THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL

2020/29

BETWEEN

MUNSTER WIRELESS LIMITED APPLICANT

AND

JUDGE TERENCE FINN

RESPONDENT

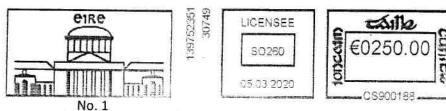
AND

TIPPERARY COUNTY COUNCIL

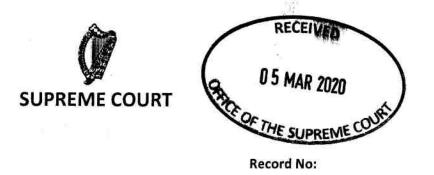
AND

IRELAND AND THE ATTORNEY GENERAL NOTICE PARTIES

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O. 58, r. 15



Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Date of Filing: 5 March 2020

2. Title of the Proceedings: [As in the Court of first instance]

MUNSTER WIRELESS LIMITED

Applicant

-v-

JUDGE TERENCE FINN

Respondent

and

TIPPERARY COUNTY COUNCIL AND IRELAND AND THE ATTORNEY GENERAL

Notice Parties

3. Name of Applicant:

Munster Wireless Limited

What was the applicant's role in the original case: [Plaintiff, Defendant, Applicant, respondent etc]

Applicant

Decision of Court of Appeal (where applicable):

Record No:	[2019] IECA 286 – 2019 / 328
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Date of Order: 28 November 2019 Perfection Date: 13 February 2020

Date of Judgment:14 November 2019Names of Judges:Whelan J., Costello J., Murray J.

5. Decision of the High Court:

Record No:	[2018] IEHC 412 – 2016 / 543		
Date of Order:	26 July 2018	Perfection Date:	14 August 2018
Date of Judgmen	it: 28 June 2018		
Names of Judge(s): Ms. Justice Faherty		

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

		Yes	No	
6.	Extension of Time:	Yes	No	x

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. As the Battle rule is applied generally, the right of a company to be represented by someone other than a legal professional is a matter of general public importance. This was recognised and expressed by Mr Justice Humphries when seeking a legitimus contradictor to refer the question of the applicant's right to be represented by William Fitzgerald for hearing as a preliminary issue.

2. The judgment of the Court of Appeal which is being appealed against has misinterpreted section 41 of the Companies Act 2014 by imposing restrictions, which are not prescribed, on the powers of attorney granted in that section. As such it creates a legal uncertainty which endangers the correct literal and purposive interpretation of that section in any and all future proceedings.

Word count - 126

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The applicant's right to appeal the decision of the High Court is being denied.

2. The Supreme Court, in refusing the "leap frog" application in this matter, wrongly claimed that there was no matter of general public importance and that there was no new question of law. This forced the applicant to apply to the Court of Appeal, which according to Mr. Justice Peart had no jurisdiction to rule contrary to the Supreme Court's rulings in Battle and Aqua Fresh Fish, leaving the applicant without access to judicial remedy.

Word count - 90

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

Word count -

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing: Yes No X

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.



12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

Article 54 of the TFEU provides that a company is to be treated as a natural person. Are there restrictions on a company being treated as a natural person? If so what are those restrictions?

Part II

The information contained in this part will not be published.

13. Applicant's Representatives:

Please identify the solicitor and counsel for the applicant, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel. In the case of an applicant in person please provide contact details including telephone and email.

Applicant in person

William Fitzgerald Munster Wireless Ltd. 1. Bridge Street, Cahir, Co. Tipperary. 087 6110187 bill@munsterwireless.com

14. Respondent's Representatives:

Please set out details of solicitor and counsel for each respondent with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel. In the case of a respondent in person please provide contact details including telephone and email.

Judge Terence Finn (Respondent) Court House, Clonmel, Co. Tipperary.

Tipperary County Council (Notice Party) Binchy Solicitors Quay House, Clonmel, Co. Tipperary. <u>law@binchylaw.ie</u> 052 6121411

Ireland and the Attorney General Chief State Solicitors Osmond House, Ship Street Little, Dublin 8 <u>BARRY_RYAN@csso.gov.ie</u> 01 4175131

If the order it is sought to appeal was made ex parte and there was no respondent present in the Court below please confirm here.

15. Legal Aid:

In the case of an application by a defendant from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

Signed:

Jilliam Fitzgerer

(Solicitor for) the Applicant

Date:

5-3-2020

To be served on:

Barry Ryan Chief State Solicitors Office

(Solicitors for) Respondent(s)

Please file your completed form in:

The Office of the Registrar of the Supreme Court The Four Courts Inns Quay Dublin 7

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

Appendix

Notice of Appeal

1. Title of the Proceedings: [As in the Court of first instance]

MUNSTER WIRELESS LIMITED

Applicant

-V-

JUDGE TERENCE FINN

Respondent

and

TIPPERARY COUNTY COUNCIL AND IRELAND AND THE ATTORNEY GENERAL

Notice Parties

Grounds of Appeal:

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

Power of Attorney:

1. In it's judgment the Court of Appeal cites the determination of the Supreme Court in the leap frog application which in turn cites Justice Faherty where she correctly states that section 41 of the Companies Act 2014 "merely permits a person to stand in the shoes of the company and to act as the company it does not divest the company of it's incorporated status

2. It is not claimed that section 41 divests the company of it's incorporated status. It is claimed that section 41 granting power of attorney, in conjunction with section 38 granting the same full legal capacity as a natural person, does permit the company to attend and argue personally and as such is the statutory exception referred to by Ó Dálaigh C.J. at p254 in the Battle Judgment which did not exist until the commencement of the Companies Act 2014.

3. The Court of Appeal cites the conclusions of McKechnie J. in his judgment in AIB Plc v. Aqua Fresh Fish [2017] I.E.C.A. and claims that section 868 of the Companies Act 2014 prohibits a company from appointing a representative to represent the company in court for any reason other than those prescribed in that section. This is a misinterpretation of the literal and purposive intent of that section.

4 Subsection 6 of section 868 of the Companies Act 2014 states that: "A representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (5), be qualified to act on behalf of the company before any court for any other purpose." (emphasis added) It does not preclude representatives appointed for any other purpose.

5. Section 868 of the Companies Act 2014 is found in the chapter Provisions relating to offences generally" whereas section 41 is found in the chapter "Corporate capacity and authority". The clear wording of section 41 is: "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.

6. The Court of Appeal by it's judgment is claiming that the phrase "any other matter" in section 41 does not include the right to represent the company in court. If it were the intention of the Oireachtas to exclude that right it would have specifically catered for it.

7. The Courts by their misinterpretation of the literal and purposive meaning of the statutes are legislating from the bench and as such infringing on the separation of powers. Enshrined in the Constitution. In the absence of a statutory prohibition on the right of a company to be represented in court by someone vested with power of attorney to do so it is incumbent on the courts and Judiciary, in order to comply with their oaths of office, to adhere to the clear wording and intention of the law and permit someone so vested to represent the company.

Article 54 TFEU:

8. Article 54 of the TFEU states that companies are to be treated in the same way as natural persons. This is reinforced by section 38 of the Companies Act 2014. Requests have been made to several courts multiple times for a referral to the ECJ under article 267 TFEU to clarify what limitations if any exist regarding such treatment. No such request has been aquiesed to. It appears that the reason for this is that it is Acte Clair that no such limitations exist. That being the case an Acte Clair should be declared.

CFREU:

9. The claim that no issue of European law exists in the underlying matter is untrue as it has been put before each court that the applicant has been refused information under Data Protection legislation as it was not a natural person. Also Article 54 of the TFEU was raised before each Court. As such the CFREU can be invoked. The Court's desire to dismiss fundamental rights is in itself cause for concern and a matter of general public importance.

10. The observation that the CJEU requires individuals to be represented by a lawyer is irrelevant.

Precedent:

11. In the underlying issue in the District Court, Judge Finn allowed the applicant be represented by William Fitzgerald claiming "exceptional circumstance.gave him an out". He did not say what those exceptional circumstances were.

12. In a subsequent application brought by William Fitzgerald in his own name, seeking legal certainty on the companies position. He was assured by Mr. Justice Peter Kelly in the Court of Appeal that the company would not be prohibited from being represented by Mr. Fitzgerald in any related proceedings.

Arma v France

13. The Arma v France ruling of the ECHR relates to access to court and in particular the injustice done to the primary shareholder by the company not being represented due to the restrictive rules applied. The situation is very similar to that in Battle and to suggest that it is irrelevant is misleading.

Exceptional Circumstances

14. There is no claim for exceptional circumstances in this matter except that it challenges the Supreme Courts ruling in Battle. The position that there must be exceptional circumstances for a company to be represented by a non legal professional creates an inequality before the law contrary to Article 40.1 of the Constitution.

15. In Re Haughey [1971]IR 217 : "In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his personal property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights and in compliance with the Constitution the State either by it's enactments or through the Courts must outlaw any proceedures which will restrict or prevent the party concerned from vindicating those rights."

16. The Courts have strayed far from the literal and puposive interpretation of the law in their dealings with this matter and have introduced obfuscation and misdirection with the apparent intention to maintain an unjust and unlawful rule in direct contravention of the Constitutional rights of those adversly affected by it.

