An Chúirt Uachtarach

The Supreme Court

Charleton J
O'Malley J
Woulfe J
Hogan J
Murray J

Supreme Court appeal number: S:AP:IE:2022:0000064
[2024] IESC 5
Court of Appeal record number: 2018/213 and 2019/0505
[2022] IECA 56
High Court record number: 2005/2747P
[2019] IEHC 695 and [2019] IEHC 749

Between

Eugene McCool (substituted as plaintiff for McCool Controls and Engineering Ltd by order of the Master of the High Court made on 8 November 2017)
Plaintiff/Appellant

- and -

Honeywell Control Systems Ltd
Defendant/Respondent

Judgment of Mr Justice Peter Charleton delivered on Tuesday 27 February 2024

1. This judgment dissents from the majority. The analysis holds that public policy debars an assignment of a corporate entity's right to litigate, a chose in action, to a director. Even were such an assignment to take place, the majority judgment contemplates potential further issues should the director succeed in the action and recover damages. The analysis here is that the assignment of a chose in action by a company, being a bare right to litigate, is possible where the company has been taken into receivership or liquidation, circumstances where the obligation to achieve value for assets is vested in an independent person, the receiver or liquidator. In that instance, not only are decisions as to value made outside the corporate structure, but the disposal of assets will be done in good faith in order to benefit creditors of the distressed company.

2. Here, it is proposed that a company assign, for nominal value, speculative litigation to the company's director, intimately engaged in the management of affairs from which that legal controversy arose. The result would be that a precedent would be set whereby in any instance where a company might be met with an application by a defendant for security for costs under s 52 of the Companies Act 2014, or where a company could not afford the costs of being represented by a solicitor in an action, as opposed to on a limited application where the court may grant indulgence to hear briefly from a company director, all that would be necessary would be for the company, by a sleight-of-hand, to assign the suit to a director or member. This would strike fundamentally at the heart of both corporate identity and at the checks to limited liability whereby an artificial person is bounded by precisely constructed legal regulation against abuse. A company cannot, chameleon-like, deform from what the law has made it to be into a human person for some purposes that might suit its directors while retaining, as a backstop, corporate privileges.

3. Further, evasion of the limitation on recovery of costs in litigation bounded by a rule that security for costs may be secured where a company launches a suit is not to be elided through an utter contradiction of the rational behind that corporate burden, as explained by Lord Bingham MR in *Radford v Freeway Classics* [1994] 1 BCLC 445, 448:

> 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.

4. In the background in this litigation are allegations, that are sought to resound in damages that McCool Control and Engineering Ltd, in 1998, entered into a sharing, or exclusive use, arrangement with Honeywell Control Systems Ltd, in respect of expertise in heating and ventilation control expertise or techniques. While what is alleged to be a binding agreement proceeded apparently satisfactorily for several years, it is claimed by McCool Ltd that when Honeywell Ltd achieved entry into a lucrative building scheme, obligations that were asserted to arise, as a contract as between two companies, pursuant to their arrangement were not honoured, resulting in what is asserted to be serious and actionable damage to the business of McCool Ltd. While not in a moribund state, McCool Ltd as a company now trades less profitably but has not been put into the examinership process and nor has it been wound up. For some years after the issue of proceedings in August 2005, McCool Ltd claims to have been targeted by Honeywell Ltd with procedural issues in the High Court, which unnecessary wrangling, it is asserted, depleted McCool Ltd's ability to pursue this action by reason of the cost and trouble involved.

5. No comment is here made on the merits in law of the proposed action and nor is anything written here to be taken as a ruling on any procedural motion or the justification, or futility, of same. What is obvious, in the light of the allegation by McCool Ltd of abuse of process, and because of the staggering level of delay, is that the case should be taken into case management under the control of a single High Court judge.

6. The core of this appeal is the two purported assignments of the entitlement of McCool Ltd to pursue the case against Honeywell Ltd to its director and majority shareholder Eugene McCool. While these assignments, of 28 September 2017 and 29 June 2018, have been abandoned as to their validity by the assignee in consequence of the earlier judgments of the High Court and Court of Appeal, what is at issue here is the legal validity of a proposed third assignment whereby Eugene McCool may pursue, as holder of the chose in action, being the right to sue Honeywell Ltd, the action instead of McCool Ltd. On the analysis which follows, any such assignment is more than problematic.

