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Companies in Court and the Limits of their Legal Personality: An Argument Against the Strict Application of the Rule in *Battle*

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Abstract: In 1968 the Supreme Court in *Battle v Irish Art Promotion Centre Ltd* ruled that representation of a company in court was limited to legal counsel instructed to act on its behalf, a judgment recently upheld by the Supreme Court in *AIB plc v Aqua Fresh Fish Ltd.* The consequence is that a company's agent cannot represent it in court. The reasons underpinning the rule in *Battle* are that it is a logical consequence of the company's separate legal personality and that it facilitates the efficient administration of justice. However, corporate legal personality is not and should not be a concept rigidly applied in disregard of the surrounding context. While the rule in *Battle* does serve the administration of justice it can, in certain contexts, produce unjust consequences on companies in financial difficulty, unjustifiably impacting their rights to fair procedures and a fair trial.

Keywords: Corporate Legal Personality, Constitutional Rights of Companies

INTRODUCTION

The company's status as a legal person is so deeply entrenched in the legal system that direct judicial analysis of its meaning, limits and purpose has become increasingly rare.[1] One of the few issues that has led to an examination of corporate legal personality by Irish courts is whether a company's officers or members can represent it in legal proceedings. This seemingly simple matter of civil procedure raises complex issues not only about corporate legal personality but also constitutional issues involving the administration of justice, constitutional justice and even the right to a fair trial under Art.6 of the European Convention of Human Rights.

In 1968 the Supreme Court in *Battle v Irish Art Promotion Centre Ltd*[2] (*Battle*) ruled that representation of a company in court was limited to legal counsel instructed to act on its behalf. While natural persons have a right to represent themselves as a litigant in person[3], only a solicitor or barrister has the right of audience to represent another person. The *Battle* judgment applied that restriction to companies as legal persons meaning in effect that a company's agents, who may otherwise have authority to act on the company's behalf, cannot represent it

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[1] Most of modern company law jurisprudence deals with resolving the consequences of the company's legal personality, usually in relation to insolvency, rather than the nature of legal personality itself. See J. Quinn and N. McGrath "Company and Insolvency Law" in R. Byrne and W. Binchy (eds), *The Annual Review of Irish Law* (Round Hall, 2016-2020).

[2] *Battle v Irish Art Promotion Centre Ltd* [1968] I.R. 252.

[3] This right is derived from the right of access to the courts. See G.W. Hogan and G.F. Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Bloomsbury 2006), 1446-1450.

in court. The consequence is that companies who cannot afford legal services must proceed in litigation without presenting legal argument thereby causing significant difficulties for insolvent companies and the natural persons involved in them. The reasoning of Ó Dálaigh C.J. in *Battle* was that the limitation was an "infirmity" stemming from the company's status as a legal person, separate from its officers and members.[4]

In 2018 the Supreme Court in *AIB plc v Aqua Fresh Fish Ltd*[5] *(Aqua Fresh Fish)* upheld the continued application of the rule in *Battle* save in "exceptional circumstances".[6] The Court clarified that exceptional circumstances did not include one-person companies, insolvent companies or the existence of facts which objectively suggest a good arguable defence.[7] The Court agreed with the reasoning of Ó Dálaigh C.J. that the rule in *Battle* was the "logical corollary"[8] of corporate legal personality. The Court also relied on the argument that the rule facilitated the administration of justice by discouraging risk-free litigation[9] and by limiting the practical and procedural difficulties caused by non-lawyers appearing in court.[10]

However, the rule in *Battle* is not a necessary consequence of corporate legal personality but rather is a choice made by the legal system.[11] Corporate legal personality is not and should not be a concept rigidly applied in disregard of surrounding context and its practical effect. The law, after all, regularly deviates from the position that a company is a separate legal person based on broader countervailing considerations. In the context of companies in court, the relevant broader considerations pertain to the administration of justice and constitutional justice. An aspect of constitutional justice is that parties to litigation must be given adequate opportunity to make their case.[12] This principle forms the basis of the rights to fair procedures and a fair trial.[13] When analysed in this broader context it becomes clear that the rule has different effects in different contexts – effects which should inform the application of the rule and its exceptions.

The rule in *Battle* has little, if any, unjust effects on would-be plaintiff companies with a *bona fide* claim. The ability of insolvent companies to litigate is already restricted by the security for

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[4] *Battle v Irish Art Promotion Centre Ltd* [1968] I.R. 252, 254.
[5] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49. The judgment was delivered by Finlay Geoghegan J. with O' Donnell J., Dunne J., Charleton J., and O'Malley J. concurring.
[6] Fn.5, [42].
[7] Fn.5, [43].
[8] Fn.5, [33] using the phrase of McKechnie J. in *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77, [58].
[9] Fn.5, [31].
[10] Fn.5, [32].
[11] This point was made by Barrett J. argued in *Dundon v Butler Homes Ltd* [2017] IEHC 265. English law allows an authorised employee to represent the company in court, having removed their equivalent to the rule in *Battle*, proving the rule need not follow the company's legal personality.
[12] The central tenet of *audi alteram partem*, one the two common law principles of natural justice, is that a person affected by, or with an interest in, the outcome of judicial or administrative decisions has the right to be given adequate notice and adequate opportunity to make their case. See G.W. Hogan and G.F. Whyte, J.M. Kelly: *The Irish Constitution* (4th edn, Bloomsbury 2006), [6.1.52] – [6.1.63].
[13] The impact of the rule in *Battle* on these rights has been highlighted by Hogan J. in *McDonald v McCaughey Developments Ltd* [2015] IECA 159 and Barrett J. in *Dundon v Butler Homes Ltd* [2019] IEHC 89.

costs provision in s.52 of the Companies Act 2014 which requires companies to provide one-third or even one-half of the defendant's potential costs before proceeding in litigation. Section 52 is significantly more restrictive on plaintiff companies than the rule in *Battle* as a company that can provide security for costs is likely to be able to pay for a lawyer to take the case. In addition, as Thomas Courtney points out, few *bona fide* claims exist where the company cannot obtain a lawyer to represent it on a "no foal, no fee" basis and the inability to do so may indicate the claim is not *bona fide*.[14] Hence, the primary effect of the rule on would-be plaintiff companies is to prevent companies that are solvent or that can afford security for costs from having their agents represent them in court. The fact that such companies would choose not to employ a lawyer or be unable to secure a lawyer on a "no foal no fee basis" increases the likelihood that the litigation is misguided with little chance of success or is frivolous or vexatious.

