COMPANY LAW, PUBLIC POLICY AND THE ROLE OF PRINCIPLE: ANALYSING *McCOOL V HONEYWELL*

Abstract: In McCool v Honeywell, the Supreme Court overruled the Court of Appeal by deciding that an assignment by a company of a bare cause of action to its shareholder was valid despite its purpose being to circumvent the rule in Battle. The rule in Battle prevents a company's shareholders or directors from representing it in court and has been strictly applied by the Irish courts. The case is notable for its focus on the public policy rationales underpinning the rule as well as for Charleton J's dissenting judgment. This artide analyses the decision and welcomes the engagement with the public policy dimensions of company law.

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Introduction

Despite the ubiquitousness of companies in our society, their fundamental characteristic of legal personality is rarely examined by the Irish courts.[1] The notable exception has been the rule in *Battle v Irish Art Promotion Centre Ltd*[2] which prevents a company's shareholders or directors from representing it in court. Under Irish law, only solicitors and barristers can represent other parties in court proceedings and the company, as a non-corporeal entity, cannot represent itself as a litigant in person. Where companies have been unable to afford or obtain the services of a solicitor or barrister, the company's directors and shareholders have frequently attempted to present arguments on its behalf but have been prevented from doing so due to the application of the rule in *Battle*. The policy rationale for the rule is to prevent individuals conducting litigation through a company while not a party to the action and therefore at no risk of a contrary costs order. The rule has been examined in three recent Supreme Court decisions. The first of these, *AIB plc v Aqua Fresh Fish Ltd,*[3] upheld the continued application of the rule in *Battle* save in exceptional circumstances. The court clarified that exceptional circumstances did not include one-person companies, impecunious companies or the existence of facts which objectively suggest a good arguable defence.[4] This position was restated by O' Donnell J (as he then was) in *Gaultier v Registrar of Companies.*[5] In the most recent decision, *McCool v Honeywell Control Systems Ltd (McCool v Honeywell)*[6] delivered in January 2024, the appellant was a director and sole shareholder in the company and sought to circumvent the rule by assigning the company's cause of action to himself. Both the High Court[7] and Court of Appeal[8] ruled that the assignment was an abuse of process as its purpose

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[1] Most company law cases deal with resolving the consequences of the company's legal personality, usually in relation to insolvency, rather than exploring the limits of legal personality itself.

[2] The rule comes from the Supreme Court case *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252.

[3] *AIB plc v Aqua Fresh Fish Ltd* [2018] IESC 49; the judgment was delivered by Finlay Geoghegan J, with O' Donnell, Dunne, Charleton, and O'Malley JJ concurring.

[4] ibid [43].

[5] [2019] IESC 89.

[6] [2024] IESC 5. Woulfe, Murray, Hogan and O'Malley JJ in the majority with Charleton J dissenting.

[7] [2019] IEHC 695.

[8] [2022] IECA 56.

was to circumvent the rule in *Battle*. However, the Supreme Court held that the purpose of an assignment was not relevant to its validity and allowed the appeal.

Under Irish law, an assignment of a chose in action is valid once the relevant set of objective criteria, as set out in *Waldron v Herring*[9] and discussed below, are met and the assignment does not contravene public policy.[10] Because the objective criteria were satisfied in *McCool v Honeywell,* the point at issue was whether the assignment should be invalidated on public policy grounds and so, the court had to examine the public policy rationale for the rule in *Battle*. This assessment of the purpose of the rule stands in contrast to most decisions on *Battle* which have applied the rule as a 'logical corollary'[11] of a company's legal personality. In other words, for the most part, the rule has been applied as a matter of legal principle with little analysis being given to its underlying rationale or the consequences which flow from a strict application of the rule.[12] This article welcomes the engagement with the underlying principles and public policy dimensions of company law and offers analysis of the issues which include the rule in *Battle*, champerty, security for costs and how an assignment of a potentially valuable cause of action fits with the fiduciary responsibilities of directors - a point raised by Charleton J in his dissent.

Section 1 sets out the rule in *Battle* and how it has been applied by the Irish courts since the original decision in 1968. Section 2 outlines the facts in *McCool v Honeywell* and discusses the judgments of the majority and Charleton J's dissent. Section 3 provides analysis and explores the difference between rigid application of legal principle and broader considerations of public policy.

The Rule in *Battle*

Most jurisdictions recognise companies as legal persons[13] meaning in general, law treats a company as a separate subject of rights and duties[14] with a formal boundary between it and the persons (natural and legal) associated with it.[15] This provides the legal basis for companies to own property, enter into contracts and sue and be sued in court. However, companies can only act through natural persons; agents that have legal authority to act on its behalf. Under s 158 of the Companies Act 2014 the company's directors have a default authority to 'exercise all such powers of the company' while other parties may gain authority due to express

[9] [2013] 3 IR 323.

[10] As per the judgment of O'Donnell J in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2019] 1 IR 1.

[11] The term was used by McKechnie J in *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77 [58] and was cited with approval in the Supreme Court (n 3) [33].

[12] I refer mainly here to the Supreme Court decisions in *Gaultier* (n 5), *AIB plc* (n 3) and *Battle* (n 2) but also *Munster Wireless Ltd v Finn and Ors* [2018] IEHC 412. It is important to note that courts have stated that the rule advances the administration of justice, for example, Finlay Geoghegan J in *AIB plc* (n 3) [32] and Faherty J in *Munster Wireless Ltd v Finn* [2018] IEHC 412 [20]. However, I think it is a fair characterisation to say that the primary basis for the continued application of the rule is that it flows as a consequence of the company's legal personality.

[13] See Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn., OUP 2017).

[14] See John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35(6) Yale Law Journal 655.

[15] The most well-known effect of this boundary is 'limited liability' whereby company debts cannot, in general, be extended to its members and likewise, members' debts cannot be imposed on the company.

agreements or be implied from the circumstances.[16] However, the general authority of the directors, or other contractual agents, does not extend to representing the company in court. Instead, the company must engage a solicitor or a barrister who have exclusive rights of audience in court.[17] Natural persons may represent themselves as a litigant in person[18] but a company, as a non-corporeal entity, cannot do so.