Chose in action

7. A chose in action is definable as: a legal right recoverable only by action at law or in equity. In this case, the nature of the property right there is intangible, unlike a real property fee simple, or not like an easement, which both creates a physical entitlement, such as to cut turf, or ownership of land, or a thing, such as a painting or a car. Choses in action may only be enforced by legal action, whereby in consequence of a court decree, the holder of the chose in action may recover damages, in contract (most commonly of a debt) or in tort, for instance, against another; *Halsbury's Laws of England* (5th edition, volume 13, paragraphs 1-3).

8. Whereas the common law regarded assignment of choses in action with disfavour, exceptions grew up to enable valid assignment. Without these exceptions, the purchase from distressed banks of their debts, or mortgage securities, would be impossible. Similarly, factoring enterprises, which purchase debts and attempt to realise a better percentage than the original creditors, base their business on assignments of rights to sue.

9. Assignment arrangements may be valid. Section 28(6) of the Supreme Court (Judicature) Ireland Act 1877 provides for the validity of an absolute assignment of any debt or any other legal chose in action, as passing the legal right to the debt or other chose in action to the assignee. The main conditions are: that the assignment be for a debt or other chose in action; that such assignment must be absolute, the assignor not retaining any interest in the suit; the assignment must be in a writing; and the party set as defendant to the suit must be given notice. See *O'Rourke v Consadine* [2011] IEHC 191. Since factoring is a business, usually money changes hands, but the law does not require consideration.

10. Here, the prior assignments were for tiny amounts, €1.00 on a contract to assign the chose in action from McCool Ltd to Eugene McCool though the value of the claim has been asserted by McCool Ltd to run into millions of euros if not tens of millions.

11. There is no doubt that, on the enumeration in the leading texts of the choses in action which are capable of assignment at law, a right to sue is generally assignable. Hence, debts, benefits under a contract, stocks, equitable rights to property (such as interests under trusts) and rights of action arising under contract or out of tort may be assigned; *Halsbury* 4-10. The common law allowed three exceptions to the prohibition of assigning choses in action: statutory exceptions such as stocks in companies; negotiable instruments assigned through law merchant by delivery (*Halsbury* 72-74); and transfers under the prerogative by the State.

12. It has been argued on this appeal, on behalf of Eugene McCool, that the 1877 Act caused a complete reform of the common law and, in particular, rendered assignments of choses in action beyond the interest of the policy of the common law which had prohibited

any other than the original holder of the right to litigate from pursuing a claim, one arising from that person (whether personal in nature or whether the plaintiff might be a company) having been wronged either in contract or in tort or as having personal entitlements (such as under a trust) in equity. Further, it is part of this Eugene McCool argument that an assignment is always valid in law and that it is only if, either, there is a fundamental abuse of a chose in action, so that it is used as an instrument of abusing the processes of the courts, or, a different matter, if the enforcement of it as a valid assignment of a right to sue is contrary to public policy, that the courts will refuse recognition of it. This legal submission cannot be accepted.

Role of public policy

13. Public policy interests, notwithstanding the 1877 Act and in consequence of subsequent statutory intervention and the survival of fundamental principle, may undermine the validity of the assignment of a chose in action. Certain choses in action are not capable of being assigned and, according to *Halsbury* 13: 80, "it may be said that the reason for this is public policy." While as of the earlier reaches of the common law, a key example of non-assignability due to public policy would have been stratagems which enabled trading with the enemy, in more modern polity circumvention of sanctions against countries waging aggressive war carries through on the same line of authority based on the precise policy of public policy overriding the validity of private commercial arrangements; *Algemeine Vershcherungs-Gesellschaft Helvetia v Berman Property Administrator* [1931] 1 KB 672.