However, the rule in *Battle*, if strictly applied, can have unjust effects for companies in other contexts such as defending a winding up petition, defending the enforcement of a disputed security agreement[15] or when taking an application for examinership. The rule may also unjustly impact companies defending civil claims who cannot afford a lawyer but who have a *prima facie* valid defence. While there has been a long-standing practice of courts informally relaxing the rule to avoid injustice, specifically in the context of winding up petitions and examinership applications[16], it is not clear how this practice can continue after *Aqua Fresh Fish* and its unequivocal statement that the rule can only be set aside in exceptional circumstances. Even if courts continue to informally relax the rule, there is no obvious reason for the law to require a uniform and strict application of the rule and to create a practical reality where courts informally relax the rule in a range of unexceptional circumstances.

The fundamental issue with the rule in *Battle* is its framing as a logical consequence of corporate legal personality. This view has led to an excessively formalistic approach such that the rule can only be set aside in exceptional circumstances and, in this regard, removes discretion from the courts to mitigate the potential for unjust consequences in the application of the rule. While a company that is represented by a non-lawyer is likely to cause difficulties for both the court and the opposing party, negatively impacting as a consequence the efficient administration of justice, the right to fair procedures and a fair trial also implicate important principles. It is submitted that it is possible to achieve a better balance between these competing

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[14] See T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), [6.079].

[15] For example, *McDonald v McCaughey Developments Ltd* [2014] IEHC 455 involved the enforcement of a floating charge by a receiver. The defendant company claimed that there was an error in registering the charge as a collateral stamp deed had been registered instead of the charge and that the receiver had not been validly appointed. However, the defendant company 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 and that applying the rule may result in injustice but that the "court is constrained to follow the decision in *Battle v Irish Art Promotion Centre*", [30]-[31].

[16] See *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [12]-[13] citing *Re Marble and Granite Tiles Ltd* [2009] IEHC 455 as an example.

principles by allowing the general application of the rule against would-be plaintiff companies while providing courts with the discretion to relax the rule where its application would, in the court's view, produce unjust consequences.

The article proceeds as follows: section one examines the limits of corporate legal personality and makes the argument that the general rule that a company is a separate unit of rights and duties does not prevent the alteration of that position in a specific context. Section two examines the law of companies in court including the right of access to the court, security for costs, the right of audience in court and the right to fair procedures and a fair trial. Section three analyses the rule in *Battle* in the context of the administration of justice and sets out the argument supporting a legal basis for courts to relax the rule in certain contexts that might lead to injustice. Section four concludes with a summary of the main argument.

THE LIMITS OF CORPORATE LEGAL PERSONALITY

Corporate legal personality entails a recognition by the legal system that a company is, in general, a separate subject of rights and duties[17] with a formal boundary between it and the persons (legal and natural) associated with it.[18] This legal status forms the basis for the company's ability to own property, enter into contracts and sue and be sued in court. While the company has legal personality, it has no physical manifestation and must act through others; those others being agents granted authority to act on its behalf.[19] Section 158 of the Companies Act 2014 confers a general power of management on the company's board of directors who have the authority to "exercise all such powers of the company". These powers usually include, subject to the company's constitution, the legal ability to contract on the company's behalf, borrow money, create security and initiate litigation in the company's name. Similar powers of management can be granted to agents through the company's constitution or by agreement[20] or can be implied and imposed in law.[21] While general powers of management are delegated, members, through their exclusive voting franchise[22], retain ultimate authority over fundamental decision-making such as altering the company's constitution, electing directors and passing resolutions at general meetings.

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[17] See J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35(6) *Yale Law Journal* 655.
[18] 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. See H. Hansmann and R. Squire, "External and Internal Asset Partitioning: Corporations and Their Subsidiaries" in J. N. Gordon and W.G. Ringe, *The Oxford Handbook of Corporate Law and Governance* (2018, OUP).
[19] See S. Worthington, "Corporate Attribution and Agency: Back to Basics" (2017) 133 *Law Quarterly Review* 118.
[20] 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 P. 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 be either express in the form of a contract or implied from circumstances. See T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), chapter 7.
[21] As is the case with shadow and de facto directors. See s.221 and s.222 of the Companies Act 2014.
[22] For criticism of this franchise see G. M. Hayden and M. T. Bodie, *Reconstructing the Corporation: From Shareholder Primacy to Shared Governance* (2020, CUP).

Despite the importance and widespread acceptance of corporate legal personality, fundamental questions remain about the limits of the concept. One such question is what factual contexts justify abandoning the position that the company is a completely separate, autonomous legal person. Numerous attempts have been made to provide an analytical definition of what the company is and, by so doing, help to further understand the limits of corporate legal personality. Three theories emerge from the literature; first, concession theory claims that a company is a State creation following a legal process of registration.[23] Second, real entity theory claims a company's legal personality is derived from the people who comprise it; its "real" social existence providing the basis for its legal status.[24] Third, the nexus of contracts or participant theory argues that the company is a fiction, merely a product of individual contracts and private ordering.[25] However, none of these theories present a "true" picture of what the company is. As H.L.A. Hart pointed out, the different theories all have descriptive validity which undermine one another[26] and that such theories rarely shed light on how the company functions in the legal system.[27] The problem with theories of the company is that they often fail to consider the complex rule-oriented context in which the company is embedded.[28] To understand the meaning and limits of a company's legal personality in a given context, one must examine the specific legal rules which operate in that context. When viewed in this way, what the company is and what legal personality means depend upon the specific legal context. The company is not something which is fixed but, rather, is context dependent, where the boundaries created by the company's legal personality shift depending upon the relevant legal rules.[29]