17. As Ms. Justice Whelan held the office of Attorney General during the passing of the Companies Act 2014 it should be expected that she at least be aware of the purposive meanings of sections 38 to 41 and of section 868 and as such should not be misinterpreting them as has been done in this case.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

Set aside the Orders and Judgment of the Court of Appeal. [2019] IECA 286
 An Order granting leave to appeal the decision of the High Court. [2018] IEHC 412

3. Costs.

O. 58, r. 18(1)





SUPREME COURT

Record No:

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Title of the Proceedings: [As in the Court of first instance]

MUNSTER WIRELESS LIMITED

Applicant/Appellant

AND

JUDGE TERENCE FINN

Respondent

AND

TIPPERARY COUNTY COUNCIL

Notice Party/Respondent

AND

IRELAND AND THE ATTORNEY GENERAL

Notice Party/Respondent

2. Name of Respondent: IRELAND AND THE ATTORNEY GENERAL

1.1	-				
3.	ADD	lication	to e	extend	time:

Yes x	No	
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If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

The Appellant's Application for leave to appeal was filed on the 5th March 2020. In advance of submitting the Respondents' Notice, consent to late filing had been sought from the Appellant. The Appellant did not refuse to consent to the extension of time for the filing of the Respondent's notice but did not formally consent. The Respondents' Notice submitted for filing on the 27th April 2020 used headings, which were not in compliance with the precedent form. (Form 2 O. 58, r. 18(1)). The substantive content of the Respondent's Notice maintained opposition to the Appellant's application for leave to appeal. By letter dated the 27th April 2020 Rochford Brady group wrote to the Respondent stating the Supreme Court Office rejected the submitted Notice as it was not in compliance with the precedent. This letter was not received by the Respondents until the 19th May 2020 by email as it had gone missing in the post. In circumstances, where the Appellant was aware that the Respondent intended to oppose the application for leave to appeal, and consent to an extension was sought, the Appellant will not suffer any prejudice or injustice if an extension of time to file the Respondent's Notice is granted.

4. Do you oppose the applicant's application to extend time:

Yes No	X
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If an application by the applicant to extend time is being opposed please set out concluely the grounds on which it is being opposed.

5. Do you oppose the applicant's application for leave to appeal:

Yes	x	No	
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Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

- 1. The Second and Third Named Respondent/Notice Party dispute the Appellant's submissions set out at Section 7(1) and 7(2) of the Application for Leave and Notice of Appeal. The within appeal against the decision of the Court of Appeal to refuse the Appellant an extension of time does not involve a matter of general public importance.
- The Appellant seeks to appeal the order of the Court of Appeal (Whelan J, Costello J. Murray J.) dated the 28th November 2019 (perfected 13th February 2020) refusing the Applicant's application for an extension of time to appeal the order of Ms. Justice Faherty made 26th July, 2018 (perfected 14th August, 2018).
- 3. The central issue in the substantive proceedings was whether, contrary to the well-established rule in *Battle v Irish Art Promotion* [1968] 1 IR 252, it was legally permissible for the company, Munster Wireless Limited, to be represented by the Appellant, one of its directors, rather than a professional legal representative.
- 4. The Supreme Court has considered the same legal issue in the decision of Allied Irish Bank plc -v- Aqua Fresh Fish Limited [2018] IESC 49 and more recently in Gaultier -v- Registrar of Companies & Ors, In the Matter of Arnaud D. Gaultier and The Companies Acts, 1963-2009, Gaultier -v- Allied Irish Banks Public Limited Company [2019] IESC 89 and held that the socalled rule in Battle v Irish Art Promotion [1968] 1 IR 252, when complemented by the inherent jurisdiction and discretion of the Court to permit, in exceptional circumstances, the representation of a company by a person who is not a lawyer with a right of audience, continues to be the law in this jurisdiction and is consistent with the Constitution.
- 5. In Munster Wireless Limited -v- Finn & ors [2019] IESCDET 97) the Supreme Court, having considered the points now being raised, refused the 'leap frog' application brought by the Appellant on the basis that the Appellant had failed to raise any matter of general public importance and had not established that it would be in the interests of justice for a further appeal to this Court to be granted.
- 6. The present application for leave to appeal the decision of the Court of Appeal

refusing the Applicants application for an extension of time to appeal to the Court of Appeal does not raise any matter of general public importance. The Court of Appeal did not misinterpret Section 41 of the Companies Act 2014 and/or impose respeticions which are not prescribed on the powers of atorney granted by the section.

7. In such circumstances, the legal points raised by the Applicant as being 'arguable grounds for appeal' have been considered and determined by the Supreme Court, the within application for leave to appeal to the Supreme Court does not involve a matter of general public importance.

Word count - 470

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Appellant was not denied his right of appeal of the decision of the High Court. The Appellant appealed the decision of the High Court to the Supreme Court (*Munster Wireless Limited -v- Finn & ors* [2019] IESCDET 97) who, having considered the points now being raised, refused the 'leap frog' application on the basis that the Appellant had failed to raise any matter of general public importance and had not established that it would be in the interests of justice for a further appeal to this Court to be granted. It is denied that the Appellant was left without access to judicial remedy, as alleged.

Word count -107

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should cantain no more than 300 words and the word count should appear at the end of the text.

N/A	
Word count -	

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered poragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A		
Word count -		
WORD CODIN		

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes

L

No

If a priority hearing is saught please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

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WOLD.	young	

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

It is not necessary to refer any of the matters raised by the Appellant to the Court of Justice of the European Union

Word count: 23

Part II

The information contained in this part will not be published.

14. Respondent's Representatives:

If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email.

Barry Ryan, Solicitor

barry_ryan@csso.gov.ie

Alan Dodd, B.L

adodd@lawlibrary.ie

15. Legal Ald:

In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

Signed:

Maria Browne

(Solicitor for) the Respondent Chief state Solicitor

Chief State Solicitors Office Solicitors for the Second and Third Named Respondent/Notice Party Osmond House Little Ship Street Dublin 8

Date:

27 May 2020

To be served on:

Mr. William Fitzgereld - Librant in Person

(Solicitor for) the Applicant / Other Respondent(s)

Please file your completed Notice in:

The Office of the Registrar of the Supreme Court The Four Courts Inns Quay Dublin 7

Appendix

Grounds of Opposition (and Cross Appeal)

Title of the Proceedings: (As in the Court of first instance)

MUNSTER WIRELESS LIMITED

Applicant/Appellant

AND

JUDGE TERENCE FINN

Respondent

AND

TIPPERARY COUNTY COUNCIL

Notice Party/Respondent

AND

IRELAND AND THE ATTORNEY GENERAL

Notice Party/Respondent

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

- The Appellant seeks to appeal the order of the Court of Appeal (Whelan J, Costello J, Murray J.) dated the 28th November 2019 (perfected 13th February 2020) refusing the Applicant's application for an extension of time to appeal the order of Ms. Justice Faherty made 26th July, 2018 (perfected 14th August, 2018).
- 2. The central issue in the proceedings was whether, contrary to the wellestablished rule in *Battle v Irish Art Promotion* [1968] 1 IR, it was legally permissible for the company, Munster Wireless Limited, to be represented by the Appellant, one of its directors, rather than a professional legal representative.
- It is clear from the decision of Whelon J. in the Court of Appeal at para 8 that the well-established three-pronged test in *Éire Continental Trading v. Clonmel Foods Limited* [1955] I.R. 170 was set out. The Court of Appeal noted at para.

10 that the Respondents did not take issue with the first two limbs of the test and that therefore, the third limb- whether the applicant has demonstrated that an arguable ground of appeal exists- was the central issue to be considered.

- 4. In Battle v Irish Art Promotion [1968] 1 IR 252 the Supreme Court refused to allow an individual who was the managing director and a major shareholder to represent his company in legal proceedings despite the fact that he said that the company had a good defence but was unable to engage legal representation due to lack of funds. The Battle case has been followed consistently in this jurisdiction for the last 50 years.
- 5. The Supreme Court in Allied Irish Bank plc -v- Aqua Fresh Fish Limited [2018] IESC 49 re-affirmed the general rule that a company has no right to lay representation. The Court held that the circumstances which lead a court to conclude that it is necessary in the interests of justice to permit representation of a company by a person who is not a qualified lawyer must be exceptional in order that the decision to permit is not one which will warrant common repetition such that the general rule is undermined.
- It has most recently been approved and applied by the Supreme Court in Gaultier -v- Registrar of Companies & Ors, In the Matter of Arnaud D. Gaultier and The Companies Acts, 1963-2009, Gaultier -v- Allied Irish Banks Public Limited Company [2019] IESC 89.
- 7. The issues raised by the Appellant in the grounds of appeal were conprehensively and correctly dealt with by the Court of Appeal:

Power of Attorney:

- 8. The Appellant submits that the Court of Appeal misinterpreted Section 41 of the Companies Act 2014 by imposing restrictions, which are not prescribed on the powers of attorney. It is denied that the provisions of Section 41 of the companies Act 2014 entitles a duly authorised attorney for the company, who is not a solicitor or barrister, to represent the company in Court.
- A power of Attorney in Section 41 of the Companies Act does not divest the company, or the attorney acting in its place, of the company's incorporated status.
- 10. A litigant in person has authority to bind himself or herself. A solicitor is an officer of the court; the solicitor has an overarching duty to the court to ensure the effective administration of justice. A director is an officer of the company, even if acting under power of attorney, the ultimate allegiance of a director and a solicitor are markedly different.
- 11. If a director acting under a power of attorney were to represent a company by filing of pleadings, this would require that the Court Services conduct an investigation to determine whether the director had been vested with the appropriate authority to bind the company. The Court Services, by accepting and filing the initiating documents, does not confer any jurisdiction on behalf

of the individual to represent the company.

- 12. It is denied that Section 41 of the Companies Act is a statutory exception that allows a director to attend and argue personally, as pleaded in Section 2 of the Applicant's Grounds of Appeal. The power of attorney permitted in this section does not analogise or transform the power of a director vested with same, into one which would allow him/her to represent the company in court. It is denied that the Court of Appeal misinterpreted the literal or purposive intent of Section 41.
- 13. Section 868 of the Companies Act, 2014 (replicating section 382 of the Companies Act, 1963) specifically provides that a duly appointed representative may represent a company where the company is charged with an indictable office. The fact that the statute provides for lay representation in this instance points to the fact that companies have no right to lay representation in civil proceedings. Section 868 (6) states that a representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (5), be qualified to act on behalf of the company before any court for any other purpose. The Court of Appeal referred in para 33 to the decision of McKechnie J. in AIB Plc v. Aqua Fresh Fish [2017] I.E.C.A who determined that the Companies Act 2014 Act, involving the legislature's most major reassessment, review and consolidation of company law, in all its aspects, in more than 50 years, did not broaden its scope of the Act so as to permit company representation by non-lawyers in other circumstances outside of Section 868 of the Companies Act, 2014 (replicating section 382 of the Companies Act, 1963).
- 14. Section 11, 128 and 196 of the Companies Act 2014 provides for the possibility that a company have a single member and/or only one director but without providing any special rules in relation to representation even of such companies in court.