14. The principle driving public policy is that the assignment of certain rights, or certain benefits, may be barred by overriding considerations. Some of the examples from the neighbouring jurisdiction are statutory, where the policy is expressed by Act of Parliament in the form of a defined prohibition: these include such allowances, pensions and statutory benefits as cannot be vested by operation of law upon bankruptcy. Similarly, it is forbidden for a receiver for a patient under wardship to mortgage an allowance to the benefit of others; *Re Weld* [1882] 20 Ch D 451. According to *Halsbury* 13: 83:

> Public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to them for the purpose of maintaining the dignity of their office, or to assure a due discharge of their duties. (citing *Stone v Lidderdale* (1795) 2 Anst 533)

15. What follows is that salaries of judges, parliamentary counsel, officers in service or in the reserve of the army or navy or armed flight cannot be assigned. The strong policy reasons undermining such an assignment are exemplified in *Arbuthnot v Norton* [1846] 5 Moo PCC 219 at 230-231. Officers in the reserve cannot assign a pension, even though that person is not on active service, since the policy behind such a payment is that those granted such a benefit are to ensure their availability pending recall to active service; *Wells v Foster* (1841) 8 M&W 149, 152, (1841) 151 ER 987. Similarly, maintenance payments to a spouse constitute money paid by order of the court, are not alienable. Further, solicitors may not purchase from their clients the benefit of an action; *Wood v Downes* (1811) 18 Ves 120, (1811) 34 ER 1202. Policy comes into play in all those situations and is not difficult of identification. It is a perfectly tame pony whose purpose is clearly delineated and is not, as has been suggested, the seductive call to the judiciary to mount on a wild horse. The policy is apparent from the disavowal of the assignment by an officer in the reserve of his pension, as in *Stone v Lidderdale* where Macdonald CB held:

> Half-pay is intended by the state to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may always be ready to return into actual service. It materially differs, therefore, from the general case of expectancies, which certainly may in equity be assigned. By such assignment no public interest is thwarted. Thus a pension is equally uncertain as half-pay; but as no future benefit is meant to arise to the state from granting it, a material distinction arises between them. The case of *Stuart v. Tucker* seems to consider half-pay only in one point of view, as a reward for past services; but that evidently appears not to be the real intent of the legislature. In that case, Mr. Justice Gould refers to the case of *Oliver v. Ennfonne*, in Dyer; it is not there said for what purpose; but when we recollect, that the same Judge concurred in the contrary decision of *Barwich v. Read*, H. Blackst. 627, and again cited the same case from Dyer in corroboration of the latter judgment, for which it is a strong authority, we cannot hesitate in seeing that it must have been cited by him on the former occasion as raising a doubt of the judgment then given. That case in Dyer, and the decisions in both the other Courts, in questions similar to the present, fix the true principle of law upon the subject. The Courts of Justice are not indeed to enter into any general abstract notions of public policy in their decisions, in opposition to the express intention of the parties; but in deciding upon the nature of a public grant, the great object of public policy in making that grant, is to be attended to. The general intent pervades the whole; each yearly payment is subject to it; perhaps it may be more strong where the gratuity is annual, as in the present case.
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> The cases of *Flarty v. Odium, Lidderdale v. The Duke of Montrose*, *and Banvick v. Read*, decide the present. As in the case put in *Dyer*, the annuity granted to a man on his being created a Duke, for support of his dignity, could not be granted over; so the half-pay, being given for a similar reason of public policy, cannot be transferred; to use the words of my Lord Dyer, "it is incident to the cause for which it was granted," and cannot be separated from it.

16. What is in issue here is a bare right to litigate in the expectation of a benefit. The policy of the law, *Halsbury* 13: 87, is to disavow any transaction "savouring of maintenance or champerty." The example given is of "the assignment of a claim as a step to its being sold on to a third party with no genuine commercial interest in the claim in return for a division of the spoils". See *Trendtex Trading Corpn v Credit Suisse* [1980] 3 All ER 721, *Laurent v Sale & Co* [1963] 2 All ER 63.

17. Formerly, it was thought that for an assignment to be effective it was necessary for it to be incidental to a property right, but the law has developed so that it suffices for the assignee to have a genuine commercial interest in the assignment and in enforcing same in his or her own interest.

Champerty

18. The two principal arguments against this proposed assignment, assessed in the light of the prior examples, are that it is champertous and is done to avoid the consequences of incorporation.

19. It would be unhelpful to attempt to add to the analysis of the reasons for the invalidity of agreements to assign a bare right to sue that emerge from the judgment of O'Donnell J

in *SPV Osus Ltd v HSBC International Trust Services (Ireland) Ltd* [2019] 1 IR 1. Public policy rebels against the use of the court system as an instrument for doing justice as between competing parties by any other than those parties who claim the rectification of an injustice through personal suit. The involvement of third parties diminishes, if not destroys, the character of a plea for justice by a wronged party with an answer directed to the claim by the party charged. For an assignment to be upheld, the party holding the chose in action must have a genuine commercial interest in the assignment. That only arises where that interest existed prior to, and independently of, the assignment or series of agreements whereby it was effected.

