APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/49

Noonan J.
Haughton J.
Allen J.

Neutral Citation Number [2022] IECA 287

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/APPELLANT

AND

OLIVER MOLONEY

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 14th day of December, 2022

Introduction

1. This is an application by Mr. Neil Maloney, a son of Mr. Oliver Moloney, who is the defendant in the High Court proceedings and the respondent to the appeal to this court, for an order giving him *"liberty to appear and be heard in lieu and on behalf of"* the respondent.

2. By leave of Costello J., given in the directions list, Mr. Maloney's motion was made returnable for 21st October, 2022 and then adjourned to 8th November, 2022, which the date

on which the appeal was listed for hearing. When the case was called, there was no appearance by the respondent but Mr. Maloney moved his application to be allowed to conduct the appeal. That application was opposed by counsel on behalf of the appellant. In circumstances to which I will come, Mr. Maloney had been permitted to represent his father in the High Court and one of the appellant's grounds of appeal was that he ought not to have been. Strictly speaking, however, this judgment is directed to Mr. Maloney's application for permission to conduct the appeal.

Background

3. As the High Court judge put it, the proceedings have had a long and intricate procedural history. To understand the decision of the High Court to hear Mr. Maloney and the decision of this court on whether he should be heard on the appeal, it is necessary to look at the history in some detail.

4. By order of the High Court (McGovern J.) made on 11th October, 2010 it was ordered that the defendant, Mr. Oliver Moloney, should deliver up to the plaintiff, then known as GE Capital Woodchester Home Loans Ltd., possession of the property comprised in Folio 31892F, County Galway. The order shows that there was no attendance by or on behalf of the defendant.

5. The property, which is a dwellinghouse at Cloonaglaslia, Tuam, County Galway, had been charged by the defendant to the plaintiff on 19th December, 2006 to secure the repayment of a loan of €125,000 together with interest over twenty five years and the charge was duly registered on 11th February, 2008 as a burden on Folio 31892F, County Galway. The loan very soon went into arrears and the order for possession made by McGovern J. was made on foot of a special summons issued on 3rd November, 2008.

6. On 14th September, 2011 the plaintiff took out an execution order on foot of the order for possession but it was not executed.

7. On 11th October, 2012 the plaintiff changed its name to Pepper Finance Corporation (Ireland) Limited.

8. By notice of motion issued on 4th December, 2012 the plaintiff applied to the High Court for an order pursuant to O. 42, r. 21 for the renewal of the order of possession – that is the execution order – and such an order was made by the High Court (Dunne J.) on 4th February, 2013. Again the order shows that there was no attendance by or on behalf of the defendant. That motion did not address the change in the plaintiff's name and did not take account of the fact that the renewal application had not been made within the one year in which the execution order was in force – the significance of which is apparent from the later judgment of Dunne J. given on 3rd December, 2013 in *Carlisle Mortgages Ltd. v. Canty* [2013] IEHC 552, [2013] 3 I.R. 406. By the way, the application appears to have been to renew an unexecuted order rather than re-execute so that the wrong rule – r. 21, rather than r. 20 – was invoked but nothing turns on that.

9. By notice of motion issued on 22nd February, 2013, the plaintiff applied to the High Court for an order pursuant to O. 42, r. 24 for leave to issue execution on foot of the order for possession. By all accounts, that motion was thought to have been necessitated by the change in the plaintiff's name, but the motion did not seek the amendment of the title to the proceedings. The order sought was made by the High Court (Dunne J.) on 15th April, 2013, again in the absence of any attendance by or on behalf of the defendant.

10. By notice of motion dated 28th January, 2014 and returnable for 10th February, 2014, the plaintiff applied for an order pursuant to O. 42, r. 20 for the further renewal of the order of possession – that is the execution order. By then, Dunne J. had given her judgment in *Carlisle Mortgages*. By the time the plaintiff's motion for renewal came before the High

Court the execution order had expired and the application was refused by McGovern J. on 10th February, 2014.

11. The difference between a renewed execution order and a new execution order is that a renewal preserves the priority of the original execution order. In a case, for example, in which there are competing judgment creditors seeking to enforce money judgments by orders of *fieri facias* this might be significant but in the case of an order for possession there is no practical issue of priority. On 2nd April, 2014 a new execution order was taken out in the office but in circumstances to which I will come, the order of possession was not executed.

The motion for leave to issue execution

12. The next step in the proceedings was that by notice of motion issued on 3rd November, 2017 and originally returnable for 20th November, 2017 the plaintiff applied for an order for the amendment of the title of the proceedings to reflect the change in the name and status of the plaintiff – which had occurred on 29th October, 2015 – to Pepper Finance Corporation (Ireland) DAC and an order pursuant to O. 42, r. 24 giving liberty to the plaintiff to issue execution on foot of the order for possession which had been made on 11th October, 2010. The notice of motion also sought an order pursuant to O. 42, r. 20 for the renewal of the execution order which had issued out of the office on 2nd April, 2014; which plainly could not be done.

13. The three and a half years which had elapsed between 2nd April, 2014 and 3rd November, 2017 was explained by the affidavit of Caroline Loftus, senior operations manager, filed in support of the motion.

14. The precise detail is not important for present purposes but there was significant engagement between the plaintiff and the defendant between February, 2014 and May, 2015

in the course of which the defendant completed two income and expenditure forms and spoke with and attended a number of meetings with his relationship manager and authorised the community welfare officer in Tuam Health Centre to discuss his mortgage account with the relationship manager. The defendant made a number of proposals and a small number of payments and at one stage asked whether he might stay on the house until his youngest child finished her Leaving Certificate.