Precedent:

15. It is accepted that the Court has an inherent jurisdiction, as a matter of discretion, to allow a lay individual to represent a litigant, whether that litigant be an individual or a body corporate. This discretion was recognised in Alled Irish Bank plc -v- Aqua Fresh Fish Limited [2018] IESC 49 and subsequetly in Gaultier -v- Registrar of Companies & Ors, In the Matter of Arnaud D. Gaultier and The Companies Acts, 1963-2009, Gaultier -v- Allied Irish Banks Public Limited Company [2019] IESC 89

Article 54 TFEU, CFREU, ECHR

- 16. It is denied that the Court exceeded its jurisdiction as pleaded or at all.
- 17. Chapter II of TFEU, in particular Article 49 provides content for the applicability of Article 54. Article 54 is not an article of general applicability.

Article 54 is not an authority for the proposition that companies are to be treated the same as natural persons regardless of context.

- 18. The rule in *Battle*, which requires a company to be represented by a lawyer, does not contravene Article 54 of the Treaty for the Functioning of the European Union.
- 19. Article 19 of the Statute of the Court of Justice of the European Union regulates the representation of parties in proceedings before the court.
- 20. Rule 36 of the Rules of Court of the European Court of Human Rights provides than an applicant must be represented by an advocate authorised to practise in any of the Contracting Parties "or other such person approved by the President of the Chamber".
- 21. 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.
- 22. The Respondent is a stranger to the references in para 11 and para 12 of the Grounds of Appeal. The legal issue of the entitlement of a director of a company to represent that company in legal proceedings has been determined by the Supreme Court. The alleged assurances by Kelly P. in the Court of Appeal do not establish a precedent.
- 23. Arma v France [2007] ECGR 5568 does not address the issue of a director or shareholder of a company appearing on behalf of that company in court. Rather, that decision concerns the issue of locus standi.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

None.

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A	 	

5. Order(s) sought

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Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

COURT OF APPEAL

2019 328

Thursday the 28th day of November 2019

BEFORE

MS. JUSTICE WHELAN

MS JUSTICE COSTELLO

MR JUSTICE MURRAY

2016 No 543 JR (HC)

BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

- AND -

A JUDGE OF THE DISTRICT COURT

RESPONDENT

- AND -

TIPPERARY COUNTY COUNCIL

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

The Motion of William Fitzgerald in person a Director of the Company in the title hereof named (hereinafter "the Appellant") pursuant to Notice of Motion dated the 09th day of July 2019 seeking "an extension of time to appeal the decision of Ms. Justice Faherty delivered on the 28th of June 2018 in the above titled matter (2016JR543 – [2018] IEHC 412)" coming on for hearing on Monday the 11th day of November 2019

Whereupon and on opening and reading the said Notice of Motion the grounding Affidavit thereto of William Fitzgerald filed on the 09th day of July 2019 the replying Affidavit of Kevin Condon filed on the 26th day of July 2019 the documents and exhibits referred to in said Affidavits including the draft Notice of Appeal herein dated the 09th day of July 2019

And on hearing what was offered by the said Appellant in person and Counsel for the Second and Third Named Notice Parties THE COURT WAS PLEASED TO reserve judgment to Thursday the 14th day of November 2019 at 10.00 o'clock in the forenoon

And the matter being called on for judgment accordingly on the 14th day of November 2019 in the presence of the said Appellant in person and said Counsel for the Second and Third Named Notice Parties

And judgment having been delivered herein on the 14th day of November 2019

And on hearing what was offered by the said Appellant in person and said Counsel on behalf of the Second and Third Named Notice Parties

And the said Appellant making application before the Court for an Order granting him liberty to take up an audio file copy of the Digital Audio Recording of the hearing of the said Motion before this Court on Monday the 11th day of November 2019 together with an audio file copy of the Digital Audio Recording of the delivery of the judgment herein on the 14th day of November 2019

And said Counsel on behalf of the Second and Third Named Notice Parties indicating to the Court that they are not objecting to the release of the said Digital Audio Recordings

IT IS ORDERED that the said William Fitzgerald do have liberty to take up an audio file copy of each of the said Digital Audio Recordings as follows

- (i) Court of Appeal Court 1 (Public Records Building) on Monday the 11th day of November 2019 between 11.03 a.m. and 12.10 p.m.
- (ii) Court of Appeal Court 1 (Public Records Building) on Thursday the 14th day of November 2019 between 10.02 a.m. and 10.16 a.m.

AND THEREUPON THE COURT ADJOURNING the further consideration of the within proceedings in respect of costs to Thursday the 28th day of November 2019 at 10.00 o'clock in the forenoon And the further consideration of the within proceedings in respect of costs coming before the Court accordingly this day

And on hearing what was offered by the said Appellant in person and said Counsel on behalf of the Second and Third Named Notice Parties

IT IS ORDERED that the said Motion do stand refused and that the appeal herein do stand dismissed

AND IT IS ORDERED that the Second and Third Named Notice Parties do recover as against Munster Wireless Limited their costs of and incidental to the said Motion and of this Order

And on the further application of the said William Fitzgerald in person for an Order granting him liberty to take up a copy of the transcript of the Digital Audio Recording of the proceedings herein this day

AND IT IS FURTHER ORDERED that William Fitzgerald do have liberty to take up a copy of the transcript of the Digital Audio Recording of the costs hearing of this day [Court of Appeal Court 1 (Public Records Building) on Thursday the 28th day of November 2019, between 09.54 a.m. and 10.02 a.m.] – the cost of the take up of a copy of the said transcript to be met by William Fitzgerald

> PÁDRAIG MAC CRIOSTAIL REGISTRAR Perfected: 13th day of February 2020

William Fitzgerald in person

Chief State Solicitor for the Second and Third Named Notice Parties

A COPY WHICH I ATTEST enus Cann FOR REGISTRAR

Approved Judgment

No Redaction Needed

THE COURT OF APPEAL

2019] |ECA 286 Record Number: 2019/328

Whelan J. Costello J. Murray J.

BETWEEN/

MUNSTER WIRELESS LIMITED

APPLICANT

- AND -

A JUDGE OF THE DISTRICT COURT

RESPONDENT

- AND -

TIPPERARY COUNTY COUNCIL AND IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

<u>JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of November</u> 2019

Introduction

1. This is an application for an extension of time to appeal the order of Ms. Justice Faherty made 26th July, 2018 (perfected 14th August, 2018) of a preliminary issue directed to be tried prior to the hearing of an application for leave to apply for judicial review. The issue for determination was whether, contrary to the well-established rule in *Battle*, it was legally permissible for the company Munster Wireless Limited to be represented by William Fitzgerald, one of its directors, rather than a professional legal representative.

2. Mr. Fitzgerald appeared on behalf on the applicant company throughout.

3. In a judgment delivered on 28th June, 2018 (further considered below) Faherty J. held that Mr. Fitzgerald was not entitled to represent the company in the application for leave to apply for judicial review. She further held that no issue of European law arose in the proceedings.

4. Mr. Fitzgerald applied to the Supreme Court for leave to pursue a leapfrog appeal from the judgment of Faherty J. The application for a leapfrog appeal was refused in a determination of the Supreme Court made on the 16th May, 2019.

5. Subsequently, Mr. Fitzgerald attended at the Court of Appeal office where he was advised that he ought to have lodged a notice of appeal prior to seeking leave to leapfrog appeal to the Supreme Court and was by then out of time to lodge an appeal.

6. He contends that the substantive legal issues in the intended appeal have not been dealt with and he seeks an extension of time to appeal the decision of Faherty J. of the 28th June, 2018. He deposes that had he known of the requirement to lodge a notice of appeal with the Court of Appeal he would have done so.

7. The only respondent to this application is the State, with the District Court judge and Tipperary Council taking no part in the matter.

Legal principles

The principles governing an application to extend time to appeal are set forth in the decision of Lavery J. in *Éire Continental Trading v. Clonmel Foods Limited* [1955] I.R.
 170. In his judgment Lavery J. identified the factors to which a court should give consideration on such an application: -

- whether the applicant has demonstrated that he has formed a *bona fide* intention to appeal the order in question within the time prescribed by the Rules of the Superior Courts;
- (2) whether the applicant can identify some mistake which caused him to miss the time limit specified for lodging an appeal; and,
- (3) whether the applicant has demonstrated that an arguable ground of appeal exists.

9. Each of the three factors are, as Lavery J. stated, proper matters for the consideration of the Court but are not binding pre-requisites. The over-arching obligation of the Court is to have regard to all of the circumstances of the case and to avoid visiting an injustice on either party to the litigation. The principles do not have the status of legislation. However, it is clear from decisions such as Murphy J. in *O'Sullivan v. O'Halloran* [2002] I.E.S.C. 32 that compliance with the third part of the test is of the utmost importance and unless the Court is satisfied that a proposed appellant has arguable grounds of appeal a court cannot appropriately make an order extending time.

10. Regarding the first and second parts of the test it is noteworthy that the respondent does not appear to take issue that same can be treated as satisfied. In an affidavit of Kevin Condon sworn 25th July, 2019 he states: -

"I say and am advised that while the Applicant may have formed a *bona fide* intention to appeal the determination within the permitted time and was mistaken as to the necessity to lodge papers in the Court of Appeal in advance of bringing an application for leave to appeal to the Supreme Court... that the Applicant has failed to put forward any arguable ground of appeal."

11. I am satisfied that compliance with the first and second ground can reasonably be inferred in circumstances where Mr. Fitzgerald lodged his application for a leapfrog appeal

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with the Supreme Court in time and deposed that had he known of the requirement to lodge a notice of appeal with the Court of Appeal he would have done so. Therefore, the central issue is whether the applicant has demonstrated any *bona fide* grounds of appeal.

