



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

Supreme Court Record No: 2022/64

[2024] IESC 5

**Charleton J.
O'Malley J.
Woulfe J.
Hogan J.
Murray J.**

Between/

**EUGENE McCOOL (SUBSTITUTED AS PLAINTIFF FOR McCOOL
CONTROLS AND ENGINEERING LIMITED BY ORDER OF THE MASTER
OF 8TH NOVEMBER 2017)**

Plaintiff/Appellant

AND

HONEYWELL CONTROL SYSTEMS LIMITED

Defendant/Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th of February 2024

Introduction

1. The advent of a corporate body possessing limited liability in a series of mid-19th century Victorian statutes - principally the Limited Liability Act 1855 and the Companies Act 1862 – presented recurring problems with which the courts in all the common law jurisdictions have struggled. If, in the words of Rimer L.J. in *Prest v. Prest* [2013] 1 All ER 795, the distinction “between the respective legal personalities, rights and liabilities of a company and those of its shareholders is as valid today as when the House of Lords decided *Salomon v. Salomon & Co. Ltd.* [1897] AC 22”, the courts have nonetheless continued to struggle to identify any coherent and principled basis as to when the distinction between the shareholders and the company which they control can be ignored or disregarded.
2. It would not be an under-statement to remark that the vast case-law on this topic is not always consistent. At times remorseless judicial logic has led the courts in the direction of a strict application of the *Salomon* incorporation principle. Thus, for example, in *The Roundabout Ltd. v. Beirne* [1959] IR 423 at 427 Dixon J. held the incorporation of a new company was a “legal subterfuge” designed “to put an end to the trade dispute and [to] enable the business to be carried on without the inconvenience of being subject to the picket.” It was nonetheless a successful legal subterfuge in that the picketing of the premises of the new company (which it had conveniently leased from the old company) was held to be unlawful.
3. At other times practical exigencies and the individual justice of a particular case tug the courts in the opposite direction. It is true that in his leading judgment for the UK Supreme Court in *Prest v. Petrodel Resources Ltd.* [2013] UKSC 34, [2013] 2 AC 475 Lord Sumption sought to draw together the disparate strands of over a hundred

years of case-law and to produce a unified, coherent doctrine on this topic. Yet not everyone is convinced that even this sophisticated endeavour has been completely successful: see, *e.g.*, the analysis of Hannigan, “Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company” (2013) 50 *Irish Jurist* 11.

4. Perhaps all of this is the judicial equivalent of seeking out the North-West Passage. We have perhaps to recognise instead that there is simply no perfectly consistent means of separating out the corporate person on the one hand from the shareholders on the other which provides for a principled solution for each and every case in which this issue arises. Yet if there is any lesson to be drawn from vast case-law on the topic it is that judicial experience has shown that incremental, pragmatic, case by case exceptions to the absoluteness of the *Salomon* rule are in practice necessary.
5. A version of this recurring problem presents itself afresh on the facts of the present appeal. I confess that I have not found this an easy issue to resolve. As Woulfe J. has explained in the judgment he has delivered (and with which judgment I respectfully agree), the appellant, Mr. McCool, was previously the managing director and majority shareholder of McCool Controls and Engineering Limited (“McCool Controls”), which was the sole plaintiff in these proceedings when the proceedings commenced against Honeywell Control Systems Ltd. (“Honeywell”) as far back as August 2005. It appears that since 2020 he has now relinquished that directorship and shareholding in favour of his son, so that he is no longer a member of the company.
6. The principal contention made by McCool Controls is that Honeywell wrongfully excluded it from a major construction project, thereby breaching what the company alleges was an exclusive distribution agreement between the parties. The claim is a

significant one, amounting to a claim of some €11m. for breach of contract. Again, as Woulfe J. has explained, Mr. McCool concluded that the company could not afford separate legal representation. He accordingly arranged in September 2017 for the company to assign its interests in the proceedings to him.

7. Mr. McCool subsequently made an application to the Master of the High Court to be joined as a co-plaintiff. In the event this resulted in an order substituting him as sole plaintiff in the action. That order was successfully appealed by the defendant company to the High Court: see the judgment of Noonan J. in *McCool v. Honeywell Control Systems Ltd.* [2018] IEHC 167.
8. Undaunted by this adverse decision, McCool Controls purported to execute a second assignment. Another application was made by Mr. McCool on foot of that assignment, this time to be substituted as plaintiff instead of the company. That application was also unsuccessful, as Simons J. held that the matter was *res judicata* having regard to the earlier decision of Noonan J. on this point: see *McCool v. Honeywell Control Systems* [2019] IEHC 695. Mr. McCool failed in his appeal against both High Court decisions: see *McCool v. Honeywell Control Systems Ltd.* [2022] IECA 56. This Court granted leave to appeal from that decision of the Court of Appeal: see [2022] IESCDET 135.

