APPROVED

THE COURT OF APPEAL

Record No.: 2022/275

Donnelly J. **Neutral Citation Number [2024] IECA 104**

Ní Raifeartaigh J.

Binchy J.

IN THE MATTER OF REGULATION 1215/2012 AND ORDER 42A OF THE RULES OF THE SUPERIOR COURTS AND S.I. NO. 9/2016

BETWEEN/

MICHAEL SCULLY

APPELLANT

-and-

COUCAL Ltd.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on this 30th day of April, 2024.

Introduction

1. This judgment considers the public policy exemption which permits a court to refuse to recognise a judgment handed down in another EU Member State. The recognition and enforcement of judgments, provided for in Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) ("Brussels I (Recast)" or "the Regulation"), is founded in the EU principle of mutual trust in the administration of justice. Article 36 of Brussels I (Recast) provides for a presumption of recognition between courts of EU Member States, and public policy is one of the limited

circumstances upon which refusal of recognition and/or enforcement is permitted under the Regulation (see Article 45).

2. One of the key issues in the case is precisely when Irish law considers the assignment of a cause of action to be invalid because it savours of champerty and when it does not. More particularly, the judgment examines the relative importance during that analysis of (i) the fact that the assignee is entitled pursuant to the express terms of the assignment to carry out a further assignment to an unconnected third party; and (ii) the degree of connection between the assignor and assignee at the time of the assignment. The discussion includes an analysis of the judgments in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2019] 1 IR 1 ("*SPV Osus*") and the recent judgments in *McCool v. Honeywell Control Systems Ltd* [2024] IESC 5 ("*McCool v Honeywell Control Systems*").

Background

3. Mr. Scully, ("the appellant" or "Mr. Scully" as appropriate), claims that recognition of a judgment ("the Polish judgment") and order awarded against him in Poland, and the subsequent order permitting enforcement of that judgment, must be refused under Article 45(1)(a) of Brussels I (Recast). That Article provides that "the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed".

4. The appellant submits that the judgment issued against him violates public policy of this jurisdiction in two ways; first, that the judgment was issued by a court in Poland improperly constituted contrary to the principle of judicial independence and second, that the transfers of rights to take the action against the appellant to the respondent company was the transfer of a bare cause of action and was impermissible in Irish law because of the prohibition on maintenance or champerty. Relying on the decision of the Supreme Court in SPV Osus , the

appellant argued that the proceedings from which the judgment in question arose savoured of champerty.

5. The appellant's request for orders seeking refusal of the recognition of the orders of the Court of Appeal in Warsaw was rejected by the High Court in an *ex tempore* judgment of 11 November 2022.

6. The respondent in these proceedings, Coucal Ltd, ("Coucal" or "the respondent" as appropriate) is a limited company registered in this jurisdiction whose shareholders consist of 63 Irish-based individuals who were among 78 investors who invested in 2006 in a construction project carried out by Castle Carbery Properties Ltd, a company owned by Mr. Scully and one Mr. Coll. The construction project consisted of the purchase of land and the construction of a shopping centre in Opole, Poland. On behalf of Coucal, Ms. Doreen Ryan, an investor in the relevant scheme and a director and shareholder of Coucal, has sworn an affidavit in which she describes the arrangement as follows:

> "The Irish Investors invested considerable sums, which took the form of share capital in a Polish special purpose vehicle Coucal SP Zoo (hereinafter "the SPV"), which was to undertake the construction project. The 78 investors acquired 99.84% of the share capital in the SPV, while the remaining 0.16% was held between Michael Scully and Padraic Coll equally. In order to build the shopping centre, the SPV borrowed approximately €48m. The shopping centre was expected to be completed in Q1 2009."