The Supreme Court in *Battle*[19] applied the general restrictions on the right of audience in court to companies, preventing directors and shareholders from representing their company in court. The plaintiff in the case claimed the defendant company owed him commission accruing from the sale of his products. The company did not have funds to engage legal representation and so the company's managing director and majority shareholder applied for leave to conduct the company's defence, claiming the company had a valid defence. That application was refused, and the managing director appealed to the Supreme Court. Ó Dálaigh CJ, in giving the judgment of the court,[20] recognised that there were no reported Irish cases on the matter and considered three English authorities, all of which had decided that a company can only be represented by legal counsel.[21] Ó Dálaigh CJ agreed with the English authorities concluding 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'.[22] The consequence was that representation of a company in court was limited to legal counsel instructed to act on its behalf. If a company could not afford legal services or obtain a solicitor or barrister on a *pro bono* basis, the company could not present arguments in court. The reasoning of Ó Dálaigh CJ in *Battle,* was that the limitation stemmed from the company's status as a legal person, separate from its directors and shareholders, explained as follows:

> 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.[23]

[16] For example, common law agency allows a consensual agreement for one party (agent) to affect the legal position of another (principal) in relation to a third party. See Peter Watts, *Bowstead and Reynolds on Agency* (22nd edn, Sweet and Maxwell, 2020). The law of agency is applicable to companies where an agency agreement can occur through contract or be implied from circumstances. See Thomas Courtney, *The Law of Companies* (4th edn, Bloomsbury 2016), Ch 7.

[17] Prior to the Courts Act 1971 barristers held an exclusive right of audience. Section 17 of the Courts Act 1971 extended the right of audience to solicitors qualified to practice under the Solicitors Act 1954.

[18] A litigant in person may utilise a '*McKenzie* friend' who can take notes, make suggestions and give advice but cannot present legal argument. See *McKenzie v McKenzie* [1970] 3 All ER 1034.

[19] *Battle* (n 2).

[20] Walsh and Haugh JJ concurring.

[21] *Scriven v Jescott Leeds Ltd* 53 Sol JO 101; *Frimpton v Walton* [1938] 1 All ER 649; *Tritonia Ltd v Equity and Law Life Assurance Society* [1943] AC 584.

[22] *Battle* (n 2) 254.

[23] ibid.

The Irish courts have consistently applied the rule in *Battle*[24] as a consequence of the company's legal personality. For example, Fennelly J, in *Stella Coffey and NO2GM Ltd.*[25] agreed with the reasoning of Ó Dálaigh CJ stating that the rule in *Battle* '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'.[26] In *Gaultier v Registrar of Companies*[27] O' Donnell J (as he then was), similarly described the rule as:

> a corollary of the fundamental feature of company law that a company is a separate legal entity from its shareholders. It followed that whereas a natural person can appear in court either through a lawyer with a right of audience or by himself or herself, an artificial legal person does not have the option of appearing personally and, rather, can only therefore appear through a solicitor or barrister with a right of audience.[28]

In *AIB plc v Aqua Fresh Fish Ltd.*[29] *(Aqua Fresh Fish)* the Supreme Court upheld the continued application of the rule in *Battle* on two grounds. First, like the judgments above, the court viewed the rule in *Battle* as the 'logical corollary'[30] of corporate legal personality and second, the court held the rule facilitated the administration of justice by discouraging risk-free litigation[31] and by limiting the practical and procedural difficulties caused by non-lawyers appearing in court.[32] The court further provided that the rule would not apply in 'exceptional circumstances'[33] based on the decision of O' Neill J in *Coffey v Tara Mines Ltd (Coffey)*[34]. In that case, O' Neill J allowed the wife of the plaintiff to represent him because of an illness which prevented him from representing himself and because he had suffered a series of difficulties with engaging legal representation.[35] O' Neill J, who relied on the decision of Somers J in the New Zealand Court of Appeal case *Re. G.J Mannix Ltd.*[36], stated that the circumstances were 'so exceptional or rare as to probably be unique'.[37] Based on *Coffey*, the Supreme Court in *Aqua Fresh Fish* held that the rule in *Battle* allows for 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'.[38] Finlay Geoghegan J provided no guidance as to what might constitute exceptional circumstances but did note three examples which would not qualify. First, the lack of funds in a company to procure legal representation; second, the fact that a company may have a good arguable defence, or the presentation of facts which

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[24] For examples see, *Friends of the Curragh Environment Ltd v An Bord Pleanála* [2009] 4 IR 451; *McDonald v McCaughey* [2014] IEHC 455; *Munster Wireless Ltd* [2018] IEHC (n 12).
[25] [2013] IESC 11.
[26] ibid at [34].
[27] *Gaultier* (n 5).
[28] ibid at [56].
[29] *AIB plc* (n 3). The judgment was delivered by Finlay Geoghegan J with O' Donnell, Dunne, Charleton, and O'Malley JJ concurring.
[30] ibid [33] using the phrase of McKechnie J in *AIB plc* (n 11) [58].
[31] ibid [31].
[32] ibid [32]. Fennelly J made the same point in *Stella Coffey* (n 25) [25] stating that courts are better able to administer justice fairly and efficiently when parties are represented by lawyers.
[33] ibid [42].
[34] [2008] 1 IR 436.
[35] The relationship between the plaintiff and his solicitor had broken down, he was unable to secure alternative legal representation and had failed in an application for legal aid.
[36] [1984] 1 NZLR 309 where Somers J stated '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' at 316.
[37] (n 34) [34].
[38] *AIB plc* (n 3) [48].

objectively suggest an arguable defence; third, the fact that the person seeking to represent the company was an agent, or a principal shareholder and director.[39] Given these express limitations, it became difficult to imagine any scenario where a company could satisfy the 'exceptional circumstances' test given it was derived from a case of human illness. Importantly, the exception had no connection with the underlying rationales of discouraging risk-free litigation or facilitating the administration of justice that were mentioned by the court.

