THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 77

[2015 239]

Ryan P.
McKechnie J.
Hogan J.

Between /

ALLIED IRISH BANKS PLC.

Plaintiff/Respondent

- and -

AQUA FRESH FISH LIMITED

Defendant/Appellant

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 8th day of February, 2017

Introduction

1. Arising out of their relationship as banker and customer, the plaintiff advanced certain monies to the defendant company, which as security therefor created a first legal mortgage dated the 17th February, 2010, in favour of the Bank over certain lands set forth and described in Folio 30443F County Louth. It is alleged that the company has defaulted in its contractual obligation to repay the loan in the manner agreed, thereby giving rise to an entitlement on the Bank's part to enforce the security so given. As part of that process it has instituted the within proceedings in which it seeks, *inter alia*, an Order for Possession and, if necessary, an Order for the Sale of such lands.

2. After the service of these proceedings, Mr. Adrian Flynn, who is the Managing Director, Chairman and Secretary of the defendant company, and also its principal shareholder, made an application seeking permission for him to both enter an appearance to the originating summons and to represent and defend the company in these proceedings. He was unsuccessful in the High Court, but on an appeal, in respect of which very little is known, the Supreme Court granted him the first relief but remitted the issue of representation to the High Court. On the 19th February, 2014, Mr. Flynn entered what he described as a "conditional appearance". Nothing turns on the conditionality of such entry.

3. On a subsequent application moved on notice, Mr. Flynn sought approval to act as an advocate on behalf of the company: the High Court, in applying well-established jurisprudence, refused to permit him to so do. It is his appeal from that Order which is addressed in this judgment.

4. Mr. Flynn, in a detailed and extensive submission which runs to over 100 pages of script involving a mixture of evidence and legal argument, says, first, that the company does not have sufficient assets to engage legal representation; second, that it has a good defence to the claim as made; and, third, that his application raises multiple issues of far-reaching importance. In short, however, Mr. Flynn, who is a non-lawyer, wishes to represent the company. Faced with authority which prohibits such a step, he seeks to challenge the rule expressed in *Battle v. Irish Art Promotion Centre Ltd* [1968] I.R. 252 ("Battle"), which is that a company can only be represented in court proceedings by a solicitor or duly instructed counsel. No officer of the company can do so.

5. Mr. Flynn argues that this rule has not survived – or at least requires substantive revision by reason of – various developments since 1968, including, *inter alia*, Ireland's becoming a member of the EEC, the enactment of the European Convention on Human Rights Act 2003 ("the 2003 Act"), the passing of the Lisbon Treaty and the coming into force of the Charter of Fundamental Rights of the European Union ("the Charter). A further strand to this argument is that the rule interferes with his constitutional and Convention rights to fair procedures and access to the courts (see paras. 49-51, *infra*). In addition, he claims that even if *Battle* continues to apply, subsequent case law has modified its strict rigidity and has carved out an exception which can be invoked in "rare and exceptional circumstances", an example of which, he says, are the circumstances of the instant case (see para. 52 *et seq., infra*).

The Rule in *Battle*:

6. Mr. Mordechai Romas was the Managing Director and beneficial owner of virtually all of the issued share capital in the defendant company, which was being sued for commission allegedly earned by the plaintiffs in the sale of its products. Mr. Romas asserted in his grounding affidavit that the company had a good defence to the claim but that it did not have sufficient assets to engage either solicitor or counsel to act on its behalf. He further said that if decreed by default, the same would reflect badly on his business reputation. Accordingly, he applied to the High Court for permission to represent the company in the proceedings. Having been unsuccessful in this regard, he appealed that decision to this Court.

7. In his judgment, with which Haugh J. and Walsh J. agreed, Ó Dálaigh C.J. referred to a number of UK authorities in which courts at various levels had refused similar applications. One such was *Tritonia Ltd v. Equity & Law Life Assurance Ltd* [1943] A.C. 584, where Viscount Simon L.C. said the following at p. 586:-

> "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."

Even though *Tritonia* was the most informative of the cases cited, it seems clear that that there had been little debate, as such, about the basis or foundation for the rule or about what its parameters might be, and certainly there was no discussion about possible exceptions to it.

8. Be that as it may, Ó Dalaigh C.J. at p. 254 of the report said:-

> "This survey of the cases indicates clearly that the law is, as we apprehended it to be when this application was first made to us, viz. that, in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own *personae* for the *persona* of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own. One sympathises with the purpose which the appellant has in mind, to wit, to safeguard his business reputation; but, as the law stands, he cannot as major shareholder and managing director now substitute his *persona* for that of the company. The only practical course open to him would, it appears, be for him personally to put the company in funds for the purpose of presenting its defence. The Court in my judgment should refuse this application."

9. As is evident from this passage, the essence of the rule was firmly anchored in the legal personality of a company as a separate and distinct entity from its members, subscribers, office holders and indeed from all others. Very much the same reason explains why the statutory provision in question in *Abbey Films v. The Attorney General* [1981] 1 I.R. 158 did not fall foul of the equality provision of Article 40.1 of the Constitution (p. 172 of the Report). As the incorporation of such an entity is a decision of choice, those who regulate their business activities in such a manner had also to accept the consequences of this characterisation. Such was the logical consequence of the House of Lord's decision in *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22, in respect of which see para. 31, *infra*.

Development of the Rule:
10. This fundamental rule and its development since *Battle* can best be outlined by differentiating the position of human persons from those entities which have their own separate legal persona. Whilst this distinction cannot be rigidly maintained and although this case is ultimately concerned with the latter, nonetheless the manner in which the law relating to humans has developed is highly relevant to what the current law is regarding companies.

Personal Litigants:
11. A human person, who otherwise has legal capacity, can represent him/herself in court proceedings. This is a right both of necessity and practicality, and was originally founded in the common law many centuries ago. In addition, however, as an adjunct, *inter alia*, to the right of access to the courts and the right to a fair hearing, the same also now has a constitutional/ECHR setting. Indeed, it seems so fundamental that it must also be regarded as a personal right under Article 40 of the Constitution. That such a right exists has never been doubted and would appear to be recognised in virtually every society which espouses equality, fundamental rights and inclusiveness, and in many others which subscribe even to a lesser degree to such traditions and values.