The background

12. In November 2016 Mr. Fitzgerald, a director of the company Munster Wireless Limited, signed an application for leave to seek judicial review. The preliminary issue before the High Court was whether a director whom the company purports to vest with appropriate authority pursuant to statute to bind the company is thereby entitled to file papers in court and initiate and conduct proceedings on behalf of the company.

13. Mr. Fitzgerald contended that section 41 of the Companies Act, 2014 conferred such an entitlement on him to represent the company in litigation.

14. Section 41 provides: -

"(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."

15. The respondent contended that the import of section 41 was merely to permit a person to stand in the shoes of the company and to act on behalf of the company in limited circumstances such as in the execution of documents but it had no bearing on the right of the courts to regulate who appears before it.

16. In her judgment Faherty J. observed: -

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"To my mind the power of attorney referred to in s. 41 of the 2014 Act 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."

17. Faherty J. noted that the right of audience of a shareholder or a director of a company to appear on behalf of the company in court was considered in *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252 where the managing director of a company brought an *ex parte* motion seeking liberty to conduct the defence to the plaintiff's action on behalf of the company. Ó Dálaigh C.J. in the Supreme Court, noting the earlier English decision of *Tritonia Limited v. Equity and Law Life Assurance Society* [1943] A.C. 584, observed: -

"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 theirs." The rule in *Battle* was subsequently endorsed by the Supreme Court in *Coffey v. Tara Mines Limited* [2008] 1 I.R. 436.

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EU law argument

18. Mr. Fitzgerald contended that the rule in *Battle* contravened Article 54 of the Treaty on the functioning of the European Union (TFEU).

Article 54 states: -

"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."

19. He argued that since it is not a requirement for a natural person to be represented by a qualified legal professional in court and a natural person is entitled to represent himself, it must follow that a company is also not required to be represented by a legal professional. Faherty J. at para. 37 of her judgment found that Article 54, when considered in its context, had no bearing on the law in this jurisdiction which requires a company to be represented by a lawyer: -

"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."

20. The judge observed that even Article 19 of the Statute of the Courts of Justice of the EU provides that the right of audience of any individual other than a Member State or an institution of the EU before the ECJ requires that such individual be represented by a lawyer.

21. Mr. Fitzgerald invoked the Charter of Fundamental Rights of the European Union contending that the rule in *Battle* was contrary to Articles 20, 47 and 52. At para. 48 of her judgment Faherty J. stated: -

"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."

She considered the High Court decision in *AIB Plc v. Aqua Fresh Fish Limited* [2015] I.E.H.C. 184 adopting the dictum of Keane J. who had determined that the Charter had no applicability to the issue of the rule in *Battle* – the key issue which she had to determine. **22.** Regarding alleged incompatibility between the requirement in Irish law that a company be represented in court by a qualified legal representative and Article 6 of the European Convention on Human Rights the judge concluded at para. 56 that there was no such incompatibility: -

"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 justice or constitutional justice or Article 6 of the Convention, there is no evidence put before this court of any such circumstances arising in the present case."

She considered that the decision of *Arma v. France* [2007] ECHR 5568, which Mr. Fitzgerald had placed reliance on, was distinguishable: -

"... Mr. Fitzgerald's circumstances cannot be said to equate to what presented in that case. Unlike the applicant in *Arma*... Mr. Fitzgerald has not come before the Court in the context of a liquidation case or a petition to wind up *Munster Wireless Limited*."
Regarding a request for a preliminary reference to the ECJ she concluded that no question which required such a referral arose.

AIB v. Aqua Fresh Fish

23. The High Court order of Faherty J. was perfected on the 14th August, 2018. On the 18th October, 2018 the judgment in the appeal of *AIB Plc v. Aqua Fresh Fish* [2018] I.E.S.C. 49 against the decision of Keane J. – on which Faherty J. had placed reliance in her judgment delivered on the 28th June, 2018 – was delivered in the Supreme Court. It concluded that: -

"The so-called rule in *Battle v. Irish Art Promotion...* when complemented by the inherent jurisdiction and discretion of the Court to permit, in exceptional circumstances, representation of a company by a person who is not a lawyer with a right of audience, continues to be the law in this jurisdiction and is consistent with the Constitution." (per Finlay Geoghegan J.)

The Supreme Court further found that exceptional circumstances had not been established which would warrant the Court permitting the company to be represented by its director. The Supreme Court upheld the decision of Keane J.

24. In Klohn v An Bord Pleanála [2019] I.E.S.C. 66 Clarke C.J. observed at para. 7.5: "Attention was also drawn to the fact that this Court has recently confirmed, in Allied Irish Bank plc v. Aqua Fresh Fish Ltd [2018] IESC 49, the proposition which had appeared to be the law since Battle v. Irish Art Promotion Centre Limited [1968] I.R. 252, which is to the effect that a corporation cannot self-represent save in exceptional circumstances, thus creating a category of party (but not of proceedings) where, it might appear, representation by a visiting lawyer other than in conjunction with an Irish-qualified lawyer would not be permissible on the basis of the argument put forward by Ms. Ohlig. Whether that consideration of national law could have any bearing on the ultimate determination of the legal issue of Union law which arises in this matter is ultimately a question for the CJEU."

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Exceptional circumstances

25. Sir Thomas Bingham M.R. in *Radford v. Freeway Classics Limited* [1994] 1 B.C.L.C. 445 explained the reason why a company director or office holder was not entitled to represent a company as follows: -

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

Determination of the Supreme Court

26. On the 16th May, 2019 the Supreme Court refused to grant leave to the applicant to appeal directly from the High Court by way of a leapfrog appeal. The Supreme Court in refusing to grant leave to appeal pursuant to Article 34.5.4 of the Constitution observed that *Battle* had established that, save for the most exceptional circumstances, a company could only be represented by a duly qualified lawyer, this being different from the case of individuals who could self-represent. The Court emphasised that this distinction is entirely justified by the fact that a company is a separate legal entity, with a personality distinct from that of its members under the Companies Act, 2014.

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27. The Supreme Court noted at paras. 25-27 that Faherty J. had correctly understood and applied the decision of Keane J. in *AIB v. Aqua Fresh*: -

"...none of the facts as outlined in the application for leave or in the other documentation... give rise to any concern that what may be described as exceptional circumstances, coming within the definition of *Aqua Fresh Fish*, are at play... The applicant submits that s.41 of the Companies Act, 2014 acts as a statutory exception to the principle established in *Battle* however such is not the case... The decision in *Arma* which is put forth by the applicant to support his invocation of Article 6.1 of the ECHR is a case which concerns *locus standi*: the applicant had set up a company of which she was the manager and sole shareholder..."

The Supreme Court considered that the reasoning in *Arma* was based "more on the *locus* standi of a director who has a vested and particular interest in the company which was clearly in a state of extremes."

The Supreme Court concluded its determination to refuse leave noting: "Faherty J. was correct in finding that the factual situation of the within case could not be equated with *Arma*, and thus there exists no incompatibility of Article 6.1 of the ECHR."

Proposed appeal

28. The proposed notice of appeal exhibited identifies five separate grounds of appeal:

(1) Precedent –

"Throughout these proceedings the courts have acquiesced to [Mr. Fitzgerald's] right to represent the company." There is no statutory prohibition on a company being represented by a non-legal professional.

(2) That section 41 of the Companies Act, 2014 does entitle a duly authorised attorney for the company to represent the company in court and that this is the statutory exception referred to by Ó Dálaigh C.J. in the *Battle* judgment which did not exist until the commencement of the Companies Act, 2014. It allows the company to attend and argue personally addressing the judgment of Viscount Simon L.C. in the *Tritonia* case.

- (3) It is contended that the High Court exceeded its jurisdiction by interpreting EU law with regard to Article 54 TFEU: "The Court claims that there are restrictions on companies being treated as natural persons but does not and cannot specify what these restrictions are."
- (4) The fourth ground is directed to Article 54 of the TFEU and also Articles 20,
 47 and 52 of the Charter.
- (5) The fifth proposed ground of defence arises pursuant to the European Convention on Human Rights and the decision of Arma v. France.

Decision

Acquiescence

29. The suggestion that some form of acquiescence equivalent to estoppel has arisen is not maintainable. Almost three years ago on the 28th November, 2016 Mr. Justice Humphreys directed a preliminary issue be heard, namely: "Whether it is appropriate that the applicant company be represented by one of its directors and not a professional legal representative..." At its highest, the evidence before this Court demonstrates that Mr. Fitzgerald attempted to represent the company in the teeth of sustained opposition from the respondent and the reason why the judicial review proceedings have not progressed is because his attempts to do so have been contested and resisted by the respondent throughout. This ground of appeal conflates his claimed right to represent the company in that

litigation. The fact that the courts afford him a right of audience to advance this argument cannot amount to an acceptance of the argument.

30. It is noteworthy that counsel for the State contended that Mr. Fitzgerald was not entitled to advance this argument at all in the first place. This approach contrasts with the stance adopted by the respondents in *Aqua Fresh Fish*, *Klohn* and indeed *Battle* itself where the party claiming *locus standi* to represent was allowed to appear in court and advance arguments in support of their contentions. The stance sought to be adopted by the State in this regard was unduly narrow, inconsistent with precedent and not an argument advanced before the High Court at the original hearing. For the latter reason, if no other, I do not consider the argument to be soundly based. Mr. Fitzgerald is entitled to advance his arguments. The constitutional right of access to the courts necessarily encompasses an entitlement to establish a claim and substantiate it.

31. The decision of the Supreme Court in *AIB v. Aqua Fresh Fish Limited* is fatal to the Mr. Fitzgerald's contention that merely because there is no expressed statutory prohibition on a company being represented by a non-legal professional that same entitles him to represent the company in proposed judicial review proceedings.