7. In 2010, it is alleged, the investors expected a return on their investment. It is said they were under the impression that the shopping centre was completed and opened in March 2009 and had been running successfully and at a profit since then. The investors allege that they were defrauded by Mr. Scully when he induced them to divest themselves of their investments in the shopping centre, on terms which were very unfavourable to them and very favourable to

Mr. Scully. As part of the new arrangement, the investors granted powers of attorney to Mr. Scully in March 2011. Following this, it is alleged on behalf of Coucal that: "In breach of the powers of attorney and his fiduciary duties to the investors, Michael Scully proceeded to enter into transactions which were heavily unfavourable to the investors. The investors were not informed of, and did not have any knowledge of, most of the transactions that Michael Scully was executing on their behalf". The transactions entered into by Mr. Scully had "devastating consequences for the investors". The investors say they have never received any proceeds of the investments, including from the sale of the shopping centre in March 2015.

8. In May 2015, the shareholders of Coucal made individual assignment agreements with the company in order to assign rights of future debt due to the shareholders from Mr Scully. A supplemental assignment was made in order "to widen the nature of the assigned rights to Coucal, so as to ensure that it was fully capable of pursuing the claims against [Mr. Scully, Helen Scully] and Mr Coll across Europe". Ms. Ryan on behalf of Coucal states that she represents those investors "who assigned their claims (described as future debts) to Coucal to enable it to take action on their behalf against Michael Scully in Poland in 2015". For completeness, she refers to a further supplemental assignment through which 57 investors assigned to Coucal, *inter alia*, their interest, causes of action, claims and actionable rights in relation to their investments in this investment project as well as for the wrongdoing committed against them by Michael Scully and other wrongdoers in the context of this investment project. Another claim against Mr. Scully was taken by Coucal in Cyprus but this appeal concerns only the Polish judgment.

9. The operative section of the assignment agreement between each investor and Coucal provides that the assignment is for a *future debt* due from Mr. Scully provided the Court rules that the Shares Purchase Agreement is null and void. That assignment agreement also provides for the assignment of all rights relating to the future debt and described it as a conditional claim

provided that the court rules that the Shares Purchase Agreement is null and void. There is a right for onward transmission of the transferred claim which is expressed in the following way: "The Assignor states that …the right to sell the Debt to the third party has not been excluded".

10. In August 2015, Coucal exercised its assigned powers by instigating civil proceedings in the Regional Court of Warsaw against Mr. Scully "seeking a declaration of nullity of the agreements that he entered on their behalf using powers of attorneys granted to [Mr. Scully], and the return of the purchase price, on the grounds, *inter alia*, that Mr Scully, his servants or agents were not authorized to sign such agreements pursuant to the powers of attorney". Coucal was initially unsuccessful but filed an appeal in October 2018.

11. In June 2021, the Warsaw Court of Appeal found that Mr. Scully had wrongfully and without authority purported to enter into agreements on behalf of Coucal's shareholders and awarded judgment against Mr. Scully to "the sum of PLN 28,391,106, as well as statutory interest and the costs of the entire proceedings". This sum equates to approximately €6.331 million.

12. On 7 July 2021, the Court of Appeal in Poland permitted Coucal to commence enforcement proceedings in Ireland in respect of the judgment. By letter dated 28 July 2021, Coucal served Mr. Scully with a copy of the Polish judgment and a certificate from the Court of Appeal in Warsaw pursuant to Article 53 of Brussels I (Recast). The letter laid out Coucal's intention to commence enforcement proceedings in Ireland against his assets in this jurisdiction, including his farm in Co. Cork, pursuant to Chapter III of the Brussels I (Recast).

13. In response, Mr. Scully filed an originating notice of motion on 30 July 2021 initiating proceedings in the Irish High Court (Record No. 2021/8FJ) seeking refusal of recognition and enforcement of the Polish judgment pursuant to Article 45 of Brussels I Recast. On 6 December 2021, Coucal issued proceedings (Record No. 2021/340MCA) seeking discovery and cross-examination in aid of execution against Mr. Scully.