12. Where one exercises this right, it is self-evidently the case that the presiding judge will not have the benefit of a trained lawyer acting on behalf of that party, and as a result particular challenges may arise for all concerned. For example, difficulties may be encountered (i) for the lay person when drafting, sorting or indexing documents, when articulating the precise point being argued for or relied upon, when tendering evidence or chasing the cross examination of witnesses, and, of course, given the increasing complexity of law, when drafting or making legal submissions; (ii) for the represented party, who may suffer from a lack of clarity in understanding the case he has to meet, or be required to supply or supplement core documentation, or to address unstateable points of law, all at additional cost and inconvenience; and (iii) for the judge and the justice system – such issues may include delay, the filing of voluminous but often irrelevant documentation, the making of ill-founded assertions, the moving of unmeritorious applications or the lodging of wholly unrelated case law, which is then used to advance baseless legal argument. Such are but examples of practical problems faced on an ongoing basis by our adversarial system of law, which in large measure depends for its efficiency on those before the courts having the necessary skill, competence, objectivity and self-restraint to facilitate the effective dispatch of its business on a daily basis.

13. It is of interest to note, and impossible to disagree with, the observations made by the trial judge, Keane J., in the instant case, where, having encountered some of these very problems, the learned judge at para. 39 of his judgment said:-

> "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 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 case law, expected of an appropriately skilled advocate, which, in itself, illustrates the point that was made by Sir John Donaldson M.R. in *Abse & Ors 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 v. The Environmental Protection Agency*."

As difficult as this situation may be, however, and whilst fully acknowledging the real problems inherent in lay litigation, particularly in any case of a complex nature, nonetheless, given that the right is firmly entrenched in our legal system, so also is the entitlement to exercise it.

14. This dilemma and the consequences of self-representation have long been recognised by our courts; for example, Keane C.J. noted in *R.B. v. A.S.* (Nullity: domicile) [2002] 2 I.R. 428 at pp. 446-447 that:-

> "Parties to litigation in our courts, whether it is civil or criminal, are entitled as a matter of constitutional right to fair procedures. They are also entitled, again as a matter of constitutional right, to access to the courts and it is a necessary corollary of that right that they may conduct litigation with or without legal representation as they choose. Save in special circumstances, which do not arise in these proceedings, the court has no function in relation to the representation of parties appearing before them ... The trial of cases involving lay litigants thus requires patience and understanding on the part of trial judges. They have to ensure, as best they can, that justice is not put at risk by the absence of expert legal representation on one side of the case. At the same time, they have to bear constantly in mind that the party with legal representation is not to be unfairly penalised because he or she is so represented. It can be difficult to achieve the balance which justice requires and the problem is generally at its most acute in family law cases, such as the present."

The challenge both for the judiciary and the legal system is not so much in recognising the problem but in how best to deal with it, so that justice can be served to all.

Exception Created:
15. Prior to the decision in *P.M.L.B. v. P.H.J.* (Unreported, High Court, Budd J., 5th May, 1992) ("*P.M.L.B.*"), there was very little

discussion on whether some form of exception could be grafted onto the self-representation rule and, if so, on what legal basis could such be founded. Each point was addressed in that case and also in the subsequent judgment of O'Neill J. in *Gabriel Coffey v. Tara Mines* [2008] 1 I.R. 436 ("Tara Mines").

16. Both judges were particularly impressed by the approach articulated by Somers J. in *Re G.J. Mannix Ltd [*1984] 1 N.Z.L.R. 309 ("*G.J. Mannix*"), even if that was a corporate case, where the learned judge said:-

> "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."

As it happened, Budd J. was satisfied that the circumstances in *P.M.L.B.* came nowhere near qualifying as an exception, whereas justification for the opposite conclusion can readily be seen from the facts in the *Tara Mines* case.

17. Mr. Coffey, the plaintiff in that litigation, had two personal injury actions against his employer, Tara Mines, one of which was an assessment only. Unfortunately, circumstances truly conspired against him; these included the fact that:-

> • The relationship which he once had with the solicitors originally on record for him completely and irreversibly broke down;
>
> • None of the 22 law firms subsequently asked to become involved would do so; it was no excuse that although said to be on a pro bono basis, it was in reality on the very common "no win, no fee" basis;
>
> • His request for legal aid went unanswered by the Legal Aid Board;
>
> • His health deteriorated in such a way that he could not speak and his mobility was seriously impaired;
>
> • As a result, the trial judge found as a fact that he was wholly incapable of representing himself.

He therefore sought to have his wife act for him in this litigation.

18. The application was opposed by Tara Mines, which, in the words of the trial judge, invoked the well settled principle that only parties themselves or duly qualified lawyers, who enjoy a right of audience under statute or *via* the common law, can appear as advocates in court. In that regard the company submitted that *Battle* applied and that the High Court was bound by such decision.

19. It is of some interest to note that the Attorney General, who was invited by the court to act as *amicus curiae*, did not support the objection so made. His position was that the court had an inherent jurisdiction to control and manage its own proceedings and that, in very rare and exceptional circumstances, it could in its discretion permit third party representation by an unqualified advocate.

20. O'Neill J., in relying on the earlier decision of *P.M.L.B.* and in adopting the above passage from the judgment of Somers J. in *G.J. Mannix*, admitted of an exception to the self-representation rule in the circumstances of the case before him, which he described as "so exceptional or rare as to probably be unique". Further, in agreeing with the submission of the Attorney General, the judge was satisfied that the inherent jurisdiction argument was well founded, and that an exception could be made as part of the court's intrinsic authority to manage its own affairs. As the 'rare and exceptional circumstances' argument had not been raised in *Battle*, it followed as a matter of course that neither was the basis upon which it might rest; accordingly, the decision of Ó Dalaigh C.J., which founded the rule exclusively on the separate legal nature of a company, did not foreclose on what O'Neill J. proposed or on his rationale for so doing. Consequently, the learned judge was of the view that he was not bound by that decision and proceeded to the conclusion as outlined.