Power of Attorney

32. The contention advanced is that s.41 of the Companies Act, 2014 gives rise to a statutory exception and in effect legislates to circumvent the *Battle* rule. This matter has already been specifically dealt with by the Supreme Court in its decision to refuse a leapfrog appeal where at para. 26 it states: -

"The applicant submits that s. 41 of the Companies Act, 2014 acts as a statutory exception to the principle established in *Battle*; however such is not the case. As stated by Faherty J., this section merely permits a person to stand in the shoes of the

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company and to act as the company: it does not divest the company of its incorporated status. The power of attorney permitted in this section does not analogise or transform the power of a director vested with same, into one which would allow him/her to represent the company in court."

I accept that this is a correct statement of the law. Accordingly, that proposed ground of appeal is doomed to failure. It is simply unstateable.

33. Further, the claim of Mr. Fitzgerald insofar as it is based on section 41 assumes that the Oireachtas in altering the manner in which the power to appoint an attorney was expressed from that previously iterated in in section 40 of the Companies Act 1963, intended to abrogate the significant rule of law clearly articulated in *Battle*, a rule which (as that decision makes clear) was by the time of that case in 1967, long established. Were this the intention, one would expect it to be clearly stated which it is not. That this is not the legislative intention is put beyond doubt by the express facility for appointment of company representatives in connection with particular functions in certain criminal proceedings provided for in section 868 of the Companies Act, 2014, and the stipulation in that provision that such a representative may not act on behalf of the company before any court for any other purpose. Section 868(6) provides: -

"(1) The following provisions of this section apply where a company is charged, either alone or with some other person, with an indictable offence.

(2) The company may appear, at all stages of the proceedings, by a representative and the answer to any question put to a person charged with an indictable offence may be made on behalf of the company by that representative but if the company does not so appear it shall not be necessary to put the questions and the District Court may, notwithstanding its absence, send forward the company for trial and exercise any of its other powers under Part 1A of the Criminal Procedure Act 1967, including the power to take depositions.

(3) Any right of objection or election conferred upon the accused person by any enactment may be exercised on behalf of the company by its representative.
(4) Any plea that may be entered or signed by an accused person, whether before the District Court or before the trial judge, may be entered in writing on behalf of the company by its representative, and if the company does not appear by its representative or does appear but fails to enter any such plea, the trial shall proceed as though the company had duly entered a plea of not guilty.

(5) In this section, 'representative' in relation to a company means a person duly appointed by the company to represent it for the purpose of doing any act or thing which the representative of a company is authorised by this section to do.

(6) A representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (5), be qualified to act on behalf of the company before any court for any other purpose.

(7) A representative for the purpose of this section need not be appointed under the seal of the company.

(8) A statement in writing purporting to be signed by a managing director of the company or some other person (by whatever name called) who manages, or is one of the persons who manage, the affairs of the company, to the effect that the person named in the statement has been appointed as the representative of the company for the purposes of this section shall be admissible without further proof as evidence that that person has been so appointed."

Noteworthy are the conclusions of McKechnie J. in this regard in his judgment in this Court in *AIB Plc v. Aqua Fresh Fish* [2017] I.E.C.A. 77 at 39-41 where he observed: -

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"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.

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.

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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."

34. Nothing in the Supreme Court decision trenches upon or is inconsistent with the said reasoning which I respectfully adopt.

Article 54

35. The third ground of appeal contends that Faherty J. exceeded her jurisdiction by interpreting EU law with regard to Article 54 TFEU. Mr. Fitzgerald's contention is that the rule in *Battle* contravenes Article 54 of the TFEU. However, it is clear from the terms of Article 54 that the article applies for the purposes of Chapter Two of the TFEU and that it is not an article of general application, but rather identifies an element of the framework for the rights of nationals of one Member State who seek to establish themselves in another Member State. It is noteworthy but not determinative in any of this application that in its determination of the leapfrog appeal application the Supreme Court found no fault with the conclusion of Faherty J. that Article 54 TFEU is not an authority for the proposition that companies are to be treated the same as natural persons for all purposes and that it had no

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bearing on the law in this jurisdiction which requires a company to be represented by a lawyer.

36. Indeed, given that the consequence of the decision in *Battle* is that a company and a natural person are treated by the law in exactly the same way – insofar as neither may instruct a third party who is not a qualified representative to represent them in Court – it is impossible to see what differential treatment is complained of.

ECHR

37. The decision in *Arma* does not avail Mr. Fitzgerald and is distinguishable. On an analysis of a French language version of the judgment I find myself in agreement with the views expressed by the Supreme Court in its determination which noted at para. 27: -

"The reasoning was based more on the *locus standi* of a director who has a vested and particular interest in the company which was clearly in a state of extremes. As such, Faherty J. was correct in finding that the factual situation of the within case could not be equated with *Arma*, and thus there exists no incompatibility with Article 6.1 of the ECHR."

38. Specifically, in this case the issue is who can represent the interests of the company in litigation in order to protect and advance the interests of the company itself. In *Arma* the question was whether a director or shareholder could intervene in a court process so as to protect her own particular interest in seeing the company continue and thereby protect the funds the manager had invested – an interest which the Court felt was convergent with the interests of the company (see para. 32 of the judgment of the Court). The case was thus concerned with the question of who had the right to properly become a party to proceedings, not the question of who had the right to represent those who were already parties to those proceedings.

39. Insofar as no incompatibility with the European Convention on Human Rights has been established, the Court has been furnished with no basis on which it could conclude that the application of the EU Charter of Rights and Fundamental Freedoms would result in any different conclusion.

Conclusion

40. Delany and McGrath "*Civil Procedure in the Superior Courts*" (4th ed., Round Hall, 2018) at para. 23-116 states: -

"The principles in *Éire Continental* have been consistently referred to in subsequent cases and while the decisions have tended to focus on whether there was compliance with the three conditions referred to therein, the breadth of the discretion that the Supreme Court enjoys in deciding whether to enlarge time has also been emphasised. It has been suggested that while the three conditions set out in *Éire Continental* are a useful guide to the manner in which the jurisdiction of the Court will be exercised, the overriding consideration is that the Court has a discretion which must be properly exercised in all the circumstances of the case. So, in *Brewer v. The Commissioners of Public Works in Ireland* Geoghegan J. stated that he would interpret the words of Lavery J. in *Éire Continental* as indicating that while the three conditions laid down were proper matters to be considered, it did not necessarily follow that a court would either grant an extension if all these conditions were fulfilled or refused the extension if they were not."

41. I am satisfied that no arguable ground of appeal has been identified such as would satisfy the third limb of the *Éire Continental* test and warrant making an order extending time to appeal.

42. I would refuse the application.

A COPY WHICH I ATTEST

Mainie R. Wehrlen 14 November 2019

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THE SUPREME COURT

DETERMINATION

BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

AND

JUDGE TERENCE FINN

RESPONDENT

AND

TIPPERARY COUNTY COUNCIL

NOTICE PARTY

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

Neutral Citation: [2019] IESCDET 97

Supreme Court record no: S:AP:IE:2018:000139

Court of Appeal record no: none

High Court record no: 2016 No. 543 JR

Date of Determination: Thursday, 16th May, 2019

Composition of Court: O'Donnell J., McKechnie J., Charleton J.

Status: Approved

APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE CONSTITUTION APPLIES

RESULT: The Court does not grant leave to the Applicant to appeal to this Court directly from the High Court.

REASONS GIVEN:

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ORDER SOUGHT TO BE APPEALED

COURT: High Court

DATE OF JUDGMENT OR RULING: 28th June, 2018

DATE OF ORDER: 26th July, 2018

DATE OF PERFECTION OF ORDER: 14th August, 2018

THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 10th September, 2018 AND WAS IN TIME.

Reasons Given

1. This determination relates to an application for leave to appeal to the Supreme Court from a judgment of the High Court (Faherty J.), delivered on the 28th day of June, 2018 and from the resulting Order of that Court made on the 26th July, 2018 and perfected on the 14th August, 2018.

General Considerations

2. The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution. What is sought in this application is what is colloquially known as a 'leapfrog' appeal directly from the High Court to the Supreme Court. The threshold for such an appeal is higher than that in respect of an appeal from the Court of Appeal. As is clear from the terms of Article 34.5.4° of the Constitution, it is necessary, in order for this Court to grant leave to appeal directly from a decision of the High Court, that the Court is satisfied that there are exceptional circumstances warranting a direct appeal, a precondition to which is the presence of either or both of the following factors: i) that the decision sought to be appealed involves a matter of general public importance, or ii) the interests of justice. 3. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33rd Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called 'leapfrog appeal' direct from the High Court to this Court can be permitted were addressed by a full panel of the Court in *Wansboro v Director of Public Prosecutions* [2017] IESCDET 115. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.

4. It should be noted that any ruling in a determination is between the parties. It is final and conclusive as far as the parties are concerned, and is a decision in relation to that application only. The issue determined on the application for leave is whether the facts and legal issues meet the constitutional criteria to enable this Court to hear an appeal. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, any issue canvassed in the application will in due course be disposed of in the substantive decision of the Court.

5. Furthermore, the application for leave filed and the respondents' notice are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties.

6. In that context it should be noted that the respondents do oppose the grant of leave.

Background and Procedural History

7. The judgment sought to be appealed is that of Faherty J. in the High Court, delivered on the 28th June 2018. It is therefore a leapfrog application. The context is as follows: an application for leave to seek judicial review was brought by the applicant with a view to obtaining an order of *certiorari* to quash decisions made by the first named respondent in Cashel District Court on 22nd February, 2016. Leave was sought on the basis of the persistent refusal by this respondent to recuse himself from the said proceedings, despite several alleged demonstrations of bias. It is alleged that he acted as a judge in his own cause by refusing to recuse himself. This leave application was grounded on the affidavit of Mr. William Fitzgerald, a director of the applicant company.

8. Humphries J., by order of the 28th November, 2016 directed that the State should be put on notice of the proceedings and that before the issue of leave should be determined, the preliminary issue of whether it is appropriate that the applicant be represented by one of its own directors, and not a legal representative, be tried. As such, this issue came before Faherty J. who ruled on the question of whether "a director, if vested with the appropriate authority to bind the company, could file papers in court and initiate proceedings on behalf of the company?".