20. Where a party holds a pre-existing interest in the claim sought to be litigated, an exception arises. That interest can involve holding shares in the company. Where the overall consequence of an assignment is that an unconnected third-party benefits, or seeks to benefit, the passing of the right to sue cannot be upheld.

21. As an appeal on the existing ruling on this issue has not been given leave to further appeal, it is unnecessary to comment further.

Corporate personality

22. There is no doubt that the purpose of the past assignments, and of that which is proposed, of the right of McCool Ltd to sue Honeywell Ltd, is to enable the action to proceed. According to the evidence, Eugene McCool financed the litigation efforts of McCool Ltd over decades in the High Court but, regrettably, to no effect other than engagement in what is claimed to be futile procedural wrangling.

23. Funding the company to litigate, by the directors, has proven insufficient. Searching for a reason why the intervention of an assignee, Eugene McCool, would improve the prospect of seeing this litigation through to final judgment, little emerges as to why a company should be less able than a natural person. One stark difference, however, is that as a matter of theory an individual resident within the jurisdiction may, like a company, have an award of costs made against them as a failing litigant, but only in defined circumstances must an individual pay an advanced assurance of those costs into court when proceeding as plaintiff; *Quinn Insurance Limited v PricewaterhouseCoopers* [2021] 2 IR 70, *Usk and District Residents Associations Ltd v The Environmental Protection Agency* [2006] IESC 1.

24. Security for costs against a natural person is confined to appeal where that individual has lost at trial. Where an individual loses a case, he or she may have assets to meet the succeeding party's claim for the costs of defending litigation, or may not, but will assume liability for such debt as the costs order represents on an unlimited basis. Hence, even without assets, they may pay off the debt from income through a court order over the rest of their lives, with the burden of what is unpaid falling on their estate, even after death.

25. A corporation only has its assets, may be wound up at any time, on the legal bases set out in the 2014 Act, including good and sufficient reason, and has no life beyond the artificial construct of the law. A company does not exist outside the legal competence, not life, which law has given to it. Before virtual reality became part of our lives, legal reality conceived of and gave birth to artificial persons. While, perhaps in the context of joint-stock companies of the 18th century, experience has put definable shape, reflected in public policy, on the first-delivered imperfections of this legal conception. Since corporations have rights, principally to sue and be active in the legal system as a trading entity separate

from its promoters, whereby the assets of the company are the only achievable kitty in litigation, and not the assets of its shareholders, methods of action, duties in governance and legal liabilities attend the artificial person. Section 52 of the Companies Act 2014 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.

26. While the expense of litigation may be the impulse behind the assignment of choses in action, for instance by a trading firm to a factoring company or by a bank to an asset-realising fund, a natural person may usually proceed unhindered by an advanced costs liability for the opposing party; only needing to assure their own legal advisors of the necessary funds or, perhaps, of the justice of the cause; no-foal no-fee litigation being common for natural person litigants. For a company, however, costs may double, or more if there are several defendants, as and from the issuance of proceedings. Assignment, hence, of the litigation of a company to a natural person is more than attractive. Here, this assignment from McCool Ltd to Eugene McCool is said to enable litigation that it is the company's just entitlement to pursue. It is more than clear that this is the company's litigation being waged under a new name and for the same motives of alleged injustice that inspired recourse to the courts in the first instance.

Underlying policy

27. There clearly exists a public policy in treating corporations differently to individuals in respect of litigation. While it has become fashionable to regard public policy, as previously mentioned, as a wild horse, beyond restraint and dragging those who seek to ride on its back to unintended and exotic destinations, perhaps that judicial caution against resort to *grundnormen* is distrust of judges usurping the legislative role, by plucking, from this and that enactment, a principle which was never the motivation, much less fundamental purpose, of those existing fragments of law. Resort to public policy may, indeed, be a dangerous path towards judicial inventiveness, and should perhaps carry a health warning thereby, but it is also a central pillar of legal interpretation: and to ignore it may be to disregard the law's purpose. Where public policy is clear, it cannot be denied but must be given effect to, as appropriate.