Prior to *Aqua Fresh Fish*, there had been a practice of informally relaxing the rule in certain contexts.[40] For example, *Re Marble and Granite Tiles Ltd*[41] concerned a petition for the winding up of the company where Laffoy J stated:

> The legal position, accordingly, is that Mr. O'Gara [a director in the company] 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 ensure that no injustice would be perpetrated.[42]

Another example is *Dundon v Butler Homes Ltd*[43] which involved a dispute between the defendant company and its former solicitors regarding costs. The defendant company did not possess the funds to engage legal representation and due to the rule in *Battle* the company's director was prevented from speaking on the company's behalf. Barrett J made it clear that he did not agree with the application of the rule in *Battle* but stated that he was bound by precedent and could not allow the company's director to be heard in court.[44] Instead, Barrett J allowed the applicant's counsel to read out affidavit evidence sworn by the company's director.[45]

These two cases are examples of what has been described as 'discretionary pragmatism' [46] from the courts to ensure that no injustice would arise from the rule's application which included potential contravention of Art. 6 of the European Convention of Human Rights.[47] These instances of discretionary pragmatism led the Company Law Review Group (CLRG) to refrain from arguing for a reform of the rule in *Battle*[48] and also influenced Dr Thomas Courtney who believed that if a company can show:

> a real and *bona fide* defence to the action against it based on sound legal argument supported by evidence, there is every likelihood that the Irish courts, in vindication

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[39] ibid [43].
[40] The practice was referenced by the Supreme Court in *Stella Coffey* (n 25) [37] and *AIB plc v* (n 3) [12]-[13].
[41] [2009] IEHC 455 (Unreported, High Court, Laffoy J, 16 October 2009).
[42] ibid [9].
[43] [2017] IEHC 265.
[44] ibid [2]. Barrett J questioned whether the rule is really a logical consequence of corporate legal personality and believed the rule may be incompatible with Art. 6 of the European Convention on Human Rights.
[45] ibid [3].
[46] To use the words of McKechnie J in *AIB plc* (n 11) [46].
[47] A point raised by Hogan J in *McDonald v McCaughey Developments Ltd* [2015] IECA 159 [3] and by Barret J in *Dundon* (n 43) [2].
[48] Company Law Review Group, *The Representation of Companies in Court* (2016) [6.2.7] < https://www.clrg.org/publications/clrg%20report%20companies%20before%20the%20courts.pdf> accessed 22 October 2024. Noting that the court could exercise its discretion where the justice of the case so required.

> of the Constitution, would allow a company in such circumstances to be represented by a lay advocate.[49]

However, both the CLRG and Courtney expressed their views prior to the Supreme Court's decision in *Aqua Fresh Fish*. Given that courts may now only deviate from the rule in 'exceptional circumstances', bearing in mind the circumstances which were expressly stated as not satisfying that requirement, it seems relatively clear that such discretion did not survive the judgment and the rule was to be applied in stricter terms.

Circumventing The Rule in *Battle: McCool v Honeywell*

The Supreme Court's decision in *Aqua Fresh Fish*, followed by *Gaultier v Registrar of Companies*[50], seemed to settle the matter of the rule in *Battle* and its exceptions. However, the court in *Aqua Fresh Fish* mentioned one possible means to avoid the rule's application by referencing *McDonald v McCaughey Developments Ltd*[51] as 'a factor to be taken into account'.[52] In that case, the Court of Appeal held that because the principal shareholder had been joined as a co-party to proceedings there could be no objection to him advancing arguments and adducing evidence, even if those arguments also benefited the company. However, to be joined as a co-party, a director or shareholder needed a direct personal interest in the litigation. In the *McCool v Honeywell* litigation, a separate question emerged as to whether the rule in *Battle* could be circumvented by assigning the action to a director or shareholder who then could present arguments as a litigant in person.

Assignment refers to the act of transferring all or part of an intangible right such as a contractual right or a chose in action (of which a cause of action is a subset) to another person.[53] Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 (the 1877 Act) provides that assignments of legal choses in action are effectual in law subject to certain conditions. In *Waldron v Herring*[54] Edwards J, adopting the test of Finlay Geoghegan J in *O'Rourke v Considine*, stated that the four main conditions which must be satisfied for the purposes of s.28(6) are: 1) the assignment must be for a debt or other legal chose in action; 2) there must be 'absolute assignment' meaning that the assignor must not retain an interest in the subject matter of the assignment; 3) the assignment must be in writing by the assignor; 4) the debtor must be given express notice in writing of the assignment.[55] In *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* (*SPV Osus*)[56] O'Donnell J (as he then was) noted that, notwithstanding s.28(6) of the 1877 Act, some assignments of rights of action are impermissible and void on grounds of public policy.

The facts of the case in *McCool v Honeywell* were that the appellant, Mr McCool, was a director and 100% shareholder in McCool Controls and Engineering Ltd ('MCC'), a company which provided building management systems such as heating and air conditioning. The respondent

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[49] Courtney (n 16) [6.079].
[50] *Gaultier* (n 5).
[51] *McDonald* (n 47).
[52] *AIB plc* (n 3) [46].
[53] See Anthony Sebok, 'Going Bare in the Law of Assignments: When is an Assignment Champertous?' (2020) 14 Florida International University Law Review 85.
[54] (n 9).
[55] As referred to by in *McCool* (n 6) [20].
[56] (n 10).