While the meaning of corporate legal personality in a given context can only be derived by examining the legal rules in that context, the general position is that a company stands as a distinct unit, capable of bearing legal rights and duties separate from its members and officers. *Salomon v A Salomon & Co Ltd (Salomon)*[30] is the seminal case in the field, not because it

[23] For the argument in favour of concession theory see S. Watson, "The Corporate Legal Person" (2019) 19(1) *Journal of Corporate Law Studies* 137. The author argues that "a modern company cannot exist without undergoing a process of incorporation set down by the state in statute."
[24] The theory originated from German theorist O. Van Gierke, Political Theories of the Middle Age (1900) translated by F.W Maitland. For the argument in favour of real entity theory see M. Phillips, "Reappraising the Real Entity Theory of the Corporation" (1994) 21 *Florida State University Law Review* 1061.
[25] This argument is best presented in F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law* (1991, Harvard University Press).
[26] H.L.A. Hart, "Definition and Theory in Jurisprudence", in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 24.
[27] Fn.26, 25. Hart goes on to argue that companies are "very often . . . neutral between competing theories."
[28] E. Orts, "The Complexity and Legitimacy of Corporate Law," (1993) 50(4) *Washington and Lee Law Review* 1565, 1574.
[29] For the view that a company is a complex institution whose boundaries shift depending on legal context see E. Orts, *Business Persons: A Legal Theory of the Firm* (OUP, 2013).
[30] *Salomon v A Solomon Co Ltd* [1897] A.C. 22.

invented corporate legal personality[31], but rather because it was the start of the strict separation between the company and the natural persons involved in its operations. A Salomon & Co Ltd was the ultimate one-person company with, at one point, Aron Salomon being the company's primary director, shareholder and creditor. Prior to *Salomon*, companies were an extension of, and still connected with, the natural persons of which they were comprised and the law did not allow a natural person to avoid liability for debts amassed through a company when that person was clearly responsible for its operations.[32] The English Court of Appeal characterised Aron Salomon's attempt to avoid personal responsibility for the company's debts as an abuse of the Companies Act and ordered him to be held personally liable for the company's debts.[33] The House of Lords, however, viewed it differently concluding that "either the company was a legal entity or it was not"[34]; if the company was a separate legal person, with separate rights and duties, then it was solely liable for its own debts. Post *Salomon*, the company was no longer legally connected with its members: in the words of Lord MacNaughten a company is at law "a different person *altogether* from the subscribers to the memorandum".[35]

While the House of Lords in *Salomon* held that the company is a separate person, it also made clear that this was a default rule only with Lord Halsbury noting that the separate legal personality of the company would only apply if there was "[n]o fraud and no agency and if the company is a real one and not a myth".[36] Complete separation between a company and its agents could be altered where the surrounding circumstances warranted it. 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.[37] Using a company as a vehicle for fraud[38] or to avoid existing legal obligations[39] are contexts where the courts set aside the company's status as a separate person. In the past, the economic context - where companies were sufficiently connected such that there was no discernible economic difference between them - was a justification to pierce the veil and extend liabilities from one to the other.[40] While

[31]Legal personality is taken from Roman Law where the Civitas (state) and the Fiscus (Treasury) had separate legal capacity and their own rights and duties while slaves, as natural persons, had no legal capacity or rights. See S. Williston, "History of the Law of Business Corporations before 1800" (1888) 2(3) *Harvard Law Review* 105.
[32]For a deeper exploration of this point see P. Ireland, I. Grigg-Spall and D. Kelly, "The Conceptual Foundations of Modern Company Law" (1987) 14(1) *Journal of Law and Society* 149.
[33] *Broderip v Salomon* [1895] 2 Ch. 323.
[34] *Salomon v A Solomon Co Ltd* [1897] A.C. 22, 31.
[35] Fn.34, 51.
[36] Fn.34,33.
[37] See B. Hannigan, "Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company" (2013) 50(2) *The Irish Jurist* 11.
[38] For example, *Re Shrinkpak Ltd* (20 December 1989) HC, (1989) *Irish Times*, 21 December involved the conversion of money from one company to another so as to deliberately defraud creditors of the company.
[39] In *Mastertrade (Exports) Ltd et al v Phelan et al* [2001] IEHC 172 Murphy J. stated the courts could pierce the veil if the company was used "as an engine for the destruction of legal obligations or the overthrow of legitimate or enforceable claims".
[40] See *Power Supermarkets Ltd v Crumlin Investments* (22 June 1981, Unreported) *HC* and *DHN Food Distributors Ltd v Tower Hamlet London Borough Council* [1976] 3 All E.R. 462.

Irish and English courts no longer pierce the veil because of economic connection[41], other jurisdictions, most notably certain US states, continue to pierce the veil based on the economic context under enterprise liability[42] or the alter ego doctrine.[43]

The veil-piercing examples demonstrate that the company is not always treated in law as a separate person. Its boundaries change across time and across jurisdictions depending upon the decisions of courts. Numerous other examples of disregarding the separate existence of the company can be found in legislation.[44] These exceptions are based on an examination of the surrounding circumstances and the outcomes of applying corporate legal personality in a given context. However, the sole reasoning of the Supreme Court in *Battle* was that because a company is a legal person, its members and officers are third parties and no third parties, except solicitors and barristers, can present legal argument on another's behalf. Ó Dálaigh C.J. stated it 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."[45]

Fennelly J., in *Stella Coffey and NO2GM Ltd,*[46] agreed with this reasoning 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".[47] The reasoning of Ó Dálaigh C.J. was also endorsed in *Aqua Fresh Fish* where McKechnie J. in the Court of Appeal affirmed that the rule in *Battle* was "the logical corollary of the Salomon principle"[48], a view that was cited with approval in the Supreme Court.[49]