28. In this regard, incorporation as a concept is the placing, within the sphere of human commerce, of a vehicle constrained by law and requiring those dealing with it towards caution; since only what it possesses as assets may satisfy those to whom it does an injustice; and since by that legal design, those who direct it, no matter how wealthy, become immune, unless cross-guarantors, by separate contract, or unless proven to act on their own behalf outside the veil of incorporation, or through its abuse beyond what the law contemplates as proper.

29. Thus it is the policy of the law that corporations have legal personality and that their rights and liabilities are those defined by law. This is perhaps best put in Ussher, *Company Law in Ireland* (Dublin, 1988), 24-25 when referencing the central authority of *Salomon v Salomon & Co* [1897] AC 22:

> One may take *Salomon's Case* as a statement of normality. This normality has three aspects: first, that a modern registered company if properly formed is a legal person separate and distinct from its members; secondly, that such a company is not *per se* the agent of its members; and, thirdly, that the motives of those who formed it are not material to its subsequent rights and liabilities. These concrete propositions are not fully axiomatic, and the courts will in fact occasionally look at the characteristics of a company's members in order to augment its legal personality or to impose legal consequences upon it.

30. What is inescapable here is public policy. Part of the separation of this artificial entity, the company or corporation, from its promoters, directors and shareholders, is that when it comes to litigation, a company should be represented: it cannot speak through its controllers since its controllers are not the company. Instead, a solicitor must be engaged; *Battle v Irish Art Promotion Centre* [1968] IR 252.

31. The repulsion with which judges approach the adjudication of a hearing where relevant facts are excluded because a company has no funds to engage legal representation may mean that a director or shareholder may be enabled to speak so as to point to what may be crucial to a decision; *AIB plc v Aqua Fresh Fish Ltd* [2018] IESC 49, [2019] 1 IR 517. Typically, in the High Court on the enforcement of a debt through summary summons, an indication may be concisely given by a shareholder or director as to why a corporation encumbered with debt may have an answer requiring a full hearing as to the merits. But, that discretion has not, and should not, extend to an action being run by a director as if he or she is the embodiment of the company. They are not. That would amount to fundamentally undermining corporate status. It would give to a director or shareholder the same status as an unrepresented, or party-, litigant, strip away protections as to security for costs and potentially secure company assets away from the consequences of an adverse costs order on the conclusion of litigation. What if a company has assets aplenty? What if such a company does not, through the decision of directors, wish to risk litigation whereby a costs order may deplete assets? Can the answer be: assign to a shareholder and then the company's assets will be untouchable? That is a denial of incorporation: of the principle that what is of the company's assets, including the right to litigate, remains with the company while still under the control of the general meeting; in other words, not in receivership or being wound up.

32. More fundamentally: directors or shareholders are not a company. Any contrary pretence offends principle.

33. Effectively that is what is proposed should happen here through the device of the company assigning to its director and majority shareholder a chose in action; consisting of the very lawsuit which the company is unable to progress itself. In many circumstances, such a manoeuvre would be unfair. For instance, to expand on the rhetorical question in the prior paragraph, a corporation with valuable land holding near a transport hub might anticipate a crippling charge on its assets should litigation fail, and there is often such a risk, and so choose to hive off the litigation to the holder of a single share in the knowledge that the litigant substituting for its rightful place as plaintiff will both face no liability in respect of security for costs and be unable to meet any costs awarded in consequence of unsuccessful litigation.

34. But what matters more than instances of potential unfairness is the principle which the law imposes. Here, it is argued that motive for the assignment of a chose in action is

irrelevant, citing *Fitzroy v Cave* [1905] 2 KB 364, and that public policy cannot lean against such an assignment since that was upheld by the House of Lords in *Norglen Ltd v Reeds Rains* [1999] 2 AC 1 in respect of enabling funds from legal aid. But, it must be remembered that in *Norglen*, since the company was being wound up, effectively both an exception to public policy was invoked and the very life of the company was being extinguished.

35. In two early cases, *Wiesener v Rackow* (1897) 76 LT 448 and *Fitzroy v Cave*, it is established that motivation does not render the assignment of a chose in action illegal. The principle is put thus *Halsbury*, (4th edition, volume 6 at 17):

> Provided that the statutory conditions are complied with, an assignment which is voluntary is within the Act. Even if the assignment is a voluntary one which would not be enforceable in equity by the assignee against the assignor, the debtor whose debt has been assigned cannot set this up as a ground of defence to an action by the assignee.

