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 Woulfe delivered on the 27th day of February, 2024

Introduction

1. The appellant appeals an order of the Court of Appeal dated the 5th May, 2022, following a judgment of Haughton J. dated the 11th March, 2022 (see [2022] IECA 56), in which the Court dismissed the appeals of the appellant against two High Court judgments, one of Noonan J. (see [2018] IEHC 167) and one of Simons J. (see [2019] IEHC 695).

2. The appellant was previously the managing director and majority shareholder of McCool Controls and Engineering Limited ("the Company"), which was the sole plaintiff in these proceedings when the plenary summons issued on the 9th August, 2005. The case has its genesis in an agreement made between the Company and Honeywell Control Systems Limited ("the respondent") in 1998. The Company is involved in the provision of building management systems, including electronic control systems, for building services such as heating and air conditioning. The respondent is an English registered company which is part of a multinational conglomerate which manufactures and distributes such systems, amongst others.

3. In its original statement of claim, the Company alleged that the 1998 agreement gave the Company exclusive distribution and installation rights to the respondent's products in Ireland, subject to certain exceptions. The Company's claim relates primarily to an allegation regarding a potentially lucrative project, in connection with the design and construction of a major pharmaceutical plant in County Dublin, in which the Company had hoped to be involved. The essential claim is that the respondent itself successfully tendered for the project by cutting the Company out, in breach of the 1998 agreement, and that this has resulted in very substantial losses to the Company, which the appellant has estimated at some €11m.

4. The respondent delivered a defence in which it denies the claim in full and pleads that any work done by it on the project in question was either not covered by the 1998 agreement, or came within the express exceptions therein provided for. The respondent further pleads that, in any event, the Company is estopped from maintaining the claim because of a compromise agreement entered into between it and the respondent in November, 2002. The respondent has also included a counterclaim in respect of goods sold and delivered to the Company.

5. These proceedings, commenced in 2005, have had, to say the least, a very protracted course. It appears that the pleadings were closed as long ago as 2007, and that there has been great controversy between the parties on various issues such as replies to particulars and discovery.

6. Along the way, the appellant sought to be joined as a co-plaintiff, in a motion brought before the Master of the High Court. The stated purpose of the application was to enable the appellant to continue the proceedings, in circumstances where the Company could no longer afford a legal team. In his grounding affidavit the appellant described in various ways that the purpose of the application to be joined was that the Company was "dependent on me to bring this case to trial", that the Company was indebted to him and that, as a party heavily connected to this case, he was in a position to protect the interests of the Company and to advance the case to trial.

7. After the motion first came on for hearing before the Master on the 28th July, 2017, and was adjourned to a date in October, 2017, the Company executed a document on the 28th September, 2017, the Company executed a document (called an "Assignment of Claim Agreement"), purporting to assign its interest in the proceedings to the appellant. It seems that it was the Master himself who raised the possibility that the cause of action might be assigned to the appellant by the Company, to thereby overcome the difficulty that at the time of the application the appellant had no personal claim against the respondent which he could litigate in his own right.

8. A resolution of the Board of the Company was passed on the 28th September, 2017, stating that the Company would assign the proceedings to the appellant, and the resolution recited "the total failure of the legal system to protect McCool Controls

against the aggressive activities of the defendant", and that the Company had been denied its constitutional right of access to justice. The assignment was described as the "only possible solution at this time", and also recited that the appellant "confirmed his commitment to the protection and wellbeing of McCool Controls, its staff, customers and suppliers and to bring these legal proceedings to a conclusion". The appellant signed the resolution as Chairman and Secretary of the Company.

9. In his second affidavit sworn on the 11th October, 2017, after the agreement for the assignment of the chose in action was executed and after the Board resolution permitting this was passed, Mr. McCool averred that he was not "making a personal claim or any form of contractual claim", but sought that he be joined as a co-plaintiff "for the sole purpose of protecting the Company against the activities of the defendant". In a later affidavit sworn on the 24th October, 2017, the appellant again outlined this intention and stated that he had "undertaken to diligently continue the proceedings, solely for the benefit of the Company and at no cost to the Company".

10. It appears that when the matter came before the Master again, he concluded that since the Company had assigned its interest in the proceedings to the appellant, it could no longer be a plaintiff. In the light of same, and in reliance on this assignment, the appellant reformulated his application and sought instead to be substituted as plaintiff. This application was successful, and on the 8th November, 2017, the Master made an order substituting the appellant for the Company as plaintiff in the proceedings.

The High Court

11. The respondent then brought an application to have the substitution order discharged, and this was determined by Noonan J. in the High Court. He felt that, in its terms, the Board resolution permitting the assignment appeared to suggest that the assignment was for the purpose of enabling the appellant to pursue the litigation, thereby conferring some benefit on the Company. He noted that the assignment was made for nominal consideration of €1, and it contained a clause by which the Company acknowledged that the appellant could at any time reassign any or all of the transferred rights.