9. Mr. Fitzgerald submitted that there should be no bar to his lodging papers on behalf of the company if he was duly authorised to so, relying in this respect on s. 41 of the Companies Act 2014, which counsel for the State said had no bearing on the right of the Court to regulate who appears before it. Faherty J. accepted the State's

proposition, saying that 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: it does not divest the company, or the person acting in its place, of the company's incorporated status.

10. Another issue raised was the question of whether Mr. Fitzgerald had been entitled to sign the statement of grounds: he submitted that the power to bind the company is generally analogous to the power to submit the company to the jurisdiction of the court. The State, argued that as a matter of public policy it is questionable whether the Central Office could accept documents signed by a director: the authority of an agent to bind a company may be set out in the constitution of a company, or in the resolutions of members/the Board: however the director has no inherent authority and no inherent power to act individually as an agent of a company, without express authority. Furthermore, that where this power is expressly contained in the constitution, any directorship can be revoked by the Board at any time (s. 38 of the 2014 Act).

11. Faherty J. noted that while O. 19, r. 3 of the Superior Court Rules (RSC) required pleadings to be signed by the litigant in person or by the counsel or solicitor acting on their behalf, O. 84 contained the relevant procedural rules for an *ex parte* application for leave to apply for judicial review and for many other aspects of process, including the statement of grounds. As such, O. 84 did not require a signature for the documents above mentioned and in the eyes of the trial judge, if the papers lodged complied with the relevant court rules then there was no basis upon which the Central Office should not accept them.

12. Having considered these questions first, Faherty J. then moved to what she described as being the salient issue in the case: whether Mr. Fitzgerald should have a right of audience to represent the company in the leave application itself.

13. She concluded that Article 54 TFEU is not an authority for the proposition that companies are to be treated the same as natural persons and that it had no bearing on the law in this jurisdiction which requires a company to be represented by a lawyer: thus rejecting Mr. Fitzgerald's submission in this regard.

14. Mr. Fitzgerald submitted that the rule established in *Battle v Irish Art Promotion Centre Limited* [1968] I.R. 252 ("*Battle*") was contrary to Article 20, 47 and 52, of the Charter of Fundamental Rights (right to equality before law, right to an effective remedy and to a fair trial, and finally the guarantee that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms) and also Article 54 TFEU. Faherty J. refused to accept his invocation of the Charter, citing Keane J. in *AIB v Aqua Fresh Fish Limited* [2015] IEHC 184, ("*Aqua Fresh Fish*") and finding that Mr Fitzgerald had failed to point towards any EU element which would allow him to rely on the Charter.

15. Mr. Fitzgerald submitted that in light of the apparent contradiction between Article 54 TFEU and the prohibition on directors representing companies in litigation, a referral to the Court of Justice of the European Union was necessary. Accordingly, having dealt with his submission in regard to the apparent contradiction, she answered the preliminary reference question by saying quite unequivocally that no issue of EU law had arisen in the case which would warrant a referral. She noted that in order for a referral to be possible, there would have to be a provision of EU law precluding the

court from applying the fundamental tenets of its legal system, in respect of which the Court had a question for referral to the ECJ as to the interpretation of primary or secondary EU law, or sought a ruling by the ECJ as to the validity of the implementing law in this jurisdiction: such had not arisen in this case.

16. Finally, in relation to Mr. Fitzgerald's submission that on Arma v France [2007] ECHR 5568, Battle contravened Article 6.1 of the Convention, Faherty J. could not see that the applicant's circumstances equated to those of the applicant in Arma – the proceedings were not in the context of liquidation or wind up and as such there was no special vested interest in that respect.

17. The only respondent to this application was Ireland and the Attorney General, with Tipperary Count Council and Judge Terence Finn taking no part thereof.

Appeal to this Court

Notice of Appeal

18. The notice of appeal to this Court comprises four main grounds of appeal which can be listed as follows:

- a) That the application of Faherty J. of s. 41 of the Companies Act was incorrect, as that section does entitle a person duly authorised to act as attorney for the company to file proceedings and represent the company in court, and to do other matters on its behalf;
- b) That the Court exceeded its jurisdiction by interpreting EU law with regard to Article 54 TFEU;

- c) That the Court was incorrect to say that the Charter of Fundamental Rights could not be invoked;
- d) That the trial judge's application of the decision of Arma v France [2007]
 ECHR 5568 was incorrect and that the Battle ruling would have failed the test laid out in Arma for the same reasons.

Respondent's Notice

19. The State respondents oppose the application for leave and in their notice they address each of the grounds of appeal put forth by the applicant. They maintain that the applicant has failed to set out any exceptional circumstances which would warrant a direct appeal to this Court and that in any event, the application does not involve a matter of general public importance nor is it in the interests of justice that a further appeal be allowed.

20. Firstly, they note the decision of this court in *Aqua Fresh Fish* and state that the issues raised by the preliminary question fall squarely within the parameters of *Aqua Fresh Fish*, thus making it unnecessary to further examine any of the issues so raised by Mr. Fitzgerald.

21. Secondly, they reject the submission in relation to s.41 of the Companies Act 2014, noting the significant difference between the obligations of a director of a company and a legal professional who is an officer of the court. They list several sections from the Companies Act 2014 in order support their contention that this submission is without merit.

22. Finally, in relation to the application of Article 54 TFEU, the Charter of Fundamental Rights and the ECHR, the respondents do not accept that the Court

exceeded its jurisdiction when dealing with these matters or when holding that the principles established in *Battle* are not in contravention with any principles espoused in EU law. They maintain that Mr. Fitzgerald has failed to point to any EU element in the matter of the dispute between Munster Wireless Limited and the first named respondent which would entitle him to invoke the provisions of the Charter.

Decision

23. In *Battle* it was established that save for the most exceptional circumstances, a company could only be represented by a duly qualified lawyer, this being different from the case of individuals who could self-represent. This distinction is entirely justified by the fact that a company is a separate legal entity, with a personality distinct from that of its members under the Companies Act 2014.

24. The principle laid down in *Battle* was considered in *AIB* v Aqua Fresh Fish Ltd, a case heard in the High Court, Court of Appeal and most recently by this Court ([2015, IEHC 184, [2017] IECA 77, [2018] IESC 49). As such, the issue of whether a company could, in any circumstance be represented by someone who was not a suitably qualified lawyer was carefully considered with reference to all of the relevant legal principles and case law. Having engaged in an analysis of some depth, this Court held that *Battle* was indeed still good law and that save for the most exceptional of circumstance, companies cannot be represented by anyone save for qualified legal professionals.

25. This leads us to the application by Faherty J. of *Aqua Fresh Fish* to the within proceedings. The High Court judge correctly understood and applied the decision of Keane J. Furthermore, none of the facts as outlined in the application for leave or in the other documentation as submitted, give rise to any concern that what may be

described as exceptional circumstances, coming within the definition of *Aqua Fresh Fish*, are at play. Since the principles used by the High Court judge have been so recently affirmed by the Court of Appeal and by this Court, there is no new or novel question of law to be tried nor is there any confusion as to the existing law. The position has now been definitively established and, as was noted in the Court of Appeal judgment in *Aqua Fresh*, it remains the default position for most of the common law world thus suggesting that there is no need for any overhaul or corrective measures.

26. The applicant submits that s. 41 of the Companies Act 2014 acts as a statutory exception to the principle established in *Battle:* however such is not the case. As stated by Faherty J., this section merely permits a person to stand in the shoes of the company and to act *as* the company: it does not divest the company of its incorporated status. The power of attorney permitted in this section does not analogise or transform the power of a director vested with same, into one which would allow him/her to represent the company in court.

27. The decision in *Arma*, which is put forth by the applicant to support his invocation of Article 6.1 of the ECHR is a case which relates to *locus standi:* the applicant set up a company of which she was the manager and sole shareholder. The company was later placed under judicial administration and court ordered liquidation. Her appeal against this was rejected by the provisions of domestic law on the basis that the company did not give her authority to act on its behalf. The EctHR found that even though the company had a separate legal personality, the applicant, as manager and sole shareholder, had a particular interest in having access to a court in connection with the judicial liquidation of her company. The reasoning was based

more on the *locus standi* of a director who has a vested and particular interest in the company which was clearly in a state of extremes. As such, Faherty J. was correct in finding that the factual situation of the within case could not be equated with *Arma*, and thus there exists no incompatibility with Article 6.1 of the ECHR.

28. The applicant has failed to raise any matter which is of general public importance and has not established that it would be in the interests of justice for a further appeal to this Court to be granted. There is no question of EU law which should be asked on the issues at hand, by way of an Article 267 Preliminary Reference to the CJEU. Further, all relevant matters have very recently been considered and decided upon by this Court, thus resulting in the position being clearly established. Accordingly, the situation is now definitively settled.

Conclusion

29. For the reasons stated above, under the Court does not grant leave to appeal under Article 34.5.4° of the Constitution.

And it is hereby so ordered accordingly.