('Honeywell') was an English company that manufactured and distributed such systems. In 1998 an agreement was made between MCC and Honeywell and MCC claimed this provided it with exclusive distribution and installation rights for Honeywell products in Ireland. The appellant claimed that Honeywell cut MCC out of a deal in contravention of the 1998 agreement costing the company €11 million. MCC initiated proceedings against Honeywell and in July 2017 the appellant issued a motion to be joined in the proceedings as a co-plaintiff. The Master of the High Court rejected the motion indicating that Mr McCool had no personal claim against the defendant company. In October 2017, the appellant claimed that MCC had executed an assignment of its claim to the appellant, later declared to be for a sum of €1[57], and on that basis he renewed his application to be joined as a co-plaintiff. The Master concluded that since MCC had assigned its interest in the proceedings to the appellant, it could no longer be a plaintiff and substituted in the appellant as the sole plaintiff.

In the High Court[58], Noonan J stated that the assignment was invalid as an abuse of process, its sole purpose being to circumvent the rule in *Battle*. On appeal, Mr McCool claimed that Noonan J wrongly decided the case on the basis that the rule in *Battle* did not apply because the proceedings had been assigned to him personally. Haughton J stated that this claim misunderstood the reasoning of the trial judge, who had held that the assignment was invalid because it was an abuse of process in attempting to circumvent the rule in *Battle*. The Court of Appeal rejected the appeal, affirmed the order of the High Court, including the order directing Mr McCool to pay costs.

The Supreme Court granted leave to appeal on the issue of whether an assignment of an interest in litigation by a corporate body may be permitted irrespective of the purpose of the assignment.[59] In the Supreme Court, the appellant claimed that the Court of Appeal erred in law because 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 in accordance with s.28(6) of the 1877 Act. The appellant further claimed that the assignment could not be an abuse of the rule in *Battle* as the rule only concerns the representation of a company by a non-lawyer who is not a party to the litigation. He argued that the rule's purpose was to prevent individuals carrying on litigation in the company's name in disregard of the company's legal personality and benefitting from its limited liability by avoiding the usual risks of being a party to litigation. The appellant claimed an individual being substituted in place of a company is markedly different as an assignee acquires not only the right to litigate, but also the risks and responsibilities of litigating in his or her own name.

The respondent claimed that the intention was relevant in an assignment, relying on *SPV Osus* and O' Donnell J's statement that some assignments of rights of action are impermissible and void on grounds of public policy. The respondent contended that if the appeal were allowed, there would be nothing to stop impecunious companies from assigning a cause of action to an indigent connected person, thereby requiring the defendant to defend proceedings with no guarantee of recovering costs. The respondent claimed this would allow litigation with no exposure to risk which would greatly increase wasteful litigation.

[57] This was noted in Murray J's judgment in the Supreme Court (n 6) [4].
[58] [2018] IEHC 167.
[59] [2022] IESCDET 135.

The Decision of the Majority

Woulfe J, with O'Malley J concurring, acknowledged that s.28(6) of the 1877 Act and the *Waldron v Herring*[60] test made no reference to the 'purpose' or 'intention' of an assignment of a chose in action.[61] However, he stated that while an assignment may be *prima facie* valid, it may still be deemed invalid and unenforceable if considered by the courts to be contrary to public policy in accordance with the judgment of O' Donnell J in *SPV Osus*.[62] Hence, the central question for the court was whether the assignment contravened public policy principles. Woulfe J agreed with the appellant's arguments stating the inescapable fact was that if an order for substitution is made following an assignment the rule in *Battle* is no longer engaged. Woulfe J stated that the rule relates only to representation of a limited company by someone who is not a party to the proceedings and an assignment and substitution means these factual circumstances do not apply.[63] He stated the legal effect of an assignment is to remove any protection of limited liability and expose that individual to all the personal risks associated with the litigation, including the risk of losing the case and having costs awarded against them. On that basis, Woulfe J rejected the argument that it could be held invalid on public policy grounds relating to the rule in *Battle*, concluding the assignment was valid irrespective of its purpose to circumvent the rule in *Battle*.[64]

Murray J agreed with Woulfe J stating that while, in theory, it is correct that the demands of public policy may generate a basis on which an assignment might be found unenforceable, the courts should be reluctant to extend public policy as a basis for the invalidation of otherwise proper assignments of legal claims.[65] Hogan J also agreed with Woulfe J, stating that relevant public policy considerations relate principally to the abuse of limited liability and once the action was assigned, Mr McCool became personally exposed to any adverse costs orders and could not hide behind the legal personality of the company to avoid costs.[66] Hogan J did acknowledge certain concerns regarding the implication on the administration of justice.[67] However, he believed that such issues were best dealt with by mechanisms other than invalidating assignments to safeguard the administration of justice noting that an assignee would be expected to comply with court orders, be expected to continue proceedings with some dispatch and defendants could seek to have proceedings struck out or stayed as an abuse of process.[68]

Murray J's judgment considered the second public policy issue in the case, namely, whether the assignment savoured of maintenance or champerty and would therefore be contrary to public policy and unenforceable.[69] In general terms, maintenance arises where a person supports litigation in which they have no legitimate interest, while champerty occurs when a person maintaining the litigant stipulates for a share in the proceeds.[70] The public policy rationale for the prohibition of maintenance and champerty is to prevent 'trafficking in

[60] (n 9).
[61] *McCool* (n 6) [50].
[62] ibid [33].
[63] ibid [64].
[64] ibid [77].
[65] ibid [9].
[66] ibid [19].
[67] ibid [20].
[68] ibid.
[69] ibid [13-26].
[70] ibid [13].

litigation'[71] thereby creating, multiplying and instigating disputes.[72] Based on the House of Lords decision in *Trendtex Trading v Credit Suisse*[73], as applied by O'Donnell J in *OPV Osus*, the test for saving an assignment from savouring of champerty or maintenance was if the assignee had a 'genuine commercial interest'.[74] Murray J stated where the 100% shareholder in a company takes a full and absolute assignment of a claim of the company, they have no proprietary interest but do have a commercial interest. The difficulty with that view, as acknowledged by Murray, is that it jars[75] with established conceptions of corporate legal personality and the rule in *Foss v Harbottle*.[76] However, Murray J stated that 'commercial interest' should be viewed in the round, and not by reference to strict requirements of ownership and that a 100% shareholder did have a commercial interest.