12. Noonan J. held that the assignment to the appellant was invalid and an abuse of process. Firstly, this was because it was not an absolute assignment of the Company's cause of action to the appellant, i.e. an assignment involving circumstances where it would retain no residual interest in the proceedings. Secondly, it was an impermissible attempt to circumvent the rule in *Battle v. Irish Art Promotions Centre Limited* [1968] I.R. 252 ("*Battle"*) that a company cannot be represented in court proceedings by a director or shareholder and must be represented only by a lawyer. Noonan J. also held that, as the assignment expressly provided for onward transfer of the cause of action to a disinterested third party, it therefore clearly savoured of champerty.

13. The appellant appealed the judgment and order of Noonan J. to the Court of Appeal, but notwithstanding the pending appeal made a second application to the High Court to be substituted as plaintiff in the proceedings. This application was grounded upon a second assignment executed on the part of the Company.

14. In his affidavit grounding the second application the appellant averred that the Board of the Company unanimously passed a proposal to have the proceedings assigned to the appellant, at a Board meeting dated the 29th June, 2018. A further

document headed up "Assignment of Claim Agreement" was exhibited, which document was also dated the 29th June, 2018, and was signed on behalf of the Company by one of its directors, Mary O'Donnell, and the appellant signed it as "assignee". The second assignment was in identical terms to the first assignment, save that the clause providing for a potential onward transfer of the assignment was now omitted.

15. Simons J. refused the second substitution application on the basis that an issue estoppel arose, by reason of the previous finding of Noonan J. that the purported assignment of the chose in action to the appellant was merely a device intended to avoid the requirement that a company be legally represented in proceedings. That finding of Noonan J. was binding on the appellant, and was dispositive of the application before him, given that there had been no material change in circumstances between the first and second substitution application. In light of the Court's finding as to issue estoppel, Simons J. felt that it was not necessary, nor indeed appropriate, for him to consider the other objections to the application raised by the respondent.

The Court of Appeal

16. The appellant unsuccessfully appealed to the Court of Appeal against both decisions of the High Court. The Court below held that many of the appellant's grounds of appeal were irrelevant to the core reasoning of Noonan J., and that his arguments failed to engage with the primary reason given by him for vacating the Master's order for substitution, namely that the first assignment was a device designed to circumvent the rule in *Battle*, and was therefore invalid as an abuse of process. The Court below also dismissed the second appeal, concluding that ample evidence supported the conclusion of Simons J. that the issue which arose for determination

on the second substitution application was not materially different from that which had been determined by Noonan J.

Determination

17. This Court granted the appellant leave to appeal by a determination dated the 13th December 2022: see [2022] IESCDET 135. The Court considered that the question of whether an assignee of its interest in litigation by a corporate body may be permitted to pursue the action by being substituted as plaintiff in lieu of that company, irrespective of the purpose of the assignment, did raise a matter of general public importance concerning the right of access to the courts. The Court stated that there is some uncertainty regarding the legal import of the actual intention of the assignment on the entitlement of an assignee to continue litigation commenced by a corporate entity.

18. The Court therefore proposed that leave to appeal be afforded on that narrow ground only. It did not propose to grant leave in respect of the general argument sought to be made by the appellant, regarding the right of a corporate entity to be represented other than by counsel or solicitor. The Court repeated that it would grant leave in regard to "the single and limited question" identified above.

Submissions in this Appeal

Submissions of the Appellant

19. The appellant submits that the Court of Appeal erred in law for the following reasons: (i) The validity of an assignment of a chose in action, including the assignment of a cause of action, is determinable by reference to objective criteria only; (ii) An assignment may be treated as void on public policy grounds only if it

is capable of offending the public policy concern arising. In the circumstances of the present case, no question of abuse of process arises where an order for substitution grounded on a valid assignment removes any possibility of engaging (much less offending) the rule in *Battle*.

(i) Validity of Assignment

20. The appellant submits that the validity of the assignment of any legal chose in action is determined, in the first instance, by reference to s.28(6) of the Supreme Court of judicature Act (Ireland), 1877 ("the 1877 Act"). He refers to *Waldron v Herring* [2013] 3 I.R. 233 where, adopting the test set out by Finlay Geoghegan J. in *O'Rourke v Considine* [2011] IEHC 191, Edwards J. stated (at para. 16) that four main conditions require to be satisfied for the purposes of s. 28(6). First, the assignment must be for a debt or other legal chose in action. Second, there must be "absolute assignment" meaning that the assignor must not retain an interest in the subject matter of the assignment. Third, the assignment must be in writing by the assignor. Fourth, the debtor must be given express notice in writing of the assignment.

21. The appellant submits that it is clear from the foregoing that the criteria for assessing the validity of an assignment of a legal chose in action are objective in nature, and that no reference is made to the intention of the assignment, although it accepts that additional criteria may be relevant if considering issues of maintenance and champerty.