THE HIGH COURT

JUDICIAL REVIEW 2016 No 543 JR

THURSDAY THE 26th JULY 2018 BEFORE MS JUSTICE FAHERTY BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

AND

JUDGE TERENCE FINN

RESPONDENT

AND

TIPPERARY COUNTY COUNCIL

NOTICE PARTY

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

The Preliminary issue directed to be tried by Order of Mr Justice Humphries on the 28th November 2016 prior to the hearing of an application for leave to apply for judicial review namely whether it is appropriate that the Applicant be represented by one of its directors and not a professional legal representative coming on for hearing before this Court on the 27th July 2017in the presence of William Fitzgerald in person a Director of the Applicant Company and Counsel for the second and third Notice parties

And on reading the said Order in the herein proceedings dated the 28th November 2016 and the Affidavit of William Fitzgerald filed on the 18th July 2016 and the Exhibits if any therein referred to

And on hearing the submissions the said William Fitzgerald and Counsel for the said second and third Notice parties The Court was pleased to reserve its judgment

And on the 15th November 2017 the Court hearing the further submissions of William Fitzgerald in person and Counsel for the second and third Notice parties

The Court was pleased to reserve its judgment

And this matter coming into the list accordingly on the 28th June 2018 in the presence of William Fitzgerald in person and Counsel for the second and third Notice parties

The Court DOTH DETERMINE that the said William Fitzgerald is not entitled to represent the Applicant in the application for leave to apply for judicial review in the proceedings herein

And the Court DOTH DETERMINE that no issue of European Law arises in the herein application

And IT IS ORDERED that the herein preliminary issue be adjourned to the 19th July 2018

And the said herein preliminary issue coming before the Court on the 19th July 2018 in the presence of the said William Fitzgerald and Counsel for the second and third Notice parties

IT IS FURTHER ORDERED that the issue of costs of the herein preliminary issue be adjourned to this day

And on hearing the said William Fitzgerald in person and Counsel for the second and third Notice parties this day

The Court doth make no Order as to costs

IT IS ORDERED that the William Fitzgerald be at liberty to take up a transcript of the hearing of the above proceedings on Thursday the 27th July 2017 in Court 14 at the Four Courts Dublin 7 in front of Ms Justice Faherty with the

THE HIGH COURT

approximate times being 15.17 pm to 16.29 pm approximately AND on Wednesday the 15th November 2017 in Court 21 in Aras O Dhallaigh Four Courts Dublin 7 in front of Ms Justice Faherty with the approximate times being 11am to 11.14am with the Applicant in person undertaking to pay for same

> SARA MCQUADE REGISTRAR Perfected: 14/8/2018

William Fitzgerald Director of the Applicant Company

A COPY WHICH LATTEST FOR REGIS

Redaction Needed

THE HIGH COURT

[2016 No. 543 J.R.]

BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

AND

JUDGE TERENCE FINN

RESPONDENT

TIPPERARY COUNTY COUNCIL AND IRELAND AND THE ATTORNEY GERNEAL

NOTICE PARTIES

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

The within proceedings concern an application brought by the applicant 1. 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.

The grounds upon which leave is sought are said to be the persistent refusal of 2. 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.

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

LIA THAILEIO

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.

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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 notices 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, 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 the 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-profitmaking."

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.

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.
 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 della 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 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 be 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 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' 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.

Approved Judgment

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THE HIGH COURT

JUDICIAL REVIEW 2014 No 603 JR

Monday the 10th day of November 2014 BEFORE MR JUSTICE NOONAN BETWEEN

WILLIAM FITZGERALD

Applicant

-AND-

JUDGE TERENCE FINN

Respondent

Upon Motion of the Applicant (in person) made on notice unto the Court this day pursuant to Order of the Honourable Mr Justice Peart dated the 14th day of October 2014 for leave to apply by way of an application for judicial review for the following reliefs:

- The referral to the European Court of Justice for Preliminary Ruling of the question: "Under what conditions and at what stage of proceedings is it a requirement for companies to be represented by a legal professional?"
- An Order that Digital Audio Recording be active during all proceedings relating to the applicant.
- A declaration that anyone before the Court be entitled to make a personal digital recording of proceedings.

4. A Stay on proceedings until DAR is implemented.

5. Such further orders as the Court see fit.

6. Leave to Apply.

- set forth in the Statement of Grounds herein signed by the Applicant on the

Grounds set forth therein

Whereupon and on reading the Statement and the Affidavit of William Fitzgerald filed on the 14th October 2014 verifying the facts set out in the said Statement and the exhibits referred to in said Affidavit

And on hearing said Applicant in person and Counsel for the Respondent

THE HIGH COURT

IT IS ORDERED that the said Application for leave is hereby

refused

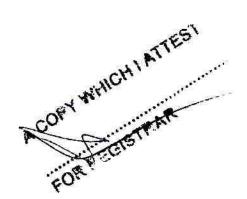
And IT IS ORDERED that the Applicant do pay to the Respondent

costs of this Motion when taxed and ascertained

VALERIE IRVINE REGISTRAR 11TH NOVEMBER 2014

William Fitzgerald - the Applicant of Drumroe Ballyporeen County Tipperary

Chief Prosecutions Solicitor



La015] EC2 339



THE COURT OF APPEAL

Kelly J. Peart J. Irvine J.

> 2014/59 2014 No. 603 J.R.

Between

WILLIAM FITZGERALD

APPLICANT/APPELLANT

AND

JUDGE TERENCE FINN

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Kelly delivered on the 12th day of October 2015

 In October 2014, Mr. Fitzgerald commenced judicial review proceedings in the High Court and the named respondent was Judge Terence Finn of the District Court.

2. The reliefs sought in the judicial review were as follows: first, he sought the referral to the European Court of Justice for preliminary ruling the question: *"Under what conditions and at what stage of proceedings is it a*

requirement for companies to be represented by a legal professional?" the second relief sought was an order that the digital audio recording (DAR) device be active during all proceedings relating to the applicant; third, he sought a declaration that anyone before the court be entitled to make a personal DAR of the proceedings; fourth, he sought a stay on proceedings until the DAR is implemented; fifth, he sought an order for costs.

3. When the application was moved ex parte, there was a direction given that it be on notice. On the ultimate hearing before Noonan J. Tipperary County Council was represented.

4. It was represented because this application is brought in respect of proceedings in which it is involved in the District Court in Cashel. In that court, Tipperary County Council is suing a company called Munster Wireless Limited and it is the desire of Mr. Fitzgerald to appear on behalf of that company.

5. The general law in relation to the representation of companies in litigation is that settled by a decision of the Supreme Court in *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252. In general it can be said that a limited company may not be represented by a director or a member of the company.

6. However, as is clear from what took place in the District Court in this instance, the District Judge, notwithstanding that decision, and in the exercise of his discretion has permitted and will permit Mr. Fitzgerald to represent

- 2 -

Munster Wireless Limited. So Mr. Fitzgerald will have his desire, in that he will be entitled on the hearing of the matter before the District Court to appear on behalf of Munster Wireless Limited.

7. The District Judge has made it clear that that is what is going to happen. When the matter was before Noonan J., as is clear from the transcripts, he took the view that that being so, then the question raised by the applicant was a moot one. The question is, does Mr. Fitzgerald have an entitlement to judicial review with a view to having it ascertained as a matter of law, whether or not he is entitled to appear for Munster Wireless Limited, in circumstances where the District Judge has made it clear that he is permitting him so to? The issue is no longer live and consequently, on that basis, the High Court judge declined to grant judicial review.

8. In my view he was correct. To grant leave would be to have a judicial review on a point which is moot. As I pointed out, during discussion with Mr. Fitzgerald, there are all sorts of circumstances where interesting legal questions and conundrums can be conjured up. The courts are not debating societies. We have to deal with cases by reference to the facts of each case. The fact here is that insofar as Munster Wireless Limited and Mr. Fitzgerald are concerned in the proceedings at present before Cashel District Court, he will have full entitlement to appear on behalf of that company and that disposes of his complaint in that regard. I would uphold the order made by the High Court judge.

- 3 -

9. The second element of complaint relates to the DAR. I am unable to ascertain any legal right that somebody would have to a DAR in advance of having some legitimate complaint pertinent to what went on in the District Court whether by way of reference either to his opponent or to the behaviour of the judge. There is however nothing to prevent Mr. Fitzgerald from taking a contemporaneous note of what goes on in the District Court. He may employ a stenographer if he is minded so to do. But I do not see that there is any justiciable issue which arises concerning the DAR in this case. In any event, it does not seem to me that it is any matter that can be addressed by Tipperary County Council who were the parties put on notice when the application was before the High Court judge. In my view, the High Court judge was correct in declining to grant leave to apply for judicial review in respect of the DAR issue also. For my part I would dismiss this appeal and affirm the order of the High Court.

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Peart J.: I would also dismiss the appeal for the same reasons pronounced by Mr. Justice Kelly.

I also agree with the judgment delivered by Mr. Justice Kelly.Kelly J.: So that brings the matter to an end and this appeal is dismissed.The order of the High Court is affirmed.

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No Redaction Needed



THE SUPREME COURT

DETERMINATION

BETWEEN

WILLIAM FITZGERALD

APPLICANT/APPELLANT

AND

JUDGE TERENCE FINN

RESPONDENT

AND

SOUTH TIPPERARY COUNTY COUNCIL

NOTICE PARTY

Neutral Citation: [2016] IESCDET 49

Supreme Court record no: S:AP:IE:2015:000063

Court of Appeal record no: A:AP:IE:2014:000059

High Court record no: 2014 No 603 JR

Date of Determination: Monday, 25th April, 2016

Composition of Court: Denham C.J., Charleton J., O'Malley J

Status: Approved

APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE CONSTITUTION APPLIES I.E., AN APPLICATION TO APPEAL TO THE SUPREME COURT FROM THE COURT OF APPEAL.

RESULT: The Court does not grant leave to appeal to this Court from the decision of

the Court of Appeal.

REASONS GIVEN:

1. This determination relates to an application for leave to appeal to the Supreme Court from a judgment of the Court of Appeal delivered on the 12th October, 2015, and the order made on the 12th October, 2015 which was perfected on the 13th October, 2015.

2. William Fitzgerald, the applicant/appellant, referred to as "the applicant", seeks leave to appeal to this Court from the said judgment of the Court of Appeal. The applicant is a lay litigant.

3. Judge Terence Finn is listed as the respondent and is referred to as "the respondent".

4. South Tipperary County Council is a notice party to this application and is referred to as "the notice party".

Jurisdiction

5. The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution.

6. Article 34 of the Constitution provides for the public administration of justice; describes the courts established by the Constitution, and those which may be established by law; provides for the full and original jurisdiction of the High Court; establishes the Court of Appeal under Article 34.2; and sets out its appellate jurisdiction under Article 34.4.1°. This states:

"1° The Court of Appeal shall –

(i) Save as otherwise provided by this Article,

(ii) With such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and also shall have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

7. Article 34.4.3° of the Constitution also provides for the finality of decisions of the Court of Appeal, save for appeals that may be taken to the Supreme Court from its decisions under Article 34.5.3°.