36. Hence, a purpose of enabling an action to be brought within the jurisdiction of the English courts does not render an assignment to a debt collecting agency; *Wiesener v Rackow* and see Smith and Leslie, *The Law on Assignment* (3rd edition, 2018, Oxford) 16.50. Neither that case nor the case cited in argument, *Fitzroy v Cave*, concerned, and this needs to be put bluntly, manoeuvres to dodge the consequences of incorporation. The latter case was of an embittered director who bought up the debts of the defendant with the admitted motive of using these for a petition in bankruptcy, which in the event of success would force him off the board of a company where both were co-directors. That case was about maintenance since the assignment provided for a profit for the assignees if the debt collection was successful. A comment from Cozens-Hardy LJ at 373-4 of the report does not establish any applicable contrary principle:

> Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a blae of goods. And on principle I think it is not possible to deny the right of the owner of any property capable of legal assignment to vest that property in a trustee for himself, and thereby to confer upon such a trustee a right of indemnity. . . . It is said that the plaintiff does not really desire to be paid and can take nothing for his own benefit under the judgment. For the reasons above stated I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, which is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result.

37. See also *Zabihi v Janzemini* [2009] EWHC 3471 (Ch). But the case most relied upon in aid of the argued validity of the assignment by McCool Ltd to its director and shareholder Eugene McCool has been *Norglen Ltd*. That case was, however, different. Its focus was on the prohibition of corporations obtaining legal aid to litigate and the assignment of what was, in one of the cases, a bare right to litigate on an alleged fraud (where the price of land for development was represented as being no more than that for horse grazing use), and, in the other, an action for a defective computer system (which allegedly ruined the

company as a going concern), to former directors so that they, as natural persons, could pursue the actions. Why *Norglen Ltd* is different to this proposed assignment of litigation from McCool Ltd to Eugene McCool is: most obviously, that there both companies were in liquidation; the decision to sell on the chose in action was made by an independent person, in the position of a trustee, and for value; and for valid reason, in one case to pay the company's creditors and in the other the sale of the cause of action for a nominal sum together with a share of 40% of the litigation proceeds.

38. Lord Hoffman clearly based his decision on the privileged position of those acting in trust. Further, a distinction was drawn in respect of the law leaning against the assignment of a bare right to sue, as opposed to *Zabihi,* a debt where recovery might necessitate litigation, as regards those dealing in such assets and those obliged by virtue of a trust obligation to obtain value for creditors. This is apparent in the analysis offered at 11-12:

> The law is traditionally hostile to the assignment of causes of action in return for a share of the proceeds. Such transactions were described as champerty (division of the field) and regarded as illegal and unenforceable. It is unnecessary to examine the reasons: judges said that it would encourage malicious suits, but treating such arrangements as criminal was also, before the introduction of legal aid, an effective way of preventing poor people from obtaining legal redress. The position of liquidators and trustees in bankruptcy is however quite different. The courts have recognised that they often have no assets with which to fund litigation and that in such case the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum or a share of the proceeds, to someone who is willing to take proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the courts have for the past century construed their statutory powers as placing them in a privileged position.

39. So, in *Seear v Lawson* [1880] 15 ChD 426, 433, Sir George Jessel MR said:

> If the trustee gets a right of action, why is he not to realise it? The proper office of the trustee is to realise the property for the sake of distributing the proceeds among the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may be disinclined to run the risk of having to pay costs, or he may consider it undesirable to delay the winding up of the bankruptcy until the end of the litigation.

40. Nearly a century later, in *Ramsey v Hartley* [1977] 1 WLR 686, 698, Lawton LJ said:

> Now, the sale of a cause of action by a trustee can only be effected by an assignment. It vests in the trustee in the first place because it is deemed to have been duly assigned to him. . . . The legal process by which it gets to him must operate to vest it in the person to whom he sells it. If this were not so, such a cause of action would be of no value to the creditors unless the trustee himself tried to enforce it. To do so, unless success was assured, would require the expenditure of money which would otherwise be available for distribution among the creditors. To assign the cause of action for good consideration to another person who was willing to try to enforce it could be a sensible way of disposing of the bankrupt's assets.