22. The appellant contends that the House of Lords decision in *Norglen Limited (in liquidation) v Reeds Rains Prudential Limited* [1999] 2 A.C. 1 ("*Norglen*") is of

significant importance. In that case liquidators appointed to two companies assigned the respective causes of action to their individual majority shareholders. The assignment was objected to in each case on the basis that it was "void and to no effect" because it was for the sole or dominant purpose of enabling the action to be prosecuted with avoidance of liability to give security for costs and/or with the benefit of the civil legal aid scheme. The House of Lords considered the "difficulties" presented by the reasoning in *Advanced Technology v. Cray Valley Products* [1993] BCLC 723 ("*Advanced Technology*"), where an assignment of a cause of action was deemed void as "a mere stratagem or device to enable the company to carry on proceedings" with the support of the assignee's legal aid. It is submitted that Lord Hoffman went on to overrule *Advanced Technology* and indicated his views as to why an examination of motive was unnecessary.

23. The appellant submits that the House of Lords approach to this question of motive in *Norglen* is not novel, and that a similar approach was taken many years ago in *Fitzroy v. Cave* [1905] K.B. 364 ("*Fitzroy*"). He notes that there does not appear to be an Irish decision in which *Norglen* or *Fitzroy*, on the specific issue of motive, has been considered; however, it is said that in England and Wales both *Norglen* and *Fitzroy* remain authority for the proposition that the motive behind an assignment of a cause of action by a company is irrelevant in determining the validity of an assignment. Where the common law principles on assignment are so closely aligned as between the two jurisdictions, it is submitted that it is appropriate for the Irish courts to mirror this approach.

(ii) Effect of Assignment and Abuse of Process

24. The appellant notes that the assignment of the Company's claim to the appellant is impugned for abuse of process, as constituting a "device" to circumvent the rule in *Battle*. He considers the *rationale* behind the rule and the "abuse" it seeks to prevent. He submits that, in this context, any abuse of process argument regarding *Battle* must be concerned with a non-legal representative of an impecunious company being permitted to control the litigation and be the voice on behalf of a company, whilst simultaneously avoiding the normal obligations and risks shouldered by a party to litigation. Importantly, it is said, this concern is only relevant when an individual seeks to *represent* the company as a non-party. The position of an individual seeking to be substituted in its place is markedly different.

25. The appellant contends that the Irish authorities have drawn a clear distinction in principle between the circumstances in which the rule in *Battle* is engaged, and those in which the rule has no application. He submits that these authorities identify the abuse which the rule prevents; *i.e.* a non-legal representative of a company effectively disregards the doctrine of separate legal personality by purporting to speak on its behalf, yet he or she may simultaneously exploit the benefit of the company's limited liability in doing so, where he or she is not personally joined to the action. He refers to distinctions drawn in *McDonald v. McCaughey Developments (in receivership)* [2015] IECA 159 and in *Allied Irish Bank Plc v. Aqua fresh Fish Limited* [2019] 1 I.R. 517, and submits that the distinctions drawn in these authorities are significant. They demonstrate that the parameters of the rule in *Battle* are firmly established by reference to the net issue of representation, to the exclusion of other considerations, such as joinder. The question of substitution of the Company on foot of an assignment of its cause of action renders the question of representation obsolete.

26. The appellant notes that the concern of the High Court in this case was that to permit substitution of the plaintiff on foot of the assignment would effectively set the rule in *Battle* at nought. He refers to the immediate effects of a substitution order, however, and argues that there is no question of abuse of process in the circumstances outlined, nor is the rule in *Battle* set at nought. The effect of the substitution is that an assignee acquires not only the right to litigate, but also the risks and responsibilities in litigating in his or her own name. He submits that it is difficult to see how, in these circumstances, an assignment which forms the basis of such an application could be void for abuse of process. In the circumstances of the present case, it is said that the sole benefit conferred by the assignment and substitution procedure is the opportunity to pursue an action which may otherwise not proceed further.

27. Finally, the appellant submits that there are two competing public concerns which are relevant. One is the importance of maintaining the integrity of the administration of justice (including by preventing abuse of process). The other is to protect and facilitate the right of access to the courts. He argues that restricting the right of access to the courts on the grounds of the rule in *Battle* is an unavoidable consequence of the concept of separate legal personality. While this may be a justifiable curb on the right of access to the courts, he maintains that any further fettering of that right which relies, directly or indirectly, on the rule would be disproportionate to the aim of protecting the integrity of the administration of justice.

Submissions of the Respondent

28. The respondent addresses four issues in its submissions. Firstly, they submit that the decision in *Norglen* does not have the meaning contended for by the appellant and the decision should not, in any event, be followed in this jurisdiction. They argue that the decision is not actually authority for the wide-ranging proposition contended for by the appellant, *i.e.* that the validity of an assignment is determinable by reference to objective criteria only.

29. The respondent relies on six features of *Norglen* in this regard;

(i) In *Norglen* both of the assignors were in insolvent liquidation. The respondent highlights that the decision in *Norglen* in its totality must be considered in the context of the assignments which were for the purpose of maximising recovery for a company's creditors, which they submit is not the case here.

