THE HIGH COURT

[2016 No.249MCA]

IN THE MATTER OF

AN APPLICATION PURSUANT TO THE LEGAL PRACTITIONERS (IRELAND) ACT 1876, SECTION 3 AND THE ARBITRATION ACT 2010, SECTION 21(7)

BETWEEN

JAMES ST JOHN DUNDON, MAEVE CALLANAN AND GLENN COOPER (PRACTISING UNDER THE STYLE AND TITLE OF DUNDON CALLANAN, SOLICITORS)

APPLICANTS

AND

BUTLER HOMES LIMITED

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 5th May, 2017.

I. Representation of Butler Homes

(i) Overview.

1. Butler Homes Limited is the respondent to the within proceedings. It is not represented by any legal advisors. The reason it is not represented, it is asserted by Mr Michael Butler, a director of the company, is because it does not possess the necessary funds to pay for professional legal fees, and its board and shareholders do not possess the necessary resources to put the company in sufficient funds to afford professional legal representation. Mr Butler attended in court when the within application came on for hearing and sought to speak for the company; however, counsel for the applicant contended that Mr Butler, as a director of the company, had no right to be heard. The position, with respect, is not quite so stark. The Court of Appeal's recent decision in *Allied Irish Banks plc v. Aqua Fresh Fish Limited* [2017] IECA 77 makes this clear. There the Court of Appeal held that the longstanding rule identified by the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd* [1968] IR 252 still applies, albeit that, following the decision of the Supreme Court in *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Stella Coffey and Others* [2013] IESC 11, in exceptional circumstances a trial judge may depart from the rigours of the rule in *Battle*. Although the decision in *Aqua Fresh Fish* issued after the hearing of the within application, it represents precedent that is binding on this Court and also offers a useful prism through which to view the longstanding decision of the Supreme Court in *Battle* and its more recent decision in *Coffey*.

2. The judgment in *Aqua Fresh Fish* helpfully examines the rationale for the rule in *Battle* in some detail. It indicates that that rule: is anchored in the legal personality of a company; and proceeds on the rationale that as the incorporation of an incorporated entity is a voluntary decision, those who regulate their business activities in such a manner have to accept the consequences of same. It might, perhaps not unreasonably, be contended by some that it does not follow as a logical consequence of this proposition (as opposed to a consequence of the rules of precedent that bound the Court of Appeal in *Aqua Fresh Fish* and which bind this Court in the within proceedings) that a company or other corporation should not be capable of being represented in civil proceedings by, *e.g.*, a director who is not a practising legal professional, if such person has been authorised by the company or corporation to appear on its behalf and the trial court permits it. Indeed, as was acknowledged by the Court of Appeal in *Aqua Fresh Fish*, the current civil procedure rules in both England and Northern Ireland expressly allow such an arrangement, albeit that the Court of Appeal was able to identify two English cases which suggest that the granting of such permission may remain uncommon in England. The reason separate legal personality is considered to have the logical consequence aforesaid, apart from being the result, ultimately, of (a) the binding decision in *Battle*, as modified by *Coffey*, and (b) the consequential effect of the rules of precedent, might therefore be contended by some, and perhaps not unreasonably, to be attributable to a choice of logic. The discussion in *Aqua Fresh Fish* of self-representation by humans and the role of so-called *McKenzie* friends points to one rationale, perhaps the pre-eminent rationale, why the logic-choice made in *Battle* was settled upon, being the practical difficulties that self-representation is perceived by some to yield as regards the efficient despatch of court proceedings. But while courts possibly may be better able to administer justice fairly and efficiently when all sides are represented by legal professionals, it might, perhaps not unreasonably, be contended by some that it is inimical to the proper administration of justice that (a) a defendant company should face going unheard from in proceedings to which it is party and where its interests stand to be affected adversely, simply because (b) that company and its shareholders and directors cannot afford the substantial funds necessary to engage the services of professional legal advisors on a prolonged basis. A legal system that, in the context under consideration, chooses to favour a logic which, in its practical effect, favours the richer over the poorer, renders itself open to due criticism; and there is also the point, to which the Court of Appeal in *Aqua Fresh Fish* draws attention, in its reference to the Opinion of Lord Clarke in *Secretary of State for Business, Enterprise and Regulatory Reform v. UK Bankruptcy Limited* [2010] CSIH 80, that there may well be force in the observation that the strict application of a Battle-like rule, in particular in circumstances 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 of the European Convention on Human Rights. Whether the discretionary exercise of judicial pragmatism in this context is sufficient to meet adequately such practical concerns as present for impecunious companies owned and/or operated by impecunious individuals, or whether a more formalised approach akin to that which operates at this time in England and Northern Ireland is to be preferred, is a point on which reasonable people may perhaps reasonably differ, though this Court admits that it finds much to attract it in the current English and Northern Irish approach.