41. These cases both happened to have concerned trustees in bankruptcy, but the powers of liquidators have been given a similar construction. In *Guy v Churchill* [1888] 40 Ch D 481, Chitty J held that there could be no objection to an assignment in return for a share of the proceeds, which "apart from the bankruptcy law. . . is plainly void for champerty." In the face of this line of authority, counsel for both appellants accepted that apart from the impact of legal aid and the effect on the defendant's right to security for costs, the assignments could not be challenged.

42. These cases cannot be taken as authority to propose that a company can retain, not being in liquidation, and yet avoid, its corporate structure through the setting up of a vehicle of litigation, being the use of an assignment to a director or shareholder. In both the cases considered in *Norglen*, the decision to assign was made in good faith and for value by an independent person charged with realising assets from a corporate collapse to the benefit of creditors.

43. Corporate death is part of corporate law; as is the dismemberment and realisation for creditors of assets of all types. In that case, a liquidator and a trustee in bankruptcy were regarded as a class apart from any other assignor. And for good reason: those called in to act on behalf of the court (as in a court appointed liquidator) or on behalf of creditors (as in a company liquidation or the official assignee in bankruptcy or a receiver under a deed) are independent of the corporate structure; are acting to realise value for third parties; are under fiduciary obligations; and may ultimately be answerable to a court or, where trustees, may seek court guidance under s 36 of the Trustee Act 1893.

44. In that light, Lord Hoffman in *Norglen*, conscious of the concession made as to security for costs by counsel, regards, at 16, the loss by a defendant of the right to security for the costs of the litigation as "For better or worse, the law entitles a defendant to be protected against incurring irrecoverable costs in litigation brought against him by an impecunious company but not by an impecunious individual. But that cannot prevent companies from assigning property to individuals." That statement must be interpreted, however, in the light of the structure of such an assignment, the arm's length nature of the transaction, the general right of liquidators and trustees in bankruptcy to sell debt for value, and the public benefit involved in the recovery of assets to the benefit of third parties on corporate death.

Corporate obligation

45. Theory capitalises a corporation with the subscriptions of its shareholders, but the reality of commerce is that assets and funds come and go from the purview of a company which, while held, are part of what is available to creditors within the scope of limited liability. While incorporation means that no duty to pay debts falls upon directors or shareholders, that separate personality carries with it the obligation to foster existing capital: which means not to expend or, to use in this context a term from land law, waste assets, since by doing so the corporate body is diminished.

46. While directors are in a fiduciary position, that duty, not being precisely that of a trustee, is to the company and to its shareholders; *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407. As Ussher, *Company Law in Ireland* (London, 1986) puts the principle:

> An individual director stands in a *fiduciary* relationship to this company. A fiduciary has power to deal with the property of another, and is assumed therefore to occupy a position of trust and confidence in relation to that other, whom we might loosely

> call the beneficiary. In our case, the beneficiary is the company. To protect the relationship from abuse, the courts will prevent the fiduciary from making any personal profit from it without the informed consent of the beneficiary. They will curb acts of the fiduciary beyond the posers delegated to him, but they will be reluctant to interfere with decisions honestly made by him within his powers, since the discretion is his, and not the court's. They will impose personal responsibility on him to compensate the beneficiary for loss caused through his dereliction of the duties which he undertook.

Reality

47. The reality of what has happened here must be looked at. An asset, comprising an entitlement to sue for breach of contract or other civil wrong, has in the past been transferred as a chose in action from the company to a director of that company for a consideration standing in negligible proportion to the proposed value of the potential, and expected, damages of millions of euro. Directors are not entitled to transfer, or at an obvious undervalue simply sell the company's assets, for no value. The issue of transfers within a corporate group of companies awaits proper consideration; *Greene v Coady* [2015] 1 IR 385.

48. The chances of a liquidator or trustee in bankruptcy or receiver acting in this way are offset by the nature of those roles and by the duty to obtain value. However, that duty is also cast on directors. In *Hutton v West Cork Railway Co* [1883] 23 Ch D 654, a company on selling its assets for value decided, as the court later found, on the basis of a gift as opposed to a legal obligation, to remunerate its directors. This was held unlawful. The celebrated quote from Bowen LJ, that companies should use capital and not disburse it save for good reason, should be repeated as the principle. That fundamental pillar of company law is disregarded by schemes such as this one:

> It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors who have got all the powers of the company given to them by sect. 90 of the Companies Clauses Consolidation Act, are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is bona fide, but whether, as well as being done bona fide, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance. A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company, and a company which always treated its employees with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted - at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