(ii) *Norglen* was decided having regard to a statutory instrument that suggested legislative sanction, in principle, for the type of assignment at issue. Here there is no statutory provision which expressly contemplates as legitimate the assignment at issue.

(iii) The decision overruled by *Norglen* (*i.e. Advanced Technology*) also concerned an assignor in liquidation and an application for civil legal aid. The decision in *Norglen* does not establish a general principle that the validity of an assignment of a chose in action, including a cause of action, is determinable by reference to objective criteria only. Rather, the decision upheld the validity of an assignment which had occurred in very specific circumstances.

(iv) The reasoning in *Norglen* on the issue of security for costs does not provide a basis for the expansionist interpretation contended for by the appellant.

There is no engagement whatsoever by the House of Lords with the questions of intent, motive, purpose, public policy or abuse of process in respect of this issue.

(v) *Norglen* does not expressly consider intention and, to the extent that it does, the reasoning is *obiter*.

(vi) As regards any subsequent treatment of *Norglen,* the respondent submits that it is not correct to say that the subsequent UK authorities suggest that "this question of motive", insofar as it relates to an assignment where the intention is to avoid a rule of law and the effect is to give rise to an abuse of process, is now entirely settled.

30. Secondly, the respondent refutes the appellant's position on the issue of whether the assignment of the Company's claim to him is an abuse of process. It submits that the position of the appellant is a wholly artificial one which endeavours to use the cloak of a legal assignment to disguise that which is the Company's claim, and which would be prosecuted by the assignee for the Company, as something that it is not, i.e. an assignment which is something other than a device through which to avoid the rule in *Battle*.

31. The respondent summarises their position on this issue as follows:

(i) The rule in *Battle* is well-established and does not warrant reappraisal;

(ii) The rule in *Battle* applies to the Company such that, in order to prosecute these proceedings, it must be legally represented;

(iii) Entirely due to the existence of the rule in *Battle*, and for the purpose of evading its effect, the Company has (twice) purported to assign its cause of action to the appellant;

(iv) It is incontrovertible that what the appellant seeks to litigate through the purported assignments (and any future assignment) is the Company's claim, for the benefit of the Company;

(v) The purported assignments have not been genuine commercial transactions but rather a transparent artifice;

(vi) If such an assignment is upheld as valid, its legal effect is not, as suggested by the appellant, to take it outside the scope of the relevant rule altogether. Rather, its effect is to enable a cause of action that is being litigated for the benefit of the Company to be litigated in circumstances which contravene the rule in *Battle* and which contain none of the safeguards that the rule intends;

(vii) The fact that the defendant to proceedings assigned by the Company to the appellant has the possibility of obtaining an adverse costs order against the assignee plaintiff does not diminish or mitigate the abuse of process, in circumstances where there is no evidence whatsoever to suggest that the assignee plaintiff would be in a position to discharge an adverse costs order;

(viii) The effect of upholding the validity of the assignment would be that any company can assign any cause of action to any connected person, who may be indigent, who can then litigate the claim beyond the reach of the rule in *Battle*, for the benefit of the Company; and

(ix) Accordingly, if the position contended for by the appellant were to succeed, the effect would be to denude the rule in *Battle* of all meaning and effect.

32. The respondent details the evidence which it says establishes that the Company's claim, if assigned to the appellant, will be litigated by him for the benefit of the Company, and that it is an attempt to circumvent the rule in *Battle* and not a genuine

commercial transaction. It submits that the appellant has not adduced any evidence, beyond a bare assertion, that either the first or the second purported assignments were anything other than a device to circumvent *Battle*. It argues that the extent to which the purported assignments give rise to an abuse of process can be illustrated by two matters. First, it is said to be clear that the Company and the appellant have no intention of litigating the claim in the manner permitted by *Battle, i.e.* by putting the Company in funds in the manner envisaged by *Battle* and, as a result, ensuring that it can be legally represented. Secondly, it is submitted that were it not for the rule in *Battle*, there would be no reason for the assignment(s) to have occurred, and there has been no suggestion at any stage that the purported assignments would have occurred in the absence of the rule.

33. The respondent refers to the appellant's submission that, where the four criteria provided for in s. 28(6) of the 1877 Act are satisfied, no reference is made to the intention of the assignment, save for an exception in the case of maintenance or champerty. It disputes this assertion and relies in this regard on *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2019] 1 I.R. 1 ("*Osus*"), where O'Donnell J. stated (at para. 29) that, notwithstanding s. 28(6), there are still some assignments of rights of action which are impermissible and void on grounds of public policy.

34. The respondent contends that if the position suggested by the appellant is adopted, there would be nothing to stop any impecunious company from assigning a cause of action to an indigent connected person, thereby requiring the defendant to defend proceedings at considerable expense with no guarantee of recovering on foot of any costs order and without the protection of the plaintiff being required to incur the costs of legal representation. The impecunious company could await the

determination of the proceedings with no exposure to risk and avoiding entirely the rule in *Battle* in the knowledge that, if the claim succeeds, it can take the benefit of the proceeds. This would be an intolerable position that would greatly increase the volume of wasteful litigation.

