

BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

AND
JUDGE TERENCE FINN

RESPONDENT

TIPPERARY COUNTY COUNCIL AND IRELAND
AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Ms. Justice Faherty delivered on the 28th day of June, 2018

1. The within proceedings concern an application brought by the applicant company where leave is sought for judicial review by way of orders of *certiorari* to quash decisions made by the respondent in proceedings at Cashel District Court on 22nd February, 2016.

2. The grounds upon which leave is sought are said to be the persistent refusal of the respondent to recuse himself from the said proceedings despite what is alleged are several demonstrations of bias, contrary to the right to a fair and impartial hearing. It is alleged that the respondent acted as a judge in his own cause by refusing to recuse himself, by refusing to allow the Digital Audio Recording (DAR) to be active and by refusing to order discovery of relevant information from the first notice party and the Valuation Office, thereby causing the applicant to be at a disadvantage.

3. The leave application is grounded on the affidavit of William Fitzgerald, a director of the applicant company.

4. By order of Humphreys J. on 28th November, 2016, it was directed that the State should be put on notice of the proceedings and that before the issue of leave be determined that the preliminary issue of whether it is appropriate that the applicant be represented by one of its directors and not a professional legal representative be tried.

5. It is common case that the application for leave was signed by Mr. Fitzgerald. Mr. Fitzgerald asserts that he is a director of the company. Accordingly, the question before the Court involves, *inter alia*, an examination of whether a director, vested with the appropriate authority to bind the company, can file papers in court and initiate proceedings on behalf of the company.

6. Mr. Fitzgerald submits that there should be no bar to his lodging papers in court on behalf of the company if he is duly authorised to do so and he argues that in this context the position would be analogous to a lay person lodging papers in court. Mr. Fitzgerald invokes s. 41 of the Companies Act 2014 ("the 2014 Act") in aid of his arguments that he has the right to represent the company in court.

7. Section 41 of the 2014 Act provides:

"41. (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.

(2) A deed signed by such attorney on behalf of the company shall bind the company and have the same effect as if it were under its common seal."

8. Counsel for the State (the second and third notice parties) submits that s. 41 of the 2014 Act has no bearing on the right of the Court to regulate who appears before it. I accept this proposition. The import of s. 41 is simply to permit a person to stand in the shoes of the company and to act as the company. To my mind, the power of attorney referred to in s.41 does not divest the company, or the attorney acting in its place, of the company's incorporated status. Even if Mr. Fitzgerald had power of attorney (of which there is no evidence), that does not transform Mr. Fitzgerald's position into something analogous to a natural person who wishes to conduct his or her litigation in person. Thus, Mr. Fitzgerald's reliance on s. 41 cannot be dispositive of his entitlement to file pleadings on behalf of the company or to represent it in court.

9. On the issue of Mr. Fitzgerald having signed the statement of grounds, counsel for the State advances the following argument: The authority of an agent to bind a company may be set out expressly in the constitution of the company, in the resolutions of the members of the company or in the resolution of the Board of Directors ("the Board"). However, a director has no inherent powers; and a director has no power to act individually as agent of the company without express authority conferred by the constitution of the company. It is submitted that even where the constitution of a company does contain such an express power, the appointment of a directorship can be revoked by the Board at any time.

10. Section 38 of the 2014 Act provides:

"38. (1) Subject to subsection (2), notwithstanding anything contained in its constitution a company shall have, whether acting inside or outside of the State—

(a) full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers and privileges.

(2) Nothing in subsection (1) shall relieve a company from any duty or obligation under any enactment or the general law."

11. Counsel submits that the power to bind the company generally is analogous to the power to submit the company to the jurisdiction of the court. It is accepted that, as a matter of company law, there is no reason why a director could not be delegated to file proceedings in court on behalf of the company and submit the company to the Court's jurisdiction.