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[41] See *Allied Irish Coal v Powell Duffryn* [1998] 2 I.R. 519; *Prest v Petrodel Resources Ltd* [2013] 3 W.L.R. 1.
[42] The doctrine is derived from A Berle's paper "The Theory of Enterprise Entity" (1947) 47(3) *Columbia Law Review* 343 and has been applied in numerous US states. See, *Paramount Petroleum Co. v Taylor Rental Ctr* 712 S.W.2d 534, 536 (Tex. Ct. App. 1986); *and Walkovsky v Carlton*, 223 N.E.2d 6, 8-10 (N.Y. 1966).
[43] See, Allen Sparkman, "Will Your Veil be Pierced? How Strong Is Your Entity's Liability Shield? - Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity" (2016) 12(3) *Hastings Business Law Journal* 349. For examples of the application of the doctrine see *Riddle v Leuschner* 335 P 2d 107, 110–11 (Cal, 1959); *Chatterley v Omnico* 485 P.2d 667 (Utah 1971).
[44] For example, under s.610 of the Companies Act 2014 reckless and fraudulent trading legislation, personal liability for the company's debts can be imposed on an officer where the actions of that officer engages in reckless or fraudulent trading. See, *Re Heffron Kearns Ltd* (No. 2) [1993] I.R. 191; *Re Appleyard Motors Ltd* [2016] IECA 280. An example from a different context is s.599 of the Companies Act 2014 which provides for a related company to contribute to the assets of an insolvent, liquidated company where that company caused the insolvent liquidation. For numerous other statutory interventions which disregard a company's legal personality see T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016) [5.099] – [5.199].
[45] *Battle v Irish Art Promotion Centre Ltd* [1968] I.R. 252, 254.
[46] [2013] IESC 11.
[47] Fn.46, [34].
[48] *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77, [58].
[49] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [32].

Ó Dálaigh C.J. correctly highlighted that incorporation represents a choice which involves agreeing to comply with a standard set of rules. Certain rules offer benefits, such as the limited liability of shareholders[50], while other rules, such as maintaining adequate accounting records[51] and share capital[52], are obligations which require compliance. However, the fact that a shareholder agrees to a certain set of rules at the time of incorporation does not mean those rules cannot change in a specific context in accordance with wider legal principles. Law should not, and often does not, blindly apply legal forms in disregard of the wider context. For example, English law allows an authorised employee to represent the company in court. This is a consequence of the removal of their equivalent to the rule in *Battle*[53] following a review of access to justice conducted by Lord Woolfe.[54] On the legal personality argument, Lord Woolfe stated:

> "A justification which is put forward for the present restriction is that it is simply the consequence of a company's limited liability. Directors cannot have it both ways by saying that the company has a separate legal personality but that they can act for it in person. To my mind that is not a sufficient answer. Incorporation is intended to provide public as well as private benefits. If it contains features which are burdensome to companies but which are not obviously justifiable in the public interest, then those features should be re-examined."[55]

Lord Woolfe's point is that the consideration of broader context should take priority over the strict application of corporate legal personality and there is no reason to disadvantage companies unless it is justified by broader considerations. While the Supreme Court has considered the impact of the rule in *Battle* on the administration of justice, corporate legal personality continues to be a primary justification for the continued application of the rule, the most recent example being *Gaultier v Registrar of Companies.*[56] Veil-piercing and the many

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[50] S.17 of the Companies Act 2014.

[51] Ss.281-285 of the Companies Act 2014.

[52] See s.82 (rule against unauthorised capital reductions), s.84 (rule against a company providing unauthorised financial assistance for the purchase of its own shares) and s.102 (rule against a company the unauthorised acquisition acquiring its own shares) of the Companies Act 2014.

[53] See Rule 39.6 of the UK Civil Procedure Rules 1998 SI No. 3132 which provides that a company can be represented at trial by an employee if that employee has been authorised by the company and the court gives permission. The Ancillary Practice Direction provides that "Rule 39.6 is intended to enable a company or other corporation to represent itself as a litigant in person. Permission under rule 39.6(b) should therefore be given by the court unless there is some particular and sufficient reason why it should be withheld". (Practice Direction 39A supplementing the Civil Procedure Rules 1998, [5.2].) Hence, the default position is that a company can be represented by an agent unless there is a particular reason why it should be withheld.

[54] Lord Woolfe, Access to Justice, Chapter 12 Practice and Procedure 1994, [63] available at https://webarchive.nationalarchives.gov.uk/20090117172129/http://www.dca.gov.uk/civil/final/sec3b.htm#c12.

[55] Fn.54,[64].

[56] *Gaultier v Registrar of Companies* [2019] IESC 89 O' Donnell J. (as he then was), citing *Aqua Fresh Fish* and *Radford v Freeway Classics Ltd.* [1994] 1 BCLC 445, stated the rule in *Battle* is "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." [56].

legislative exceptions demonstrate that corporate legal personality is a general rule only, one which is often set aside in specific contexts. As evidenced by the English position, the general rule that a company has a separate legal personality does not prohibit a company's agent representing it in court.[57] The relevant broader context of the administration of justice, rights to fair procedures and a fair trial, plus the practical effects of the rule in specific contexts should, it is submitted, be the sole basis on which the continued application of the rule in *Battle* is evaluated.

