



# COMPANY LAW REVIEW GROUP

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## REPORT ON THE REPRESENTATION OF COMPANIES IN COURT



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# REPORT ON THE REPRESENTATION OF COMPANIES IN COURT

## Introduction

The Company Law Review Group (the 'Review Group') were tasked by Richard Bruton T.D., Minister for Jobs, Enterprise and Innovation, under item 3 of the Review Group Work Programme 2014-2016, to examine and make recommendations on whether it is necessary or desirable to provide for amendments to the law relating to the representation of a company before the Courts.

A subcommittee of the Review Group was formed and chaired by Brian Hutchinson of University College Dublin. It examined the matter and produced this report which was adopted by the Review Group at their plenary meeting on 9<sup>th</sup> March 2016. The membership of the subcommittee is set out in Appendix A.

## Executive Summary

The common-law rule that companies can only appear or be represented in court by a solicitor or counsel carries with it the consequence that impecunious companies are often unable to appear in court at all, and that courts are sometimes forced to deal with cases involving absent companies. The Irish Courts, like many others, apply the rule strictly; and though they contemplate exceptions in rare and exceptional circumstances, there are few examples of such cases, if any. Some jurisdictions, notably England and Wales, and certain Australian States, have introduced legislation or procedural rules allowing companies to be represented by their directors or employees in certain circumstances.

Given the stated policy of the Irish Courts to work around the rule where the requirements of justice dictate, and the unique position of the courts to be able to measure the need for such exceptions, the Company Law Review Group remains to be convinced of the need for wider reform of the rule, though it is not indisposed to wider reform in principle if introduced in the proper context.

The Company Law Review Group considers that in the absence of a general overhaul of civil procedure rules or concerted action with the Rules Committees of the Courts, the most that can be achieved by means of a change to the Companies Act 2014 is a statutory restatement of the rule, and that any further relaxation of the rule by means of provision in the Companies Act 2014 should be limited to specific corporate proceedings such as applications to extend the time for filing of Annual Returns. Wider reform would have consequences for grander policies on access to justice and rights of audience in the civil courts – matters beyond the remit of the Company Law Review Group. The Company Law Review Group would make itself available to the relevant bodies as part of any such wider reform as a number of specific company related issues might be addressed in such measures.

## 1. Background

- 1.1 The basic rule (hereafter “the rule”) concerning the representation of companies in court is that a company can only be represented, or appear as a party to legal proceedings at all, by a solicitor or counsel, *not* by a member or director or other person.
- 1.2 The rule occurs at the confluence of two well-known legal principles – first the general principle against the unlicensed practice of law before the courts; and second, the basic principle in company law that companies are separate legal persons. The basis for the rule is thus straightforward: companies, as fictitious personae, are inherently incapable of appearing in person or “*pro se*”, and must therefore be represented by, or appear through, someone else; but if that person is not a licensed advocate they contravene any requirements about the licensing of advocates in court.
- 1.3 Two practical consequences of the rule are of note. First, companies unable to afford legal representation are effectively unable to appear in court to pursue or defend their rights. Secondly, the courts often face the difficulty of having to deal with complex cases involving companies in the absence of the company concerned. These consequences have been the subject of comment both in the Courts and in the Dáil.

## 2. The Rule in Ireland

- 2.1 In Ireland, the rule is not expressed in legislation or in the Rules of Court.
- 2.2 The rule finds clear expression, however, in the case-law. In the Supreme Court decision in *Battle v. Irish Art Promotion Centre Ltd* [1968] IR 252, Ó Dálaigh CJ stated –

*“...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.”*

- 2.3 The rule has been applied consistently and inflexibly in Ireland - even, indeed especially, in recent times.
- 2.4 A limited prospect of an exception to the rule has been countenanced by the Irish Courts. The Courts acknowledge that they enjoy inherent or residual jurisdiction to hear from lay advocates on behalf of any person in “rare and exceptional circumstances”: accordingly, in such exceptional circumstances a lay advocate might in principle be permitted to appear on behalf of a company: *Coffey v. Tara Mines Limited* [2008] 1 I.R. 437; *Re an Application by Stella Coffey, NO2GM Ltd & Others* [2013] IEHC 11. However, no such application has yet succeeded in the reported cases, and notably it has recently been confirmed by the High Court that impecuniosity of the company and its shareholders does *not* constitute rare and exceptional circumstances justifying representation by a lay advocate: *Allied Irish Banks Plc - v- Aqua Fresh Fish Limited* [2015] IEHC 184.