12. However, it is argued by the State that, as a matter of public policy, it is questionable whether the Central Office should accept documents signed by a director. It is argued that a director is an officer of the company. He or she is not a litigant in person. If a director is to represent a company by signing papers to be lodged in court, it is submitted that the Central Office would be required to conduct an investigation to determine whether the director has been vested with the appropriate authority to bind the company. At a minimum, it is suggested that when the court documents are lodged in the Central Office, a director who has signed such documents would also have to submit an up-to-date copy of the company's constitution and, if the express power to bind the company was not included in the company's constitution, a copy of the resolution of either the board of directors or the members of the company delegating the necessary authority to the director to submit the company to the Court's jurisdiction. It is also submitted that there are public policy reasons in terms of economy of resources and effective administration of justice which suggests that proceedings filed by a company director on behalf of the company should not be accepted.

13. The State also maintains that the acceptance by the Central Office of documents signed by a company director in such circumstances would not correct any jurisdictional defect. It is submitted that where a natural person or other legal entity is represented by a solicitor as an attorney, the solicitor has the capacity to act on behalf of the person or entity. Moreover, the solicitor is an officer of the court. A solicitor has an overarching duty to the court to ensure the effective administration of justice. It is argued that a director is an officer of the company and thus the ultimate allegiance of a director and a solicitor are markedly different.

14. Mr. Fitzgerald submits that for the purposes of lodging the requisite papers in court a notarised resolution by the board of directors would be sufficient to prove that a director had authority to bind the company.

15. In general, it is a requirement that pleadings lodged in the Central Office are either signed by the litigant in person or by the counsel or solicitor acting on the litigant's behalf. (O. 19, r. 3 of the Rules of the Superior Court ("RSC")).

16. Order 84, RSC however does not require that an *ex parte* application for leave to apply for judicial review or the statement of grounds be accompanied by a signature.

17. It seems to me that if the papers lodged with the Court in this case complied, on their face (as they appear to) with the requirements of Order 84, then there was no basis for the Central Office not to accept the papers. The State has not said that the papers as lodged do not comply with Order 84. This is not to say, of course, that in the course of the case, a party opposing the application for judicial review may seek proof that the leave application was initiated with the authority of the company.

18. However, the issue as to whether Mr. Fitzgerald should have a right of audience to represent the company in the leave application is a matter which Humphreys J. raised the issue of Mr. Fitzgerald's entitlement to represent the company in the leave application and directed that that issue be tried before the leave application would be proceeded with. . This, to my mind, is the salient issue to be determined by this Court.

Who has a right of audience in court?

19. The right of audience in the courts by the legal profession is regulated as follows: Barristers enjoy a right of audience under common law subject to the requirement that they be instructed by a solicitor who must, in general, be in attendance. Section 17 of the Courts Act, 1971 extends the right of audience to solicitors:

"A solicitor who is acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practise (within the meaning of the Solicitors Act, 1954) who is acting as his assistant shall have a right of audience in that court."

20. No other profession or individual enjoys the right to speak for another's interest in a court. It is submitted on behalf of the State that the restriction on the right of audience does not exist for the purpose of creating monopoly rights for the legal profession; rather it is designed to serve the administration of justice and thus the public interest.

21. It is well established that in addition to the right of audience of the legal professions, an individual also has a right to appear in court as a litigant in person appearing on their own behalf. In general, however, a litigant cannot be represented by a lay person. However, the courts have also long recognised that a lay litigant enjoys a right to assistance from a friend who may take notes, make suggestions and give advice during the hearing. (*McKenzie v. McKenzie* [1970] I.R. 1 (at p. 33)).

22. The involvement of the McKenzie friend in litigation was traditionally limited to taking notes, making suggestions and giving advice. It is however accepted that a court may ask a McKenzie friend to address the court on a point, if clarification is required. However, the McKenzie friend does not enjoy a general right of audience.

23. In wholly exceptional cases, a litigant may be represented in court by a lay person. In *Coffey v. Tara Mines Limited* [2008] 1 I.R. 437, the plaintiff suffered from specific communication difficulties due to illness and, in consequence, was incapable of representing himself. A serious breakdown had occurred in the relationship between the plaintiff and his solicitor. The plaintiff was unable to secure alternative legal representation. Accordingly, he sought to discharge his solicitor and be represented for the purposes of the trial of the action by his wife who was neither a solicitor nor a barrister. The question which arose for consideration was whether a lay person can represent a litigant in proceedings.