COMPANIES AND THEIR RIGHTS IN COURT

(i) The Right of Access to the Court and Security for Costs

One of the effects of legal personality is that companies can sue and be sued in court. By virtue of the constitutional requirement that justice be administered in courts, as envisaged by Art.34 of the Constitution, citizens are granted a right of access to the courts.[58] The right was first recognised in *Macauley v Minister for Posts and Telegraphs* where Kenny J. held that there was a right under the personal rights guarantee of Art. 40.3 to have recourse to the High Court to defend and vindicate a legal right.[59] He stated that if such a right of "recourse to the court" did not exist "the guarantees and rights in the constitution would be worthless".[60] More recent cases grounded the right of access to the courts as part of a citizen's property rights, in contradistinction to their personal rights under Art. 40.3.[61]

While constitutional protections reserved for "human persons" clearly do not apply to companies[62], other constitutional rights such as protections based on citizenship and property rights have been extended to companies. The traditional position was that companies did not qualify as citizens for the purposes of the personal rights guarantee in Art. 40.3.[63] However, that position was changed, at least in relation to private property. In *Iarnrod Eireann v Ireland*[64] Keane J. (as he then was), stated that companies were legally capable of owning property, a practice which was well established by 1937, and there would accordingly be "a spectacular deficiency" in the constitutional protection of property rights if companies were not regarded

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[57] It is worth noting that the extension of the right of audience to company employees was enacted without any broader impact upon corporate legal personality which, in other contexts, continues to be strongly upheld. See *Prest v Petrodel Resources Ltd* [2013] 3 W.L.R. 1 which limited the number of exceptions to legal personality in the context of piercing the veil.

[58] *Macauley v Minister for Posts and Telegraphs* [1966] I.R. 345. See G.W. Hogan and G.F. Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Bloomsbury 2006) 1446-1450.

[59] Kenny J. stated that this was derived from the breadth of the High Court's jurisdiction under Art. 34.3.1.

[60] *Macauley v Minister for Posts and Telegraphs* [1966] I.R. 345, 358.

[61] *O'Brien v Keogh* [1972] I.R.241 and *O' Brien v Manufacturing Engineering Co* [1973] I.R. 334. The Supreme Court in *Tuohy v Courtney* [1994] 3 I.R. 1 clarified that classification as a personal or property right would make no material difference to the constitutional protection afforded.

[62] For example, the equality provision of Art 40.1: "All citizens shall, as human persons, be equal before the law".

[63] In *PMPS v AG* [1983] I.R. 339 Carroll J. reasoned that the property rights guaranteed in Article 40.3.2 were founded on the property rights guaranteed in Article 43 which limits those rights to "man, in virtue of his rational being".

[64] [1996] 3 I.R. 321.

as citizens, at least for the purposes of property rights. He went on to opine that if the framers of the constitution intended to limit the property protections in Art. 40.3.2 to natural persons they would have done so expressly as provided for in other constitutional provisions.[65]

Like all constitutional rights, the right of access to the courts is not absolute and is limited by the courts' inherent jurisdiction to prevent an abuse of court procedure or to strike out frivolous or vexatious litigation.[66] A significant limitation on a company's right of access to the courts is the requirement for the provision of security for costs.[67] When a company initiates legal proceedings as a plaintiff, s.52 of the Companies Act 2014 allows the defendant to apply to the court for an order requiring the provision of security for costs.[68] 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.[69] If the order is granted the company cannot continue the proceedings until it provides sufficient funds to cover the costs of the defendant. This, in practice, is usually one-third of the estimated costs with the exact amount remaining at the discretion of the court.[70]

The courts have maintained that granting an order for security for costs does not breach the right of access to the courts.[71] The justification is that a potential contrary costs order creates a risk which serves as an important deterrent to litigate. However, an insolvent company bears no such risk if it cannot pay a costs order thereby creating an incentive for litigation through the company. Hence, s.52 serves the important purpose of correcting for the risk-free incentive to litigate created by the insolvent company that cannot afford costs.[72] Section 52 is a significantly greater burden to potential corporate litigants in financial difficulty than the rule in *Battle* as any company that can afford one-third of the defendant's potential costs is likely to be able to pay for a lawyer to bring the case.

(ii) The Right of Audience in Court

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[65] Keane. J stated: "It does not necessarily follow that the property rights of the individual citizens which are protected against 'unjust attack' by Article 40, s 3 are confined to rights enjoyed by human persons. Had the framers of the Constitution wished to confine the comprehensive guarantee in Article 40, s.3 in that manner, there was nothing to prevent them including a similar qualification to that contained in Article 40, section 1."

[66] For a discussion see G.W. Hogan and G.F. Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Bloomsbury 2006), 1449.

[67] For an exploration of the security for costs case law see A. O Neill, *The Constitutional Rights of Companies* (Round Hall 2007) chapter 11 or T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), 322-360.

[68] S. 52 in full provides: "Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given".

[69] See *Ronbow Management Company Ltd v Sorohan Builders Ltd et al* [2010] IEHC 60.

[70] T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), [6.066]-[6.067].

[71] See *Salih v General Accident* [1987] I.R. 628 and *Superwood Holdings plc v Ireland* [2005] 3 I.R. 398.

[72] See T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), [6.018] and H. Biehler,"Security For Costs And Corporate Plaintiffs — Recent Developments" (2019) 37(7) *Irish Law Times* 98, 98.

Historically, legal representation to act on another's behalf was restricted to barristers who enjoyed 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. Apart from solicitors and barristers, no other profession or individual enjoys the right to present legal arguments on another's behalf in court. To ensure access to the courts, natural persons may represent themselves as a litigant in person.[73] After *McKenzie v McKenzie*[74], a litigant in person has a right of assistance from a "friend" who can take notes, make suggestions and give advice during a court hearing. However, the "McKenzie friend" is prohibited from presenting legal argument.

The Supreme Court in *Battle* applied these general restrictions on the right of audience in court to companies. The *Battle* case involved a claim from the plaintiff that the defendant owed them commission accruing from the sale of the plaintiff's 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 C.J., in giving the judgment of the court,[75] 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.[76] The most influential of these was, arguably, *Tritonia Limited v Equity and Law Life Assurance Society.*[77] Here Viscount Simon stated that in "the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf." Ó Dálaigh C.J. agreed with this stance 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".[78]

It is possible for a company's officer or shareholder to gain the right of audience by being joined as a party in the litigation and, then, presenting legal arguments as a litigant in person. In *McDonald v McCaughey Developments Ltd & McCaughey*[79], the Court of Appeal held that because the director had been joined personally as a second defendant there could be no objection to the director advancing arguments and adducing evidence, even if they also benefited the company. However, a company's officer or shareholder can only be joined as a party if they have a personal interest in the litigation. *McCool v Honeywell Control Systems*

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[73] See *R.B. v A.S.* [2002] 2 I.R. 428.
[74] *McKenzie v McKenzie* [1970] I.R. 1.
[75] Walsh J. and Haugh J. concurring.
[76] *Scriven v Jescott Leeds Ltd* 53 Sol JO 101; *Frimpton and Walden UDC v Walton and District Sand and Mineral Co. Ltd* [1938] 1 All E.R. 649; *Tritonia Limited v Equity and Law Life Assurance Society* [1943] A.C. 584.
[77] [1943] A.C. 584.
[78] *Battle v Irish Art Promotion Centre Ltd* [1968] I.R. 252, 254.
[79] [2015] IECA 159.