The first two assignments and the judgment of the Court of Appeal

9. As I have already noted, the company purported to effect two assignments of the claim against Honeywell, it is important to note that first resolution of the company approving the first assignment referred to the company assigning ‘the legal proceedings against Honeywell ... *in a suitable proportion*, whereby Eugene McCool could pursue the claim for damages against the defendant ...’. (emphasis supplied).

- 10.** In the accompanying affidavits filed in the High Court in support of these applications, Mr. McCool adduced a range of reasons for these assignments. They were all essentially inter-related, as he claimed that he was not acting as such in his own personal interests, but that he had taken this step in order to protect the company and to advance the case to trial. So far as the first assignment was concerned, Mr. McCool had informed Honeywell's legal advisers that he had paid €1 by way of initial consideration, with the balance to be agreed by reference to expert advice. The first assignment made provision for the claims to be assigned further, if necessary to third parties and then back to McCool Controls.
- 11.** Quite independently of the *res judicata* aspect of the judgment of Simons J., both Noonan J. and the Court of Appeal gave essentially three reasons for their respective conclusions. The first was that the first assignment had sought to circumvent the strictures of the decision of this Court in *Battle v. Irish Art Promotion Centre* [1968] IR 252. As we shall shortly see, in *Battle* it was held that the managing director of a company could not represent it in legal proceedings to which the company was a party. Both Noonan J. and the Court of Appeal took the view that the purported assignment of the chose of action amounted to an attempt to circumvent the rule in a manner which was abusive.
- 12.** The second reason was advanced by Haughton J. in his judgment for the Court of Appeal. He took the view that the first assignment was not absolute and that it thus did not comply with the requirements of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 ("the 1877 Act"). The third reason was that the first assignment was found by both the High Court and the Court of Appeal to savour of champerty, so that the assignment was unenforceable for that reason alone.

13. The question which thus arises is whether such a deed of transfer is in principle lawful or whether such an assignment violates some principle of public policy, specifically, first, the rule in *Battle*. This, actually, was the sole issue on which this Court granted leave to appeal from the Court of Appeal. So stated, the issue presented on this appeal is a very narrow one, albeit that I consider that it is also well-nigh impossible to avoid the question of whether the first assignment was either champertous or savoured of champerty. I propose now to consider these questions in turn.

Public policy and the decisions of this Court in *Battle* and *Aqua Fresh Fish*

14. There seems little doubt but that as of the date of the execution of the first deed of assignment Mr. McCool essentially stood in the same shoes as Mr. Salomon had done some 120 years previously. Of course, in Mr. McCool's case he confronted this issue in a particular way, in that by virtue of this Court's decision in *Battle* he was not permitted to appear personally on behalf of the company. In *Battle*, Ó Dálaigh C.J. said that this was because "in the absence of statutory exception" a limited company could only be represented in legal proceedings by legal professionals. As he explained ([1968] IR 252 at 256), this was:

"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 had as individuals; but the choice has been their own."

15. This matter was most recently re-examined by this Court in *Allied Irish Banks plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49, [2019] 1 IR 517. Here Finlay Geoghegan

J. conducted an exhaustive review of the authorities which it is unnecessary to repeat here. She drew attention to the fact that the *Battle* rule had not been modified by the Oireachtas when it enacted the Companies Act 2014 (“the 2014 Act”). While s. 868(5) of the 2014 Act allows a company to be represented by a duly appointed “representative”, this had already been provided for in s. 382 of the Companies Act 1963. As Finlay Geoghegan J. observed, the Oireachtas clearly legislated in the knowledge of the existence of the *Battle* jurisprudence and elected not to make any further changes to the law.

16. Finlay Geoghegan J. went on to acknowledge that there might, however, be exceptions to the apparent absolutism of the *Battle* rule, saying that ([2019] 1 IR 517 at 533) *provided* that “there is an inherent jurisdiction to make exceptions to the general rule” which were “justified in the interests of the due administration of justice, such as a restriction is not then, in my view, prohibited by the Constitution.” She further stated ([2019] 1 IR 517 at 535) that:

“The discretion of the court to permit in exceptional circumstances representation of litigants, whether human or corporate, by person who are not lawyers with a right of audience is both important and essential in ensuring that the general rule is not in breach of the constitutional guarantees of rights of access to the courts and fair procedures.”