24. In the course of his decision on the matter, O'Neill J. had regard to the relevant authorities in this jurisdiction, including *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252 (discussed further hereunder) and the decision of the New Zealand Court of Appeal in *Re. G.J. Mannix Limited* [1984] 1 NZLR 309. In the latter case, Somers J. stated:, at p.316

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

25. In *Coffey v. Tara Mines*, O'Neill J. was doubtful as to whether the decision of the Supreme Court in *Battle* precluded the court from adopting the approach of Somers J. in *Re. G.J. Mannix Limited*. He ultimately concluded that the issue of whether the court had an inherent power of the type described by Somers J. had not been raised or argued in *Battle*. He stated:,

"[32] In my view the judgment of the Supreme Court [in the Battle case] is not to be seen as an authority which excludes an inherent jurisdiction in this court to manage and control its own proceedings and in a rare and exceptional

cases to permit an unqualified advocate to represent another litigant.”

O'Neill J. concluded that the circumstances of the case before him were “so exceptional or rare as to probably be unique.” (at para. 34)

Right of audience on behalf of a company

26. The right of audience of a shareholder or a director of a company to appear on behalf of the company in court was addressed in *Battle*. In that case, the managing director, who was also a major shareholder of the defendant company, brought an ex parte motion seeking liberty to conduct the defence to the plaintiff's action on behalf of the company. The High Court refused the application and the matter was appealed to the Supreme Court. The Supreme Court dismissed the managing director's application. In his judgment, Ó Dálaigh C.J. observed that he had not come across any Irish reported case on the issue. He noted the dicta of Viscount Simon L.C. in *Tritonia Limited v. Equity and Law Life Assurance Society* [1943] AC 584, as follows:

“In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf.”

27. In deciding that a managing director or shareholder is not entitled to a right of audience on behalf of the company, Ó Dálaigh C.J. opined:, at p. 254

“[I]n 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.”

28. As to what might constitute a particular injustice such as would allow an exception to the general rule that a company director is not entitled as a matter of law to represent a company in a winding up, this was considered by Laffoy J. in *Dublin City Council v. Marble and Granite Tiles Limited* [2009] IEHC 455. She stated:

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

29. The issue as whether a non-lawyer could represent a company again arose in *Coffey v. the Environmental Protection Agency & Ors.* [2014] 2 I.R. 125.

30. In the course of his judgment, Fennelly J. opined:

“[24] The fundamental rule is that the only persons who enjoy a right of audience before our courts are the parties themselves, when not legally represented, a solicitor duly and properly instructed by a party and counsel duly instructed by a solicitor to appear for a party. That rule does not exist for the purpose of protecting a monopoly of the legal professions... The limitation of the right of audience to professionally qualified persons is designed to serve the interests of the administration of justice and thus the public interest.

...

[26] It is true that a party to proceedings (other than a corporation) has the right to appear for him or herself and to plead his or her case. This is a matter of necessity as well as right.”

31. With reference to the decision in *Battle*, Fennelly J. went on to state:

“[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 that is far from ideal, it represents the present law.

[36] A slight modification of the strict rule regarding companies was adopted in the New Zealand case of Re G.J. Mannix Ltd [1984] 1 N.Z.L.R. 309, considered by Budd J. in P.M.L.B. v. P.H.J. (Unreported, High Court, Budd J., 5th May, 1992). Cooke J. in the New Zealand Court of Appeal had thought that the court should retain a residual discretion to hear unqualified advocates but considered that it would be a reserve or rare expedient.

[37] In Coffey v. Tara Mines Ltd. [2007] IEHC 249, [2008] 1 I.R. 436 at p. 444, Ó Néill J. thought that Battle v. Irish Art Promotion Centre Ltd. [1968] I.R. 252 did not preclude him from exercising an inherent jurisdiction where, in his view, there was in existence “a combination of circumstances that are so exceptional or rare as to probably, be unique”. He permitted the plaintiff to be represented by his wife because he had formed the view that the action would “proceed no further and that is an outcome or consequence that would be destructive of the interests of justice”.

