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Supreme Court of Ireland Decisions

Judgment Title: In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others

Neutral Citation: [2013] IESC 11

Supreme Court Record Number: 451, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 464, & 498/2012

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Date of Delivery: 26/02/2013

Court: Supreme Court

Composition of Court: Denham C.J., Fennelly J., McKechnie J.

Judgment by: Fennelly J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Fennelly J.	Link	Dismiss	Denham C.J., McKechnie J.

Outcome: Dismiss

THE SUPREME COURT

APPEALS RECORD Nos.:

451, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 464, 498/12

Denham C.J.
Fennelly J.
McKechnie J.

In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by

STELLA COFFEY, NO2GM LTD., DEREK BANIM, THOMAS O'CONNOR, RICHARD AULER, THERESA CARTER, DAVID NOTLEY, MICHAEL HICKEY, MALCOLM NOONAN, GAVIN LYNCH, DANNY FORDE, ENDA KIERNAN AND DYMPHNA MAHER.

APPELLANTS:

JUDGMENT of Mr. Justice Fennelly delivered the 26th day of February 2013

1. This judgment provides the reasons for the decision of the Court made at the hearing of these thirteen appeals on 11th December 2012 declining the application of the thirteen appellants to be permitted to be represented at the hearing of the appeal by Mr. Percy Podger or, put otherwise, the application of Mr. Podger to be permitted to appear for and to argue the appeals as the representative or advocate of the appellants.

2. For the purpose of considering that issue, the Court has heard Mr. Podger and permitted him to argue that point and that point only. Having heard him, the Court ruled that it would not hear Mr. Podger as representative of the appellants. It informed the appellants that it would hear them or any of them who wished to present the appeal on his or her own behalf. The Court adjourned briefly to enable them to consider the position. At the resumed hearing, none of the appellants wished to do so. However, Mr. Podger announced that he had, during the period of the adjournment of the hearing, been made a member of the appellant company, No2GM Ltd, and that he proposed to represent it. The Court declined to hear him as representative of the company.

3. In this judgment, I give the reasons for ruling that the Court should not hear Mr. Podger as advocate or representative of the appellants.

4. The situation is procedurally singular, if not unique. The appeals, like the applications in the High Court, are presented ex parte, even though the appellants applied to the High Court and are now applying to this Court for orders potentially adversely affecting the interests of the respondents to their intended applications for judicial review but without hearing the latter. Thus, the appellants and Mr. Podger on their behalf do not even name the affected bodies (the Environment Protection Agency and Teagasc) in the titles of their applications in the High Court or in their notices of appeal to this Court.

5. The appellants are: Stella Coffey, No2GM Ltd., Derek Banim, Thomas O'Connor, Richard Auler, Theresa Carter, David Notley, Michael Hickey, Malcolm Noonan, Gavin Lynch, Danny Forde, Enda Kiernan and Dymphna Maher. It will be noted that one of the appellants is a company, in fact a company limited by guarantee. The papers submitted to the High Court and supporting submissions for each of the 13 appellants are, in effect, identical and clearly prepared by the same person. It is clearly Mr. Podger who is co-ordinating the applications for judicial review which the appellants apparently wish to commence in the High Court.

6. The appeals are taken against judgments of the High Court delivered respectively by Birmingham J. on 14th August (one case), Hogan J. on 28th August 2012 (eleven cases) and Hedigan J. on 22nd October 2012 (one case).

7. It appears that each of the appellants wishes to seek judicial review of a decision made on the 25th July, 2012 by the Environment Protection Agency ("EPA") in the exercise of the powers conferred on it by the Genetically Modified Organisms (Deliberate Release) Regulations 2003 (S.I. No. 500 of 2003) granting a consent to Teagasc, Oak Park, County Carlow to carry out the deliberate release of certain genetically modified potato lines subject to certain conditions. None of the applicants has, to date, in fact made any application to the High Court for leave to apply for judicial review. In fact, they did not even place before the High Court any material by way of evidence or legal argument providing grounds for judicial review of the EPA decision. As Birmingham J. said, in the case of Stella Coffey, "the papers address only the request for a not prohibitively expensive order."