3. Circumstances akin to those touched upon by Lord Clarke in *UK Bankruptcy Limited* were contended to present in the within proceedings; however, there was not sufficient evidence before the court for it to conclude that they did in fact present. In consequence, the court had to proceed on the basis that there were not those "*exceptional circumstances*" referred to, inter alia, in *Aqua Fresh Fish* (echoing the decision of the Supreme Court in *Coffey*) that would justify the court in allowing a departure from the rigours of the rule in *Battle*. As a result, in the within case, counsel for the applicant read out the entirety of the affidavit evidence sworn by Mr Michael Butler and sought to present all of the issues arising as fairly as he could without compromising his professional responsibilities towards his own client. This would be something of an ethical 'tight-rope walk' for any counsel. At the hearing of the within application that tight-rope was carefully and properly traversed by counsel for the applicants, who also helpfully addressed the brief couple of points that Mr Butler politely but persistently insisted on making at the hearing. The foregoing was the best that could

be done in the circumstances, by reference, *inter alia*, to such binding precedent as the decision in *Aqua Fresh Fish* (in which the Court of Appeal was itself bound by the decision in *Battle*). Even so, the court must admit that it has the dissatisfying impression that the binding rule in *Battle* (as modified in *Coffey*) is, in practice, failing small, cash-strapped companies whose directors and shareholders are likewise cash-strapped, and all by reference to logic that appears not to be unassailable, from which there have been departures in other jurisdictions and which, at least in the circumstances canvassed by Lord Clarke in *UK Bankruptcy Limited*, may yet be found, in a suitable case, to be incompatible with Art. 6 of the European Convention on Human Rights.

II. The Substance of the Within Application

(i) Background.

4. The applicant firm of solicitors represented Butler Homes Limited in respect of the compulsory acquisition by Limerick City Council of certain of the company's lands and was retained at all material times by Butler Homes Limited in arbitration proceedings between company and council in which the purchase price of the lands was determined, resulting in an award on 24th November, 2011, of, *inter alia*, €110k to Butler Homes Limited. An award of costs was also made against Limerick City Council in favour of Butler Homes Limited; unfortunately a further dispute has arisen between the parties as to the nature of the costs that may be sought of Limerick City Council, with the applicant firm claiming that less costs may be claimed in this regard than Butler Homes Limited considers may properly be recovered. The applicant firm now comes to court seeking, *inter alia*, (1) a declaration that the applicant firm is entitled to payment and receipt of the said costs, (2) a declaration that the applicant firm is entitled to a charge over the said costs, and (3) such order or orders as to the court appears just and proper for the raising and payment of the said costs. There was some mention at the hearing of the within application that there may be a certain urgency to the within application on the basis that as the arbitration issued on 24th November, 2011, the award of costs thereunder may soon become statute-barred. However, the award issued under seal, a 12-year limitation period thus applies by virtue of s.23 of the Arbitration Act 2010 and s.11(5)(b) of the Statute of Limitations 1957 (as amended) and so the expiry of the applicable limitation period is as yet some years hence.

(ii) Allegations Made but never Proven.

5. In his affidavit evidence before the court in the within application, Mr Butler alleges that Butler Homes Limited never saw these award monies, with such monies as were received being used by the applicants to settle outstanding legal fees without authority. These are among the most serious allegations that one could make of a legal professional and it is extremely important to note that such allegations of misbehaviour as are made by Mr Butler in this regard are but allegations: they have never been established, they may never be established, they may in fact be completely untrue. Mr Dundon is considerably aggrieved by what has been alleged in this regard, and in his affidavit evidence avers, *inter alia*, that "*I take grave exception to the completely unfounded and untrue allegation made by Mr Butler that either I or this firm unlawfully took [any monies]…without any agreement or permission from the Respondent*." He also points to the fact that Mr Butler's allegation has, it seems, already been investigated and rejected by the Law Society, which body rightly treats alleged solicitor transgressions in respect of client funds with the utmost seriousness.

(iii) 'No Foal, No Fee' Arrangement.

6. One notable feature of the within application is that it is acknowledged by the applicant firm that it and all persons engaged in the arbitration acted on a 'no foal, no fee' (or contingency fee) basis. No details of this arrangement have been furnished to the court in evidence. In general, such an agreement has the effect that a client: (a) if successful, will be liable for (i) solicitor fees, (ii) expert fees, and (iii) outlays; and (b) if unsuccessful, will be liable for (i) expert fees, (ii) outlays, and (iii) usually, the costs of the winning side. But anything lawful can be agreed in contract law and, despite adjourning matters briefly to facilitate the applicants in this regard, no affidavit evidence has been placed before the court as to what was agreed by the applicant firm and/or such other persons as were engaged in the proceedings that have led to the within application; and no copy of the 'no foal, no fee agreement' has been exhibited. One slight difficulty that this presents in the within application is that it is not clear that the entirety of the fees over which the s.3 charge is sought are fees owing to the solicitor.

(iv) Section 3 of the Act of 1876.