Ltd[80] involved a protracted dispute between an Irish company and an international conglomerate regarding an alleged breach of contract. A company director issued a motion to be joined in the proceedings as a co-plaintiff alongside the company. The Master of the High Court rejected the motion on the basis that the director had no personal claim which he could litigate in his own right. A further attempt to assign the company's interest in the litigation to the director was rejected by Noonan J., who ruled that the assignment was for the sole purpose of circumventing the rule in *Battle* which, if allowed, would set the rule at nought.[81]

While Irish courts have consistently applied the rule in *Battle*[82], there has also been established a practice of informally relaxing the rule in certain contexts, including examinership applications.[83] For example, *Re Marble and Granite Tiles Limited*[84] concerned a petition for the winding up of the company where Laffoy J. heard submissions from the company's director. Laffoy J. stated:

> "The legal position, accordingly, is that Mr. O'Gara is not, as a matter of law, entitled to represent the company in these proceedings. However, as frequently happens on the hearing of a winding up petition when a director or a member of the company appears in Court without legal representation, he was listened to to ensure that no injustice would be perpetrated."[85]

This informal relaxation of the rule has offset many of the potentially negative consequences of the rule in *Battle* but it does create an unnecessary gap between the law as stated in *Battle* and subsequently in *Aqua Fresh Fish* and its operation in practice. It would yield more consistency and coherence if courts had the legal discretion, via means of an exception to the rule in *Battle*, to relax the rule in contexts where its application would, in the court's view, produce unjust consequences.

(iii) The Right to Fair Procedures and a Fair Trial

While there is no express right to fair procedures in the Irish Constitution, such a right has been implied from the language of Art. 34.1 and Art. 34.3.1 and the concept of constitutional justice.[86] A right to fair procedures also appears to be an unenumerated right under Art. 40.3 based on the judgment in *Garvey v Ireland.*[87] The concept of constitutional justice appears broader than, but includes, the two common law rules of natural justice: "*nemo iudex in causa*

[80] [2018] IEHC 167.
[81] Fn.80, [30].
[82] For examples see, *Friends of the Curragh Environment Ltd v An Bord Pleanála* [2009] 4 I.R. 451; *McDonald v McCaughey* [2014] IEHC 455; *Munster Wireless Ltd v Finn* [2018] IEHC 412.
[83] The practice was referenced by the Supreme Court in *Stella Coffey and NO2GM Ltd* [2013] IESC 11, [37] and *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [12]-[13].
[84] [2009] IEHC 455 (Unreported, High Court, Laffoy J., 16 October, 2009).
[85] Fn.84, [9].
[86] See A. O Neill, *The Constitutional Rights of Companies* (Round Hall 2007) chapter 12.
[87] [1980] I.R. 75. Griffin J. stated that "Article 40.3….has been held by this Court to be a guarantee of fair procedures" (at 108).

sua" (the rule against bias) and "*audi alteram partem*" (listen to the other side). According to Walsh J. in *McDonald v Bord na gCon*[88]:

> "In the context of the Constitution natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well established principles that no man shall be a judge in his own cause and *audi alteram partem*."[89]

The basic principle of *audi alteram partem* is that a person affected by, or with an interest in, the outcome of judicial or administrative decisions has the right to be given adequate notice and adequate opportunity to make their case.[90] These principles form the basis of the right to a fair trial expressed in Art. 6(1) of the European Convention of Human Rights (the Convention)[91] which has been regularly relied upon by companies.[92]

Certain judgments have expressed concern that the limitations on the ability of companies to be represented in court arising from the rule in *Battle* may be incompatible with the principles of constitutional justice and the right to fair procedures and a fair trial. For example, Hogan J. in *McDonald v McCaughey Developments Limited*[93] questioned whether the guarantee of fair procedures and compatibility with Art.6 of the Convention could be sustained where the rule in *Battle* provided that in every case a company must be represented by professional lawyers.[94]

The one formal exception to the rule in civil cases[95] is that the court may deviate from the rule in exceptional circumstances. The exception is derived from *Coffey v Tara Mines Limited*[96]*(Coffey)* where O' Neill J. outlined an exception to the general rule that a natural person cannot be represented by a person other than a solicitor or barrister. The plaintiff in *Coffey* suffered from specific communication difficulties due to illness and was incapable of representing himself. 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. Accordingly, he sought to be represented in court by his wife who was neither a

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[88] [1965] I.R. 217.
[89] Fn.88, 242.
[90] See G.W. Hogan and G.F. Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Bloomsbury 2006), [6.1.52] – [6.1.63].
[91] Art.6(1) provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'
[92] See *Sovtransavato Holding v Ukraine* (2004) 38 EHHR 44; *APB Ltd, APP and EAB v UK* (1998) 25 EHRR CD 141 and *Immobilare Saffi v Italy* (2000) 30 EHRR 756.
[93] [2015] IECA 159.
[94] Fn.93, [3]. For another example, see *Dundon v Butler Homes Ltd* [2017] IEHC 265, [3].
[95] There is one statutory quasi-exception to the rule in *Battle* in the context of criminal proceedings. S.868 of the Companies Act 2014 allows a company charged on indictment to appear by a representative who may answer any question, exercise any right of objection and plead on the company's behalf. S.868(6) makes clear that appointment as representative under the section does not qualify the person to act on behalf of the company before any court for any other purpose.
[96] *Coffey v Tara Mines Limited* [2008] 1 I.R. 437.