Murray J did point to one restriction on the ability to assign litigation from a company to a shareholder based on whether the shareholder's commercial interest was sufficiently substantial.[77] He stated that there may be a general principle that the law requires a reasonable proportion between the share of the proceeds of the claim taken by the assignee and their commercial interest in that claim but declined to formulate a precise test.[78]

Charleton J's Dissent

Charleton J dissented on the basis that public policy debars an assignment of a corporate entity's right to litigate to a director. His central objection was that an assignment of a corporate cause of action to an individual enabled litigation that was the company's to be waged under a new name[79] thereby escaping the normal legal regulation that exists against companies taking part in legal proceedings.[80]

He emphasised that the principal difference between individual and corporate litigation is that individuals are only required to pay advance assurance of costs on appeal.[81] In contrast, a corporate litigant is required by s 52 of the Companies Act 2014 to provide security for costs if a successful application is taken by a defendant.[82] Hence, the assignment of litigation from a company to a natural person is attractive, as a natural person may advance the litigation unhindered by the provision of advanced costs, while for a company, advance costs

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[71] ibid [22], judgment of Hogan J citing his own judgment in *Greenclean Waste Ltd. v Lealy* [2014] IEHC 314.
[72] See David Capper, 'Third Party Litigation Funding in Ireland: Time for Change?' (2018) 37(2) Civil Justice Quarterly 193.
[73] [1982] AC 679.
[74] This term was taken from the judgment of Lord Roskill in *Trendtex Trading* ibid.
[75] *McCool* (n 6) [19].
[76] (1843) 2 Hare 461. The rule provides that where a company is harmed it is the company, as a legal person, that must take the claim to vindicate the harm, rather than a shareholder.
[77] *McCool* (n 6) [21-25].
[78] ibid [25]. As an example, he stated that a holder of 5% of the shares of a company who takes the assignment of a cause of action on the basis of retaining 100% of the proceeds may render the commercial interest of the assignee to be so attenuated and remote to not to amount to a real commercial interest.
[79] ibid [26].
[80] ibid [2].
[81] ibid [23] citing *Quinn Insurance Ltd v Pricewaterhouse Coopers* [2021] 2 IR 70.
[82] The defendant must show there is a *prima facie* defence to the plaintiff's claim and that credible testimony gives reason to believe that a plaintiff company will be unable to meet the costs of a successful defendant. See *Ronbow Management Company Ltd v Sorohan Builders Ltd* [2010] IEHC 60. For the s.52 case law see Courtney (n 16) [6.022 – 6.068].

may need to be provided and could double, or more if there are several defendants.[83] Charleton J was also concerned that assignments of corporate litigation would allow people to circumvent the rule in *Battle*.[84] He also raised the difficulty of a wealthy company that does not wish to risk its assets in litigation and that in such a situation, the company could assign the litigation to a shareholder and the company's assets would be untouchable.[85] He believed that allowing these circumstances to continue would strike at the heart of both corporate identity and at the checks to limited liability ultimately allowing a company to deform what the law has made it back into a human person for some purposes.[86]

Charleton J then introduced a point not discussed elsewhere in the litigation which focused on fiduciary obligation. Charleton J stated that the company's claim was an asset, comprising an entitlement to sue for breach of contract or other civil wrong, which was transferred away for a consideration of €1 which was a negligible amount compared to the proposed value of €11 million in potential damages. Charleton J stated that, as a matter of company law, the company's directors are not entitled to transfer or sell the company's assets for no value or at an obvious undervalue citing the seminal case of *Hutton v West Cork Railway Co*.[87] He stated that while the 1877 Act does not require consideration for the assignment of a chose in action, the underlying company law principle remains that directors cannot dispose of company assets at a nominal value.[88]

Company Law, Public Policy and the Role of Principle

The majority arrived at their decision based on two points. First, that the assignment rendered the policy basis of the rule in *Battle* redundant; once assigned, the individual bore the risks of a contrary costs order and so the rule's rationale of preventing risk free litigation through a company disappeared. Second, the assignment did not savour of champerty due to the 100% shareholder's 'genuine commercial interest' in the company's litigation. The decision of the majority is well founded when viewed from the perspective of the law of assignment (the 1877 Act, *Waldron v Herring* and *SPV Osus*). However, as noted by Charleton J[89] and by Murray J,[90] the consequences of applying the law of assignment in this case seem to contravene several well-established principles of company law. The fundamental distinction between the majority and Charleton J was that the majority viewed the public policy question purely in terms of the policy rationale for the rule in *Battle* and champerty while Charleton J viewed it in broader terms, focusing on the importance of upholding the coherence of company law, legal personality and the regulatory implications of conducting business through a company. This difference can ultimately be reduced to the significance given to upholding company law principles and maintaining their consistent application. Should principles of corporate legal personality and limited liability be applied rigidly – a line followed by the Supreme Court on the rule in *Battle* – or should they be relaxed when

[83] *McCool* (n 6) [26]. The underlying rationale for s.52 is to correct for the risk-free incentive to litigate created by a company that cannot afford costs. See Hilary Biehler, 'Security for Costs and Corporate Plaintiffs - Recent Developments' (2019) 37(7) Irish Law Times 98.
[84] *McCool* (n 6) [30].
[85] ibid [31].
[86] ibid [2].
[87] [1883] 23 Ch D 654. The case was the first to recognise that directors owed a duty to the company to act in its interests as a legal person rather than as a vehicle to further their own interests.
[88] *McCool* (n 6) [49].
[89] ibid [2].
[90] ibid [19].

prevailing considerations demand it. In the present case, the countervailing considerations being upholding the freedom to assign litigation in accordance with the 1877 Act.