7. The within application is made under s.3 of the Legal Practitioners (Ireland) Act, 1876, and s.21(7) of the Arbitration Act 2010 (which latter provision applies s.3 of the Act of 1876 to arbitration proceedings as though an arbitration were a proceeding in the High Court, with the High Court given the power to make declarations and orders accordingly). Section 3 of the Act of 1876 provides as follows:

> *"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit matter or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit matter or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs charges and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."*

8. No case-law concerning s.3 of the Act of 1876 was placed before the court. However, although s.3 speaks of property "*recovered or preserved*" and not just property to which, for example, a legal right has been established by way of an order for costs such as that made by the arbitrator in favour of Butler Homes Limited against Limerick City Council, the court happens itself to be aware of, and is of course bound by, the decision last year by the Supreme Court in *Lett and Co. Ltd v. Wexford Borough Council and ors* [2016] IESC 13, that an order under s.3 may be granted in respect of costs payable but not yet paid. This being so, the court sees no reason on the facts before it why a s.3 order ought not to issue in the within proceedings. It is the exact form of the order to be made that is in issue.

(v) The Detail and Mode of Recovery.

9. Which costs ought now to be sought of Limerick City Council? When it comes to this aspect of matters, two sets of well-known cost accountants of repute have hitherto been engaged and each have offered their advices as to what costs may and may not be sought by Butler Homes Limited. It appears to the court from the correspondence before it that the preferable way to proceed in this

regard is for the applicants to seek of Limerick City Council (a) such costs as Connolly Lowe, the cost accountants engaged by the Butler family, have previously indicated to the applicants might properly be recovered, together with (b) any (if any) such further costs as the applicant firm considers may be recovered. The court does not itself see, at least on the evidence before it, that any costs further to (a) are recoverable.

10. The regrettable breakdown in relations between the applicants and respondent in the within case has had the practical consequence that Butler Homes Limited has ceased to cooperate with the applicant firm in any respect as regards the recovery of costs from Limerick City Council. This has had the result that Butler Homes Limited is itself prejudicing, to an ever greater extent as time elapses, the potential for recovery of costs to which it is presently entitled. Such behaviour appears on the face of it to be so commercially imprudent as to run a very real risk of placing board members of Butler Homes Limited in breach of their fiduciary duties to the company, a matter to which board members should ever have the most careful regard.

11. A significant decree of acrimony between the parties was manifest at the hearing of the within application and suggests to the court that it would be of no practical consequence for it merely to urge the board of Butler Homes Limited to put aside its differences with the applicants as regards costs and to work with them to recover from Limerick City Council such monies as Connolly Lowe, mindful of the interests of Butler Homes Limited and the wider concerns of the Butler Family, has estimated to be recoverable from the Council. Moreover, the court is mindful of the desirability in matters such as the within application where money, to use a colloquialism, is far from 'flush', to avoid insofar as possible the need for repeat visits to court. As will be seen from the orders that the court proposes to make, the court considers it necessary, in light of all the foregoing, to give the applicant firm some degree of discretion as regards how best, and on what basis, to proceed with recovering such costs as are to be obtained.

(vi) Orders to be Made.

12. Having regard to the foregoing, the court will grant the following orders:

(i) an order permitting and authorising each and all of the applicants to negotiate and settle the amount of costs owing by Limerick City Council under the arbitration award;

(ii) an order permitting and authorising the applicants to take part in and conclude the taxation of the said costs in place of Butler Homes Limited, without reference to and to the exclusion of Butler Homes Limited;

(iii) an order directing Limerick City Council to pay to the applicants, the said costs, when taxed, agreed or ascertained, and

(iv) an order granting to the applicants liberty to enforce the said award of costs and to execute the same directly against Limerick City Council,

which orders shall each be subject to the proviso that each and all of the applicants will hold any such funds aforesaid as may be recovered to the order of the court pending such future order as may be made regarding those funds, following the earlier of (a) the conclusion of the separate High Court proceedings now ongoing between the applicant firm and Butler Homes Limited, or (b) separate agreement being reached in respect of those funds between the parties to this application, which agreement would require the approval of the court. In this last regard, the court would respectfully draw the attention of the board of Butler Homes Limited to the fact that the longer outstanding fees go unpaid, the more interest may become due and owing thereon.

13. The court notes that in light of the pending hearing of the separate High Court proceedings between the applicants and respondents, but without any concession of liability in this regard on the part of the applicants, the applicants are satisfied at this time for any costs recovered to be held by them in the manner contemplated by the last-mentioned proviso so far as any monies owing to them are concerned; however, they suggested that a possible unfairness might arise as regards any third-party service-providers who might rightfully expect payment from those costs. Absent any detail as to the substance of the 'no foal, no fee' agreement reached between the parties, the court is to some extent operating 'in the dark' in this regard. However, it is satisfied to grant liberty to the applicants to seek, should they wish so to do, the release of any or all of the costs when in hand to any (if any) parties as might then be established to be entitled to such payment.