solicitor nor a barrister. O' Neill J. relied on a decision from the New Zealand Court of Appeal in *Re. G.J. Mannix Limited*[97] where Somers J. observed that:

> "I consider the superior courts to have a residual discretion in this matter arising from the inherent power to regulate their own proceedings. Cases will arise where the due administration of justice may require some relaxation of the general rule. Their occurrence is likely to be rare, their circumstances exceptional or at least unusual and their content modest."[98]

O' Neill J. concluded that existing Irish law, including the rule in *Battle*, did not preclude him from adopting the approach of Somers J. in *Re G.J. Mannix Limited* and allowing an exception to the general rule. He stated that the circumstances of the case before him were "so exceptional or rare as to probably be unique"[99] and allowed the plaintiff's wife to represent him in court.

The Supreme Court in *Aqua Fresh Fish,* relying on *Coffey,* made it clear that the rule in *Battle* includes 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".[100] 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 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.[101]

It is difficult to see how litigation involving companies could ever meet the standard required, a standard derived from a case involving human hardship and illness. The term "exceptional circumstances" renders the exception effectively notional for companies as the potentially unjust consequences of the rule in *Battle* arise in circumstances which are far from exceptional e.g. circumstances such as defending a petition for winding up, defending against disputed security agreements, applying for examinership or defending civil claims. Yet, despite the effectively notional nature of the exception, the Supreme Court considered that the existence of the exception ensured compatibility with the Constitution and presumably, by extension, Art. 6. of the Convention.[102]

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[97] *Re G.J. Mannix Limited* [1984] 1 N.Z.L.R. 309.
[98] Fn.97, 316.
[99] *Coffey v Tara Mines Limited* [2008] 1 I.R. 437, [34].
[100] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [48].
[101] Fn.100, [43].
[102] Fn.100, [32]. The issue of Art.6 was raised by the defendant company, but the court did not directly comment on the compatibility of the rule in *Battle* with the Convention, remarking only that the exceptional circumstances exemption rendered the rule compatible with the Constitution.

The second primary justification for the rule in *Battle* is that the rule facilities the efficient administration of justice. The first time the Supreme Court examined its decision in *Battle* was in 2014 in *Stella Coffey and No2GM. Ltd*[103] and while the Court agreed with the reasoning in *Battle* that the rule was a consequence of corporate legal personality[104], it also stated that the rule served "the administration of justice and thus the public interest".[105]

One argument is that the rule serves the efficient administration of justice by discouraging risk-free litigation.[106] While the existence of s.52 and the burden it places on insolvent plaintiff companies prevents any wholly risk-free litigation, there is still potential for solvent companies or companies that have provided security for costs to be represented by agents in misguided litigation with little to no chance of success or in litigation that is frivolous or vexatious. McKechnie J. in the Court of Appeal in *Aqua Fresh Fish* presented the argument as follows:

> "to permit directors or other officers to represent companies and so pursue potentially hopeless causes without fear of personal risk or of an adverse personal costs order, would be to impose a considerable burden not only on the other party to the action, who would surely incur costs that they had no hope of recovering, but also on the scarce and limited resources of the courts."[107]

In similar fashion, the Company Law Review Group (CLRG)[108] believed that allowing agents to represent their companies may facilitate frivolous or vexatious claims because the agent would not face personal liability for costs.[109] It is true that such an agent would not be personally liable for costs. Nonetheless, the company would still remain liable for costs. It seems illogical for a solvent company or a company who has provided security for costs to initiate such proceedings while the company bears the risks of an adverse costs order. However, such scenarios may still exist and in these circumstances the rule in *Battle* provides an important barrier to such claims. Hence, in the context of would-be plaintiff companies, the rule serves an important function of limiting the initiation of misguided, frivolous or vexatious claims while creating little, if any, potential for injustice given that plaintiffs with *bona fide* claims are likely to be able to secure legal representation on a "no foal, no fee" basis.[110]

Another argument is that the rule in *Battle* facilitates the efficient administration of justice by reducing the practical and procedural difficulties caused by lay litigants who appear in court.

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[103] [2013] IESC 11. More recently in *Munster Wireless Ltd v Finn* [2018] IEHC 412, [20] Faherty J. stated that "the restriction on the right of audience [on companies]…is designed to serve the administration of justice and thus the public interest".
[104] *Stella Coffey and NO2GM Ltd* [2013] IESC 11, [34].
[105] Fn.104, [23].
[106] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [31].
[107] *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77, [62].
[108] Company Law Review Group, *Report on The Representation of Companies in Court* (2016).
[109] Fn.108, [6.17].
[110] See T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), [6.079].

Fennelly J. in *Stella Coffey and NO2GM Ltd*[111] remarked that courts are better able to administer justice fairly and efficiently when parties are represented by lawyers[112] and that extending rights of audience to non-lawyers causes significant procedural difficulties given that they are not subject to the training and oversight of professional barristers and solicitors.[113] 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.[114] 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".[115] Lay litigants may also produce hardship for the opposing parties by causing delay and an increase in legal fees. It should be appreciated that opposing parties may well be *bona fide* and of modest means.

There is no doubt that non-lawyers appearing in court can cause procedural difficulties that result in time and financial costs for opposing parties. Clearly, it would be preferable if all parties were represented by professionally trained lawyers. However, in certain contexts, such as where the company is an insolvent defendant or is the subject of a petition for winding up, or applying for examinership, the choice is often not between the company being represented by a lawyer or a non-lawyer but between the company being represented by a non-lawyer or proceeding in litigation without any representation. As the CLRG noted, the rule in *Battle* results in courts facing the procedural difficulties involved with dealing with often complex commercial cases in the absence of the company concerned[116], something which Fennelly J. described as "far from ideal".[117] Hence, a strict application of the rule is not itself free from practical and procedural difficulties while, in certain contexts, also causing hardship for companies who cannot afford legal representation thus adversely affecting their rights to fair procedures and a fair trial.