15. On 24th May, 2015 the defendant wrote to the plaintiff to authorise it to discuss *"repayment restructure plans with my son Neil Maloney, regarding the above mortgage account."* By letter dated 17th July, 2015 Mr. Maloney proposed that he would buy the house from the plaintiff and said that he had been in contact with a mortgage broker. Thereafter there was fairly regular engagement between the plaintiff and Mr. Maloney in the course of which Mr. Maloney advised the plaintiff of the progress of his plan to borrow money to buy the house and in the course of which he made a number of payments on account. In her affidavit grounding the substantive motion Ms. Loftus listed and briefly described the various conversations and meetings with Mr. Maloney which culminated in a decision by the plaintiff on 17th July, 2017 to seek leave to execute the order for possession.

16. Mr. Maloney's affidavit sworn on 14th October, 2022 in support of the motion now before this court shows that on the return date of the plaintiff's motion before the High Court on 20th November, 2017 he attended court and the motion was put back to allow him time to save money and to have work carried out to the house which he hoped would allow the debt to be refinanced. The High Court record confirms Mr. Maloney's evidence that when the motion was next listed on 12th February, 2018, Eager J. made an order in the terms of para. 1 of the notice of motion amending the name of the plaintiff. The order of Eager J. shows that the court then heard *"Mr. Moloney (sic.) the defendant's son attending court on behalf of the defendant."*

17. The plaintiff's motion came back before the High Court, Coffey J., on 9th April, 2018, when, as Mr. Maloney has deposed, he *"shared"* all that he had been doing since May, 2015 and his *"findings on the legal and beneficial owner of the debt."* In essence, Mr. Maloney's researches had brought him to believe that there had been a transfer of his father's loan and that the plaintiff was no longer the person entitled to issue execution on foot of the order for possession. No formal order was then made by the High Court but the uncontested evidence of Mr. Maloney is that Coffey J. gave him liberty to file affidavits setting out what he thought was the defence to the motion and instructed the plaintiff's side to respond to them. This, as Mr. Maloney says, set off a chain of events which would see him attend before the High Court on 28 further occasions over the next four years.

18. On one of the three adjournments between 9th April, 2018 and 23rd July, 2018 – it is unclear which because no formal order was made – McDermott J. disallowed an objection by the plaintiff to Mr. Maloney appearing and gave him liberty to file further affidavits. Over the following fifteen months there were eight adjournments, at each of which Mr. Maloney appeared, and at which he was heard by Pilkington J. and Simons J. to consent to requests by counsel on behalf of the plaintiff for further adjournments.

19. The High Court record shows that the plaintiff's motion was listed for hearing on 22nd January, 2020. Reynolds J. then identified a potential problem with the order of McGovern J. of 10th February, 2014. As I have said, the motion which had been before the court on 10th February, 2014 was an application pursuant to O. 42, r. 20 for the renewal of the execution order of possession but the order drawn suggested that the application – which had been refused – was a motion pursuant to O. 42, r. 24, for the renewal of the order for possession. The motion before the court on 22nd January, 2020 was a motion pursuant to O. 42, r. 24 and a potential issue was identified as to whether the plaintiff's motion was *res judicata*.

20. On 3rd February, 2020 the plaintiff issued a motion pursuant to O. 28, r. 11(b)(i) – the slip rule – to correct the written order of 10th February, 2014 to show that what had been refused was an application pursuant to O. 42, rule 20. That motion was heard by Simons J. on 24th February, 2020 and, for the reasons given in a written judgment delivered on 2nd March, 2020 ([2020] IEHC 105) was granted. The order of Simons J. shows that he heard *"Neil Moloney the defendant's son de bene esse there being no attendance in court by the defendant."*

21. Then came COVID-19. The High Court quickly made arrangements to deal with as much of its business as possible by remote hearings but for a long time could not accommodate cases in which one or more parties were unrepresented.

The High Court ruling as to representation

22. The plaintiff's motion for leave to issue execution was eventually re-listed for hearing before Egan J. on 12th October, 2021 but for completeness I mention that the hearing date was fixed by me on 22nd July, 2021. On the listing application, counsel for the plaintiff renewed – or flagged the renewal – of the plaintiff's objection to Mr. Maloney representing his father. Specifically, the point was made that while theretofore Mr. Maloney had been heard on the adjournments and had been allowed to file affidavits, the question of whether he should be allowed to do so on the substantive hearing was another matter. The date was fixed on the basis that the issue of representation would be dealt with by the assigned judge.

23. Mr. Maloney applied to Egan J. to be heard. He recalled that along the way he had repeatedly been told that he had no right of audience but might be heard in exceptional circumstances. He submitted that his circumstances were exceptional. He submitted that it would be awfully unfair if, having been heard previously on 28 occasions, he was not heard

on the day of the full and final hearing. Mr. Maloney suggested that his father was unable to attend court. He said that his father was suffering from depression and had been for a number of years. Mr. Maloney produced a short medical report dated 21st October, 2020 in the form of a letter addressed to Reynolds J. The letter recorded the defendant's date of birth as 17th July, 1964 and continued:-

> *"Mr. Maloney (sic.) is a patient of this practice since Oct. 1990. Since the break up of his marriage in 2004 he has suffered depression & unfortunately he lost his business approx. 2007. This has affected him mentally and he was not in a position to deal with ongoing problems & demands.*
>
> *Since his eldest son Neil began to look after his affairs (over the past 5 years) he has improved mentally and has been able to work under a Community Employment Scheme. He is at present not on any medication. However, I feel that he is not mentally or physically capable of attending court at this stage."*

24. Egan J. postponed her ruling on the preliminary objection until after the motion papers had been opened. The affidavits, in particular the grounding affidavit of Ms. Loftus, confirmed what Mr. Maloney had said about his involvement with the plaintiff and showed the extent of his engagement with the plaintiff in two years or so immediately before the issue of the motion.