2.5 An exception may lie for single member private limited companies. In *McDonald -v- McCaughey Developments Limited & Anor* [2014] IEHC 455, Gilligan J, in a thorough judgment, paid passing respect to the “rare and exceptional circumstances” exception before finding that the discretion should not be exercised in favour of allowing a director to represent a company in court. Referring to South African case law (see below) observing that in some cases a person who is the controlling mind of a small corporate entity may know as much about the company’s business and financial affairs as an individual would know of his own, Gilligan J observed that there might be certain exceptional circumstances where a company director and significant shareholder on a valid *bona fide* arguable point at the discretion of the court could be allowed to represent the company’s interests, provided the court was satisfied that the point was at least arguable on the known facts and the applicable law. Those circumstances did not exist in the case before him, however.

2.6 Whilst the rule is inflexibly applied, the Courts have demonstrated pragmatic willingness when possible to ensure that the application of the rule does not occasion injustice. Thus, in *McDonald v. McCaughey Developments Ltd & McCaughey* [2015] IECA 159 (an appeal of the High Court decision discussed in the preceding paragraph) the Court of Appeal noted that the director in that case was joined personally as a second defendant and that in such circumstances there could be no objection to him advancing arguments and adducing evidence relevant to the issues to be tried, even such arguments and evidence as might inure for the benefit of the company. And in *DBP Construction Ltd v. ICC Bank Plc* Supreme Court, 21 May 1998, Keane J, whilst invoking the rule in *Battle*, effectively allowed evidence and arguments on behalf of a company to be put by its managing directors and sole shareholders by way of written submission; though in the event the Court did not need to rely on them since the appeal was denied on other grounds. And in *Re Marble and Granite Tiles Ltd* [2009] IEHC 455, a winding-up petition, Laffoy J allowed a director of a contributory company (Mr O’Gara) to have a say, stating:

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

*There is no evidence before the Court that Mr. O’Gara is a contributory of the company and is entitled to be heard in that capacity.”*

2.7 Moreover, there is no issue in civil proceedings where lay-representation is automatically permitted, e.g. in the small claims court, or in arbitration, or in ADR procedures.

2.8 A statutory exception to the rule occurs by statute in criminal cases prosecuted on indictment – s868 of the Companies Act 2014 allows a company charged on indictment to appear by a representative who may answer any question and plead on the company’s behalf. That provision was originally introduced as section 382 of the Companies Act 1963 to

remedy an issue brought to light in the case of *The State (Batchelor and Co (Ireland) Ltd) v O'Leannáin* [1957] IR 1. In that case a decision to send a company forward for trial on indictment for breaches of the Merchandise Marks Act was quashed because the decision of the District Justice to send the company forward for trial was founded on deposition evidence, and the Indictable Offences Act 1849 provided for the examination of deposition witnesses “in the presence of the accused person” and provided for the taking of a statement under caution from “the prisoner”. Murnaghan J considered that there was no jurisdiction in the District Court to take evidence on deposition against a corporation because it could not be present at the taking of the deposition. He further held that the jurisdiction to send a person forward for trial on bail could not be exercised against a corporation because there is no prospect of imprisoning a corporation. Section 868 of the 2014 Act remedies the problems highlighted in the case by allowing a company to appear in person via a representative appointed for that purpose. The representative may answer to any question that is required to be put to a person charged with an indictable offence; exercise any right of objection or election conferred upon an accused person by any enactment; and enter a plea on behalf of the accused company. But the representative cannot do more: section 868(6) provides that appointment as representative under the section does not qualify him or her to act on behalf of the company before any court for any other purpose. The section also provides that where a company chooses not to appear via a representative the District Judge may still send it forward for trial on a not-guilty plea.