17. What, then, were the type of exceptional circumstances which might justify a departure from the rule? Here Finlay Geoghegan J. referred to a decision of the Court of Appeal in *McDonald v. McCaughey Developments Ltd.* [2015] IECA 159 where a co-defendant who was a director and principal shareholder was permitted in effect to argue the case on behalf of the co-defendant company. While acknowledging that this approach might not be appropriate in all cases, it was

nonetheless “a factor to be taken into account.” Finlay Geoghegan J. then added ([2019] 1 IR 517 at 537):

“Similarly, if a person seeks to be joined as a party to the proceedings, this may be a factor to be taken into account if the interests of justice required representation also of the company by the person joined as a party.”

- 18.** Finlay Geoghegan J. then went on to explain the public policy, which is at issue in the rule in *Battle*, namely, first, to ensure the appropriate administration of justice by ensuring that what she described as the “professional rules” and obligation of legal professionals are upheld. She went on to identify the second objective in the following terms ([2019] 1 IR 517 at 537):

“As explained so clearly by Bingham MR in *Rayford v. Freeway Classics* [1994] 1 BCLC 445, part of the fairness and justice of the rule of limited representation, certainly in relation to limited companies... relates to their separate legal personality from their directors and shareholders and the absence of any risk either by reason of the company’s debts or costs of the proceedings to the directors and shareholders. A person who is already a party to the proceedings is probably at risk of an adverse order for costs if unsuccessful in the claim or defence.”

- 19.** It seems to me that this exposition of the public policy considerations which provide the foundation of the *Battle* jurisprudence really provides the answer to the present conundrum. As the decision of this Court in *SPV Osus Ltd. v. HSBC International Trust Services (Ire,) Ltd.* [2018] IESC 44, [2019] 1 IR 1 makes clear, an assignment of this nature could in principle properly be made having regard to the provisions of s. 28(6) of the 1877 Act, save that it is said that this particular assignment offends certain public policy considerations. Once, however, the chose

in action is transferred to Mr. McCool (assuming always for this purpose that any such assignment complied with these requirements) he becomes personally exposed to any adverse costs orders and he cannot in any sense hide behind the separate corporate personality of his company from the consequences of any such orders. To that extent the rationale for the rule in *Battle* no longer applies.

- 20.** There remains the question of the potential impact on the administration of justice if the cause of action were to be so assigned to the principal shareholder. While this is a valid consideration, there are other mechanism short of invalidating the assignments whereby the objective of the orderly administration of justice can be safeguarded. In his capacity as a personal litigant, Mr. McCool would be expected to comply with court orders and directions in the same general manner as legal professionals. He will also be expected to continue with these proceedings with some dispatch. In the event that he was to fail in either of these respects – such as, for example, by regular and contumelious failures to abide by or comply with court orders and direction – it would be then open to the defendants to seek to have the proceedings struck out or stayed as an abuse of process.
- 21.** Here I am not unmindful of the criticisms of Mr. McCool’s conduct in this litigation which have been voiced by Noonan J. in particular: see his judgment in the High Court: see *McCool v. Honeywell Control Systems Ltd.* [2018] IEHC 167 at paragraphs 31-48. While Mr. McCool would be entitled to pursue the claim forcefully and with vigour, there is no reason why Honeywell (or their legal advisers) should have to put up with obstructive tactics or ill-founded allegations of misconduct, whether personal or professional. Should this re-occur, Honeywell would be fully entitled to apply to the High Court to have the proceedings struck out as amounting to an abuse of process.

Whether the proposed assignment savoured of champerty

22. There remains the question as to whether any such assignment would be champertous or would savour of champerty. Contrary to the views expressed by Noonan J. in the High Court and by Haughton J. in the Court of Appeal, I do not think that any such assignment could be invalidated on the ground that it savoured of champerty or that it otherwise offended against public policy on this ground, provided that Mr. McCool retained a significant – if indirect – in the outcome of the proceedings . As I put it in *Greenclean Waste Ltd. v. Leahy* [2014] IEHC 314:

“Maintenance may be defined as the improper provision of support to litigation in which the supporter has no direct or legitimate interest. Champerty, on the other hand: ‘is an aggravated form of maintenance and occurs when a person maintaining another’s litigation stipulates for a share of the proceeds of the action or suit’: *Camdex International Ltd. v. Bank of Zambia* [1998] Q.B. 22, 29, per Hobhouse L.J. Champerty may thus be described with only a little exaggeration as a secular form of simony within the legal system, for, as Hobhouse L.J. aptly put it in *Camdex International*, what ‘is objectionable is trafficking in litigation.’”

23. While this decision was reversed by the Court of Appeal ([2015] IECA 97), I do not think that in his judgment Kelly J. intended to doubt the accuracy of this passage.