21. In so doing, the question of what conditions might be imposed on the third party individual who was afforded such a right was not discussed. Matters such as knowledge, competence or ability to contribute, efforts to obtain legal representation or legal aid, the arguability of the issue(s), and the terms of the third party's authorisation to act, are but some that come to mind. In light of my conclusions in this case, it is unnecessary to further discuss these matters.

22. The provision in the Aarhus Convention whereunder an intended litigant in environmental or related matters can seek from the court, on an *ex parte* basis, a "not prohibitively expensive costs order", gave rise to the Supreme Court decision in *Stella Coffey, No2GM. Ltd & Ors v. The Environmental Protection Agency* [2014] 2 I.R. 125 ("*Stella Coffey*"). There were in all twelve personal applicants and one by a company, No2GM, all of whom wished to challenge the legality of a particular decision made by the EPA. As such applications were made at various times, the same were heard by three different High Court judges, each of whom refused the orders sought.

23. On the opening of the appeal a Mr. Percy Podger, a non-party and a non-lawyer, sought an unconditional right to act as an advocate on behalf of each applicant and to present their individual appeals without restriction. As Mr. Podger had expressly disavowed any interest in acting as a McKenzie friend, the Court, following a brief discussion on the difficulties which he faced, adjourned for a short period so as to ascertain whether any one or more of the applicants would move his or their application in person. Such a step was available to all, even if simply to adopt what any one or more of the others had said. On the resumption no party indicated any willingness to do so.

24. Fennelly J., with whom the other members of the Court agreed, conducted a wide ranging review of the justification for restricting the rule of representation to qualified lawyers. He referred to *G.J. Mannix* with apparent approval, and acknowledged that the decision of Somers J. had created what he described as a "slight modification" of the strict rule regarding companies. The learned judge then referred to the view of O'Neill J. that as the rule could also be founded within the inherent jurisdiction of the court to regulate its own affairs, the *Battle* case did not prevent that judge from creating the exception which he did in *Tara Mines*.

25. Fennelly J. then summarised the position as applying to personal litigants. At para. 38 of the judgment he said:-

> "38. 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 …"

Accordingly, Mr. Podger was not permitted to represent the personal litigants in their application. The position of the corporate applicant, No2GM, is dealt with at paras. 35 e*t seq., infra.*

A Point to Note:
26. A point which arises from the above case law is worth noting. It is whether there must exist both rare *and* exceptional circumstances, howsoever defined, before an exception to the rule can be countenanced. I do not believe that such is the case, nor do I feel this is either necessary or justified. Such a requirement is not evident from the judgment of Somers J. in *G.J. Mannix,* nor has O'Neill J. asserted it. In fact his concluding line, namely, that the combination of circumstances in *Tara Mines* were "so exceptional or rare as to be probably unique" (emphasis added), suggests the contrary. The *Stella Coffey* decision if anything supports the latter viewpoint, as Fennelly J, when addressing the lay individuals, referred to "rare occasions" in which exceptions have been permitted and when referring to No2GM stated that the company had not demonstrated "any exceptional circumstances" to justify allowing Mr. Podger to represent it. These observations therefore apply to all litigants. Accordingly, it seems to me that the focus of any modification to the rule is adequately captured by the reference to "exceptional" circumstances, and that the inclusion of the word "rare" is apt to confuse. This is because it seems to call for an examination of extraneous matters which may not be material to the issue before the Court. In this regard I agree with the views of the Company Law Reform Group which are later referred to.

Collateral Support: *McKenzie* Friend:
27. Although an altogether distinct facility, but one nonetheless created in aid of personal litigants, it is worth noting that an individual may be able to avail of the services of a McKenzie friend, so called after the title of the action clarifying the role of such a person (*McKenzie v. McKenzie* [1970] 3 W.L.R. 472). In his judgment in that case, Davies L.J. adopted the following statement made as far back as *Collier v. Hicks* (1831) 2 B. & Ad. 663 at 699:-

> "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

That such a statement correctly represents the law was first confirmed in this jurisdiction in *R.D. v. McGuinness* [1999] 2 I.R. 411, and was latterly reaffirmed in *Stella Coffey*.

28. Although having its more recent origin in family law proceedings, it has never been doubted but that such an entitlement extends to all matters civil. As legal aid is available in criminal cases to anyone who cannot afford to underwrite his costs, I know of no case where an accused person has sought the assistance of such a friend instead of, or for that matter in addition to, legal representation.

29. A McKenzie friend can offer much assistance in a variety of ways to the party with whom he/she is associated; this includes giving advice, prompting new lines of thought, making suggestions, having available relevant documentation, preparing for what is anticipated and identifying what is next required, to give but some examples. However, such person has no right of audience and cannot act as an advocate. The party himself must articulate the case which he is asserting. The McKenzie friend must perform his function in a manner consistent with accepted court practice and procedure, and must show due respect for acknowledged court decorum; further, he must remain fully detached from the opposing parties, their witnesses and all persons present in support of them. Overall he is expected to behave in such a manner as reflects the mutuality of respect essential for all players participating in the administration of justice.

30. Permission to be assisted by such a friend can only result from a successful application to that end. This will always be a matter of discretion for the judge in charge, who may decline or accede to such request, either unconditionally or subject to such conditions as the circumstances may require, an example of which could perhaps be the preservation of the *in camera* rule. Such permission may be withdrawn at any time. The requesting party must demonstrate that the application is *bona fide* and genuinely made: if there is evidence to the contrary at that time, the request should be refused *ab initio*; moreover, if subsequent events should establish such evidence, or if an ulterior motive should become apparent, any such permission previously granted should be immediately terminated.