14. Subsequently, on 11 May 2022, the Polish Court of Appeal delivered written reasons for its judgment of 10 June 2021. On 11 July 2022, Mr. Scully sought leave to appeal to the Supreme Court of Poland, which was granted in March 2023. The respondent submitted that the appeal in Poland has no bearing on this appeal where no stay has been granted on the Polish judgment delivered in favour of Coucal. This Court has been informed that in February 2024 the Polish Supreme Court has made an Article 267 reference to the CJEU relating to issues concerning judicial independence and impartiality; one of those questions concerns the precise issue raised in this appeal of the claimed lack of independence of one of the Polish Court of Appeal judges.

High Court Judgment

15. In an *ex tempore* judgment delivered on 11 November 2022, the High Court refused the orders sought in the motion by Mr. Scully. The High Court noted that "compelling policy grounds [have] always been a basis on which courts have refused to recognise foreign judgments". The High Court stated that it had an obligation to consider refusal of recognition under Article 45(1)(a) where there is evidence that recognition would be "manifestly contrary to public policy". The High Court found that there was no evidence before it to such effect.

16. Dealing with the impugned assignment, the trial judge said in this jurisdiction, generally the assignment of a right of action for damages in tort is treated as void, though not always. He said that he found the decision in *SPV Osus,* in which the Supreme Court refused to allow an action to proceed based on reasons of public policy, to be of no assistance. The first reason was because it involved a claim taken in Ireland. The view of the trial judge was that the Irish courts would have upheld the judgment of the New York court if those holding the benefit of the assignment had sued there. He said that "[t]he law of the place where the litigation is engaged in determines whether or not the assignment will or will not be recognised as valid for

public policy reasons". His second reason for saying *SPV Osus* was not applicable, was because in his view the facts did not demonstrate a manifest public policy reason for refusing recognition. He stated the investors who had a right to sue in Poland for return of their money were also shareholders in Coucal. He said there was a correspondence between the investors' shareholding and the claims in the case. He said the point was covered in para 88 of the judgment of O'Donnell J. and he said that this was not a case of a cause of action being traded. The shareholders were involved to recover their money and not to make a profit.

17. The trial judge stated that he did "not accept that this arrangement smacks of maintenance or champerty". Instead, he redefined this ground as being an argument "that Irish law may not align with that of Poland on who can bring an action if the action was brought here". He commented "[t]hat is a matter for the law of the forum. It is not an essential ingredient of the legal order in Ireland that we insist that other states' rules relating to assignments of rights of action be the same as our own", he found no basis on which to refuse recognition of the Polish judgment. He also highlighted that this argument had not been raised before the Polish courts, and so the matter of who "could or should have sued cannot be made here now". The High Court concluded "there is no issue that some fundamental principle of Irish law would be infringed by recognition of the judgment by reason of the assignment and cause of action issue.

18. In relation to the second ground concerning rule of law issues in Poland, the issue before the Court was that one of the judges who heard the appeal was seconded from a lower court in Poland by the Minister for Justice. The Polish Minister retains control of the appointment and removal from the Court of such a judge in this position (and has a certain role in the discipline of judges). This procedure, in the context of criminal prosecutions, has been condemned by the CJEU as being incompatible with Article 19(1) TFEU on judicial independence in Joined Cases C-748/19 to C-754/19 *WB & Ors*.

19. The High Court held that there was no evidence before him demonstrating that this possibility for ministerial abuse had any impact on the conduct or outcome of the respondent's appeal in Warsaw. It was stated:

> "Applying Article 45(1)(a) of the Regulation to this issue, this court is required to examine whether the appeal was conducted in some way which infringed a fundamental principle of Ireland. Theoretical possibilities for executive interference of a direct or indirect way in the conduct of a judge of this sort of an appeal or the outcome are not enough to justify this court in interfering".