35. Thirdly, the respondent argues that intention is always relevant to abuse of process. It notes that the question on which leave to appeal was granted concerns whether an assignee of a corporate body's interest in litigation may be permitted to pursue the action by being substituted as plaintiff in lieu of the company *irrespective of the purpose of the assignment.* The respondent submits that the assertion that an assessment of intention is not relevant to an analysis of a potential abuse of process is a far-reaching one that is not supported by the authorities. The respondent cites Costello J in *Miranda v Rosas Construtores SA* [2019] IECA 327, where she stated that "the motive of the litigant in pursuing what might otherwise appear to be a lawful exercise of his or her right of access to the courts may be relevant to the determination whether there has been, or continues to be, an abuse of process". Reference is also made to *Sean Quinn Group Ltd v An Bord Pleanala* [2001] 1 IR 505 and *Dunnes Stores v An Bord Pleanala* [2015] IEHC 716.

36. The respondent states that it is useful to consider also the importance that the courts place on costs orders, as being a mechanism through which to maintain standards of responsible conduct by litigants. If the Company is allowed to assign its claim to the appellant, the position of the respondent with respect to costs would be impaired, and it would be faced with a plaintiff whose appetite for aggressive litigation would not be contained by the necessity to expend monies on instructing legal representatives, without any evidence to suggest that he would be in a better position than the Company to meet an order for costs in favour of the respondent.

37. Finally, the respondent submits that ulterior motive can be relevant. It contends that on the facts arising in this appeal, the motive of the assignor and assignee of the Company's claim is plainly different to that of a genuine commercial transaction; it is to circumvent the rule in *Battle,* which amounts to an abuse of process.

Supplemental Submissions

38. Following the oral hearing the Court felt it necessary to seek further written submissions on a number of questions arising, including whether public policy precludes the assignment of a cause of action that is the property of a company to a natural person who may be a director or shareholder or someone unconnected by reason of the avoidance of (a) the requirement of security for costs by a company suing, (b) the requirement that a company be represented in court only by a solicitor, (c) the disposition of an asset at undervalue by a company, thereby being potentially a diminution of capital, or (d) any aspect of public policy?

39. The respondent submitted that it is apparent that there exists a range of public policy grounds in respect of which the law (either at common law or by statute) will prohibit an assignment, and that such a prohibition is not limited simply to assignments of a bare right of action on the basis that it savours of champerty. It pointed to the judgment of O'Donnell J. in *Osus* as demonstrating that the applicable public policy concerns can develop over time. As regards possible avoidance of the security for costs jurisdiction, it argues that the fact that this does not arise on the facts of the instant case does not alter the fact that an assignment for this purpose should be invalid on grounds of public policy.

40. As regards the rule in *Battle*, the respondent further submitted that there are two key public policy considerations which motivate this rule; first, the maintenance of the

separate legal personality of a limited liability company and the associated protection of potential creditors which this requires and second, the protection of the administration of justice and the public interest in limiting the rights of audience to qualified legal professionals and to natural persons with legal capacity (but only *qua* litigant in their own cause). The protection of both of these public policy considerations is said to require the invalidation of the appellant's assignments.

41. As regards the assignment possibly amounting to the disposition of an asset at an undervalue, the respondent contends that, as a matter of principle, if the company's claim has merit (which the respondent denies but which the appellant maintains) then the impugned assignments plainly amount to the disposition of an asset at an undervalue, and therefore a diminution of capital. Although the Company is not in liquidation, it appears to be in a poor financial state and, insofar as the Company's claim is a cause of action, to allow the assignment to proceed would be to prejudice the position of the Company's creditors. Therefore, the public policy considerations concerning the protection of creditors are undermined and the assignments should be invalided on this basis.

42. The appellant refers to the cases cited in Halsbury's *Laws of England* (5th Ed., Vol. 13), regarding the invalidation of assignments on public policy grounds. He submits that, in the present case, the respondent cannot identify an existing public policy which prohibits the assignment on the basis of the conduct of the appellant and his/or the Company's alleged intention to evade a rule of law. While he accepts that there can be a general public policy to ensure the proper administration of justice, the public policy concerns identified in the authorities cited in Halsbury are defined in terms which are both specific, and of no relevance to the issue in this

appeal, *i.e.* whether the purported attempt to avoid the rule in *Battle* is a justification for avoiding the assignment.

43. As regards possible avoidance of having to give security for costs, the appellant states that, in the present case there is no question of abuse of the privilege of limited liability; the shield of limited liability would effectively be voluntarily waived by the appellant. If the appellant is permitted to take assignment of the claim and be substituted as plaintiff, then the personal assets of the appellant are at risk and the justification for ordering security for costs falls away. He submits that there is no justification to deem an assignment invalid simply because its effect is to replace the corporate plaintiff with a natural person, against whom security for costs could never be sought in the first instance.