### 3. The Rule Elsewhere

- 3.1 The basic rule is followed throughout the common law world– notably in the US, New Zealand, South Africa, Scotland, Canada, Hong Kong, and with modification in England, Northern Ireland and Australia, – and the precedent applying the rule is voluminous.
- 3.2 In the United States the rule is followed, with few exceptions, in the Federal and State Courts; indeed the Washington Courts have held that lawyers established as single member companies require separate representation in court (*Cottinger v. Employment Security Department*, 162 Wn. App. 782 (2011)). Where exceptions arise, they tend to be in the lower courts and small claims courts where proceedings are of a more informal manner and where *pro se* representation generally is more common. Where such exceptions arise they are usually expressly stated in the procedural rules of such courts. The rule has been held to apply equally to not-for-profit and for-profit corporations. Some states will allow an appearance to be filed by a corporate officer to avoid judgment in default; and some states expressly permit corporations to be represented by in-house counsel as long as they are authorised advocates in the court concerned.
- 3.3 In New Zealand a company can be represented in the District Court by any officer (including a director), attorney or agent by virtue of the District Courts Act 1947 s57(2). This concession is not extended to the High Court, but the Court has allowed a director to represent the company in circumstances where the company could not afford to hire counsel and the case was not complex so the Director could adequately represent the company (*Para Ltd v David*



*Ellis Productions Ltd* (1992) 6 NZCLC 67) however, where the case was technical and involved complex legal issues such permission has been denied (*Gold Medal Hortech Ltd v Edwards & Williams Greenhouses Ltd* (2001)9 NZCLC 262).

3.4 In South Africa the Supreme Court confirmed that the rule applied in the case of *Manong & Associates PTY v. Minister of Public Works and Another* [2009] ZASCA 110. The Supreme Court observed that 'litigation would become very difficult if a Court had to be concerned at every step of the proceedings as to the authority of the person conducting the litigation to make decisions and admissions binding on the company.' The Court was also concerned that corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk. The Court contemplated the prospect of a relaxation of the rule in rare and special circumstances where to do so would best serve the administration of justice.

3.5 In Scotland, in 2010 the Inner House of the Scots Court of Sessions in *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* [2010] CSIH 80 upheld the strict rule and found it consistent with Art 6 of the European Convention on Human Rights. Lord Hodge stated:

*'Article 6 of the European Convention on Human Rights gives everyone a right to a fair trial. That right includes, in most circumstances, the right to attend a court hearing and participate effectively in the proceedings. Companies and other non-natural persons can be victims in terms of the Convention. But that does not necessarily mean that in relation to representation in court a company should be treated in precisely the same way as a party litigant. A company as a legal person is not the same as a natural person. Where a person chooses to obtain the benefits of limited liability by trading through the medium of a registered company, he has also to accept the disadvantages to which separate legal personality gives rise. Thus as a general rule I see no incompatibility between Article 6 and the requirement that a company be represented in court not by a director but by a suitably qualified legal representative who has responsibilities to the court and who is subject to professional discipline.'*

Lord Hodge went on to state, however, that an exception might be required in exceptional circumstances in order to ensure a fair hearing under Article 6.

3.6 The rule is also strictly applied in Hong Kong. In *Wing Hang Bank Limited v. Kit Choy Development Limited & Choy Bing Wing* [2005] HKCA 287, the Court refused to allow a director represent the company at an appeal of a decision to strike out proceedings, even though he was also personally named as a defendant in the proceedings.

## 4. The approach in England, Northern Ireland, and Australia

4.1 Wider discretion is apparent in English and some Australian cases. Most notable is the decision of Scott J. in the English case of *Arbuthnot Leasing Ltd. v. Havelet Leasing Ltd.* [1990] BCLC 802 where the learned judge recognised the inherent right of the English Courts to permit any person to act as lay advocate for another provided exceptional circumstances so warrant. In that respect the decision differs little from the Irish Courts' decisions in *Coffey v. Tara Mines Limited* and *Re an Application by Stella Coffey, NO2GM Ltd & Others*, above. What is of interest, however, is that Scott J. considered the cost of litigation and the inability of the company to pay for representation as a significant factor in the exercise of the Court's discretion; he said:

*"I can see no sound reason of practice, procedure or policy which obliges the court to say to the director who desires to make such an application, 'your only remedy is to put your hand in your pocket and instruct solicitors and counsel to appear on the company's behalf.' I repeat, I see no reason why an individual should be forced to incur the horrendous cost of commercial litigation if he is willing to appear in person"*

In *Arbuthnot* a decisive factor may also have been the fact that the assets of the Company were frozen by injunction. In later cases (*Radford v. Freeway Classics* [1994] 1 BCLC 445; *Floods of Queensferry Ltd v Shand Construction Ltd and others* [1997] 81 BLR 49) mere financial difficulty alone was held *not* to amount to exceptional circumstances justifying departure from the rule that a company must be represented in court by a lawyer.