Company Litigants:

Salomon v. Salomon
31. In order to fully explain and therefore fully understand both the genesis and essence of the rule precluding companies from being represented by anyone other than solicitor or counsel, it is necessary to have some basic understanding of their separate legal personality. Such principle, that a company is an artificial legal entity, separate and distinct from the members of which it is composed, was first unequivocally stated by the House of Lords in *Salomon v. Salomon & Co Ltd* [1897] A.C. 22 ("*Salomon v. Salomon*"). The facts, whilst interesting in themselves, need not detain us save to note that in all courts other than the final appellate court, Mr. Salomon and his company were identified as one for liability purposes in circumstances where the company was unable to pay its debts.

32. In his judgment, Lord Halsbury said:-

> "[I]t seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself …
>
> … the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence."

Lord Macnaghten, described as that "great Irish judge" (Keane on *Company Law*, 5th Ed., para. 11.04), stated that:-

> "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' … The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

33. The basic principle has applied thus ever since, meaning that a company is not the agent of its subscribers, irrespective of the degree of control or shareholding which they may have, nor does it act as their trustee. Likewise, such shareholders, no matter how

much influence they exercise or equity they hold, will not be regarded as one with the company.

34. However, many exceptions to this rule have been created over the years at both legislative and judicial level, almost all under the rubric of that enigmatic phrase, "lifting the corporate veil", but none of these have any direct effect on the rule in issue in the instant case. Notwithstanding such intervention, *Salomon v. Salomon* remains, in essence, the authoritative statement of the fundamental principle of separate legal personality to this day. It is from this characterisation that the inherent disability, or "infirmity", as described in *Battle*, flows.

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

> "35. This ruling proceeds from the fact that the incorporated company is, as a strict matter of law, a legal person separate from its members and from its directors and management. Nonetheless, in practice, the courts have to deal on a daily basis with difficult cases involving unrepresented companies, frequently because there are simply no funds to provide for legal representation. The company, being a purely legal or notional person, cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although this is far from ideal, it represents the present law."

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

> "39. Nor do I think that the attempt to represent the company No2GM Limited gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstances which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the court's brief adjournment of the hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit."

37. Two important points emerge from *Stella Coffey*: the first is the Court's endorsement of the exception to the strict rule which O'Neill J., in relying on *G.J. Mannix*, applied in *Tara Mines*, and also of that exception applying to a corporate entity in this jurisdiction. In so doing, the Court could hardly have intended that its judgment should apply only to a shareholder of a company, thereby leaving open the position of officers or directors. Such would be a very narrow construction of its overall perspective. The second is an acknowledgement that the basis for the Court establishing such an exception is found within its inherent jurisdiction to manage, control and regulate its own affairs. Such is the case whenever it is sought to apply the exception at either a personal or non-personal level.

38. It therefore seems to me that the law from the Supreme Court in this regard is no longer simply that as outlined in *Battle*, but also now includes the judgment in *Stella Coffey*. I regard the latter case as complimentary to *Battle*, and certainly not in any way inconsistent with it. In fact, no suggestion to that end as such has been made by either party in this appeal. Accordingly, I regard both as representing the law from that Court, which of course I am and remain bound by.

Further Domestic Developments:

Section 868 of the Companies Act 2014:
39. The modification based on exceptional circumstances, as above discussed, has of course been created judicially; the Oireachtas has also taken an interest, however, but only in a restricted sense, confining its intervention to situations where a company is prosecuted on indictment. Even then, as s. 868 of the Companies Act 2014 shows, the relaxation is modest, as the duly appointed person has a limited representative function. Such person may answer any question required to be put to the company (s. 868(2)), exercise any right of objection or election on the company's behalf (s. 868(3)) or enter a plea in writing to the offence as charged (s. 868(4)). However, the representative cannot go further. Similar exceptions were contained in the corresponding subsections of s. 382 of the Companies Act 1963, which provision was first enacted to deal with the problems identified in *The State (Batchelor & Co (Ireland) Ltd.) v. Ó Leannáin* [1957] I.R. 1.

40. The real relevance of these provisions, however, is not in the limited exception they have created in respect of criminal offences, or even in the severe restrictions imposed within that exception, but rather in what they do not permit a representative to do on behalf of a company. Section 868(6) of the 2014 Act provides that the appointment of such a person under the section does not qualify that person to "act on behalf of the company before any court for any other purpose". Strikingly, s. 382(5) of the 1963 Act likewise provided. As is clear, this exception in its original setting pre-dates even *Battle* and evidently it was open to the legislature in drafting the 2014 Act, or at any time in the preceding fifty years, to broaden its scope so as to permit company representation by non-lawyers in other circumstances. This it has not done, instead retaining the narrow exception for indictable matters and continuing the express prohibition that a person so appointed shall not be qualified to act other than for the purposes of the section.

41. In coming to this conclusion I acknowledge an alternative approach to a provision such as that created by s. 868 of the 2014 Act. It is that such a measure could be regarded as being in the nature of a *lex specialis* designed to deal with a specific issue in a specific context, and that no wider implication should be drawn from it. The reason why I believe that the former view is more correct is the legislative context in which the section was enacted. Such involved the most major reassessment, review and consolidation of company law, in all its aspects, in more than 50 years. If the situation had been more specific, and in particular if the provision had been adopted in a criminal statute, then perhaps the latter view might be more appropriate. This is not what occurred, however. Accordingly, the broader interpretation is thus justified in this case.

Reports:
42. The Law Reform Commission, in its Report on the Consolidation and Reform of the Courts Acts (LRC 97 – 2010), did not recommend altering the current position. In its discussion of what categories of person should have a right of audience, it stated that "[t]hese would obviously include practising barristers and solicitors, and litigants in person, though not a representative of a body corporate" (para. 2-98; the footnote to that section refers to **Battle**).

43. The rule in *Battle* was also considered by the Company Law Review Group ("C.L.R.G.") as recently as March, 2016. It concluded that "[g]iven the stated policy of the Irish Courts to work around the rule where the requirements of justice dictate, and the unique position of the courts to be able to measure the need for such exceptions, the Company Law Review Group remains to be convinced of the need for wider reform of the rule" (C.L.R.G., *Report on the Representation of Companies in Court*, March 2016, at p. 5). It further recognised that "the Courts retain the discretion to hear from non-lawyers where justice requires and are best placed to

determine whether justice so requires in the case of companies who are party to court proceedings" (p. 12).