44. As regards the rule in *Battle*, the appellant states that the respondent suggests that the assignment contemplated in the present case would render meaningless the public policy justification requiring a company to be represented in litigation only by legal professionals. This is said to ignore the inescapable fact that, by virtue of the assignment, there is no question of exercising a right of audience on behalf of the Company or assisting the Company in the style of a so-called McKenzie friend.

45. The appellant then addresses the issue as to whether the assignment might amount to the disposition of an asset at an undervalue. He states that it is not the case that any future assignment proposes the payment of a modest sum by the appellant to the Company, in a similar model to that previously undertaken, and that his previous submission acknowledged that a subsequent assignment would need to be structured differently in light of the conclusions (which are not at issue before this Court) that the previous assignments were void.

46. The appellant cites the recent decision of the Court of Appeal in *Dully v. Athlone Town Stadium Limited* [2021] IECA 337, where the Court considered an argument by a company that a settlement agreement purportedly entered into on its behalf had the effect that the company had divested itself of its only assets, being the fruits of an appeal. In that case the Court of Appeal held that a piece of litigation does not always have an obvious value, and that there was no evidence before the Court on the basis of which it could have concluded that the appeal had any value. It is submitted that the asset in question here is one to which it is impossible to ascribe any certain value, at this juncture, given the inherent risks of litigation. It would be inappropriate and premature to void the assignment on the basis that it may at some future date have the appearance of an asset that was disposed of at an undervalue.

Discussion

47. It is important at the outset to recall the "narrow" ground upon which leave to appeal to this Court was granted. The matter of general public importance arising was stated to be the question of whether an assignee of its interest in litigation by a corporate body may be permitted to pursue the action by being substituted as plaintiff in lieu of that Company, irrespective of the purpose of the assignment.

(a) *Validity of Assignment*

48. In assessing the validity of an assignment of any legal chose in action, which would include the Company's cause of action in these proceedings, the starting point would appear to be s. 28(6) of the), 1877 Act, which provides as follows:

> "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in

action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge of the same, without the concurrence of the assignor…".

49. In *Waldron v. Herring* [2013] 3 I.R. 323, Edwards J. stated that four main conditions require to be satisfied for the purposes of s. 28(6) (at para. 16):

"- *first, the assignment must be for a debt or other legal chose in action;*

- *second, there must be "absolute assignment" meaning that the assignor must not retain an interest in the subject matter of the assignment. Thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by s 28(6) of the Judicature Act;*

- *third, the assignment must be in writing by the assignor;*

-fourth, the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (i.e. any form of payment) to be valid. The assignee can then sue the debtor in their own name, without joining the assignor as a party to the action."

50. One might note that there is no reference to the "purpose" or "intention" of the assignment in s. 28(6). It seems to me that there is some limited authority, albeit not authority in this jurisdiction, to support the appellant's submission that the purpose behind an assignment of a cause of action by a company is irrelevant in

determining the validity of the assignment, (or, more correctly, the *prima facie* validity, subject to public policy considerations, to be discussed below).

51. The leading English textbook in this area, Smith & Leslie, *The Law of Assignment* (3rd Ed.) states as follows, under the heading "Non-requirements" (at para. 16.50):

> "(2) The Object of the Assignment
>
> The object with which an assignment is made does not affect the validity of the assignment. In *Fitzroy v. Cave*, an assignment of debts, taken with a view to procuring an adjudication of bankruptcy against the debtor, so as to remove him as one of the directors of the company, was upheld by the Court of Appeal."

52. The more modern decision of the House of Lords in *Norglen i*s also of some relevance, notwithstanding the respondent's submission that the context of insolvent liquidation was very different. In that case two separate appeals were brought by two corporate plaintiffs who subsequently became insolvent, and the liquidator appointed to each company assigned the respective causes of action to their individual majority shareholders. One of the shareholder assignees sought to be substituted as plaintiff while the other sought to be joined as a co-plaintiff. The assignment was objected to in each case on the basis that it was "void and to no effect" because it was "for the sole or dominant purpose" of enabling the action to be prosecuted with avoidance of liability to give security for costs (only obtainable against impecunious companies) and/or with the benefit of the civil legal aid scheme (which, under the relevant statutory scheme, was only available to natural, and not corporate, legal persons).

53. The House of Lords considered the "difficulties" presented by the reasoning in *Advanced Technology v. Cray Valley Products* [1993] BCLC 723 ("*Advanced Technology*"), where an assignment of a cause of action was deemed void as "a

mere stratagem or device to enable the company to carry on proceedings" with the support of the assignee's legal aid. Lord Hoffman went on to overrule *Advanced Technology* and indicated his views as to why an examination of motive was unnecessary ([1999] 2 A.C. 1, at 13):

> "If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think that it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction."

54. Later (at 15) Lord Hoffman stated that the appeals were concerned solely with the validity, as a matter of private law, of the assignments by the two companies and he then commented as follows (at 16):

> "The legal aid scheme can look after itself and does not require the courts to strike down private transactions which would otherwise be valid."