25. Egan J. decided, in the exercise of her discretion, to hear Mr. Maloney. She noted that it was *"unusual"* that the court might hear a person other than a solicitor or barrister and that *"some good reason"* must be advanced before that could be allowed. The judge referred to the medical report which had stated that the defendant was not mentally or physically capable of appearing before the court himself; the fact that Mr. Maloney had 28 times previously been allowed to represent his father; and the fact that Reynolds J., besides hearing Mr. Maloney, had directed that a separate copy of the papers should be sent to him directly.

The judge thought that the slip rule motion was a reasonably substantive matter and did not see any distinction in principle between that motion and the motion for leave to issue execution then before her. Finally, the judge noted that the application was a serious matter for the defendant, for Mr. Maloney, and for the other members of his family and concluded:-

> *"I would hold that in circumstances where the defendant is, on medical advice, apparently not mentally or physically capable of attending to address the court, and having regard to the manner in which the proceedings have been conducted so far, there would be a risk on unfairness to the defendant if Mr. Maloney were not permitted to address the court."*

26. Having heard further from counsel on behalf of the plaintiff and from Mr. Maloney, Egan J. reserved judgment. By order made on 18th January, 2022, for the reasons given in a written judgment delivered on 3rd December, 2021 ([2021] IEHC 761) the plaintiff's motion was refused.

The appeal

27. By notice of appeal dated 28th February, 2022 the plaintiff appealed. Most of the grounds of appeal were directed to the refusal of the relief which had been sought but the plaintiff also appealed against the decision of the High Court judge to permit Mr. Maloney to represent the defendant.

28. A respondent's notice was eventually filed which correctly showed the defendant as the respondent to the appeal but identified Mr. Maloney as the author. Under the heading *"Respondent's notice of cross-appeal (where applicable)"* it was indicated that Mr. Maloney would contend that the High Court ought to have allowed him *"the modest sum of €4,000 he incurred in mainly travel expenses to Dublin from the family home in Galway"* which the High Court judge had refused.

29. When the notice of appeal first came before this court for directions on 1st April, 2022 there was no appearance by or on behalf of the defendant. Directions were given for the exchange of written submissions and a hearing date fixed for 8th November, 2022.

30. The appeal was listed in a positive call over list on 29th July, 2022. Mr. Maloney then attended before this court and there was a discussion about representation. Mr. Maloney again produced the medical report of 21st October, 2020 which had been provided to the High Court. Costello J. made it clear to Mr. Maloney that he could not represent his father on the hearing of the appeal unless by leave of the Court of Appeal granted on foot of a formal application in that behalf. Noting the suggestion in the medical report that the defendant was not mentally capable of attending court, Costello J. made an order giving liberty to Mr. Maloney to bring a motion, which was to have been issued no later than 15th September, 2022 and made returnable for the first day of the new term, seeking to have the defendant declared to be a person of unsound mind and/or for liberty to represent him. The court also directed that an updated medical report would be required.

31. By the time the appeal was next listed before the court for mention on 3rd October, 2022 Mr. Maloney had not issued any motion, nor had any respondent's notice or written legal submissions been filed but Mr. Maloney was in attendance. Costello J. contemplated whether it might be appropriate to ask the President of the High Court to appoint a medical visitor under s. 11 of the Lunacy Regulation (Ireland) Act, 1871 but Mr. Maloney expressed his confidence that any medical visitor would find that his father had sufficient capacity to deal with the appeal. In the event the court directed that a motion be issued by Mr. Maloney seeking to speak on his father's behalf, which was to be made returnable for no later than 21st October, 2022. It was directed that the motion should be grounded on an affidavit and that an up to date medical report was required. The time for filing the respondent's notice and replying legal submissions was extended to 11th October, 2022.

Mr. Maloney's application for liberty to represent the respondent

32. The motion now before the court was issued by Mr. Maloney on 14th October, 2022 and was initially returnable for 21st October, 2022.

33. The notice of motion describes Mr. Maloney as *"Mr. Neil Maloney Esq. ... the eldest son of the respondent, vested with a power of attorney, nominated as his third party and the de facto defendant in the High Court proceedings already had herein"* and asks for an order that he be *"... given liberty to appear and be heard in lieu and on behalf of the named respondent already underway before this Honourable Court."* With no disrespect to Mr. Maloney, the suggestion that he was the *de facto* defendant in the High Court is quite different to an application to be heard on his father's behalf.