49. Hence, it is not just that the business of McCool Ltd is to trade, habitually in heating systems and design, but that if, for the sake of argument and by reason of that trade, the company has an entitlement enforceable by litigation, to substantial damages, then that entitlement belongs to the company. The company has that asset: it is the company's: it cannot be just chucked away for €1. By assignment of a chose in action, that asset is lost. Hence, the company cannot validly sign it away. While under the 1877 Act, writing is required but no consideration is necessary for the assignment of a chose in action, the underlying law remains: that a company must use its assets as part of a working capital and not dispose of these at a value that is unjustifiable in terms of commercial analysis.

50. Perhaps it may be contended that if the assignment carries an underlying intention, or express provision, whereby, on the potential success of the litigation, the assignee will recapitalise the company with the damages awarded against Honeywell Ltd, but how can that transform the situation? Such an arrangement underlines that the company retains a beneficial interest in what is its own property while shearing itself of any potential costs liability and of an obligation to provide security to a defendant for costs that the legislature has seen fit to impose as a pre-condition of suit.

Conclusion

51. It is impossible in law that a company has the capacity to offload a valuable asset for a peppercorn consideration; Ussher, *Company Law in Ireland* 123. Nor can a company, through the stratagem of assigning a right to sue another party, validly undermine the central pillar of incorporation whereby corporations should remain responsible for their own issues. Certainly, a liquidator, or other person in a fiduciary capacity over the assets of a dying or distressed company, may sell debts and may also sell the right to litigate to recover damages.

52. That case, however, is different. There, value is being realised to the benefit of creditors. Corporate status, conceived in incorporation and the subscription of shares, may be brought to an end in death and the disposal of assets for those creditors disappointed in their dealings with the company. That is part of company law. This is not. In this case, a crude mechanism substitutes a director to effectively pursue what all sides admit being something that can only be classified as an interest of the company. Such a stratagem potentially carries tax implications, in addition.

53. Thus, by assignment from McCool Ltd to Eugene McCool, it is not simply that a director is enabled to speak on behalf of the company in court, through the stratagem of company assigning to him the right to litigate, rather the very transaction undermines the foundations upon which the separate corporate personality of a company from its shareholders and controllers is built.

Case management

54. No comment can be made on the allegation by McCool Ltd that their litigation against Honeywell Ltd has been met with, year after year of, unnecessary procedural wrangling which has eaten up any fund that might be available within the company to prosecute this case. It suffices to face the icy reality that the abuse of pre-trial motions and procedures can happen. When it does, it is the duty of the High Court to put it down and to award costs in a way that does not only have regard to individualised motions but has considers the overall picture.

55. In *Armstrong v Moffatt* [2013] 1 IR 417 Hogan J rightly condemned lengthy and unnecessary motions for particulars on the basis that the Rules of the Superior Courts are there to further justice and not for the purpose of harassment or waste; followed by Charleton J in *IBB Internet Service Limited & ors v Motorola Limited* [2013] 11 JIC 1903.

56. This is a case which should be taken into case management under the control of a single judge. Case management should not be misunderstood. It is not a computer-system of tracking litigation from inception to final disposal. The object of case management is to require parties to state clearly, to a judge, the nature of their core allegations and their answer, to objectify focus on what is essential to disposal, and to move a case forward towards a hearing that, for these reasons, is concise in time and rational in terms of costs expenditure; *Talbot v Hermitage Golf Club* [2014] 10 JIC 0901. In that regard, the Rules of the Superior Courts give ample authority to set time-limits and to limit repetitive testimony, including the deployment of experts. Many of those powers are set out in *HSBC v Defender (France)* judgment of Charleton J [2020] IESC 37, [2021] 1 IR 516 and are deserving, in cases of this kind, of deployment.

57. If cases are not so controlled, then those which fit into the potential category of ones where unfocused allegations may be met by notices for particulars, interrogatories, repeated and disproportionate discovery motions which seek the production of more than what is reasonably required, and applications resulting, litigation has been known to spiral into a limbo state where justice seriously risk never being heard because the funds to support litigation and the will to fight are already sapped.

58. Should this litigation continue as is proper, the parties have a duty in cases such as this to draw such dangers to the attention of the judge in the appropriate list. Failing to do so should result in a costs order.