[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. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of 13 litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons.

[39] Nor do I think that the attempt to represent the company No2GM Ltd. gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the court's brief adjournment of the

hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit."

Mr. Fitzgerald's EU arguments

32. It is argued by Mr. Fitzgerald that the rule in *Battle*, as endorsed by the Supreme Court in *Coffey*, appears to contravene Article 54 of the Treaty on the Functioning of the European Union (TFEU).

33. Article 54 provides:

"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

34. Mr. Fitzgerald's position is that given that Article 54 TFEU applies to all companies of all Member States it must necessarily also apply to domestic companies. He submits that, pursuant to Article 54, companies are to be treated in the same way as natural persons who are nationals of Member States. He maintains that given that it is not a requirement for a natural person to be represented by a qualified legal professional and that a natural person may represent him or herself, it follows that a company is also not required to be represented by a legal professional.

35. The State's position is that Article 54 is not an article of general applicability. It is submitted that Article 54 expressly provides the context in which the article is to be interpreted, i.e. in the context of Chapter 2 TFEU which provides the framework for the rights of nationals of one Member State who set up and establish in another Member State.

36. I agree with this argument. Article 54 is not an authority for the proposition that companies are to be treated the same as natural persons regardless of context. Article 49 TFEU provides the context for what is contained in Article 54. It provides:

"Article 49

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

37. It is clear from the provisions of Chapter II TFEU, and in particular from Article 49, that Article 54 relates solely to the freedom to establish companies across the EU and, having so established in Member States, companies are to be treated in the same way as natural persons who are nationals of Member States. It does not say that companies have to be treated the same as natural persons in every circumstance regardless of context. In those circumstances, Mr. Fitzgerald's reliance on Article 54 TFEU is misplaced. I find that Article 54 has no bearing on the law in this jurisdiction which requires a company to be represented by a lawyer.

38. Furthermore, the approach of the EU itself to how parties to litigation in the European Court of Justice (ECJ) should be represented is of assistance to the Court in rejecting Mr. Fitzgerald's arguments. Article 19 of the Statute of the Courts of Justice of the European Union provides:

"The Member States and the institutions of the Union may be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an advisor or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in the same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisors and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in Rules of Procedure.

As regards such advisors and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure."

Thus, the right of audience of an individual, who is not a Member State or an institution of the European Union, before the ECJ requires that the individual be represented by a lawyer.

39. The scope of Article 19 of the ECJ's Statute was considered by the ECJ in case T-226/10 *Prezes Urzedu Komunikacji Elektronicznej* (23rd May, 2011). The ECJ held:

"16. According to the settled case-law, it is apparent ... from the use of the term 'represented' in the third paragraph of Article 19 of the Statute of the Court of Justice, that, in order to bring an action before the General Court, 'a party', within the meaning of that article, is not permitted to act itself must use the services of a third person authorised to practise before a court of a Member State ...

17. That requirement to use a third person is based on a view of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. That conception reflects legal traditions common to the Member States and is also to be found in the Union legal order, as is precisely demonstrated by Article 19 of the Statute of the Court of Justice ... "

40. While the ECJ's judgment related to the issue of in-house lawyers representing their employers, counsel for the State submits that the dictum is equally applicable in the context of individuals seeking to be permitted to represent the entity of which they are a director. I accept counsel's submission in this regard. My acceptance is reinforced by the comments of Fennelly J. in *Coffey v. EPA* in relation to the manner in which the ECJ regulates representation before it.

41. Fennelly J. referred to the approach of the ECJ on the issue of representation in the following terms:

[40] Finally, Mr. Podger purports to demand that the court provide some reference to a provision of European Union law excluding him from representing the appellants. That would be to reverse the proper nature of the inquiry, which is whether there is any provision of European Union law precluding the court from applying the fundamental tenets of its legal system adopted in the interests of the protection of the integrity of the administration of justice. In fact, article 19 of the Statute of the Court of Justice of the European Union regulates the representation of parties in proceedings before the court. Member states and the institutions of the union must "be represented before the Court of Justice by an agent appointed for each case". The agent "may be assisted by an adviser or by a lawyer." Most materially, the article then provides:-

"Other parties must be represented by a lawyer.""