34. The affidavit of Mr. Maloney filed on 14th October, 2022 in support of the motion commenced by saying that in early February, 2015 he and his younger siblings had noticed a change in their father's demeanour and then discovered that he had *"fallen into some sort of mortgage arrears and seemed in danger of losing our family home."* Mr. Maloney went on to summarise his – Mr. Maloney's – engagement with the plaintiff. He characterised the defendant's letter to the plaintiff of 24th May, 2015 – by which, it will be recalled, the defendant authorised the plaintiff to discuss *"repayment restructure plans with my son Neil Maloney, regarding the above mortgage account"* – as a nomination as the defendant's third party under the Central Bank of Ireland Code of Conduct on mortgage arrears and gave an account of his dealings with the plaintiff over the following two years or so which, if it was given very much from Mr. Maloney's perspective, was not materially different to the account of the engagement which had previously been given by Ms. Loftus. Mr. Maloney then outlined the progress of the motion for leave to issue execution up to and including the ruling

by Egan J. on 12th October, 2021, from which he quoted extensively. Mr. Maloney exhibited a copy of the order of Simons J. of 2nd March, 2020 and the corrected order of McGovern J. of 10th February, 2014. He also exhibited a copy letter of 16th April, 2018 from the appellant to him, dealing with a data subject access request and some copy letters written directly to him by the appellant's solicitors advising of adjournments and enclosing copy documents and so forth.

35. Strikingly absent from Mr. Maloney's affidavit was any indication that he was making the application on behalf of his father or with his father's authority, or even knowledge. Absent, also, was any reference – other than in the passages quoted from the ruling of Egan J. – to any medical report or medical condition. To be clear, there was simply no indication whatsoever that the respondent was not in a position to deal with the appeal himself.

36. The book of motion papers soon after filed by Mr. Maloney included a medical report dated 17th October, 2022 addressed *"To Whom It May Concern"*. This is materially identical to the letter to Reynolds J. of two years earlier. The confirmation in the earlier letter that Mr. Moloney, senior, was not then on any medication was omitted, but it was not said that he was on any medication.

37. In reply to Mr. Maloney's motion quite a long affidavit of Mr. Ciaran Kirwan, the appellant's solicitor, was filed on behalf of the appellant. Mr. Kirwan helpfully set out what had happened on the directions hearings – as to which there is no dispute. Not altogether unreasonably, Mr. Kirwan protested that the motion had not been served on his office until late on the Tuesday after the Friday on which it had been issued but if Mr. Kirwan was thereby put under unreasonable pressure to answer the motion, he managed to do so and I do not regard the delay in service as a sufficient basis on which to refuse it.

38. Mr. Kirwan suggested that the direction of Costello J. that Mr. Maloney would not be heard by the Court of Appeal unless on foot of an order made on a formal motion meant that the appellant's appeal against the ruling of the High Court had been decided in favour of the appellant. That is not so. The directions which were given by the Court of Appeal were directed to the orderly hearing of the appeal and were made without reference to anything which did or did not happen in the High Court. Moreover, Mr. Kirwan quite mistakenly suggests that the High Court judge found that Mr. Maloney was *"entitled"* to represent his father. That is not correct. The very first thing the judge said was that Mr. Maloney had no right of audience. Her ruling was that in the exercise of her discretion, she would hear him.

39. As to the merits of the application, Mr. Kirwan suggested that the history of engagement in Mr. Maloney's grounding affidavit was not relevant to or supportive of the reliefs sought by the motion. He suggested that Mr. Maloney's authority to engage with the plaintiff for the purposes of the Code of Conduct on mortgage arrears had no application in the context of legal proceedings. Mr. Kirwan suggested that the findings of the High Court on the question of representation below – from which, as I have said, Mr. Maloney had quoted extensively – did not support the present application. He suggested that the direction of this court that there should be a further report was premised on a finding that the letter to Reynolds J. was and is insufficient to support an order in the terms sought. Mr. Kirwan urged that the court could not continue to permit a non-party to maintain the litigation in isolation from the actual respondent and that the evidence came nowhere close to meeting the exceptional threshold that might justify a departure from the well settled principle that a party to litigation must either represent themselves or be represented by a solicitor and barrister.

The applicable legal principles

40. On the question of representation, it was recognised in the High Court by both sides that Mr. Maloney had no right of audience. As the question was left to the judge, she had a discretion. But there was no submission or argument as to what that discretion was, or as to the circumstances in which it would be engaged. Not having been referred to the authorities, the High Court judge, as I have said, dealt with the application on the basis that it was *"unusual"* and that it should not be allowed unless for *"some good reason".*

41. By contrast, in advance of the hearing of this motion, this court was provided with a short and focussed written legal submission and was referred to all of the relevant authorities, to which I will come.

42. I do not overlook the fact that the written submissions filed on behalf of the plaintiff in the High Court included a reference to *Coffey v. The Environmental Protection Agency* [2014] 2 I.R. 125 and an objection to Mr. Maloney being heard to oppose the application. The objection was that Mr. Maloney was not a party to the proceedings or the mortgage and had no standing or entitlement to defend the application on the merits. The written submission quoted from that case the statement of the fundamental rule that the right of audience is confined to the parties themselves, when not legally represented, or a solicitor duly and properly instructed by a party and counsel duly instructed by a solicitor; but made no reference to the possibility of any exception.

43. For many years the law was that a litigant who was a natural person was entitled to be heard on his or her own behalf, or to be represented by counsel instructed by a solicitor, or, since 1971, by a solicitor. There was no possibility that a corporate litigant might be represented other than by a solicitor, with or without counsel.