4.2 The decision has been overtaken to some extent by civil procedure reforms in England and Wales. In his 1996 Report *Access to Justice*, Lord Woolf recommended that the rules of court should no longer require a company to act by a solicitor and that the court should normally exercise its discretion to allow an employee of a company to take any steps on behalf of the company which a litigant in person could take (paras 61-72 and recommendations 152 and 153). These recommendations were in the context of a complete overhaul of the civil procedure rules which also provided for extensive case management and for the power to award costs against non-parties.

4.3 Rule 39.6 of the Civil Procedure Rules now expressly gives the court discretion to allow a company to be represented by a non-lawyer on a case-by-case basis. It provides simply:

*A company or other corporation may be represented at trial by an employee if –*  
*(a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and*  
*(b) the court gives permission.*

The accompanying Practice Direction requires the company to produce information about the intended representative in a written statement, as well as the requisite authority, to

enable to the court to determine whether the employee has the knowledge and capacity to make a meaningful contribution to the proceedings.

- 4.4 The cases applying rule 39.6 of the Civil Procedure Rules reveal generally that the rule is “not an indulgence and still less unlimited” (*Pall Mall Investments Ltd v Leeds City Council* [2013] EWHC 3307 (Admin)) and “the exception rather than the rule” (*Shared Network Services Ltd v Nextiraone UK Ltd* [2011] EWHC 3845 (Comm) (QBD (Comm))). Particularly interesting also is the decision in *Watson v Bluemoor Properties Ltd* [2002] EWCA Civ 1875 where the Court of Appeal noted that a former director of a company was in effect the *alter ego* of the company and therefore effectively represented the company in court when he appeared in court himself.
- 4.5 The position in Northern Ireland reflects the approach adopted in England and Wales: *Ulster Weavers Home Fashions Limited v. Waterfall NI Limited* [2013] NI Master 2.
- 4.6 In Australia, approaches differ from State to State; in Victoria the Supreme Court Rules require a company to appear through a solicitor save where the rules or statute provide otherwise; in New South Wales, however, the Uniform Civil Procedure Rules permit a corporation to appear in any court by a solicitor or by a director of the company, and in the local courts by a duly authorised officer or employee of the company.

## 5. The Validity of the Rule

- 5.1 The Scottish Court of Sessions in *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd*, above, upheld the strict rule and found it consistent with Art 6 of the European Convention on Human Rights. In Ireland, the rule is understood not to offend against the Irish Constitutional right of access to the courts either (*Abbey Films v Attorney General* [1981] IR 158). And in *Schreibman v. Walter E. Heller & Co. (In re Las Colinas Dev. Corp.)*, 585 F.2d 7 (1st Cir. 1978) the US First Circuit found that the rule did not breach anti-trust (competition) law. Even the European General Court has embraced the rule to a significant extent in the context of in-house lawyers employed by a company in relation to proceedings involving the company; *Prezes Urzedu Komunikacji Elektronicznej v European Commission, Case T-226/10*. And in *Allied Irish Banks Plc -v- Aqua Fresh Fish Limited* [2015] IEHC 184 Keane J held that the coming into force of the Lisbon Treaty has not in any way affected the validity of the rule or the binding effect of that rule upon the Court.

## 6. Matters considered by the Company Law Review Group

### 6.1 Whether there is a need for legislative action in this area?

- 6.1.1 The Review Group remains to be convinced of the need for a radical overhaul of the law in this area. Though it remains sympathetic to the plight of the many companies that fell victim to the collapse of the property market, and recognises that in the absence of available funding a number of companies have been unable to have their objections to summary judgment heard, the Review Group recognises that the Courts retain the discretion to hear from non-lawyers where justice requires and are best placed to determine whether justice so requires in the case of companies who are party to court proceedings. In particular the Review Group does not recommend that legislation should introduce a blanket permission to companies to be represented by their shareholders, officers, or others, or a general entitlement to so act where they are in financial difficulty.
- 6.1.2 The Review Group observes that the general rule against *pro se* representation of companies in court is well established in Ireland and almost universally followed in other jurisdictions. There is no suggestion that the Irish approach is significantly out of line with the approach in most other jurisdictions; indeed the Irish Supreme Court's decision in *Battle* has itself been cited with approval in the courts of many other jurisdictions. That in itself is not a justification for the rule but it is an indicator that it is not arbitrary or absurd. Whilst the strict application of the rule may on occasion lead to apparent or real hardship, such consequences can be considered the *quid pro quo* for the concession of separate legal personality. As O'Dálaigh CJ stated in *Battle* -