Judicial Pragmatism:
44. As the C.L.R.G. has identified, the courts in this jurisdiction have consistently shown a high level of pragmatism when faced with the Battle issue. The following are but examples which come to mind as illustrating the point:-

(1) In *Re Marble & Granite Tiles Ltd* [2009] I.E.H.C. 455, Laffoy J., when dealing with a winding-up petition, allowed a director of a contributory company to make submissions to the court. The learned judge stated that:-

"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."

(2)(i) In *McDonald v. McCaughey Developments Ltd and Martin McCaughey* [2014] I.E.H.C. 455, the trial judge, following *Battle* and *Stella Coffey*, held that the personal defendant, who was the Managing Director of and one of three shareholders in the company, could not act on its behalf in proceedings where both defendants wished to challenge the validity of the Deed by which the plaintiff was appointed as receiver over the company's assets.

(ii) The Court of Appeal, in a judgment by Kelly J. ([2015] I.E.C.A. 159), held that the *Battle* issue did not as such arise as Mr. McCawley in his own right was named as a co-defendant in the proceedings. Accordingly, he was in a position to assert any point, make any argument and adduce any evidence pertinent to the issues. Any material so advanced would "… inure for the benefit of the company", a viewpoint not dissented from by the receiver.

(3)(i) The third case to which reference can be made is an example on the personal side: *Kennedy v. Harrahill* (High Court, 11th June, 2010). This involved a bitter family quarrel between the executor of an estate and Mr. Kennedy, who claimed that he had purchased certain lands from his deceased brother in 1972, and so that such lands did not form part of the residue to which his sister was entitled. This dispute gave rise to multiple actions in both the Circuit Court and the High Court, virtually all of which, even at appellate level, Mr. Kennedy lost.

(ii) In the action above referenced, Mr. Kennedy sought ownership of these lands, which of course was at the root of the basic issue. As it happened, I was the trial judge. At each of the several pre-trial hearings, Mr. Kennedy made very serious allegations against the executors both surviving and dead, their solicitors and the different solicitors who once appeared for him, as well as a great number of other people, most of whom were standing on the periphery. More importantly, however, he also made an allegation against every judge who was involved at Circuit, High and Supreme Court level, this to the effect that he had never been given a fair or full hearing by any one of them. This sense of injustice was ingrained at a deep and intense level, and was forcibly agitated by Mr. Kennedy.

(iii) Though highly dubious of these assertions, nevertheless, as the dispute had been ongoing for at least a decade or more, and as the plaintiff had spent many months incarcerated for refusing to vacate the lands, the court decided, without objection, to re-examine the core issue of land ownership and to do so without reference to any of the decisions previously made.

(iv) At the hearing I permitted Mr. Kennedy's son, an accountant by occupation, to effectively present the case on his father's behalf. I was totally satisfied that such a step was essential to try and bring finality to this very damaging litigation. Admirable as his son's efforts were, Mr. Kennedy could not establish title; unfortunately, far from that being the end of the matter, the litigation, in one form or another, has continued long thereafter.

(v) As a postscript: Mr. Kennedy in fact remains a regular visitor to the Four Courts to this very day.

Summary:
45. To conclude on this limited survey of the domestic position regarding natural persons, the related *McKenzie* situation, and the rule in Battle, can I summarise as follows:-

Human Persons:

(i) A human person who otherwise has legal capacity is entitled as of right to represent him or herself in court proceedings. Such a right, which has existed at common law for centuries, has a direct association with various constitutional rights, such as the right of access to the courts and the right to fair procedures, and with the European Convention on Human Rights, particularly with the provisions of Article 6 thereof.

(ii) In exceptional circumstances a third party may be permitted to represent another individual where a refusal to so allow would be destructive of justice.

McKenzie Friends:

(iii) An individual may avail of the services of a McKenzie friend to assist him or her by prompting, taking notes, and quietly giving advice; however, this entitlement is in no way analogous to the exception mentioned above, as the party in question must still present the case himself; the friend, having no right of audience whatsoever, may not in any way advocate on his behalf.

Companies:

(iv) A company, or any other artificial or fictitious person with a distinct legal persona, can be represented only by a lawyer duly accredited with a right of audience in our courts.

(v) There is no right for a secretary, director, shareholder or any other officer to appear in court proceedings on behalf of a company.

(vi) However, this rule does not interfere with the court's undoubted discretion to permit an individual person to act on behalf of the company where justice so demands.

(vii) The manner in which this might be done will reflect the presenting circumstances of each particular case, with the courts generally adopting a pragmatic approach to such relaxation on both the personal and corporate side.

(viii) The existence of such judicial flexibility when the rule might defeat the interests of justice, which is evident in the case law, is

not an insignificant factor when the very existence of the rule is under challenge.

Edges of the Rule/Exception:
46. From the above discussion on the rule and the exception, a number of specific matters arise for consideration in the instant case. Before addressing these, however, could I refer back for a moment to the valuable contribution which the Report of the C.L.R.G., published in March, 2016, has made to this issue. In essence, the Report does not favour any substantive change to the primacy of the basic rule, or to the exception as presently framed. In coming to this conclusion it views the absence of any definition regarding 'exceptionality' as a considerable strength in itself, in that it allows the presiding judge to exercise what it calls "discretionary pragmatism" whenever the dictates of justice so demand.

47. In general terms I agree with these views, and in particular with the point last mentioned. The discretion available to the trial judge, which is of considerable significance in the context of any argument pertaining to the constitutional right of access to the courts or to rights under Article 6 of the Convention, should, I feel, be maintained, certainly in the absence of any comprehensive review giving rise, perhaps, to new statutory provisions or rules of court. I therefore feel, as matters presently stand, that it seems unnecessary and most probably unwise to have the rule ring fenced in any formalistic way.