44. *Coffey v. Tara Mines Ltd.* [2007] IEHC 249, [2008] 1 I.R. 436 *("Coffey")* was an action which had stalled for want of representation. The plaintiff, who had three personal injury claims, was very significantly physically disabled following an intra cranial

haemorrhage. In particular, Mr. Coffey had a significant speech impediment from which he was unlikely to recover. He had discharged his solicitors and all efforts to find a replacement had failed. He had been refused legal aid by the Legal Aid Board. As O'Neill J. put it, the court was confronted with the issue as to whether or not the plaintiff's wife, Mrs. Susan Coffey, was either entitled as of right or whether a privilege should be extended to her, to represent her husband in the proceedings. That was an issue which had previously touched upon in other cases but not definitively decided in Ireland.

45. Having reviewed the authorities in Ireland and New Zealand, O'Neill J. – accepting a submission which had been made by the Attorney General as *amicus curiae* – found that the court, as part of its inherent jurisdiction to manage and control its own proceedings, had a discretion, in rare and exceptional cases, to permit a litigant to be represented by an unqualified advocate. That had been the conclusion of the New Zealand Court of Appeal in *G. J. Mannix Ltd.* [1984] 1 N.Z.L.R. 309, which had been considered and approved by Budd J. in *P.M.L.B. v. P.H.J.* (Unreported, High Court, Budd J., 5th May, 1992). O'Neill J. distinguished *Battle v. The Irish Art Promotion Centre Ltd.* [1968] I.R. 252 on the ground that the argument on which Mrs. Coffey's application was based had not been made to the Supreme Court.

46. In *Coffey*, O'Neill J. found that the combination of circumstances – the fact that the action had previously been adjourned on the day on which it had been listed for trial; the collapse of the relationship between the plaintiff and Mrs. Coffey and the plaintiff's legal advisors; the occurrence of an illness which had rendered the plaintiff wholly incapable of representing himself; the fact that the plaintiff was not a person of unsound mind; the inability of Mrs. Coffey, despite her best efforts, to secure the services of another solicitor; and the refusal of the Legal Aid Board to provide legal aid – was so exceptional or rare as to be probably unique. It was clear that unless Mrs. Coffey was permitted to represent her

husband, his claims would proceed no further. That, said O'Neill J., was an outcome or consequence which would be destructive of the interests of justice, and in the exercise of his discretion he made the order sought.

47. *Coffey* was referred to with approval by the Supreme Court in a case of *Stella Coffey v. The Environmental Protection Agency* [2014] 2 I.R. 125 *("Stella Coffey").*

48. In *Stella Coffey* Fennelly J. gave the Supreme Court's reasons for a ruling previously made refusing an application by an unqualified person, a Mr. Podger, to be permitted to represent thirteen appellants in their appeals, and then an application by Mr. Podger to represent a corporate appellant, of which he had been made a member.

49. In *Stella Coffey* the appeals were appeals against the refusal by the High Court of the appellants' *ex parte* applications for protective costs orders in intended judicial review proceedings which contemplated a challenge to a decision of the Environmental Protection Agency. The High Court applications had described each of the appellants as *"European citizens … lacking sufficient resources"* and had sought a *"Not-Prohibitively Expensive Costs Order"*.

50. The three High Court judges who had dealt with the applications had heard Mr. Podger who had been described in the grounding affidavits as *"My person of choice, to speak and interact for me, with you for the instant matters, pursuant not only to your duties and obligations towards wide access to justice but also in the interests of the full and proper application of the EU law and International Law …"*. The applicants had then suggested that *"Any so-called 'McKenzie friend' type of communication with you, and where such friend cannot address the court and speak on my behalf is a too restrictive approach and not allowing wide access to justice …"*.

51. Fennelly J. began his analysis by referring to the judgment of the Court of Appeal in England in *McKenzie v. McKenzie* [1970] 1 P. 33, in which Davies L.J. had recalled the statement of Lord Tenterton C.J. in *Collier v. Hicks* (1831) 2 B. & Ad. 663 that:-

> *"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part on the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."*

52. Noting that this description of the role of a McKenzie friend, which had been approved by Macken J. in *R.D. v. McGuinness* [1999] 2 I.R. 411, was correct, Fennelly J. went on to say that:-

> *"This is not to say that a judge may not, on occasion, as a matter of pure practicality and convenience, invite the McKenzie friend to explain some point of fact or law, where the party is unable to do so clearly. That must always be a matter solely for the discretion of the judge. The McKenzie friend has no right to address the court unless invited to."*

53. The judgment of Fennelly J. in *Stella Coffey* shows that Mr. Podger had been unwilling to accept the limited nature of the role of a McKenzie friend but sought an unrestricted right of audience. In this case, as I have said, Mr. Maloney acknowledges that he has no right of audience but to understand the nature of the discretion which he invokes it is important not only to acknowledge the general rule but to understand the reasons for it. Having examined the authorities in this jurisdiction and in England, Fennelly J. concluded, at paras. 29 and 30 that:-

> *"29. It would be inimical to the integrity of the justice system to open to unqualified persons the same rights of audience and representation as are conferred by the law on duly qualified barristers and solicitors. Every member of each of those*

professions undergoes an extended and rigorous period of legal and professional training and sits demanding examinations in the law and legal practice and procedure, including ethical standards. Barristers and solicitors are respectively subject in their practice to and bound by extensive and detailed codes of professional conduct. Each profession has established a complete and active system of professional discipline. Members of the professions are liable to potentially severe penalties if they transgress.