20. The High Court agreed with Coucal's submission that in order to refuse recognition in this case, it would be necessary to identify a systemic deficiency in the procedure, and then that the systemic deficiency had a significant impact on the proceedings. This, per the court, aligns with the "second step" of the examination described in Joined Cases C-562/21 PPU and C-563/21 *X and Y v Openbaar Ministerie* related to the European Arrest Warrant ("EAW") framework. In the context of execution of an EAW, "the executing judicial authority is only required to put in course enquiries about the position in Poland on the basis of some evidence by the person concerned which warrants the making of this type of enquiry… There must be tangible evidence to justify an enquiry". The trial judge held that any evidence warranting such an inquiry in this case would be purely speculative. For largely the same reasons, the trial judge found that he was not in a position to make a preliminary reference on whether an enquiry into some irregularity of substance in the secondment procedure in this case or a potential interference with judicial independence should be carried out by the Polish Supreme Court, as requested by the appellant.

21. Finally, the High Court also refused to await the outcome of a reference made by a Polish Court concerning the compatibility with EU law of the secondment of a judge to a higher

civil court for a fixed or indefinite period on the basis of criteria which have not been made public, with the possibility of terminating the secondment of that judge at any time and without stating reasons (Case 43/22 *Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 18 January 2022 — Prokurator Generalny*). It was held that no useful purpose would be served in doing so given the conclusion that no evidence of interference with judicial independence had been presented.

Grounds of Appeal

22. The appellant's notice of appeal, broadly, presents three grounds of appeal, divided into several sub-grounds. These are:

1. Refusing to make an Order pursuant to Article 45(1)(a) of Brussels I (Recast) refusing recognition of the Polish judgments.
2. Refusing and/or failing to make an Order requesting a preliminary ruling from the CJEU under Article 267 of the Treaty on the Functioning of the European Union especially in circumstances where the High Court had relied upon the EAW jurisprudence in making its decision to refuse the appellant the relief sought. In doing so, the appellant claimed the trial judge was establishing a new test for the application of Article 45(1)(a) founded in EAW jurisprudence, despite the Brussels I (Recast) regulation being confined to the recognition of civil and commercial judgments.
3. Determining that no useful purpose would be served by awaiting the result of point 2 of the pending preliminary reference before the CJEU in Case C-43/22.

Refusal on Public Policy Grounds: The Principles

23. The principles underpinning the legal framework governing non-recognition of EU judgments are not in doubt. In *Brompton Gwyn-Jones v McDonald* [2021] IECA 206

("*Gwyn-Jones (No. 1)*"), the Court of Appeal (Murray J.) summarised the general principles underlying the application of Article 45(1)(a) in Ireland as follows:

> a. "the circumstances in which the receiving court will refuse to recognise and enforce a judgment to which the Recast Regulation applies will, by definition, be exceptional;
>
> b. the court asked to recognise or enforce a judgment to which the Recast Regulation applies may not review the accuracy of the findings of law or fact made by the court of the State of origin; and,
>
> c. the onus is on the party seeking to avoid recognition and enforcement to establish the facts and circumstances which require the application of one or other of these exceptions."

24. There is a high bar for non-recognition of EU judgments on the grounds of public policy. Member States are, however, free to determine the content of their national public policy when considering Article 45(1)(a) applications (see *Gwyn-Jones (No. 1)* and Case C-7/98 *Kromback v Bamberski)*. That freedom operates inside strict boundaries. As the Court of Justice stated in Case C-420/07 *Apostolides v Orams & Anor ("Apostolides v Orams")* referring to the relevant provision in the predecessor to Brussels I (Recast), and repeated in C-681/13 *Diageo Brands BV v Simiramida*:

> "Recourse to the public-policy clause in Article 34(1) of Regulation No 44/2001 may therefore be envisaged only where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another Member State

to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order…". (para 44)

24. Recognition or enforcement of a judgment on public policy grounds may not be refused on the basis "solely that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute" (see *Apostolides v Orams* at para 58). It should also be noted that the word manifest was an addition to the exception when the original Regulation was recast in 2012. Murray J. views this addition as underscoring the exceptional nature of the public policy ground with a view to improving the free movement of judgments (citing Case C-681/13 *Diageo Brands BV v Simitramida-04* ECLI:EU:C:2015:137 at para 42 Opinion of Advocate General Szpunar).

