule in *Battle* is a valid rule and that it does not contravene any EU law

which was cited to it in argument. Likewise, in this case, I do not accept Mr. Gaultier's submissions that the rule in *Battle* contravenes any provision of EU law. Moreover, I am clearly bound by the decisions of the Supreme Court in this matter.

Conclusion

42. Following on from his additional submissions, the first and second defendants were forced to file replying submissions, which they did on 19 June, 2023. Mr. Gaultier also filed further submissions on 19 June, 2023. I heard oral argument for half a day on 20 June, 2023 and I reserved my judgment.

43. However some two weeks later, Mr. Gaultier made another *ex parte* application to deliver yet further submissions. I acceded to this application and I have considered this further submission of 13 July, 2023 in this judgment.

44. Mr. Gaultier has requested that this Court would reverse its decision not to allow him to represent the company and, in the alternative, requested a preliminary reference to the CJEU on this matter. He also requested that he be allowed represent the company in these proceedings until the CJEU had considered this matter.

45. However, I am of the view that all of these arguments are without merit. They are, in substance, an impermissible collateral attack on the Supreme Court decision in *Gaultier v Registrar of Companies.* As such, these arguments are not only wrong in law and misconceived, they are also an abuse of process.

46. In the circumstances, I am satisfied that Mr. Gaultier has not put forward any "strong reasons" or "exceptional circumstances" which would require that I should revisit or amend my judgment in any way. The application is refused.