30. There would be little point in subjecting the professions to such rules and requirements if, at the same time, completely unqualified persons had complete, parallel rights of audience in the courts. That would defeat the purpose of such controls and would tend to undermine the administration of justice and the elaborate system of controls."

54. Fennelly J. noted what he referred to as the slight modification to the strict rule which had been adopted in New Zealand in *G. J. Mannix Ltd.* and the decision of O'Neill J. in *Coffey* but concluded that Mr. Podger's application came nowhere near justifying the making of an exception.

55. The question of lay representation came back to the Supreme Court in *Allied Irish Banks plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49, [2019] 1 I.R. 517, a case in which a director of the defendant had been refused permission to represent it. It was accepted by the plaintiff bank that what appeared to have been laid down in *Battle* as an absolute rule was subject to the discretion, in exceptional circumstances, identified in *Coffey* and *Stella Coffey* but it was submitted on behalf of the appellant director that there should be a broader approach. The appellant's argument was that rule in *Battle* conflicted with the State's obligations under Article 40.3 of the Constitution to protect the personal rights, including the

property rights, of citizens and their right of access to the courts. The appellant also relied on the right to a fair trial under article 6 of the European Convention on Human Rights.

56. The focus of the judgment of Finlay-Geoghegan J. in *Aqua Fresh Fish* was, of course, on the position of a director seeking to represent a company but she noted that it was not in dispute that in the case of natural persons of full age and not of unsound mind, the basic rule was that, at their choice, they may appear in person or be represented by a lawyer. They may have the assistance of a McKenzie friend who may advise them but who does not have a right of audience. Finlay-Geoghegan J. noted the conclusion of O'Neill J. in *Coffey* that the High Court, as part of its inherent jurisdiction to manage and control its own proceedings, may *"in rare and exceptional circumstances permit an unqualified advocate to represent another litigant."*

57. The reasoning of the Supreme Court in *Battle* was focussed on the separate corporate personality of the company. In considering whether the rule in *Battle* should be continued, Finlay-Geoghegan J. first noted that the general rule applicable to natural persons did not permit representation by a lay person. Having contemplated whether the fact that a corporate defendant, as an artificial person, could not represent itself as a natural person could, might justify a different approach in the case of companies and concluded that it could not, Finlay-Geoghegan J. went on to say, at para, 37, that:-

> *"37. That conclusion leads to a consideration of the general rule which restricts the right of any litigant to third party representation by a qualified lawyer. For all the reasons set out by Fennelly J. in Stella Coffey and the decisions to which he refers, I consider that it is in accordance with the interests of justice and our principles of fair procedures that the right of any litigant to be represented by a third party should, subject to any different statutory entitlement, continue to be confined to a right to be represented by a lawyer who has a right of audience before our courts.*

As pointed out by Fennelly J., barristers have a right of audience at common law. When it was sought to grant solicitors a right of audience, that development was carried out by statute. EU law now provides for a right of audience for certain lawyers from other EU jurisdictions. The position as a matter of right for litigants is tempered by the inherent jurisdiction to permit lay representation in exceptional cases. …

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

58. At para. 42, Finlay-Geoghegan J. recalled that the earlier authorities to which she had referred had spoken of *"rare and exceptional circumstances"*. She explained that her reference to *"exceptional circumstances"* had been deliberate, on the basis that the addition of the word *"rare"* did not add anything to what the court was required to consider and continued:-

"42. … The starting point is always the general rule that a company has no right to lay representation. The circumstances which lead a court to conclude that it is necessary in the interests of justice to permit representation of a company by a person who is not a qualified lawyer must be exceptional in order that the decision to permit is not one which will warrant common repetition such that the general rule is undermined. It follows that the circumstances which warrant such permission may be considered to be rare and those which may occur often will not usually be considered exceptional. However, all the relevant facts must be considered and a

particular combination of facts which individually might occur more often may be considered exceptional."

59. Earlier in her judgment, Finlay-Geoghegan J. had said that she did not consider it desirable or practicable to attempt to give general guidance on what might, in any individual case, constitute exceptional circumstances but at para. 43 she identified a number matters which were not. The impecuniosity of a company or the lack of resources to obtain legal representation was not exceptional, or even unusual. Similarly, the proposition that the company had a good arguable defence could not be considered to be exceptional circumstances. Similarly the fact that the person seeking to represent the company was a director or the principal shareholder. On the facts of *Aqua Fresh Fish* the court concluded that no exceptional circumstances had been established and the appeal was dismissed.

60. The general rule, then, is that no litigant – whether natural or corporate – has a right to be represented by anyone other than a qualified lawyer but the court has a discretion, in the interests of justice, in exceptional circumstances, to permit lay representation.

The principles applied

61. Mr. Maloney is an articulate, respectful and determined young man. Counsel emphasised that the appellant did not question his *bona fides* or motivation but submitted that the circumstances were by no means exceptional and that the evidence did not justify a departure from the general rule that a litigant may not be represented by an unqualified person.

62. I do not see how the circumstances of this case might properly be seen as exceptional.

63. The action is an action by a mortgagee to recover possession of mortgaged property on the ground that the mortgage has not been paid. Such cases have always been common.

The appellant's High Court application for liberty to issue execution on foot of an order for possession which had been made upwards of six years previously was, perhaps, less common but nevertheless a relatively routine application. To be sure, the order sought by the appellant would, if granted, have impacted on Mr. Maloney and his siblings who were living in the house but the case was not for that reason exceptional, or even unusual.

