Neutral Citation : [2013] NIMaster 2 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **12/2/13**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Ulster Weavers Home Fashions Limited

Plaintiff;

and

Waterfall NI Limited

Defendant.

Master Bell

INTRODUCTION

[1] The substance of this litigation is that the plaintiff is taking an action against the defendant because goods it supplied have not been paid for. The plaintiff therefore seeks a declaration that the plaintiff is the legal and beneficial owner of goods supplied to the defendant on the foot of certain invoices, together with an order for delivery of those goods or, alternatively, damages for conversion.

[2] The statement of claim was served at the Defendant's registered office on 26 March 2012. A memorandum of appearance was filed on 5 April 2012 and a defence and counter claim was filed on 28 May 2012. Both were filed by Mr Joe Maginness.

[3] This is an application by the Plaintiff for an Order striking out the Defendant's memorandum of appearance, defence and counter claim for

failure to comply with Order 5 Rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 and entering judgment for the Plaintiff in accordance with the relief sought in the Plaintiff's statement of claim.

[4] The plaintiff was represented by Mr Jonathan Dunlop to whom I am grateful for his clear and focused skeleton argument and oral submissions. Mr Dunlop indicated that his client would be grateful for written reasons for my decision and these are they.

[5] Prior to the hearing of the contested summons, I gave Mr Maginness leave to appear on behalf of the Defendant company, limited to arguing this application. Mr Maginness is the managing director of the company. He is also the largest shareholder of the company. He has filed an official minute of the company to the effect that a meeting of the board of directors had been held on 11 June 2012 and that it had been resolved that Mr Maginness should attend on the hearing of the Plaintiff's summons to request that he be allowed to represent the company in the litigation.

[6] The plaintiff offered *Radford v Freeway Classics Ltd* [1993] BCC 870 as the relevant authority for how this application should be approached. *Radford* however dealt with a Rule that was different from the current Rule which applies in Northern Ireland. The judgment of Sir Thomas Bingham MR was delivered in a context where the old Rule provided :

> "Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."

[7] Bingham MR set out the legal position under the old Rule as follows :

> "On a straightforward reading of those provisions they appear to be very clear legislative provisions requiring a limited company to pursue its litigation, other than to the limited extent of acknowledging service, through legal advisors. There is, however, a limited gloss which has been put on those provisions in the cases, and the clearest and most succinct statement of the gloss is that given by Scott J in *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1990] BCLC 802, [1992] 1 WLR 455. In the passage of Scott J's judgment which Forbes J cited, one finds the following ([1990] BCLC 802 at 809, [1992] 1 WLR 455 at 462):
>
> > 'With the guidance given by those authorities, which collectively are of long standing, are consistent with one another and are, as counsel for the joint administrators (Mr Rimer QC) impressed on me, of a character and weight such

> as to make it impossible for me to contemplate either overruling or ignoring them, the position seems to me to stand as follows. First, RSC Ord 12, r 1 is of statutory effect and prohibits a body corporate from taking a step in an action otherwise than through a solicitor. Second, the courts have an inherent power to regulate their own procedure and a judge in an individual case has, as part of that inherent power, the power to permit any advocate to appear for a litigant if the exceptional circumstances of the case so warrant. No limit can be placed on what might constitute sufficient exceptional circumstances. But third, subject to any exceptional circumstances that might require a particular individual in the interests of justice to be allowed to appear as advocate, the general practice of the court is that bodies corporate cannot appear by their directors but only by solicitors or counsel.'"

[8] The position in *Radford* therefore was that the Court of Appeal for England and Wales approved a test which provided that only in exceptional circumstances could an employee represent a corporate defendant.

[9] In 2008, however, the Rules of the Court of Judicature in Northern Ireland (which had previously been in similar terms to those considered in *Radford*) were altered. Order 5 Rule 6 now provides :

> (1) Subject to paragraph (2) and to Order 80 rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a solicitor or in person.
>
> (2) Except as provided by paragraph (3), or under any other statutory provision, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.
>
> (3) A body corporate may begin and carry on any such proceedings by an employee if—
> (a) the employee has been authorised by the body corporate to begin and carry on proceedings on its behalf; and
> (b) the Court grants leave for the employee to do so.