*"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 their legal right of audience which they would have as individuals; but the choice has been their own."*

- 6.1.3 The Review Group notes also that the rule is derived from principles that are fundamental to the procedure of the Courts in general (the principle against unlicensed practice of law before the Courts) and fundamental to company law in particular (the principle of separate corporate personality); and the Constitutional validity of the rule and its compliance with Human Rights law and European Union Law has been upheld in various forums.
- 6.1.4 The Review Group also notes that the Irish Courts retain the discretion to relax the rule in circumstances where the requirements of justice permit, and that the Courts themselves are well placed to determine the requirements of justice in any particular case. The Review Group is sensitive to the danger that legislative intervention in this area may have knock on consequences in other areas – for example in the general

principles regarding lay litigants, in the licensing of legal practice, and in the capacity of the courts and court services to manage the ever increasing number of cases being sent to litigation.

- 6.1.5 The Review Group is also conscious that significant practical implications may arise for the effective conduct of litigation in the courts if the rule is to be dispensed generally. The proportion of litigation involving natural legal persons before the courts has increased very substantially in recent decades. While a natural legal person is, of course, fully entitled to prosecute or defend proceedings without legal representation, the presence of a professionally unrepresented litigant in proceedings can add very considerably to the time requiring to be devoted to a the case both by the court and the other party or parties involved, and consequently to the costs of resolving the dispute. In *R.B. v A.S.* [2002] 2 IR 428, Keane CJ observed (at page 447):

*“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...”*

*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 ...”*

A distinguished commentator in a neighbouring jurisdiction has concluded:

*“However hard the courts try to accommodate personal litigants it is unrealistic to suggest that such litigants are not often at a considerable disadvantage. So too is the court. The adversarial system depends, not only for the justice of the ultimate outcome, but also for the efficiency with which the proceedings are conducted, upon the assumption that the competing cases are being put by professionals who have the skills necessary to marshal evidence and argument, to identify the issues to be determined, to present the facts capably, and to understand and argue the law. For a system based upon that assumption, self-represented litigants are a serious problem.”*

[Master Evan Bell, Court of Judicature of Northern Ireland, *“Judges, Fairness and Litigants in Person”*, Judicial Studies Institute Journal (2010), Vol. 2, pages 75 to 76]

- 6.1.6 The extension of a general right of self-representation to companies could result in a further increase in the proportion of litigation before the courts in which one or more of the parties is unrepresented, adding to the length of hearings of pre-trial applications and trials, and placing additional pressure on court lists and waiting times for disposal of cases. Aside from the effect on the courts system itself, however, litigation prosecuted or defended by an inexperienced litigant imposes burdens on the other party or parties to the case, by virtue of the additional time expended in and complication of addressing it, and the additional legal costs which that may entail.
- 6.1.7 A danger of allowing self-representation to companies is that it may facilitate the circumventing of restraints on the bringing of frivolous or vexatious claims. A significant deterrent to the bringing of such claims is the prospect that the plaintiff concerned – who almost invariably will be self-represented and free from the constraints which professional legal representation impose – may face personal liability for costs awarded against them on the proceedings being struck out. In serial instances, the individual may be the subject of an *Isaac Wunder* order. However, were it possible for a claim of that nature to be brought through the medium of a company without the need for legal representation, the prospect of a costs sanction against the company would not likely be dissuasive. Furthermore, an *Isaac Wunder* order would be of little value were it possible to defeat it by litigating afresh through a newly formed company.
- 6.1.8 That said, the Review Group is generally supportive of efforts to improve access to justice, and of measures to simplify the interaction between companies and the courts and regulators; bearing in mind particularly that the vast majority of Irish companies are small private companies. To this end, the Review Group considered a range of matters, discussed in the following paragraphs.