64. The respondent was duly served with the notice of appeal and books of appeal and was duly notified of the directions listings and of the date which had been fixed for the hearing of the appeal, but he did not appear. If, inferentially, the respondent's wish and hope was that Mr. Maloney would be allowed to represent him, he never said so. Moreover, the fact that a litigant might prefer to be represented rather than represent himself could not be regarded as exceptional.

65. Mr. Maloney has been engaging with the appellant since early 2015. The case now made by Mr. Maloney is that in February, 2015 he and his siblings noticed a change in their father's demeanour and then discovered that the mortgage on the family home was in arrears. Well, the mortgage had been in arrears since soon after it was taken out. Mr. Maloney's submission that until he, Mr. Maloney, became involved, his father had had his head in the sand is not borne out by the evidence. The appellant commenced proceedings on 3rd November, 2008 and obtained a High Court order for possession on 11th October, 2010. It does rather appear that the respondent failed to engage with the legal proceedings but by reference to the uncontradicted evidence of Ms. Loftus, there was a close engagement between the appellant and the respondent between February, 2014 and May, 2015. By February, 2015 the respondent appeared to be coming to the end of the road but a new hope was introduced that Mr. Maloney might be able to buy the house and, in the meantime, to pay or to provide the wherewithal by which his father might be in a position to pay, something towards the mortgage. Objectively, the fact is that the respondent, by himself, had kept the

appellant at bay for something like eight years since the mortgage first went into arrears and for more than four years since the order for possession was made. The reason for Mr. Maloney's involvement was that he might be able to find the money to fund a solution and not because of any inability of the respondent – other than by reason of impecuniosity – to engage with the appellant.

66. As of 14th October, 2022 – the date on which the motion now before the court was issued – the only medical report was the letter written by the respondent's general practitioner to Reynolds J. dated 21st October, 2020. With respect, there is no justification in that report for the opinion or *"feeling"* expressed that the respondent was not mentally or physically capable of attending court at that stage. The doctor recorded the breakup of the respondent's marriage in 2004 and the loss of his business in approximately 2007 which, it was said, affected him mentally so that he was not in a position to deal with ongoing problems and demands. He went on to record an improvement over the previous five years, to the point that the respondent was able to work and was not on any medication. If, previously, the respondent was not in a position to deal with his problems, there was no indication that he was not then in a position to do so, still less any basis for any such assertion. There was no hint in the medical report that the respondent had ever suffered from any physical disability and it seems to me that the assertion that he was not physically capable of attending court was utterly at variance with the stated fact that he was working. If the doctor's bald assertion as to the respondent's mental capacity might have given rise to any concern, that, it seems to me, was entirely dispelled by Mr. Maloney's answer to the suggestion that a medical visitor might be sent to examine the respondent.

67. The medical report of 17th October, 2022 was for all practical purposes a cut and paste of the previous report. There was no indication as to whether the doctor had seen the

respondent in the meantime. Indeed, there was no indication in the earlier report either as to when the respondent had most recently been seen.

68. Notwithstanding the direction of Costello J., Mr. Maloney did not produce any further medical report. In the course of the hearing he suggested that his father had gone to see his doctor to get a better report but could offer no explanation as to why no such report was forthcoming.

69. On the evidence, the respondent is a man of full legal and physical capacity.

70. The substance of the answer to the appeal – as it had been the substance of the defence to the appellant's application in the High Court – is that the appellant is no longer the party entitled to issue execution on foot of the order for possession. Mr. Maloney has deposed that at about Christmas 2017 he discovered a determination of the Tax Appeals Commission dated 24th November, 2017 which, he would argue, shows that his father's loan and the security for it were transferred in 2012 to a company called Windmill Funding Ltd. The appellant's case was, and is, that the 2012 transaction was a securitisation transaction which did not affect its entitlement to issue execution on foot of the order for possession.

71. For present purposes it is not appropriate that I should express any view as to the merits of the arguments as to the nature and effect of the 2012 transaction. I merely observe that the argument which Mr. Maloney would make is potentially a defence to the application for leave to issue execution and that it was Mr. Maloney who identified the basis for it. I do not see that as being in any way sufficient to justify an order permitting Mr. Maloney to conduct the appeal. It is clear from *Aqua Fresh Fish* that in the case of an application by a director for leave to represent a company, the proposition that the company had a good arguable defence could not be considered to be exceptional circumstances. It is also clear from *Aqua Fresh Fish* that whether the litigant is a natural or an artificial person, the test to be applied on an application for lay representation is the same. The fact that the respondent

might have a good arguable defence does not justify the making of an exception to the general rule.

72. On his motion to this court, as he did in the High Court, Mr. Maloney's made much of the fact that he had previously been permitted on numerous occasions to address the court. I can understand that on each successive adjournment on which he was heard – on each such occasion relying on the fact that he had previously been heard – Mr. Maloney became more confident that he would be heard again on the next listing. However, that fails to take account of the nature of each listing or of any change in the circumstances.

73. To take a very simple example, a friend of a litigant would surely be heard by the court to say that the litigant had been delayed in getting to court and could the case be put to second calling. Or a friend might come to court with a medical certificate to say that the litigant is indisposed and to ask that the matter be adjourned. In the second example, the friend might be heard on several adjournments but there could be no expectation or grounds for any expectation that the friend might be permitted to argue the substance of the case.