48. Having said that, however, it must be acknowledged that certain events and circumstances would appear to have a decisive influence on whether, in any given situation, its consequences should be mitigated or neutralised. As Mr. Flynn wishes to challenge the correctness of this situation, it becomes necessary to give consideration to some of the more obvious matters in this respect. In so doing, I neither wish nor intend to be overtly prescriptive with anything I say, remaining, as I do, fully conscious of the principle of *stare decisis.*

The Challenge of Mr. Flynn:
49. Mr. Flynn has argued in the first instance that the rule in *Battle* no longer applies, or at least requires to be substantially reconsidered, by virtue of various developments that have occurred since that case was decided in 1968. He points in particular to Ireland joining the EEC, now the EU; the enactment of the 2003 Act; the passing of the Lisbon Treaty; and the giving of effect to the Charter. The thrust of his argument is that these issues self-evidently were not considered in *Battle* and as a result the rule now requires modification to take these developments into account. Mr. Flynn asserts that Irish law is failing to progress with the rest of modern society and that it is stuck in the past on this issue. He therefore submits that the underlying principle is no longer good law, that the Battle decision need not necessarily be afforded full respect under the doctrine of *stare decisis*, and, accordingly, that he should not be prevented from representing his company.

50. Very much these same arguments were considered by the learned High Court Judge at paragraphs 40-51 of his judgment in this case. I agree with his analysis and conclusion. The *Battle* judgment remains binding upon this Court (subject to the exception above discussed) and none of the developments referred to by Mr. Flynn affect the authority of that decision. Moreover, not one of these issues touches upon the fundamental basis for the rule, that being the separate legal personality of the company. This is a case concerning domestic law exclusively and does not involve the implementation of EU law. Therefore our membership of the Union, the passing of the Lisbon Treaty and the coming into force of the Charter cannot avail Mr. Flynn.

51. In addition, even if this Court were minded to reconsider the rule in the context of the modern understanding of the interlocking constitutional guarantees regarding the administration of justice and access to the courts (Articles 34.1 and 40.3) and fair procedures (Article 40.3), as well as any submission based on Article 6 of the Convention, the position remains that the *Battle* decision itself is binding on this Court as it was on the High Court judge. Thus the critical issue is whether there exist any "exceptional circumstances" such as to persuade this Court to exercise its inherent discretion to depart from the rule, as discussed above.

Exceptional Circumstances
52. Mr. Flynn submits that even if the rule in *Battle* survives, the facts of his case bring it within this exception, which was recognised in *Stella Coffey* as applying to companies. In so doing he points, first, to the unique, exceptional and rare nature of the company itself, which was attempting to farm fish in an environmentally friendly way in land-based systems. It was apparently the only company in Ireland conducting that type of operation. Second, he says that it took nine and a half years before the company could commence business, this because of administrative and other impediments outside of the company's control. This, he claims, is an exceptional circumstance. Third, Mr. Flynn submits that he himself was the controlling mind of the company and that he now owns 100% of it. Finally, he submits that the company is impecunious. The company and its shareholders are entitled to have access to the courts, but the company will not be able to take a further step in the proceedings unless he is permitted to represent it.

53. None of these circumstances are "exceptional" and they do not warrant this Court departing from the fundamental rule. The nature of the company, even if it is unique in the sense of the business it conducts, is not a rare or exceptional circumstance for the purposes of invoking the Court's inherent jurisdiction to permit a company to be represented by a director. It is not the distinguishing features or characteristics of the company itself which fall to be considered in this regard, but rather the circumstances of the case. If it were otherwise then the rule would very swiftly suffer considerable erosion. Nor is the time that it took to establish the company germane to this question.

54. As to the third and fourth issues raised, neither is in any respect exceptional; indeed, as has been pointed out elsewhere, impecuniosity is a regrettably common state of affairs. These issues do, however, require some further consideration.

One Man Company:

55. In the G.J. Mannix case, which was cited with approval in P.M.L.B., Tara Mines and *Stella Coffey*, and which established the basis which led to the exception recognised in those cases, McMullin J., at p. 315 of the report, suggested that the situation of so called "one-man companies" may fall within the exception. In essence, the rationale for this view was based on knowledge: that is, that senior officers can be expected to have as much knowledge of a company's business and financial affairs as an individual has of his own. In particular, the learned judge stated that:

> "[I]t may seem 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 or managing director of a small 'one-man' company which is no more than his business alias."

56. McMullin J. further reasoned that the director of such a company would be "as well acquainted with the facts of a dispute involving his company as he would be if a party to it personally." In addition, the learned judge considered that the principle in *Salomon v. Salomon* would suffer "no erosion" if the director was given the right to represent such a company. A similar exception for small corporate entities was discussed, in almost identical terms, by Ponnan JA of the Supreme Court of Appeal of South Africa in

57. I would, with great respect, differ from this view. Not only does such encroach upon the principle that a company is an individual, separate from all others, it also in fact entirely overlooks the basic distinction between fictitious or artificial personae, on the one hand, and physical persons, on the other, albeit for a limited purpose. This very point is also an answer, one of many, to the alleged comparator with the right of audience which human persons necessarily have.

58. Although the *Battle* principle can undoubtedly raise difficulties in a variety of ways, including for the type of company in question, it must be remembered that this is not the intention of the rule, nor does it seek to discriminate against or work an unfairness on a small, medium or indeed any type of company. Any adverse consequences which flow from the rule are merely the logical corollary of the *Salomon* principle which, it must be remembered, allows persons to greatly benefit and profit from conducting their business through this form of legal entity without the risk of being liable for any losses. If individual and company can be fused on the basis of knowledge, and in effect become one and the same for the purpose of legal representation, why should not the same basis also permit a creditor to stand down the legal personality of that company? If that should happen, it would of course undo at the most basic level the strict separation that Mr. Salomon fought for in the first place so many years ago. In my view, therefore, "knowledge" alone could not support any such step, particularly when the consequences could be far reaching. In addition, the information which one man has can be imparted to another quickly and most often easily, as advocates can testify on a daily basis. Accordingly, I am not attracted to the underlying reasoning within which this possible exception has been judicially discussed.