8. The appellants each applied to the High Court for what they describe as a "Not-Prohibitively Expensive Costs Order." Each applicant is described on the face of the application as a "European citizen…… lacking sufficient resources."

9. The appellants base their application for a "Not-Prohibitively Expensive Costs Order" essentially on the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark, on 25 June 1998. That is a United Nations Convention, which was not ratified by Ireland until 20th June 2012 though it had been ratified by the European Union in February 2005 and effect has been given to certain provisions in European Union Law.

10. The appellants allege that to proceed without the benefit of the claimed "Not-Prohibitively Expensive Costs Order" would render them financially incapable of continuing with the challenge against the EPA, and would leave them financially exposed should they be ultimately unsuccessful and have costs awarded against them.

11. The Aarhus Convention is the basis of the appellants' argument that costs incurred in challenging an environmental decision should not be "prohibitive." The appeals brought by the thirteen appellants against the substance of the High Court orders remain pending before this Court. This judgment does not deal with the correctness or otherwise of the High Court judgments or the merits of the appeals. For that reason, it is sufficient to state very briefly the effect of the High Court judgments.

12. None of the High Court judgments decided, on the merits, whether the court had jurisdiction to make what the appellants term a "not-prohibitively expensive costs order." Hogan J. raised issues concerning the status of the Aarhus Convention in Irish law and referred to case-law of the Court of Justice. He was of the view that further clarification would have to be sought from the Court of Justice. However, his decision was based, like those of Birmingham J. and Hedigan J., on the fundamental departure from fair procedures which would be involved in making a final order of that kind necessarily affecting an opposing party but without affording that party any opportunity to be heard. As Hogan J. expressed the matter:

> "Since the making of a final order of the kind sought without notice to other parties actually or potentially affected by such order would infringe fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the EU Charter of the Fundamental Rights, I consider that I have no jurisdiction to make such an order. For those reasons, I must decline to grant the relief sought."

13. As I have emphasised, however, that is a matter for the substantive hearing of the appeals, which remain pending. I turn, therefore, to the question of Mr. Podger's representation of the appellants.

14. Each of the three judges heard Mr. Podger in the High Court. Hogan J. said, in the case of No2GM Ltd Mr. Podger had represented the applicants, though he had freely admitted that he was neither a solicitor nor counsel. The learned judge said that he had heard him "[a]s a concession and a courtesy to the applicant…" He added: "I express no view as to whether he was lawfully entitled to represent the company in this manner, whether by virtue of being a McKenzie friend or otherwise."

15. Each of the appellants included the following statement in his or her grounding affidavit and repeated in an affidavit for this court:

> "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 and you giving full effect to and moreover-best effect to-and proper application to the European Law and International Law, and proceed to permit me to make this application here with Mr Percy Podger, who has,- as Justice Murphy of the Irish Superior Courts High Court acknowledged, - has a particularly good knowledge of this European Law concerned, and consequently I know he can handle it better than I, with a better flow of communication, - thus best effect possible - as anything other than so, if forced upon me by you, shall be a violation of the EU Law concerned inter-alia the rubric of the application, as I declare I have lesser abilities to make this application particularly in verbal communication and interaction with you, though of course I comprehend the nature of the application etc.
>
> 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, and obstructs the flow of thought and obstructs the flow of communication and is an impediment to Justice itself, apart from being in practice dysfunctional and resulting in poor communication and consequently is wholly unacceptable and unnecessary and contrary to letter, spirit and intent of the European Law and International Law concerned, and makes it in practice impossible or excessively difficult for me to exercise my rights conferred by EU law, in the instant matter. If I be somehow wrong in this, then I put it to you: -- that less you can state answers to the following two questions precisely and with detailed reference as to:-
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> A. - Where does it state in "European Law" that I must only represent myself via your (or our former Colonial Rulers) so-called "McKenzie Friend" process or suchlike process? And
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> B. -if it does, then where is it said in "European Law" of that such discrimination is proper and in order and why?" [Emphasis in original]