[10] This provision, in my view, sets out a more liberal regime than that which existed under the old Rule. The norm provided for in Rule 6(2) is still that a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor. However, as against this, a court must take into account Rule 6(3). Hence in circumstances where a particular employee has been authorised by the body corporate to begin and carry on proceedings on its behalf and the court grants leave, then that employee may act for the corporate body in the litigation.

[11] The possibility of granting leave creates a discretion for the court to exercise in appropriate cases. This discretion is in wide terms as the Rule provides no limiting words as to how it should be exercised. Thus the Rule does not set out any particular test to be applied in the exercise of the discretion.

[12] I invited Mr Dunlop to make submissions as to what test I should apply in determining whether I should grant leave. He advocated that I should apply an "exceptional circumstances" test. He also argued that the reasoning underpinning the decision in *Radford* still remained valid. He thus argues that since in *Radford* an argument that the defendant could not afford solicitors was unsuccessful, then so too in this case that argument ought to be unsuccessful. I disagree.

[13] I have concluded that, in exercising my discretion, to apply a test which only allows an employee to represent a body corporate in exceptional circumstances would be incorrect. It would not represent any change from the old Rule. As a matter of statutory interpretation, in introducing a provision which allowed a court a discretion which had not previously existed, the purpose must have been to adopt a more relaxed test, not to leave the old one in place.

[14] The situation where a discretion is granted in wide terms and without limiting words as to how it should be exercised is not, of course, unknown. For example, in *Oyston v Blaker and others* [1996] 2 All ER 106 where the words of a statute imposed no express limit on the exercise of a judicial discretion, simply providing that leave was required, the Court of Appeal for England and Wales held that the judge was correct to apply a test of doing what was just in all the circumstances. In this instance I similarly propose to exercise my discretion in a manner which seems to me to be just in all the circumstances.

[15] I have taken into account the following factors in deciding whether to grant leave :

(i) The normal position envisaged by the Rules is that a corporate body ought to be represented by legal advisors.

(ii) There is a strong public policy reason that the normal position envisaged by the Rules should generally be applied. As Lord Bingham stated in *Radford* :

> "A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is the rule that I have already referred to that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may not be able to compensate parties who litigate with them, should be subject to certain constraints in the interests of their potential creditors."

(iii) As argued by Mr Dunlop, a director granted leave could use any leave which was granted to adopt a litigation strategy which maximised the costs incurred by a Plaintiff, knowing that those costs could not be recovered from the directors of the defendant company. Nonetheless the weight of this factor is undermined to some degree by the obligation upon judges dealing with litigation to apply the overriding objective and to robustly case manage it.

(iv) In the case before me I am informed by Mr Maginness that the problem which exists for the defendant company is that it cannot afford the services of a solicitor and counsel.

(v) The Plaintiff initially accepted Mr Maginness as being the representative of the Defendant company, having corresponded with him and instructing him to file a defence.

(vi) In the event that I refuse to grant leave to Mr Maginness, then the Defendant would in the circumstances effectively be barred from offering any defence in the litigation. The Plaintiff's application would therefore amount to a summary judgment application "by the back door".

(vii) In the case before me Mr Maginness' written submission dated 14 September 2012 argues that the defendant has a strong defence and counter claim which cannot be advanced unless I grant leave that he represent the company. He argues that this would deny the defendant a fair trial. The role of the court in ensuring a fair trial is, of course, a fundamental obligation. (I note that Forbes J in *Radford* observed that where there were substantial grounds for believing that some application or step in the proceedings could not be brought or put fairly before the court for some reason or other unless somebody on behalf of the company had an opportunity to speak for the company, such a factor might even satisfy the test of exceptional circumstances.)

[16] Weighing these factors together, I conclude that the Plaintiff's application must fail and I therefore dismiss this application. Although the defendant ought to have issued a summons seeking leave under Order 5 Rule 6(3), I will apply Order 1 Rule 1A and Order 2 and, in the light of the factors set out above, will grant leave that Mr Maginness may represent the Defendant for the purposes of the action.

[17] In respect of costs, I reserve the costs of this application to the trial judge.

[18] I have agreed that in order to minimise costs, this judgment will be posted to the parties so as to obviate the necessity of an appearance to receive the judgment. I therefore extend time for any appeal against this decision to 5.00 pm on 22 February 2013.