74. In this case, the first adjournment of the appellant's motion for leave to issue execution was put back by agreement between Mr. Maloney and counsel to allow Mr. Maloney time to save money and to allow him to progress his plan to purchase the house. It is not clear whether, when the motion came back into the list before Eager J. on 12th February, 2018, there was any objection to Mr. Maloney being heard but if there was, the judge may have had to choose between hearing the motion or hearing Mr. Maloney to ask that it be adjourned, and why it should be adjourned. In such a case it is easy to see that a judge might take the view that the interests of justice required that Mr. Maloney be heard for the limited purpose of the business which needed to be immediately dealt with. As I have said, I can understand that Mr. Maloney might have become increasingly confident on each listing that he would be heard on the next occasion but he appears to have clearly understood

that on each occasion that on the next occasion he would need to satisfy the judge, in the exercise of his or her discretion, that he should be heard. While Mr. Maloney dealt with the several adjournments, the defendant was formally advised by letter of each adjournment and was served with the further affidavits filed in support of the application.

75. I am mindful of the fact that I am dealing now with Mr. Maloney's application for liberty to represent the respondent on the appeal, rather than the appellant's appeal against the ruling of the High Court on his application in that court, but I feel compelled to say that I do not believe that the direction made along the way that the papers be served on or sent to Mr. Maloney directly was appropriate. In my view that direction was calculated at best to cause confusion as to Mr. Maloney's role and status.

76. As Mr. Maloney attended the High Court many times in busy lists I can understand if there may have been a degree of acquiescence on the part of the plaintiff which may have given rise to a degree of expectation on the part of Mr. Maloney. However, at the listing application before me on 22nd July, 2021 it was made clear to Mr. Maloney that the fact that he had been previously heard as the case had progressed did not mean that he would be heard on the substantive motion. I think that the transcript of the hearing on 12th October, 2021 shows that Mr. Maloney clearly understood the position but on reflection I think that it would have been better if I had then – as Costello J. did on the appeal – directed that Mr. Maloney should make his application by motion on notice, grounded on an affidavit, setting out the evidence which he relied on as constituting the exceptional circumstances said to justify the making of the order sought.

77. Again mindful of the fact that I am dealing with Mr. Maloney's motion to represent the respondent on the appeal rather than the appeal against the decision of the High Court judge, I think that the substance of the motion for leave to issue execution was quite different to the merits of the slip rule application. The slip rule application was, as Egan J. put it, a

reasonably substantive matter in the sense that the order of McGovern J. of 10th January, 2014 as drawn might – and I express no view as to whether it would or would not, but it might – have precluded any further motion for leave to issue execution. However, as Simons J. explained in his judgment of 2nd March, 2020 ([2020] IEHC 105) the application before him was merely to correct an obvious clerical mistake in the drawing up of the original spoken order. The order of Simons J. shows that he heard Mr. Maloney *de bene esse*. His judgment, at para. 20, shows that Simons J. took what he said was the very unusual step of allowing Mr. Maloney to make a short submission *de bene esse* and he emphasised that Mr. Maloney did not have a right of audience on behalf of his father. I do not believe that the unusual step taken by Simons J. on what was a purely administrative or procedural application coming up to three years ago could possibly amount to sufficient exceptional circumstances to warrant the making of the order now sought.

78. For completeness, I should refer to the fact that during the course of the hearing of this application, although not on affidavit, Mr. Maloney relied on the fact that he had obtained a written power of attorney from his father which purported to authorise him, *inter alia,* to speak on his father's behalf in court. This document was, perhaps surprisingly, drafted by a solicitor and executed in his presence by the defendant. The court agreed to examine the document *de bene esse* and when the court noted that it was no longer in date as it was for a period certain, Mr. Maloney advised the court that it had been renewed several times before the same solicitor. For the avoidance of any doubt, I would emphasise that such a document cannot confer a right of audience in court on any party, that being a matter solely for the court as I have explained – see in that regard *Walsh v Minister for Justice* [2016] IEHC 323.

Conclusion

79. The respondent is entitled to represent himself, or to be represented by a solicitor, with or without counsel, but not by anyone else.

80. The jurisdiction invoked by Mr. Maloney is one which is available to the court in the interests of justice in exceptional circumstances.

81. There is no evidence that the respondent is in any way restricted in his ability to attend court or make his case and no basis for the assertion that he is.

82. On the evidence, the respondent's circumstances are not unusual, still less exceptional. Mr. Maloney has not shown that the jurisdiction which he invokes has been engaged and his application must be refused.

83. As to the question of costs, my provisional view is that the appellant has been entirely successful on this application and is entitled to an order that its costs should be paid by Mr. Maloney as the unsuccessful party. If Mr. Maloney wishes to contend for any other order as to costs, he may, within twenty one days of the electronic delivery of this judgment, file with the Court of Appeal office and serve on the appellant's solicitors a short written submission, not to exceed 1,000 words. In that event, the appellant will have fourteen days within which to file and serve a written submission in response, not to exceed 1,000 words. My expectation is that the court will be able to deal with any argument on costs by way of a written ruling but if a further oral hearing is required, the parties will be informed.

84. In the meantime, the appeal will be listed for mention in the directions list on Friday 13th January, 2023 for the purpose of fixing new hearing date.

85. I am authorised by Haughton and Noonan JJ. to say that they have read this judgment in draft and agree with it and with the orders proposed.