16. These paragraphs encapsulate the nature of the application being made by Mr. Podger on behalf of the appellants. The Court is not confronted in this case with a litigant in person. Such litigants have become an increasingly common feature of litigation in our courts. The reasons are many and various. There can be no doubt that a major contributory factor has been that the difficult economic circumstances prevailing in recent years have made it difficult or impossible for many people to pay for their own legal representation. In these circumstances, the courts of necessity are obliged to allow

parties to present their own cases and, though it may be difficult for them, legal arguments. The courts have recognised the capacity of a McKenzie friend to assist a lay litigant, usually by giving advice or organising papers. That procedure, however, must, of necessity, be carefully supervised. Only in the most limited circumstances, will a court permit a McKenzie friend to address it. In the family courts, in particular, it is necessary to ensure that the admission of a McKenzie friend does not undermine the confidentiality of proceedings being heard in camera. Furthermore, any application in this regard must be made bona fide and must relate solely to the activities which, if admitted, such a friend may perform."

17. The notion of a McKenzie friend originates in the decision of the Court of Appeal in England in McKenzie v McKenzie [1970] 1 P. 33. Davies L.J. recalled the following statement of Lord Tenterden C.J. in Collier v Hicks (1831) 2 B. & Ad. 663:

> "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 in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

18. That brief statement continues to represent an accurate description of the role of a McKenzie friend and is generally accepted by our courts. It was considered in the High Court by Macken J. in R.D. v McGuiness [1999] 2 I.R. 411, which were family-law proceedings. She concluded, at page 421, that "a party who prosecutes proceedings in person is entitled to be accompanied in court by a friend who may take notes on his behalf and quietly make suggestions and assist him generally during the hearing, but……may not act as advocate." This conclusion was based, in part, on an order made by this Court in an earlier case, where there was no note of a written judgment. Nonetheless, I am satisfied that the statement is correct. It will be noted, of course, that this is a description of the role of the McKenzie friend. 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 or 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 do so by the presiding judge.

19. Here the court is asked to permit something utterly different.

20. In effect, Mr. Podger wishes to be permitted to exercise the role of advocate, without restriction. If he were himself an appellant, he would have the right to appear for himself. In that situation, each of the other appellants would be able briefly to adopt his arguments. But then, he would be a party, with an interest with all the attendant duties and responsibilities associated with that status and would, inter alia, be liable for any costs awarded against him.

21. Mr. Podger is neither counsel nor a solicitor, nor does he wish to act in the capacity of a McKenzie friend. He seeks an unrestricted right of audience before the courts. As I understand it, he wishes to be permitted to present the appeal on behalf of all of the appellants to the same extent as if he were a professionally qualified counsel or solicitor. He rejects the suggestion that he could act as a McKenzie friend. He is unwilling to accept the limited nature of that role. He considers it unduly restrictive that he should be limited to assisting the appellants without enjoying a right of audience. He seeks an unlimited right to appear and to argue the appeals but without any of the limitations which would apply either to a McKenzie friend or to a properly qualified legal practitioner. He submits that, in the absence of any provision of EU law prohibiting such a lay advocate as himself, that he is entitled to an unrestricted right of audience before the courts and that to deny him such a right of audience is to infringe the rights of the appellants to access justice in

general, and specifically to access justice under the Aarhus Convention.

22. I am satisfied that the application of the appellants to be allowed to be represented by Mr. Podger and by him that he should be allowed to represent them must be rejected.