I have argued elsewhere against the strict application of the rule in *Battle* on the basis that it can have unjust effects on companies in certain contexts where the underlying concern regarding preventing risk-free litigation does not apply.[91] These contexts include where a company is defending a winding up petition, the enforcement of a disputed security agreement[92] or any general civil claim where the defendant company cannot afford a lawyer but has a *prima facie* valid defence. I am not alone in questioning a strict application of the rule.[93] In a book discussing the legal legacy of Christopher Palles,[94] McGrath describes the Lord Chief Baron's approach to company law as pragmatic[95] and imagines that Palles would be unimpressed by the 'doctrinaire refusal' to allow directors to represent impecunious companies.[96] In a review of that book published in this journal, Barrett J, who was also critical of the rule in *Dundon v Butler Homes Ltd,*[97] expressed further reservations.[98] The broader point I attempted to make was that the application of the principles of legal personality and limited liability should be context-dependent and that a rigid, formulaic application of principle can lead to 'jarring practical effects'.[99] Indeed, this should not be a controversial point, the law regularly deviates from the position that a company is a distinct unit, wholly separate from the persons involved in its operation[100] based on broader considerations.[101] The company's

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[91] John Quinn, 'Companies in Court and the Limits of their Legal Personality: An Argument Against the Strict Application of the Rule in Battle' (2022) 67(67) The Irish Jurist 55.

[92] For example, *McDonald* (n 24) involved the enforcement of a floating charge by a receiver. The defendant company claimed that there was an error in registering the charge but could not afford a lawyer and its directors were prevented from arguing their case because of the rule in *Battle*. Gilligan J stated that he had sympathy for the defendant company but that the 'court is constrained to follow the decision in *Battle v Irish Art Promotion Centre*, [30]-[31].

[93] The Company Law Review Group (n 48) [1.3] noted the procedural difficulties caused by the rule in complex commercial cases in the absence of the company concerned, a point which Fennelly J described as "far from ideal" in *Stella Coffey* (n 25) [39].

[94] Oonagh B Breen and Noel McGrath (eds), *Palles, The Legal Legacy of the Last Lord Chief Baron* (Four Courts Press 2022).

[95] Referring to *R (Conyngham v Pharmaceutical Society of Ireland* [1899] 2 IR 132 and *R (Cottingham v Justices of Cork* [1906] 2 IR 415.

[96] Breen and McGrath (n 94) 69. The book is discussed by Peter Leonard and Mark Tottenham on the podcast *The Fifth Court* Ep. 32 (2023) <https://www.thefifthcourt.com/podcast/episode/684a46d0/e32-the-fifth-court-prof-oonagh-breen-and-dr-noel-mcgrath-bl-discuss-chief-baron-palles-forty-years-an-irish-judge> accessed 22 October 2024.

[97] (n 43).

[98] Max Barrett, 'Book Review: Oonagh B Breen, and Noel McGrath (eds), Palles, The Legal Legacy of the Last Lord Chief Baron' (2023) 1 Irish Judicial Studies Journal 110, 110 commenting 'The needs of the poor, I submit, require constant attentiveness from judges; for the rich can afford to look after themselves'.

[99] Borrowing the term of Phillip Gavin, 'An Evaluation of The Jarring Practical Effects of Separate Legal Personality in An Irish Context: A Response to David Kershaw' (2020) 38(7) Irish Law Times 95.

[100] The clearest example of disregarding the legal boundary created by the company is "veil-piercing" where liability for a company's debt is extended to a shareholder. See Brenda Hannigan, "Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company" (2013) 50(2) The Irish Jurist 11. However, there are also many statutory exceptions in Ireland see Courtney (n 16) [5.099] – [5.199] and examples in EU law, where under competition law formally separate companies can be treated as a single 'undertakings'. See *Shell International Chemical Co Ltd v Commission* T-11/89 [1992] ECR-II-757, [311] and Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8(2) European Competition Journal 301.

[101] The need to do so was recognised in *Salomon v A Solomon Co Ltd* [1897] AC 22, 31 where Lord Halsbury noting that the separate legal personality should only apply if there was '[n]o fraud and no agency and if the company is a real one and not a myth'.

legal personality is not fixed, rather, the company is embedded in a broader set of legal rules which *shift* its boundaries in certain contexts.[102] It is a view that Hogan J appears to ascribe to when he states that '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'[103] and that corporate legal personality 'cannot be applied with inexorable logic as if it were some kind of mathematical theorem'.[104]

Taking this view of the company and company law necessarily leads to the difficult question of what circumstances warrant deviating from established legal principle, which should, of course, be generally upheld in the absence of compelling countervailing situations. Again, here, I refer to Hogan J's characterisation of the problem as one which cannot be solved in the abstract, but only by reference to a given case and the specific factual and legal considerations:

> 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.[105]

So, what then of the context and legal principles in *McCool v Honeywell*. Based on Charleton J's dissent, it is worth evaluating the applicability of company law principles to the present case regarding the validity of assignments.

The Rule in *Battle*

I have stated already that the decision of the majority in relation to the law of assignment appears to me to be well-founded, and that I have previously argued against the strict application of the rule in *Battle* on the basis that it should be relaxed where its underpinning rationale does not apply. It would, to my mind, be a far too strict an application of the rule in *Battle* to not only rigidly apply it to companies engaged directly in litigation, but to also use it as a basis to prevent the otherwise legitimate assignment of a cause of action. To do so would, as Murray J stated, 'cast the rules regulating legal representation before the Courts as a normative principle that invalidates a contract of assignment'.[106]

Security for Costs and the Administration of Justice

Woulfe J considered the matter of security for costs and cited the decision of Hogan J in *CMC Medical Operations Ltd v The Voluntary Health Insurance Board*[107] who stated that the whole

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[102] From a theoretical perspective, this view is influenced by the work of Eric Orts, see Eric Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50(4) *Washington and Lee Law Review* 1565 and Eric Orts, *Business Persons: A Legal Theory of the Firm* (OUP, 2013). It stands in contrast to the view of the company as a set of contracts (see Easterbrook and Fischel, *Economic Structure of Corporate Law* (HUP 1991)) or a view of the company as a state concession (see Susan Watson, 'The Corporate Legal Person' (2019) 19(1) Journal of Corporate Law Studies 137).
[103] *McCool* (n 6) [4].
[104] ibid [28].
[105] ibid [4].
[106] ibid [35].
[107] [2015] IECA 68.