(b) *Public Policy*

55. Notwithstanding the *prima facie* validity of any assignment, it may still (like any agreement) be treated as invalid and unenforceable by the courts if it is considered to be contrary to public policy. In *Osus*, O'Donnell J. stated as follows (at para. 29):

> "The plaintiff argues that s. 28(6) of the 1877 Act is a statutory recognition of the lawfulness of assignments of choses in action, *i.e.*, assignments of claims recoverable by way of litigation…The 1877 Act did not purport to alter in any way the distinction between the classes of assignments which were lawful and those which were void as contrary to public policy, being those constituting

maintenance or champerty or savouring of champerty…However, the very existence of s. 28(6) is relevant in one respect. It illustrates the fact that there is no absolute rule against the assignment of rights of action. In some cases, such as assignment of debts, assignment is permissible, and arguably to be encouraged. There are, therefore, some permissible and legitimate assignments of a right to litigate, and other assignments which are impermissible and void. The distinctions made between the two classes are sometimes excessively refined and difficult to follow. That difficulty is compounded by the fact that, as with any question of public policy, it is recognised that the approach is one which has changed over time, sometimes quite significantly."

56. The above comments of O'Donnell J. were made in the context of an argument that an assignment was void or contrary to public policy, because it "savoured of champerty", which involves a person providing financial support for litigation in return for its share of the proceeds. This aspect of public policy was also one of the grounds upon which Noonan J. held the first assignment in this case to be invalid, which finding was upheld by the Court below.

57. The appellant accepted at the hearing that he had no leave to challenge that finding in this appeal, and that any future assignment, if permissible in principle, would have to be structured in a manner which could overcome that finding. Beyond that acknowledgment, issues of public policy regarding maintenance and champerty did not feature in this appeal.

58. The aspect of public policy which did feature prominently in this appeal was the rule in *Battle*. The plaintiff in *Battle* was the managing director and major shareholder in a company which he sought to represent in conducting the defence of proceedings before the High Court. As in the present case, the company had

insufficient assets to enable lawyers to be instructed to represent it in the defence of the claim. Mr. Battle argued that the company had a good defence and if it were to suffer judgment without being able to advance that defence, it would have an effect on his reputation and standing as a businessman. The claim was unsuccessful in both the High and Supreme Courts.

59. Given the unanimous judgment of the Supreme Court in 1965, Ó'Dálaigh C.J. said (at 254):

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

60. As regards the application of *Battle* in this case, Noonan J. concluded as follows (at para. 30):

> "I think it is clear beyond any real doubt that the assignment in this case was entered into for the sole purpose of circumventing the rule in *Battle*. As such, it cannot be regarded as other than an artifice which, if upheld, would set the rule at nought. I am therefore satisfied that it is an abuse of process and invalid."

61. The Court below upheld the trial judge's conclusion on this issue. In his judgment for the Court Haughton J. stated as follows (at para. 59):

> "It is not in dispute that the trial judge correctly identified the rule in *Battle* and the relevant case law. I am satisfied that he correctly applied it to the circumstances of this case in coming to the conclusion that the first assignment was an abuse of process. Mr. McCool has failed to identify any error of law or relevant error of fact on the part of the trial judge on this issue. Nor has Mr. McCool identified any principle or authority that would warrant treating Mr. McCool's complaints and allegations in relation to the conduct of the proceedings to date by Honeywell as justifying an exception to the rule in *Battle*."

62. The appellant's essential submission before this Court was that the policy concerns underlying the rule in *Battle* are only relevant where an individual seeks to *represent* the company as a non-party. He submits that the position of an individual seeking to be substituted in place of the company is markedly different.

63. As set out in some detail above, however, the respondent submits that if such an assignment is upheld as valid, then its legal effect is not, as suggested by the appellant, to take it outside the scope of the relevant rule altogether. Rather, its effect is to enable a cause of action that is being litigated for the benefit of the company to be litigated in circumstances which contravene the rule in *Battle*, and which contain none of the safeguards that the rule intends.

64. In my opinion the submissions of the appellant on this point are correct and the submissions of the respondent are misconceived. The inescapable fact is that if an order for substitution is made following an assignment of the type in question here, the rule in *Battle* is no longer engaged. The rule relates to representation of a limited company by someone who is not a party to the proceedings, but post-assignment and substitution these factual circumstances are simply not applicable: the company is no longer a party to the proceedings requiring any representation.

65. In *Gaultier v. Registrar of Companies* [2019] IESC 89, O'Donnell J. referred to certain principles as underpinning the rule in *Battle*, namely separate legal personality and the related concept of limited liability. He cites a passage from Bingham M.R. in *Radford v. Freeway Classics Limited* [1994] 1 BCLC 445, to the effect that limited liability is an enormous benefit to a limited company, but it is a benefit bought at a price, and part of the price is the rule that a company cannot act without legal advisers.