23. The fundamental rule is that the only persons who enjoy a right of audience before our courts are the parties themselves, when not legally represented, a solicitor duly and properly instructed by a party and counsel duly instructed by a solicitor to appear for a party. That rule does not exist for the purpose of protecting a monopoly of the legal professions. Kennedy C.J. considered an application, In the matter of the Solicitors (Ireland) Act, 1898 and in the matter of an application by Sir James O'Connor [1930] 1 I.R. 623 at page 629, for the readmission to the roll of solicitors of a person who had formerly practised as both a solicitor and a barrister before being appointed to the bench from which he had retired. That issue is not before the Court and I express no view on the issue of readmission of former members of a profession. It is of interest, however, that the Chief Justice explained that one of the points of view of relevance was that "of the public—of the people from whom ultimately are derived and held,……as a privilege the monopoly of the right to practise as solicitors and advocates," The limitation of the right of audience to professionally qualified persons is designed to serve the interests of the administration of justice and thus the public interest.

24. The exclusive right of counsel to audience in the courts is derived from the common law. In order to extend that right, in the case of the superior courts, to solicitors, it was necessary to enact s. 17 of the Courts Act 1971, which provides:

> "A solicitor who is acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practise (within the meaning of the Solicitors Act, 1954) who is acting as his assistant shall have a right of audience in that court."

25. Thus, the right of audience is regulated by law. It is true that a party to proceedings (other than a corporation) has the right to appear for him or herself and to plead his or her own case. This is a matter of necessity as well as right. Regrettably it is a fact of life especially during the current economic difficulties in our country that many people are unable to afford the often high cost of professional representation and that the availability of legal aid is limited. There are other cases where litigants disagree with their lawyers or are unwilling to accept representation. Whatever the reason, there is an inevitable number of cases before the courts where litigants are unrepresented. In those cases, they have the right to represent themselves. It has to be accepted that this is sometimes unavoidable, which is not to say that it is desirable. There is no doubt that courts are better able to administer justice fairly and efficiently when parties are represented.

26. In R.B. v A.S. [2002] 2 I.R. 428 at 447, Keane C.J. remarked on the difficulties presented by the necessity to deal with litigants in person:

> "The conduct of a case by a lay litigant naturally presents difficulties for a trial court. Professional advocates are familiar with the rules of procedure and practice which must be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants. Advocates, moreover, are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition: one cannot expect the same of lay litigants, least of all in family law cases.

> The trial of cases involving lay litigants thus requires patience and understanding on the part of trial judges. They have to ensure, as best they can, that justice is not put at risk by the absence of expert legal representation on one side of the case. At the same time, they have to bear constantly in mind that the party with legal representation is not to be unfairly penalised because he or she is so represented. It can be difficult to achieve the balance which justice requires and the problem is generally at its most acute in family law cases, such as the present."

27. Sir John Donaldson M.R. in Abse and Others v Smith [1986] 2 W.L.R. 322 remarked on the benefits for the administration of justice from the competent representation of parties. At pages 326 to 327 of his judgment he referred to the limitation of rights of audience to qualified persons:

> "These limitations are not introduced in the interests of the lawyers concerned, but in the public interest. The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. Failure to display these skills will inevitably extend the time needed to reach a decision, thereby adversely affecting other members of the public who need to have their disputes resolved by the court and adding to the cost of the litigation concerned. It may also, in an extreme case, lead to the court reaching a wrong decision."

28. The Master of the Rolls also made some remarks, with which I agree, concerning the essential qualities of probity and integrity expected of qualified members of the legal profession and how important it is to the fairness and efficiency of the administration of justice. He said:

> "The public interest requires that the courts shall be able to have absolute trust in the advocates who appear before them. The only interest and duty of the judge is to seek to do justice in accordance with the law. The interest of the parties is to seek a favourable decision and their duty is limited to complying with the rules of the court, giving truthful testimony and refraining from taking positive steps to deceive the court. The interest and duty of the advocate is much more complex, because it involves divided loyalties. He wishes to promote his client's interests and it is his duty to do so by all legitimate means. But he also has an interest in the proper administration of justice, to which his profession is dedicated, and he owes a duty to the court to assist in ensuring that this is achieved. The potential for conflict between these interests and duties is very considerable, yet the public interest in the administration of justice requires that they be resolved in accordance with established professional rules and conventions and that the judges shall be in a position to assume that they are being so resolved. There is thus an overriding public interest in the maintenance amongst advocates not only of a general standard of probity, but of a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved.
>
> These high standards of skill and probity are not capable of being maintained without peer leadership and pressures and appropriate disciplinary systems and the difficulty of maintaining them increases with any increase in the size of the group who are permitted to practise advocacy before the courts."