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. Similar to the reasoning directly above, once the litigation was validly assigned, Mr McCool took on the personal risk of an adverse costs order and the justification for the provision of security for costs ceased to exist.[108] However, while no justification exists for the ordering of security for costs against individuals who have been validly assigned corporate litigation, there are broader implications of allowing the assignment in the first instance.

Charleton J was concerned by the incentives created by free assignment of corporate litigation to lay litigants, using the example of a company assigning litigation to an individual to avoid risking its assets in litigation or by providing security for costs.[109] The respondent in *McCool v Honeywell* made a similar argument that there would be nothing to stop impecunious companies from assigning a cause of action to an indigent connected person, thereby requiring the defendant to defend proceedings with no guarantee of recovering costs, increasing the likelihood of wasteful or vexatious litigation. The difficulty with the above arguments is that while they articulate the incentives for a company to assign litigation, they disregard the extent of the risk on the individual. When an individual loses a case and the court orders a contrary costs order, they become personally liable on an unlimited basis. As Charleton J observed, if they are unable to pay, they may be required to pay off the debt from their future income with the remaining burden falling on their estate.[110] Even if it may be to the advantage of the company, given the risks it places on individuals it seems unlikely for such assignments to become widespread, particularly if they are for the purpose of vexatious litigation where the risk of a contrary costs order is even greater. That said, it is nevertheless concerning that an individual can calculate the likelihood of success of a specific cause of action, circumvent the normal rules of separate legal personality via assignment, yet in all other respects retain the benefits of incorporation. This, I think, was the fundamental objection expressed by the lower courts in describing the assignment as an abuse of process. The point returns us to Ó Dálaigh CJ's original reasoning in *Battle* that choosing to conduct business through a company is a voluntary choice to accept a set of rules, some offer benefits, others impose obligations[111] and others present limitations. Regarding the specifics of the present case, the countervailing point is that the Companies Act 2014 does not prohibit assignment of corporate litigation while the 1877 Act expressly allows it, and so, it is not obvious that incorporation includes acceptance of limitations on the company's ability to assign litigation. As a more general response, while accepting it to be true as a general principle, I would argue that unjust consequences and broader constitutional principles become relevant in certain contexts which make this uniform application argument less persuasive.[112]

There is a further, related, point regarding the potential negative effects on the administration of justice that could arise from the free assignment of corporate litigation to lay litigants. In the *Aqua Fresh Fish* litigation, McKechnie J in the Court of Appeal noted the difficulties caused by non-lawyers in court including delay, the filing of voluminous but irrelevant documentation, the making of ill-founded assertions and the lodging of irrelevant case law.[113]

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[108] ibid [70].
[109] *McCool* (n 6) [28].
[110] ibid [24].
[111] For example, maintaining adequate accounting records under ss.281-285 of the Companies Act 2014.
[112] Quinn (n 91).
[113] *AIB plc* (n 11) [12].

This concern was shared by the Supreme Court where Finlay Geoghegan J stated that 'representation of litigants by unqualified persons creates challenges and quite often difficulties for the administration of justice in accordance with fair procedures'.[114] Despite not intending to engage in frivolous or vexatious litigation, lay litigants can impose unnecessary hardship on opposing parties through delay, increased legal fees and those opposing parties may well be *bona fide* and of modest means. This point is particularly relevant in the *McCool v Honeywell* litigation. In the High Court, Noonan J stated that Mr McCool had made a series of unsubstantiated allegations including that a named officer of Honeywell committed perjury by swearing a false affidavit, that Honeywell had issued false documentation and had abused the legal system.[115] Noonan J described the accusations as scurrilous, highly defamatory and without foundation.[116] However, as noted by Hogan J, in the event excessive delay or ill-founded allegations of misconduct, the appropriate course is to apply to have the proceedings struck out or stayed as an abuse of process[117], not to prevent access to the courts or invalidate an otherwise legitimate assignment. Hogan J's point brings into question the reasoning of the court in *Aqua Fresh Fish* and whether the administration of justice provides reasonable justification for the rule in *Battle* given its limitation on the right of access to the courts[118] and the alternative methods available to enable the efficient administration of justice.

The Rule in *Foss v Harbottle*

Another fundamental principle of company law, mentioned by Murray J, is the rule in *Foss v Harbottle*[119] which provides that where a wrong is done to the company it is the company, and not its shareholders, that is the proper plaintiff. On first viewing, a shareholder being assigned litigation would seem to directly contravene a central principle of company law since 1843. However, the rule's underlying purpose is to protect the principle of majority rule within companies.[120] If the directors, as elected by the majority of shareholders, have decided not to initiate legal proceedings, the rule prevents a minority shareholder from overturning that decision or initiating proceedings in a personal capacity for a harm suffered to the company.[121] This was expressly stated in the Irish case of *Glynn v Owen*[122], which held that 'central to the rationale underlying the rule in *Foss v Harbottle* and the exceptions to it is that the courts should not interfere with the internal management of the company'.[123] The only exception to the rule occurs where the majority have perpetrated a fraud on the minority[124] which provides the basis for a minority shareholder to take a derivative action[125], although

[114] *AIB plc* (n 3) [32].
[115] *McCool* (n 6) [31-40].
[116] ibid [40].
[117] *McCool* (n 3) [21].
[118] As set out in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345. See Gerard W Hogan and Gerry F Whyte, *JM. Kelly: The Irish Constitution* (4th edn, Bloomsbury 2006) 1446-1450.
[119] (1843) 2 Hare 461.
[120] For a detailed discussion see David Kershaw, "The Rule in *Foss v Harbottle* is Dead: Long Live the Rule in *Foss v Harbottle*" (2015) 3 Journal of Business Law 274.
[121] See *Connolly v Seskin Properties Ltd* [2012] IEHC 332.
[122] [2007] IEHC 328.
[123] ibid [29].
[124] See Irene Lynch-Fannon, 'A Transatlantic Case: The Derivative Action as a Corporate Governance Tool' (2005) 27 Dublin University Law Journal 1, 18 noting that fraud in this context means only acting in their own self-interest.
[125] See Order 15, r39(5) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Derivative Actions) 2010 (S.I. No 503 of 2010).

very few attempts have proven to be successful.[126] In any event, the rule in *Foss v Harbottle* is not intended to prevent or limit the otherwise legitimate assignments of choses in action.