An example of the unjust consequences and procedural difficulties caused by a strict application of the rule in *Battle* can be seen in *Dundon v Butler Homes Ltd.*[118] The case dealt with a dispute between the defendant company and its former solicitors regarding the nature of costs that should be sought from Limerick City Council following arbitration proceedings in respect of a compulsory acquisition of land. The defendant company did not possess the funds necessary to engage legal representation and the company's director was prevented from

[111] *Stella Coffey and NO2GM Ltd* [2013] IESC 11.
[112] Fn.111, [25].
[113] Fn.111, [29] relaying on the judgment of Keane C.J. in *R.B. v A.S* [2002] 2 I.R. 428, [47].
[114] *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77, [12].
[115] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [32].
[116] A point noted by the Company Law Review Group in their *Report on The Representation of Companies in Court* (2016), [1.3].
[117] *Stella Coffey and NO2GM Ltd* [2013] IESC 11, [39]
[118] [2017] IEHC 265.

speaking on the company's behalf because of the rule in *Battle*. Instead, the applicant's counsel read out affidavit evidence sworn by the company's director and presented the issues "as fairly as he could" without compromising the interests of his client. Barrett J. said that this amounted to an ethical "tight rope walk" for the applicant's counsel but that it was the best that could be done given the rule in *Battle*.[119] This situation is one which highlights the fact that the rule is not free from practical difficulty.

Barrett J. made it clear that he did not agree with the continued application of the rule in *Battle*, but that he was, nonetheless, bound by precedent and could not allow the company's agent to be heard in court. He questioned whether the rule is really a logical consequence of corporate legal personality[120] and believed the rule may well be incompatible with Art. 6 of the Convention, particularly in the case where a company is genuinely unable to pay for representation and has a *prima facie* valid claim or defence.[121] The judge concluded his criticism by observing that the "court must admit that it has the dissatisfying impression that the binding rule in *Battle* is, in practice, failing small, cash-strapped companies whose directors and shareholders are likewise cash-strapped".[122]

A point consistently relied upon by courts and commentators to support the rule in *Battle* is that the court retains the ability to disregard the rule thus allowing the judge to use "discretionary pragmatism"[123] in the interests of justice. This point was cited as a basis for the rule's compatibility with Art. 6 of the Convention by the Court of Appeal in *Aqua Fresh Fish*[124] and has been relied upon as an argument for not reforming the rule by the CLRG[125] and by Thomas Courtney[126] 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 of the Constitution, would allow a company in such circumstances to be represented by a lay advocate."[127]

However, both the CLRG and Courtney were writing prior to the Supreme Court's decision in *Aqua Fresh Fish* and were of opinion that the discretion of judges would offset the potentially unjust consequences of the rule. However, it is not clear how such broad discretion survives the judgment in *Aqua Fresh Fish* and its unequivocal statement that the rule could only be set aside in exceptional circumstances. Insolvency, having a good arguable defence, being a one-

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[119] Fn.118,[3].
[120] Fn.118, [2].
[121] Fn. 118, [2].
[122] Fn.118, [3].
[123] *AIB plc v Aqua Fresh Fish Ltd* [2017] IECA 77, [46].
[124] Fn.123.
[125] CLRG, *The Representation of Companies in Court* (2016), [6.2.7].
[126] T. Courtney, *The Law of Companies* (4th edition, Bloomsbury 2016), [6.079].
[127] Fn.126.

person company were expressly stated as not falling within the exception.[128] Applications for examinership and defending winding up petitions or the enforcement of a disputed security agreement are similarly not exceptional circumstances. After *Aqua Fresh Fish* any informal relaxation of the rule is in direct contravention of precedent. The real effect of the judgment in *Aqua Fresh Fish*, and its narrowly defined exception, is to remove discretion from the courts. This lack of discretion has the potential to result in decisions in cases similar to *Dundon v Butler Homes Ltd*[129] where Barrett J. clearly felt the rule should be relaxed but could not do so because of precedent.

Even if courts continue the practice of informally relaxing the rule, there is no obvious reason for the divorce between the law as stated in *Aqua Fresh Fish* and its practical application. A foundational principle of constitutional justice is that parties to litigation must be given adequate opportunity to make their case This principle applies to natural persons and legal persons alike. While the efficient administration of justice is an important principle to uphold so, too, is constitutional justice and the right to fair procedures and a fair trial. A broader exception providing the court with the discretion to relax the rule in contexts where, in the court's view, strict application of the rule would produce unjust consequences would provide for a more consistent legal framework and a better balance between the relevant competing principles. These contexts include defending a winding up petition, defending the enforcement of a disputed security agreement, taking an application for examinership or defending a civil claim where a *prima facie* valid defence exists. A broader exception based on preventing "unjust consequences" rather than in "exceptional circumstances" would allow for the continued general application of the rule against would-be plaintiff companies, while limiting the potential for unjust consequences in the application of the rule.

CONCLUSION

The rule in *Battle* has, it is submitted, been viewed from the wrong perspective. In this regard it is seen formalistically emanating as a consequence and logical extension of corporate legal personality rather than from a contextual perspective which evaluates the effects of the rule in different contexts. The judgment in *Aqua Fresh Fish*, and its effectively notional exception, is the result of this excessively formalistic framing. The rule in *Battle* has, as a consequence, become excessively rigid in its construction and in the process has removed legal discretion from the courts to relax the rule in contexts where unjust consequences arise from its application. A better balance between the efficient administration of justice and the rights to fair procedures and a fair trial would undoubtedly be achieved if the exception was expanded and courts had at their disposal the discretion to relax the rule in contexts where, in the courts view, application of the rule would produce unjust consequences.

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[128] *AIB plc v Aqua Fresh Fish Limited* [2018] IESC 49, [43].

[129] [2017] IEHC 265.

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