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 profession 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.

31. I wish to make it clear that there is no reason at all to suspect the integrity of Mr. Podger, his commitment to the cases he wishes to bring on behalf of the appellants or his knowledge of this particular area of environmental law. However, the fact remains that he is not qualified in law and does not have any right of audience.

32. It may be that the representation of companies presents a particular aspect of the problem. In Battle v Irish Art Promotion Centre Ltd [1968] 1 I.R. 252, Ó'Dálaigh C.J., with the agreement of his colleagues, ruled that:

> "…in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."

33. In the course of his judgment, the Chief Justice cited with approval the statement of Viscount Simon L.C. in his speech in Tritonia Ltd. v. Equity and Law Life Assurance Society [1943] 1 A.C. 584. where he said at p. 586 of the report:— "In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally the right of audience is necessarily limited to counsel instructed on the corporation's behalf."

34. This ruling proceeds from the fact that the incorporated company is, as a strict matter of law, a legal person separate from its members and from its directors and management. Nonetheless, in practice, the courts have to deal on a daily basis with difficult cases involving unrepresented companies, frequently because there are simply no funds to provide for legal representation. The company, being a purely legal or notional person, cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although that is far from ideal, it represents the present law.

35. A slight modification of the strict rule regarding companies was adopted in the New Zealand case of Re G.J. Mannix Ltd [1984] 1 NZLR 309, considered by Budd J. in P.M.L.B. v P.H.J. (High Court unreported 5th May 1992, Budd J.). Cooke J. in the New Zealand Court of Appeal had thought that the court should retain a residual discretion to hear unqualified advocates but considered that it would be a "reserve or rare expedient."

36. In Coffey v Tara Mines Limited [2008] 1 I.R. 436, O'Neill J. thought that Battle v Irish Art Promotion Centre Ltd did not preclude him from exercising an inherent jurisdiction where, in his view, there was in existence "a combination of circumstances that are so exceptional or rare as to probably, be unique." He permitted the plaintiff to be

represented by his wife because he had formed the view that the action would proceed no further, and that is an outcome or consequence that would be destructive of the interests of justice."

37. In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making of an exception. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of thirteen litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons.

38. Nor do I think that the attempt to represent the company No2GM Ltd gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the Court's brief adjournment of the hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit.

39. Finally, Mr. Podger purports to demand that the Court provide some reference to a provision of EU law excluding him from representing the appellants. That would be to reverse the proper nature of the inquiry, which is whether there is any provision of EU law precluding the Court from applying the fundamental tenets of its legal system adopted in the interests of the protection of the integrity of the administration of justice. In fact, Article 19 of the Statute of the Court of Justice regulates the representation of parties in proceedings before the Court of Justice of the European Union. Member States and the Institutions of the Union must "be represented before the Court of Justice by an agent appointed for each case…" The agent "may be assisted by an adviser or by a lawyer." Most materially, the Article then provides:

> "Other parties must be represented by a lawyer.
>
> Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court."

Furthermore,

> "University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers."
>
> To similar effect, Rule 36 of the Rules of Court of the European Court of Human Rights provides that an applicant "must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative." Furthermore, any such representative shall "be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber."

It is clear, therefore, that there is no warrant for the claim that, in the application of EU

law or the European Convention on Human Rights, specifically either by the Court of Justice or the European Court of Human Rights, there is any obligation on the court of a Member State to permit a litigant to be represented by a person other than a duly qualified lawyer.

40. Thus Mr Podger's application to be allowed to represent the appellants at the hearing of their appeals must be rejected.