The Fiduciary Duty to Act in the Company's Interest

The final relevant principle is the issue of fiduciary responsibility raised by Charleton J[127] who believed that assigning away a valuable cause of action for a nominal fee potentially breached the fiduciary principle first set out in *Hutton v West Cork Railway Co*.[128] A foundational principle of company law is that directors are legally obliged to serve the interests of the company rather than their own or any collateral interest.[129] This fiduciary responsibility is the primary limitation on their otherwise broad powers of management.[130] It is also trite law that these responsibilities are owed to the company as a legal person and not to the shareholders as a group or any individual shareholder.[131] In delivering the leading Irish case on the matter, Charleton J in *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd*[132] quoted with approval from Ussher's *Company Law in Ireland* that it is 'well established that the director owes the duties arising out of his office to the company itself, the separate person, and to no one else'.[133]

The legislative expression of this responsibility is set out in s 228(1)(a) of the Companies Act 2014 which provides that a director of a company shall 'act in good faith in what the director considers to be the interests of the company'. Charleton J provided a hypothetical justification for the assignment being in the company's interest if Mr McCool had declared an intention or had an express agreement whereby any proceeds of litigation would be used to recapitalise the company.[134] This argument aligns with s 232(1) of the Companies Act 2014 which provides the penalty for a breach of fiduciary duty is to account to the company for any gain made from the breach. Mr McCool returning the proceeds of litigation back to the company would certainly be in the company's interests. However, as Charleton J pointed out, the company would retain a beneficial interest in an assigned litigation, avoiding potential costs liability and of an obligation to provide security for costs, while maintaining the proceeds of that same litigation. Such an arrangement would not only entirely disregard the company's separate legal personality but also contravene the *Waldron v Herring*[135] test which provides that for an assignment to be valid it must be 'absolute', meaning the assignor retains no interest in the subject matter of the assignment.

An alternative argument is that Mr McCool could claim that, in his capacity as director, he was acting in good faith in the company's interest by assigning the litigation to himself on

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[126] See Deirdre Ahern, *Directors' Duties: Law and Practice* (Round Hall 2009)260 expressing the view that the courts are generally unwilling to get involved in the internal workings of companies. In support of this, see *Fanning v Murtagh* [2009] 1 ILRM 368.
[127] *McCool* (n 6) [49].
[128] [1883] 23 Ch D 654.
[129] A directors' fiduciary duties are now encoded in s228(1) of the Companies Act 2014.
[130] When a company enters insolvency, this duty shifts toward protecting creditors. See John Quinn and Phillip Gavin, 'The Creditor Duty Post *Sequana*: Lessons for Legislative Reform' (2023) 23(1) Journal of Corporate Law Studies 271.
[131] Section 227(1) of the Companies Act 2014 explicitly states that a director owes the fiduciary duties 'to the company (and the company alone)'; see also *Crindle Investments et al v Wymes et al* [1998] 2 ILRM 275.
[132] [2014] IEHC 93.
[133] ibid [3] citing Patrick Ussher, *Company Law in Ireland* (Sweet & Maxwell 1986)203.
[134] *McCool* (n 6) [50].
[135] (n 9).

the basis that the company was otherwise unable to progress the litigation and so was not, in fact, assigning away a valuable asset. A counterpoint to this argument is that, as Courtney has pointed out, there are few *bona fide* claims where a company cannot obtain a lawyer to represent it on a 'no foal, no fee' basis[136], especially given that the claimed damages amounted to €11 million. However, while a company may be able to obtain a lawyer on such a basis, it should be noted that 1) even if successful in litigation, the estimated value of a claim is often quite removed from the damages awarded and 2) obtaining a lawyer on a no foal no fee basis does not prevent a defendant from making a s 52 application for security for costs and lawyers will be aware of such a possibility. Hence, obtaining a lawyer on a no foal, no fee basis may not always be straightforward. However, it still seems reasonable to suggest that it would have been in the interests of the company for Mr McCool to at least attempt to find a lawyer to represent the company on a 'no foal, no fee' basis. Charleton J's fiduciary argument, seems to me at least, to be the strongest conceptual argument against the legal validity of the assignment, however, any such claim in future cases would depend on the specific facts.

Conclusion

McCool v Honeywell is a judgment to be welcomed from a company law perspective. The issue in the case was far from straightforward leaving scope for disagreement on points of legal principle and public policy with Hogan J confessing that he did not find it 'an easy issue to resolve'.[137] Yet, the Supreme Court engaging with the underlying principles and public policy dimensions of company law rules is a welcome development. If it were to continue, it could see a move away from being 'wedded to *Salomon*'[138] in favour of an approach where facts, context and consequences become, at least, important factors to be considered alongside well-established legal principles such as legal personality, the rule in *Foss v Harbottle* and the rule in *Battle*. A note of caution to that view is that public policy was directly at issue in this case due to it being the basis upon which assignment can be ruled to be invalid per the O' Donnell J's judgment in *SPV Osus*.

[136] See Courtney (n 16) [6.079].
[137] *McCool* (n 6) [5].
[138] Borrowing the term of Brenda Hannigan, 'Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company' (2013) 50(2) The Irish Jurist 11.