## 6.2 A legislative restatement of the rule?

- 6.2.1 As part of its policy of simplifying company law the Review Group in its First Report 2000-2001 recommended the statutory restatement of a number of common law principles, principally the fiduciary duties of directors, which are now listed expressly in section 228 of the Companies Act 2014. The Review Group has considered whether a statutory restatement of the rule regarding the representation of companies in court, which is also a common law rule and not stated in the Companies Act 2014, might also improve the landscape for the users of the Companies Act 2014.
- 6.2.2 On balance the Review Group did not consider that a legislative restatement of the rule was a high priority, but overall there was no resistance to the idea, provided such a restatement remained true to the original principle whilst maintaining the discretion of the Court and did not trespass on the domain of the Rules Committees of the Courts with regard to the general regulation of the court procedure. The advantage of a restatement would be that the rule would be more accessible – or perhaps less of a surprise – to the users of the Companies Act 2014, and to the Courts. A disadvantage

might be that the Supreme Court would be deprived of the possibility of revisiting the decision in *Battle* - though that may seem remote given recent decisions here and elsewhere.

- 6.2.3 As to form – how would the rule be restated? The Review Group suggests that the rule would comprise two elements: the general prohibition, and the reservation of the discretion. This might be worded thus:

**“Appearance and Representation of a Company in Court**

(1) Save as provided by law, a Company may not appear or be represented in court unless by a solicitor or by counsel instructed by the solicitor for the company.

(2) Subsection (1) shall not restrict a court from exercising its discretion in exceptional circumstances to allow a company to appear in court or be represented by someone who is not a solicitor or counsel instructed by the solicitor for the company.”

- 6.2.4 The saving in subsection (1) is designed to allow for any exceptions that might be carved out elsewhere in the Companies Act 2014 (see para2.7 above and para6.3.2 below) or in other Acts or the Rules of Court. Further detail might be required to preserve any relaxation of the representation rules applicable in the Small Claims Court. The Review Group also notes that representation rules in private arbitration and other forms of Alternative Dispute Resolution differ to the rules applicable in court and the above provision is not intended to change that situation.
- 6.2.5 The use of the words “solicitor” and “counsel instructed by the solicitor for the company” follows the pattern of Order 6 of the District Court Rules providing for rights of audience before the courts (there is no analogous express rule in the Rules of the Superior Court or the Circuit Court Rules) and is phrased thus to avoid any implication of a general right of direct access to barristers by companies in contentious matters.
- 6.2.6 The use of the formula “exceptional circumstances” departs from the formula “rare and exceptional circumstances” which is found in the case-law. The Review Group considered that the word “rare” connoted a degree of empirical consideration which would be difficult to quantify and which might deter a court from exercising the discretion in otherwise worthy cases.
- 6.2.7 The Review Group considered that the court’s discretion is best preserved when the provision does not list, by way of individual examples or by way of general principle (e.g. “where the justice of the case so requires”) the circumstances in which the court might exercise its discretion. There might, however, be some merit in a limitation for the avoidance of doubt to the effect that economic difficulties and insolvency are not normally of themselves “exceptional circumstances” for the purposes of the provision.



### 6.3 A relaxation of the rule for certain proceedings or courts?

- 6.3.1 The Review Group noted that in jurisdictions where the rule had been relaxed by legislation it was often in the context the lower courts where proceedings might be more informal in any event. In this regard the question arose as to whether the rule might be relaxed for, say, the District Court. Given the concerns expressed at para 0 above the Review Group felt that such blanket changes should not lightly be made, if at all, and should at a minimum involve the District Court Rules Committee.
- 6.3.2 That said, the Review Group was positively disposed to a suggestion from the Companies Registration Office that the rule should not apply in the District Court in applications to extend the time for filing an Annual Return with the CRO under section 343(5) of the Companies Act 2014, since that is a limited corporate procedure which does not involve third parties and does not otherwise trespass on the general principles of procedure before that Court. It is the only non-criminal procedure of the District Court under the Companies Act 2014.
- 6.3.3 The Review Group would recommend that the District Judge should retain the discretion to refuse to allow the company to be represented by someone who is not a director, officer or authorised employee of the company; or who does not have direct knowledge of the circumstances grounding the application.
- 6.3.4 A provision implementing the above recommendation might be made by the addition of a new subsection , subsection 13, to section 343 of the Companies Act 2014 as follows:

*“(13) Notwithstanding subsection (1) of section [the section proposed at section 6.3.2 above], an application under subsection (5) may be made by someone who is not a solicitor or counsel instructed by the solicitor for the company, but the court shall have discretion to refuse to hear someone who is not a director, officer, or employee having authority to make the application, who does not have direct knowledge of the circumstances grounding the application.”*

- 6.3.5 The Review Group was also concerned that the introduction of such an exception would create a precedent for the relaxation of the rule in respect of other corporate applications in other courts. The application in section 343 is the only one of its kind under the Companies Act 2014 in which an application is made to court on notice to the Registrar and which does not involve third parties directly or indirectly. The Review Group was of the view that any similar such procedures introduced in the future should benefit from the provision suggested at para. 6.3.4, provided: they do not involve private third parties; they do not involve complex arguments on issues of law; and they require the representative to have direct knowledge of the facts at issue.