42. The learned Judge went on to state:, in the same paragraph

"It is clear...that there is no warrant for the claim that, in the application of European Union law...by the Court of Justice...there is any obligation on the court of a member state to permit a litigant to be represented other than by a duly qualified lawyer."

43. It is also the Fitzgerald's contention that the rule in *Battle* is contrary to Articles 20, 47 and 52 of the Charter of Fundamental Rights of the European Union ("the Charter"), as cited hereunder:

"Article 20

Equality before the law

Everyone is equal before the law

...

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

...

Article 52

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

44. Mr. Fitzgerald also referred the Court to the judgment of the ECJ in *Amministrazione della Finanze dello Stato v. Simmenthal SpA* (Case 106/77) [1978] ECR 1978-00629 and the judgment of the ECJ in *Wilhelm & Ors. v. Bundeskartellamt* (Case 14/68 13th February, 1969), in aid of his arguments that the decision in *Battle* is contrary to EU law, and that national laws which conflict with EU law must be set aside and allowing precedence to EU law.

45. In response to Mr. Fitzgerald's reliance on Articles 20, 47 and 52 of the Charter, counsel for the State submits that there is no basis for the reliance on the Charter since no issue of EU Law arises in the within case with regard to the right of a director of a company to represent the company in court.

46. Article 51 of the Charter outlines the scope thereof, in the following terms:

"1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

47. The issue of when the EU Charter can be invoked was considered by Keane J. in *AIB plc v. Aqua Fresh Fish Limited* [2015] IEHC 184, wherein application was made by the managing director and principal shareholder in the respondent company for an order permitting him to represent the company in the proceedings. Keane J. opined as follows:

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

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

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

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

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

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

...

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

48. To my mind, apart from the Court's finding that no issue of EU law arises in respect of Mr. Fitzgerald's claimed entitlement to represent the company in court, Mr. Fitzgerald has failed to point to any EU element in the matter of the dispute between Munster Wireless Limited and the respondent such as would entitle him to invoke the provisions of the Charter. Accordingly, I adopt the *dictum* of the learned Keane J. in finding that the Charter has no applicability to the issue which this Court has to decide.

Alleged incompatibility of Irish law with the European Convention on Human Rights ("The Convention")

49. Reliance is also placed by Mr. Fitzgerald on the judgment of the European Court of Human Rights ("EctHR") in the case of *Arma v. France* [2007] ECHR 5568. In that case the applicant had set up a company of which she was the manager and sole shareholder. The company was later placed under judicial administration. The national court made an order for the company's liquidation and appointed a liquidator. An appeal by the applicant against the liquidation order was declared inadmissible by the national court on the grounds that the managing director of a company in liquidation had no authority to act on its behalf and that the appeal should have been lodged by *an hoc* representative.

50. As the company had a legal personality separate from that of its manager, the EctHR had to examine whether the applicant, as the company's manager, had an interest in having access to a court in connection with the judicial liquidation of her company. The Court found such an interest. It found that in her capacity as manager and sole shareholder of the company, the applicant had a particular interest in its continuity and in the protection of the capital she had invested in it. Her intervention in the appeal proceedings in the national court would have been in the company's interests since she could possibly have enabled the company to continue trading or at least she could have submitted arguments in favour of a continuation. It also found that the applicant could also validly claim a direct personal interest in lodging an appeal since serious accusations had been made against her personally which could have repercussions for her future. It further found that an *ad hoc* representative would not physically have had the time to lodge an appeal on behalf of the company and its manager with the statutory ten-day time limit for appeal. The Court accordingly found that the applicant's Article 6 rights had been infringed as a result of her being unable to represent a company in which she was a stakeholder due to the excessive restrictions on her access to court.