Impecuniosity: a Pre-Condition:
59. I have no doubt whatsoever but that a company which is acting in the normal course of business or has available adequate funds – or sufficient means of obtaining such funds – to engage solicitor and/or counsel should not be permitted to deviate from the general rule. To do otherwise would be to seriously erode the fundamental principle of not permitting unlicensed operators to act as legal representatives or as advocates on behalf of others. Such a step would be entirely destructive of the legal process, and in my view should be not countenanced. A much more problematic issue, however, is the following.

Impecuniosity, of itself, not sufficient:
60. Impecuniosity of a company, on its own and without more, will rarely if ever justify an exemption. In virtually every comparable jurisdiction such is the prevailing situation. As has been said numerous times, the lack of funds in the first instance is neither rare nor exceptional. From time to time, however, one finds an occasional judgment in which a company's inability to pay for representation is considered as a significant factor in the exercise of the court's discretion. One such case is *Arbuthnot Leasing International Ltd v. Havelet Leasing Ltd* [1990] B.C.C. 627, in which Scott J., having espoused such view, continued to contextualise his position by adding:-

> "…I see no reason why an individual should be forced to incur the horrendous costs of commercial litigation if he is willing to appear in person…"

Shortly thereafter, however, the more traditional position was reasserted in *Radford v. Freeway Classics* [1994] 1 B.C.L.C 445 and *Floods of Queensferry Ltd v. Shand Construction Ltd & Ors* [1997] 81 B.L.R. 49. This apparent conflict ceased to have any importance in England and Wales after the implementation of civil procedural reforms in those jurisdictions in the late 1990s (see para. 71 *infra*).

61. There are of course legitimate views on both sides of this debate. Some of these have been expressed elsewhere in the judgment, but could I add two further observations, one of which falls on the side of sustaining the rule, with the other being more challenging to its continuation.

62. The first is this: to permit directors or other officers to represent companies and so pursue potentially hopeless causes without fear of personal risk or of an adverse personal costs order, would be to impose a considerable burden not only on the other party to the action, who would surely incur costs that they had no hope of recovering, but also on the scarce and limited resources of the courts. Moreover, such persons are not ethically restrained and apart from the contempt process are otherwise free of judicial control. In many respects, therefore, such persons can freewheel through the system.

63. The second point, whether discussed in the context of the Irish constitution or the Convention, is one which is not free of concern. In a great number of cases, the lack of resources is the pivotal reason for non-legal representation. Where that arises, it may create a real problem for the company and for its subscribers, investors and many others. Unless some solution is found, its voice will not be heard, a situation described by Fennelly J. in *Stella Coffey* as being "far from ideal", but nonetheless one which represents the present law (para. 35, *supra*). Whilst I understand why this is so, what is not so obvious is why, in a terminal situation, impecuniosity largely counts for nothing. Take a case such as this, which is not as directly on point as many others are. If there is an arguable point to be made regarding the validity of the receiver's appointment, and if such cannot be articulated, then almost certainly the receiver's pathway will follow the normal course, namely, that the assets will be realised and, if any shortfall should result, Mr. Flynn, who is a personal guarantor, will become individually liable. Furthermore, the company may or may not be liquidated or indeed dissolved. In such circumstances, where its very survival might be in issue, it might be thought that such is a situation where the exception could apply. Having raised these issues, however, it is unnecessary to go further with this debate for the following reasons.

Decisive Issue:
64. The key point in *Battle* was the lack of funds so as to engage legal representation. The Supreme Court did not consider such a state of affairs as being sufficient to step down the rule. Even though the "exceptional circumstances" point was not discussed, nonetheless, even if I were now so minded to utilise that avenue in favour of Mr. Flynn, I could not do so, as such a step would be acting clearly in the teeth of *Battle*. Whilst the application of Mr. Ramos could have been rejected on the basis that the purpose of representing the company was to safeguard his personal business reputation rather than any asset of the company itself, that was not the actual basis of the Court's decision. The *ratio decidendi*, in my view, was centrally focused on poverty. As the issue of funding did not arise in *Stella Coffey*, that particular point was not further discussed. As a result, I am satisfied that I am bound by the Battle decision and accordingly, on that basis, I would dismiss this appeal.

Other Jurisdictions:
65. In maintaining this rule, Ireland is not out of line with other jurisdictions regarding the issue of representation. In this respect, it can be said that the rule or principle set out in *Battle* remains the default position across much of the common law world. It is applied, albeit with greater or lesser stringency, in the United States, New Zealand, Scotland, South Africa, and Hong Kong. The situation in England, Northern Ireland and Australia is set out at paras. 71 to 73 below.

66. The rule is followed in the United States. Justice Souter, delivering the opinion of the majority of the US Supreme Court in *Rowland v. California Men's Colony*, 506 U.S. 194 (1993), stated at 201-203 that:

> "It has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel. *Osborn v. President of Bank of United States*, 9 Wheat. 738, 829 (1824); *see Turner v. American Bar Assn.*, 407 F. Supp. 451, 476 (ND Tex. 1975) (citing the 'long line of cases' from 1824 to the present holding that a corporation may only be represented by licensed counsel) ("*Turner*")… As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases, the lower courts have uniformly held that 28 U. S. C. § 1654, providing that 'parties may plead and conduct their own cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney. See, e. g. … *Jones v. Niagara Frontier Transportation Authority*, 722 F. 2d 20, 22 (CA2 1983) (corporation); *Richdel, Inc. v. Sunspool Corp.*, 699 F. 2d 1366 (CA Fed. 1983) (*per curiam*) (corporation) …"

67. In *Turner*, the U.S. District Court for the Southern District of Alabama stated that:

> "Corporations and partnerships, both of which are fictional legal persons, obviously cannot appear for themselves personally. With regard to these two types of business associations, the long standing and consistent court interpretation of § 1654 is that they must be represented by licensed counsel. … [T]here is a long line of cases starting with *Osborn v. Bank of United States*, 9 Wheat. (22 U.S. 738), 6 L.Ed. 204, and continuing through… *Flora Construction Company v. Fireman's Fund Insurance Company*, 307 F.2d 413 (C.A.10, 1962), which have held that under 28 U.S.C.A. § 1654 and its predecessor statutes a corporation may only be represented by licensed counsel. Several of these cases, particularly *Nightingale, Hearst* and *White Lamps*, have emphasized the importance of the Centuries-old concept of a Court having a lawyer before it who has been qualified to practice, and who is subject to the Court's control … Corporations and partnerships, by their very nature, are unable to represent themselves and the consistent interpretation of § 1654 is that the only proper representative of a corporation or a partnership is a licensed attorney, not an unlicensed layman regardless of how close his association with the partnership or corporation." (p. 476).