8. Under Article 34.5.4° it is possible for a decision of the High Court to be directly appealed to the Supreme Court, bypassing the Court of Appeal. This type of appeal is sometimes referred to colloquially as a "leap-frog" appeal.

9. The Article relevant to this appeal, where the Court of Appeal has already given judgment in a matter, is Article 34.5.3°, which states:-

"The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that -

(i) the decision involves a matter of general public importance, or

(ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court."

10. The decision of the Supreme Court under Article 34.5.6 is, in all cases, "final and conclusive".

11. Primarily, this Court is now "subject to such regulations as may be prescribed by law", an appellate jurisdiction from the Court of Appeal. Such an appeal may only be exercised provided that this Court is satisfied, either that the relevant decision of the Court of Appeal "involves a matter of general public importance", or, alternatively, that it is "in the interests of justice", necessary that there be an appeal to this Court. The constitutional framework established by the 33rd Amendment of the Constitution

thus requires, in order for a party to be entitled to appeal to this Court from a decision of the Court of Appeal, that it be demonstrated that either "a matter of general public importance" arises, or that, "in the interests of justice, it is necessary that there be an appeal" to this Court. The constitutional framework established by the 33rd Amendment of the Constitution thus requires, in order for a party to be entitled to appeal to this Court from a decision of the Court of Appeal, that it be demonstrated that either "a matter of general public importance" arises, or that, "in the interests of justice, it is necessary that there be an appeal" to this Court.

12. The statutory framework for the exercise of the right to appeal to this Court for such leave is to be found in the Court of Appeal Act, 2014, and, in particular, the provisions of s.44 of that Act, which inserts a new s.7 into the Courts (Supplemental Provisions) Act, 1961.

13. The Rules of Court are set out in the amended Order 58 of the Rules of the Superior Courts.

14. The Constitution has retained the entitlement of one appeal as a right from the High Court, subject to express exclusions or regulation by statute from the High Court to the Court of Appeal. What is sought here is a second appeal. The jurisdiction to bring an appeal to this Court is confined principally to cases where, as a result of the determination of the Court of Appeal, the decision of that court is such that the issues raised on a proposed appeal would involve a matter of general public importance, or would be such that it is in the interests of justice that there be a further appeal to this Court.

Application

15. The applicant seeks to appeal from the entire decision of the Court of Appeal which refused the applicant's appeal on three points, first, a referral for a preliminary ruling on the **Battle v Irish Art Promotions** point; second, the right to DAR records and finally, costs.

16. The applicant is asking this Court to depart from one of its own decisions, namely

Battle v Irish Art Promotions Ltd [1968] IR 252, which the applicants submits,

prohibits companies from being represented by someone other than a legal

professional. It is submitted that this decision contradicts Article 54 of the Treaty on

the Functioning on the European Union, "the TFEU", which declares that companies

be treated as natural persons, as natural persons are not required to be represented by a

legal professional.

17. The applicant is asking this Court to make a reference to the Court of Justice of

the European Union on the following questions:-

"1. Under what conditions and at what stage of proceedings is it a requirement for companies to be represented by a legal professional?

2. Is the prohibition of electronic recording compatible with Article 47 of the EUCFR?

3. If the hearing is public should the record be public?"

18. The applicant put forward the following reasons why this Court should grant

leave to appeal:-

"1. There is a contradiction between Irish law and European law on the rights of companies being represented before the courts and consequently to their access to justice.

2. There is an obligation on every national court to set aside any provision of national law which conflicts with community law.

3. There is an absence of legal certainty until the contradiction is resolved.

4. The prohibition of recording by the sitting judge makes him judge in his own cause.

5. The prohibition of personal recordings makes it impossible to challenge the accuracy of the record. (errors and omissions in transcripts of DAR recordings)"

19. No response has been filed on behalf of the notice party.

Background

20. In October 2014, the applicant commenced judicial review proceedings in the High Court against the decision of Judge Terence Finn of the District Court. The High Court declined to grant judicial review and costs were awarded against the applicant.

21. When the application was moved *ex-parte*, there was a direction given that it be on notice and the notice party were represented by counsel at the hearing.

22. The judicial review proceedings concerned a decision of the District Court in

Cashel, Co. Tipperary. In that Court, the notice party was suing a company called

Munster Wireless Limited and it was the desire of the applicant to appear on behalf of that company.

23. In the High Court, the learned trial judge was informed by counsel for the notice party that the District Court had given the applicant permission to represent the company in this particular case and thus the issue was effectively moot. Thus the High Court judge held that it was not appropriate to grant leave.

24. In relation to the operation of the DAR, it was held that this was not a matter for the applicant or the notice party.

25. The Court of Appeal upheld the decision of the High Court in relation to both the representation of companies/mootness issue and the DAR issue.

26. In relation to the first issue, whether the representation of companies argument was moot, Kelly J. of the Court of Appeal held as follows:-

"5. The general law in relation to the representation of companies in litigation is that settled by a decision of the Supreme Court in <u>Battle v. Irish Art</u> <u>Promotion Centre Limited</u> [1968] I.R. 252. In general it can be said that a limited company may not be represented by a director or a member of the company.

6. However, as is clear from what took place in the District Court in this instance, the District Judge, notwithstanding that decision, and in exercise of his discretion has permitted and will permit [the applicant] to represent Munster Wireless Limited. So [the applicant] will have his desire, in that he will be entitled on the hearing of the matter before the District Court to appear on behalf of Munster Wireless Limited.

7. The District Court has made it clear that that is what is going to happen. When the matter was before Noonan J., as is clear from the transcripts, he took the view that that being so, then the question raised by the applicant was a moot one. The question is, does [the applicant] have an entitlement to judicial review with a view to having it ascertained as a matter of law, whether or not he is entitled to appear for Munster Wireless Limited, in circumstances where the District Judge has made it clear that he is permitting him so to? The issue is no longer live and consequently on that basis, the High Court declined to grant judicial review.

8. In my view he was correct. To grant leave would be to have a judicial review on a point which is moot...The fact here insofar as Munster Wireless Limited and [the applicant] are concerned in the proceedings at present before Cashel District Court, he will have full entitlement to appear on behalf of that company and that disposes of his complaint in that regard..."

27. In relation to the applicant's second point regarding the DAR, Kelly J. held that

the High Court was correct in declining to grant leave for judicial review in respect of

this issue. Kelly J. stated that he was unable to ascertain any legal right that somebody

would have access to a DAR in advance of having some legitimate complaint

pertinent to what went on in the District Court whether by way of reference either to

his opponent or to the behaviour of the judge. He noted that there was nothing to

prevent the applicant from taking a note of the proceedings or employing a

stenographer. He concluded that there was no justiciable issue concerning the DAR

in this case.

Decision

28. Following the case of <u>Battle v Irish Art Promotion Centre Ltd</u> [1968] I.R. 252, before this Court, it is established jurisprudence that the director of a company cannot

represent the company before the courts on the basis that separate legal personality cannot be set aside. O'Dálaigh C.J held that "in the absence of any statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant".

29. This Court in <u>Stella v. Environmental Protection Agency</u> [2014] 2 IR 125, approved the decision in <u>Battle v. Irish Art Promotion Centre Ltd</u> and Fennelly J. delivering judgment stated as follows:-

"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."

30. Thus, according to **Battle** and **Coffey**, as a general principle, a company is obliged to instruct qualified lawyers to represent it in legal proceedings. However, the Court has an inherent jurisdiction, in exceptional circumstances, to permit representation of a company by an unqualified person, including a shareholder or director, where the administration of justice so requires.

31. This "exceptional circumstances" jurisdiction was clearly invoked by the District

Court judge in this case as he permitted and will permit the applicant to represent

Munster Wireless Limited.

32. Thus, the issue as to representation of companies is clearly moot and as per

established jurisprudence, this Court will not hear academic or hypothetical appeals.

33. There is no justiciable issue in relation to the DAR.

34. For the reasons set out above, the Court does not grant leave to appeal to this Court from the Court of Appeal.

And it is hereby so ordered accordingly.

Record No: 2014/00049

AN CHUIRT DUICHE (The District Court)

DISTRICT COURT AREA OF Cashel

BEFORE JUDGE TERENCE FINN

THE 22nd DAY OF February 2016

BETWEEN

FRANK O'BRIEN (REVENUE COLLECTOR FOR SOUTH TIPPERARY COUNTY COUNCIL)

CLAIMANT

-AND-

MUNSTER WIRELESS LIMITED

RESPONDENT

The Defendant having been duly served with the Summons herein and the same coming for hearing before the Court this day. 22nd February 2016. WHEREUPON and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by or on behalf of the Claimant/Plaintiff and it appearing to the Court that the Claimant is entitled to the sum of €3690.05 on foot of the Summons

THE COURT DOTH ORDER

1. That the Claimant do recover from the Respondent Decree in the sum of €3690.05 .Costs.

2. Allow one month to pay. /Distress.

BY JUDGE OF THE DISTRICT COURT THE DAY OF July 2018

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THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL

2020/29

BETWEEN

MUNSTER WIRELESS LIMITED

APPLICANT

AND

JUDGE TERENCE FINN

RESPONDENT

AND

TIPPERARY COUNTY COUNCIL

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

I certify that the Application for Leave Notice was served on The Chief State Solicitor, Osmond House, Little Ship Street Dublin on the 5th day of March 2020 by hand.

And on Judge Terence Finn at Clonmel Courthouse, Clonmel, Co. Tipperary on the 6th day of March 2020 by hand.

And on Tipperary County Council at Binchy Solicitors. Quay House, Clonmel, Co. Tipperary on the 6th day of March 2020 by hand.

signed

William Healer

William Fitzgerald. 13th July 2020