51. Mr. Fitzgerald's submission is that the decision in *Battle* contravenes Article 6.1 of the Convention for the same reason that a violation was found by the EctHR in *Arma v. France*.

52. Counsel for the State submits that *Arma v. France* does not address the issue of a director or shareholder of a company appearing on behalf of the company in court. It is further submitted that the EctHR did not find that requiring an *ad hoc* representative was unfair; rather the Court questioned how realistic it was that an *ad hoc* representative could be instructed within a restrictive time period of ten days. It is submitted that the decision in *Arma v. France* concerns the issue of locus standi and does not concern issues surrounding a right of audience.

53. I was referred by counsel for the State to the decision of the Scottish Court of Session (Outer House) in the Petition of *Her Majesty Secretary of State for Business Enterprise and Regulatory Reform for an order to windup UK Bankruptcy Limited* [2009] CSOH 50. The issue in that case was the petitioner's challenge to the right of a director and shareholder of the company to address the court in his capacity as a director, instead of opposing the application to wind up the company in his capacity as a shareholder. Reliance was placed by the petitioner on the decision of the House of Lords in *Tritonia Limited v. Equity and Law Life Assurance Society* [1943] SC (HL) 88 (a decision cited by Ó Dálaigh C.J. in *Battle*).

54. In *Tritonia Limited v. Equity and Law Life Assurance Society*, the Lord Chancellor (Viscount Simon) stated:

"When an appeal is argued before the House of Lords, no one has any right of audience except counsel instructed on behalf of a party or (when the litigant is a natural person) the party himself. In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf."

55. In the course of his submissions in the *UK Bankruptcy Limited* case, a director of the company, Mr. Mason, advanced the argument that *Tritonia Limited v. Equity and Law Life Assurance Society* was an old authority. It was suggested that it had been superseded by legal developments. Mr. Mason also raised an argument pursuant to Article 6 of the Convention.

Lord Hodge, writing for the Scottish Court, addressed the Article 6 argument in the following terms:

"[9] Article 6 of the European Convention on Human Rights gives everyone a right to a fair trial. That right includes, in most circumstances, the right to attend a court hearing and participate effectively in the proceedings. Companies and other non-natural persons can be victims in terms of the Convention. But that does not necessarily mean that in relation to representation in court a company should be treated in precisely the same way as a party litigant. A company as a legal person is not the same as a natural person. Where a person chooses to obtain the benefits of limited liability by trading through the medium of a registered company, he has also to accept the disadvantages to which separate legal personality gives rise. Thus as a general rule I see no incompatibility between Article 6 and the requirement that a company be represented in court not by a director but by a suitable qualified legal representative who has responsibilities to the court and who is subject to professional discipline."

[10] I consider, nonetheless, that exceptional circumstances may arise in which the court has to take steps to allow a company or corporation to be represented in court in order to ensure a fair hearing under Article 6. The Rules of Court do not provide for such a circumstance but the court has an inherent power to regulate its own procedures which it can use in this context. It appears to me that there needs to be careful consideration of the circumstances in which the court may authorise a person who is not a lawyer with rights of audience to represent a company or corporation. Parties have not addressed to me on this issue. It is likely to require the court to hear well thought out submissions from interested parties. ..."

56. Notwithstanding Mr. Fitzgerald's arguments, I find no incompatibility between Article 6 and the requirement in Irish law that a company be represented in court by a qualified legal representative. Insofar as there might be exceptional circumstances such as might warrant a relaxation of the rule in Irish law so as to allow a fair hearing as envisaged by the rules of natural or constitutional justice, or Article 6 of the convention, there is no evidence put before this Court that any such circumstances arise in the present case.

57. In light of Mr. Fitzgerald's reliance on the Convention, it is, I believe, also apt to note the provisions of r. 36 of the Rules of Court of the ECtHR. It provides that an applicant before the ECtHR must be represented at any hearing decided on by the Chamber, "unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative." Any such representative shall "be an advocate authorised to practise in any of the Contracting States and resident in the territory of one of them, or any other person approved by the President of the Chamber."