This position largely prevails at state level also, albeit with exceptions recognised in some lower courts and small claims courts.

68. In New Zealand, the general position at High Court level is that set out in the *G.J. Mannix* case, discussed above. That decision was applied by the Court of Appeal in *New Zealand Cards Ltd v. Ramsay* [2012] N.Z.C.A. 285 and *Dreamtech Designs and Production Pty. Ltd v. Clown Fish Entertainment Ltd* [2015] N.Z.C.A. 491, and as recently as 2016 by the High Court in *Sovereign Books Limited v Commissioner of Inland Revenue* [2016] N.Z.H.C. 1313, with Asher J affirming that the general rule will only be departed from in exceptional circumstances, which did not present in that case. Although there is an exception in New Zealand whereby an officer can represent the company in cases before the District Court (section 57(2) of the District Courts Act 1947), there is no equivalent provision in the New Zealand High Court Rules. However, in *Commissioner of Inland Revenue v. Chesterfields Preschools Ltd* [2009] N.Z.C.A. 334 the Court of Appeal was willing to exercise its discretion to permit a director to represent an impecunious company in circumstances where the director in question was also a named defendant in the proceedings and had received legal training, the appeal was being prosecuted by an experienced Crown counsel and there was no other prospect of representation for the respondent companies. Similarly, the High Court has allowed a director to represent the company where the issues raised in the case were not complex (*Para Ltd v. David Ellis Productions Ltd* (1992) 6 N.Z.C.L.C. 67), but has not extended such permission where the case was technical and involved complex legal issues (*Gold Metal Hortech Ltd v. Edwards & Williams Greenhouses Ltd* (2001) 9 N.Z.C.L.C. 262).

69. In Scotland, the Second Division of the Inner House of the Court of Session affirmed the general position in *Secretary of State for Business, Enterprise and Regulatory Reform v. UK Bankruptcy Limited* [2010] CSIH 80, with Lord Justice Clerk stating that:

> "[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, I can think of good reasons why a company should not be represented by a director whose own actings may have caused the litigation."

Lord Clarke made the observation in his Opinion that there may be force in the observation that the strict application of the general rule, in particular where a company is genuinely unable to pay for representation and has a *prima facie* valid claim or defence which cannot be vindicated, could be incompatible with Article 6 ECHR; however, those circumstances did not present in that case.

70. The rule has also been applied by the Supreme Court of South Africa in *Manong & Associates PTY v. Minister of Public Works and anor* [2009] ZASCA 110, where Ponnan JA recognised the residual discretion of the Court to relax the general rule where the administration of justice so requires. The rule is strictly applied in Hong Kong: in Wing Hang Bank Limited v. Kit Choy Development Limited & Choy Bing Wing [2005] HKCA 287, the court was unwilling to allow a director to represent the company even though he was also personally named as a defendant (cf. the approach of Kelly J in *McDonald v. McCaughey Developments Limited* [2015] IECA 159).

71. The strict implementation of the rule has been relaxed to a certain extent in England in light of wider civil procedure reforms. Rule 39.6 of the Civil Procedure Rules 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."

The accompanying Practice Direction PD 39A provides that:

"5.3. 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."

However, certain cases applying this Rule suggest that it is not as permissive as the Practice Direction suggests. In *Shared Network Services Limited v. Nextira One UK Limited* [2011] EWHC 3845 (Comm), Flaux J gave permission for a director to represent a company under Rule 39.6 whilst noting that "at least before the Commercial Court, that is the exception rather than the rule." In *Pall Mall Investments Ltd v. Leeds City Council* [2013] EWHC 3307 (Admin), His Honour Judge Roger Kaye QC stated that "[w]hile the CPR

envisage and make provision for a company to represent itself, this is not an indulgence still less unlimited."

72. A similar position pertains in Northern Ireland (see the Rules of the Court of Judicature in Northern Ireland: Order 5, Rule 6(2), laying down the general rule that a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor, and 6(3), providing for permission to be given in the same manner as under the English Civil Procedure Rules). In *Ulster Weavers Home Fashions Limited v. Waterfall NI Limited* [2013] NIMaster 2, a director was permitted to represent the company in circumstances where the company could not afford legal representation and where it was alleged that there was a strong defence and counterclaim which would otherwise not be advanced before the Court.

73. In Australia, the approach to this issue varies from State to State. In Victoria, Order 1.17(1) of the Supreme Court (General Civil Procedure) Rules 2015 provides that "[e]xcept where otherwise provided by or under any Act or these Rules, a corporation, whether or not a party, shall not take any step in a proceeding save by a solicitor." In New South Wales, on the other hand, a corporation may appear in any court by a solicitor or by a director of the company.

74. As the above demonstrates, the preservation of the rule in this jurisdiction is not in any way fundamentally at variance with what applies elsewhere in the common law world. That would suggest that the existing system does not demand immediate remedial measures of any significance.

Conclusion:
75. In conclusion, I am satisfied, first, that the rule in *Battle* still survives and that it applies to the presenting circumstances in this case. Secondly, there are no exceptional circumstances which would justify any departure from the rule. Accordingly, I would dismiss the appeal.