24. Provided that Mr. McCool retain his status as principal shareholder, nothing of the kind would have arisen here because there would then have been no question of any “investing in litigation” or “commodisation of litigation” on the part of Mr. McCool of the kind which, in the words of O’Donnell J. in *SPV Osus*, captures “an important element of what is considered both dubious and offensive”: [2019] 1 IR 1 at 24-25.

As our decision in *SPV Osus* makes clear, the assignment of a what is sometimes described as a bare cause of action is unenforceable unless the assignee had a genuine commercial interest in the assignment in question. If, as O’Donnell J. observed ([2019] 1 IR at 61) “an assignment of a claim to a party where the shareholding is the same as that in the assignor at the time the cause of action accrued” is not regarded as champertous, then the same can fairly be said in the present case where the proposed assignee was the principal shareholder at the time the cause of action accrued.

25. In that regard O’Donnell J. referred with approval to a decision of the Privy Council in *Massai Aviation Services v. Attorney General* [2007] UKPC 12. That was a case where the shareholders of Company A had sold that company while assigning for a nominal sum an existing cause of action against a third party to a new Company B which they controlled. In her judgment Baroness Hale rejected the argument that this arrangement savoured of champerty, saying at (at paragraph 21):

“This was not wanton and officious intermeddling in another person’s litigation for no good reason. It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against the defendants and no good reason why these defendants should be permitted to escape any liability that they may have. That is not, of course, to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company’s claims. To take an extreme example, for a minority shareholder to buy a substantial claim in the hope of making a substantial profit may well be contrary to public policy. But that is not this case. Aerostar owed all the shares in CAASL

and taken as a whole the transaction was a perfectly sensible business arrangement.”

26. This is where I respectfully differ on this issue with the Court of Appeal. In a very careful treatment of this question Haughton J. concluded (at paragraph 76) that Mr. McCool could not be himself within any of the *SPV Osus* exceptions because the proposed assignment was not:

“to a party with a ‘pre-existing legitimate interest in the transaction giving rise to the claim.’ Only the company has [a] legitimate interest in the claim, which is pleaded as a claim for damages for breach of contract – and there is no pleading or suggestion that Mr. McCool personally was in any contractual relationship with Honeywell.”

27. For my part I think, however, that this is too strict a reading of *SPV Osus*. It is clear from the judgment of O’Donnell J. that he approved of *Massai Aviation Services*, and it is equally clear from that the application of the principles set out in that judgment that an assignment of this kind would not be contrary to public policy. This is because in the present proceedings Mr. McCool had – at least prior to relinquishing ownership of McCool Control - a clear personal interest qua principal shareholder in the outcome of the proceedings. In any event if he were to succeed in this litigation then in view of the circumstances of the assignment, it might well be held in appropriate proceedings (such as, for example, a claim brought against the company by a third-party creditor) that any such proceeds were subject to a constructive trust for the benefit of the assignor company. While it is unnecessary to express any concluded view on this point (as this issue remains entirely hypothetical), it does show the close links between Mr. McCool and the assignor

company such that the assignment cannot be said to savour of champerty or to be contrary to public policy, precisely because of this shared mutual interest.

Conclusions

- 28.** Summing up, therefore, it is sufficient to say that having regard in particular to the judgment of Finlay Geoghegan J. in *Aqua Fresh Fish* I am persuaded that there is no clear public policy to be found in the 2014 Act which in principle precludes an assignment of this kind. It is true that the rule in *Battle* is, as McKechnie J. observed in his judgment for the Court of Appeal in *Aqua Fresh Fish* ([2017] IECA 77) “the logical corollary of the *Salomon* principle.” Yet that principle cannot be applied with inexorable logic as if it were some kind of mathematical theorem, such that any departure from the separate corporate personality underlying both *Salomon* and *Battle* would automatically violate public policy.
- 29.** In the present case the relevant public policy considerations relate principally to the potential abuse of the limited liability principle. Once Mr. McCool takes the benefit of the assignment of the cause of action then he will be personally liable for any costs which might thereafter be made in favour of the defendants.
- 30.** I likewise take the view that having regard to the decision of this Court in *SPV Osus* and that of the Privy Council in *Massai Aviation Services* that this agreement cannot be regarded as champertous or savouring of champerty because Mr. McCool qua principal shareholder had a legitimate interest in receiving the assignment of the cause of action. There is no question of him “investing in litigation” of the kind which was regarded by O’Donnell J. in *SPV Osus* as being the essence of what was captured by the public policy underlying the tort of champerty.
- 31.** In these circumstances I agree with the judgment of Woulfe J. and I would accordingly allow the appeal.