66. The legal effect of substitution of an individual on foot of an assignment, however, is to remove the benefit of limited liability afforded to an individual controlling the company by way of the veil of incorporation. The reality is that the individual is, by virtue of substitution, then exposed to all the personal risks associated with the litigation, and in particular the risk of losing the case and having costs awarded against him or her.

67. I accept the appellant's submission that it is difficult to see how, in such circumstances, an assignment which forms the basis for a substitution application could be held invalid on public policy grounds relating to the rule in *Battle*. In such circumstances the sole benefit conferred by the assignment and substitution

procedure appears to be the opportunity to pursue an action which may otherwise not proceed further.

68. While the rule in *Battle* may entail some restriction on an impecunious corporate litigant's right of access to the courts, as an unavoidable consequence of the concepts of separate legal personality and limited liability, the rule has heretofore been engaged in well-defined circumstances and can be seen as a proportionate restriction on that right of access: see for example, the judgment of Finlay Geoghegan J. in *AIB v Aqua Fresh Fish Limited* [2018] IESC 49. I cannot, however, see any public policy justification for expanding the rule to the present circumstances, where the effect of the assignment and the substitution is to render the policy underlying the rule inapplicable.

69. As set out above, following the oral hearing the court asked the parties for further submissions as to whether any other aspect of public policy might preclude the assignment of a cause of action of the type in question here by reason of the avoidance of the possible requirement to furnish security for costs by a company suing, or by reason of the disposition of an asset at undervalue by a company, thereby being potentially a diminution of capital.

70. As regards avoidance of security for costs, the Court was told that this issue does not arise on the facts of the present case, in circumstances where a motion seeking such relief was issued by the respondent but was not pursued. In any event, as a matter of general principle, I do not think that there is any public policy basis for treating the assignment as invalid by reference to the issue of security for costs. In *Radford*, Bingham M.R. stated (at 448) that part of the price paid for limited liability was 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. In

a concurring judgment in *CMC Medical Operations Limited (In Liquidation) v. The Voluntary Health Insurance Board* [2015] IECA 68, Hogan J. stated that the whole object of the statutory jurisdiction to order a company to give security for costs is fundamentally to protect against the potential abuse of the privilege of limited liability.

71. In the present case, however, there is no continuing possibility of abuse of the privilege of limited liability, if the appellant is permitted to take an assignment of the claim and to be substituted as plaintiff. In those circumstances the personal assets of the appellant are now at risk, and any justification for ordering security for costs against the company can no longer be applicable.

72. In my opinion the above conclusion is consistent with the finding on this issue by the House of Lords in *Norglen,* where Lord Hoffman stated as follows (at 16):

> "Like the Court of Appeal in the *Norglen* case, I also think that there is nothing in the point that the assignment is invalid because it deprives the defendants of the right to apply for security for costs under s. 726 of the Companies Act 1985. For better or worse, the law entitles a defendant to be protected against incurring irrecoverable costs in litigation brought against him by an impecunious company but not by an impecunious individual. But that cannot prevent companies from assigning property to individuals."

73. One must next consider any public policy aspect relating to the possible disposition of an asset at an undervalue by a company, thereby being potentially a diminution of capital. The appellant submits that the asset comprising the substantive claim is in a sense currently valueless, in that any value is at present inaccessible to the company, because it cannot exercise its right to litigate the claim. Alternatively, it

is impossible to ascribe to it any certain value, at this juncture, given the inherent risks on litigation.

74. The appellant accepts that he would have to structure any future assignment in accordance with the relevant rules of company law regarding the disposition of an asset at an undervalue and diminution of capital. He also states that it is not the case that any future assignment of the claim from the company to the appellant proposes the payment of a modest sum by the appellant, in a similar model to that previously undertaken. In my opinion, it is not possible for this Court to say now that any future assignment would necessarily breach the relevant rules of company law in this regard, and a Court would require sight of the precise terms of any future assignment before making any such assessment.

75. The respondent did not identify any other aspect of public policy which might preclude the validity of the assignment.

76. I might mention that I have had the benefit of reading a draft of the judgment which my colleague Charleton J. proposed to deliver in this matter. While I appreciate the concerns expressed by him, and greatly respect his views, I cannot agree with the conclusion arrived at by him. I do, however, fully agree with him as to the obvious need for this very long-running litigation to be taken into case management under the control of a single High Court judge.

Conclusion

77. In conclusion, I am satisfied that an assignee of a company's interest in litigation may in principle be permitted to pursue the action by being substituted as plaintiff in lieu of that company, irrespective of whether the purpose of the assignment is to avoid the rule in *Battle*. I would therefore allow the appeal on that narrow ground.

78. The wider issue of whether such an assignment can ultimately be valid will be dependent on the assignment complying with the conditions in s. 28(6) of the 1877 Act, and any applicable rules of public policy regarding champerty and any applicable rules of company law. As regards those matters, I have had the benefit of reading a draft of the judgments to be delivered herein by Hogan J. and Murray J., and I am in broad agreement with their judgments in relation to these matters.