58. To my mind, the aforesaid reinforces the validity of the law as it is in this jurisdiction and, to paraphrase Fennelly J. in *Coffey v. EPA*, r. 36 cannot be said to aid any argument that there is an obligation on the court of a Contracting State to permit a litigant to be represented in person. I find that, in fact, the provisions of r. 36 sit harmoniously with the approach adopted by the Irish courts on the issue of representation. In actual fact, the approach of the Irish courts is more accommodating of representation by lay persons.

59. It is not a requirement for a natural person to be represented before the Irish courts by a legal professional, meaning that a natural person can represent himself or herself. However, for the reasons as set out in *Battle* and *Coffey*, the position is not the same for a company. It cannot represent itself in court.

60. Furthermore, insofar as Mr. Fitzgerald places reliance on *Arma v. France*, I find that Mr. Fitzgerald's circumstances cannot be said to equate to what presented in that case. Unlike the applicant in *Arma v. France*, Mr. Fitzgerald does not come before the Court in the context of a liquidation case or a petition to wind up Munster Wireless Limited. Nor, were that to be the case, is it the position that Mr. Fitzgerald would not be heard in a winding up petition or liquidation *qua* his position as a director or shareholder of the company. Were it the case that there was an application to wind up the company and Mr. Fitzgerald appeared without legal representation, as set out by Laffoy J. in *Dublin City Council v. Marble and Granite Tiles Limited*, he would be listened to "to ensure that no injustice would be perpetrated".

61. In the present case however, Mr. Fitzgerald simply seeks an unrestricted right of audience to represent the company in the application for leave for judicial review. Having regard to the relevant legal authorities in this jurisdiction (*Battle* and *Coffey v. EPA*), the Court finds that Mr. Fitzgerald's arguments as to his right to represent the company in the leave application must be rejected.

The request for a preliminary reference to the ECJ

62. In the course of his submission, Mr. Fitzgerald impressed upon the Court that in light of an apparent contradiction between Article 54 of the TFEU and the prohibition in this jurisdiction on directors representing companies in litigation, a referral to the ECJ under Article 267 TFEU is required. It is of course the case that where an issue of EU law arises, this Court has a discretion as to whether to refer a question to the ECJ. However, as a prerequisite to a consideration of the exercise of its discretion in relation to any such reference, the Court must find, in the words of Fennelly J. in *Coffey v. EPA*, "[a] provision of European Union law precluding the court from applying the fundamental tenets of its legal system", in respect of which the Court has a question for referral to the ECJ as to the interpretation of primary or secondary EU law, or seeks a ruling by the ECJ on the validity of the implementing law in this jurisdiction. In short, however, for the reasons already set out herein, the Court finds that no issue of EU law arises in the present

case. Accordingly, no question of a consideration of a referral arises.

Mr. Fitzgerald's supplemental submission with regard to the Data Protection Acts 1988 and 2003

63. Subsequent to the initial hearing in this matter, Mr. Fitzgerald made a supplemental submission to the Court with regard to the Data Protection Acts 1988 and 2003 and Directive 95/46/EC. He asserts that he has been denied information by the third Notice Party relating to the matter the subject matter of the leave application under the data protection legislation on the basis that the Data Protection Acts 1988 and 2003 do not apply to a limited company.

64. Therefore, he requested that in addition to a referral to the ECJ in relation to the issue of the representation of companies before the courts, that any referral would encompass the issue of companies not being treated as natural persons with regard to data protection. He suggested that the question for referral be amended to "What, if any, are the restrictions on a company being treated as a natural person?"

65. Without commenting on the merits of the argument being advanced by Mr. Fitzgerald in relation to the Data protection Acts 1988 and 2003, I am satisfied that his submission to the Court is misguided. The sole preliminary issue which the Court must determine is whether Mr. Fitzgerald is entitled to represent the company in the leave application. For the reasons set out in the within judgment, the Court has determined that issue in accordance with the legal principles set out in *Battle and Coffey v. EPA*, and has rejected Mr. Fitzgerald's arguments with regard to Article 53 TFEU, the EU Charter and the Convention.