#### 6.4 Reform of the Rule in Criminal Cases.

6.4.1 As regards criminal cases, noted in para. 2.7. above, a statutory exception already exists in section 868 of the Companies Act 2014 permitting companies prosecuted on indictment to appear by a representative who may answer any question and plead on the company's behalf. The section does not confer a general right on companies to be represented by a non-lawyer for all purposes in criminal cases, and the Review Group, for reasons stated at para 6.1 *et seq* above, does not propose any change to this position.

6.4.2 The enactment of section 868 of the Companies Act 2014 concerning trials on indictment does, however, create an apparent anomaly whereby a company prosecuted on indictment can appear by an authorised representative whilst a company prosecuted summarily must appear by a solicitor or barrister. Though the Review Group has not heard that this apparent anomaly has caused any difficulty or concern, it is disposed towards removing the anomaly by extending the permission given by section 868 of the Companies Act 2014 to companies who are defendants in summary prosecutions. This could be achieved by the deletion of the word "indictable" wherever it appears in the section, or, by the adoption of a provision along the following lines:

- 1) A company charged with a summary offence may appear at all stages of the proceedings by a representative who may answer any question, exercise any right of objection or election, and enter any plea on the company's behalf.
- 2) In this section, "representative" in relation to a company means a person duly appointed by the company to represent it for the purpose of doing any act or thing which the representative of a company is authorised by this section to do.
- 3) A representative of a company shall not, by virtue only of being appointed for the purpose referred to in subsection (2), be qualified to act on behalf of the company before any court for any other purpose.
- 4) A representative for the purpose of this section need not be appointed under the seal of the company.
- 5) A statement in writing purporting to be signed by a managing director of the company or some other person (by whatever name called) who manages, or is one of the persons who manage, the affairs of the company, to the effect that the person named in the statement has been appointed as the representative of the company for the purposes of this section shall be admissible without further proof as evidence that that person has been so appointed.

#### 6.5 Wider reform involving other agencies?

6.5.1 As noted above the Review Group would not recommend the relaxation of the rule further by means of a provision in the Companies Act 2014, despite the criticism that the rule sometimes appears harsh or unjust. The Review Group considers that any further relaxation should only be in a context of wider policy reforms on access to justice and rights of audience in the civil courts.

- 6.5.2 The Review Group would make itself available to the appropriate agencies in any relevant reform of the general procedural rules regarding representation in court. The Review Group notes in particular that changes to the rules regarding representation of companies in court in England and Wales were part of a general overhaul of civil procedure rules, and were matched by changes strengthening the power of the courts to strike-out vexatious or delayed litigation and the power to award costs against non-parties.
- 6.5.3 Other issues that might be considered in the context of such a review and upon which the Review Group might be able to advise include:
- 6.5.3.1 Whether a specific exception should be made for corporate (in-house) counsel without having to meet local recognition requirements?
  - 6.5.3.2 Whether a distinction might be made between corporate plaintiffs and corporate defendants?
  - 6.5.3.3 Whether special provision is justified for not-for-profit companies or registered charities?
  - 6.5.3.4 Whether certain persons should specifically be excluded from acting as corporate representatives in Court?
  - 6.5.3.5 Whether corporations can recover their costs when represented by a director or employee?

## Appendix A: Members of the Company Law Review Group Subcommittee on the Representation of a Company in Court Courts

<b>Brian Hutchinson</b>	Chairperson
<b>Jonathan Buttimore</b>	Office of the Attorney General
<b>Jim Byrne</b>	Revenue Commissioners
<b>Helen Dixon</b>	Companies Registration Office
<b>Stephen Dowling</b>	Bar Council
<b>Tanya Holly</b>	Department of Jobs, Enterprise and Innovation
<b>Ralph MacDarby</b>	Institute of Directors
<b>Vincent Madigan</b>	Ministerial nominee
<b>Kevin Prendergast</b>	Office of the Director of Corporate Enforcement
<b>Noel Rubotham</b>	Courts Service
<b>Conor Verdon</b>	Department of Jobs, Enterprise and Innovation