25. It is in the application of those general principles to the factual situation at issue that the parties diverge. The appellant submits that his application for non-recognition is not based on a mere discrepancy of legal rules between Poland and Ireland, but on a "serious and manifest violation of a rule of law which must be regarded as essential within the legal order of the State". These violations, the appellant submits, are the violation of the EU rule of law principle of judicial independence, and the Irish law prohibiting litigation trafficking. On the other hand, Coucal submits that the principles are set out in quite stark terms in the case-law and that the level of breach required had not been reached.

First Public Policy Ground: Transfer of a Bare Cause of Action

26. This ground requires consideration of two separate matters. The first is whether the assignments by the investors to Coucal are the types of assignment which would be contrary to Irish law in the hypothetical situation that the claim was litigated in this jurisdiction. The

second issue is whether, if these specific assignments would not be enforced in this jurisdiction, the public policy exception within Brussels 1 (Recast) permits (or indeed requires) the court to refuse recognition of the judgment. I am addressing them in this order because a final determination on the second issue could only be made, if indeed required, after identification of the public policy interests in this jurisdiction that might prohibit these assignments.

The Assignment; prohibited if litigated in this jurisdiction?

27. The assignments have been described in broad terms above. The respondent, Coucal, is described by the appellant as "a special purpose vehicle formed to receive a transfer of the asserted claims from 63 individual investors". The agreement between each individual investor and Coucal is for the assignment for *future debt* due from the appellant and all rights related to that future debt, on the condition that "the court rules that the Shares Purchase Agreement/s is/are null and void". It was stated by the High Court that the assignment agreement was "somewhat similar" in its effect to an arrangement where "it is not the right of action but the proceeds that are assigned". The trial judge compared it to an equitable assignment by way of charge of the proceeds of the claim, likening it to a debtor getting his or her solicitor to undertake that the proceeds of a separate claim that they have will be paid by the solicitors into the bank account to reduce the debt. I am satisfied that this is not a correct characterisation of the assignments, indeed I do not understand the respondent to argue that it is correct. These were assignments where Coucal had acquired the *underlying claim* as well as the proceeds of prosecuting that claim through the assignment agreement. As set out above, Ms. Doreen Ryan on behalf of Coucal, averred that the investors "*assigned their claims* (described as future debts)" (*emphasis* added). It was on foot of those assignments which Coucal brought their claim in Coucal and obtained the judgment that is the subject of these proceedings. Apart from

assigning their own claims, what must also be considered is that the rights transferred to Coucal included provision for the onward assignment of the transferred claim to third parties.

28. Are each of these assignments an assignment of a bare cause of action which would be unenforceable if litigated in this jurisdiction? In *McCool v Honeywell Control Systems,* a recent decision of the Supreme Court to which I will return, Murray J. stated: "An assignment of a chose in action is not enforceable if it '*savours of'* maintenance or champerty". Maintenance arises where a person supports litigation in which they have no legitimate interest, while champerty occurs when the person maintaining the litigant stipulates for a share of the profits. But when does an assignment of a chose in action savour of champerty? The appropriate starting place in seeking the answer is the decision in *SPV Osus*. Indeed both parties rely on aspects of it in support of their positions. The judgment of O'Donnell J. (as he then was) is a comprehensive analysis of the "complex and nuanced decisions" on the law relating to assignments of causes of action which are alleged to "savour of champerty". As O'Donnell J. said, these decisions must be read with an appreciation that the public policy considerations involved are acknowledged to have developed and altered over time. I do not believe that the public policy considerations identified by the Supreme Court in 2019 have changed to any appreciable extent in the meantime. No legislative change has taken place. The only other development has been the publication in 2023 of the Law Reform Commission Consultation Paper on Third-Party Funding and Assigning Causes of Action, which will be referred to below. It will be seen from the discussion below, that the case law in this jurisdiction confirms that the assignment of a bare right to litigation is prima facie champertous and therefore unenforceable except where there is a genuine commercial interest in the claim purportedly assigned where that interest exists prior to and independently of the assignment. What is relevant in the assessment of whether there is such a genuine commercial interest in the claim is the nature and strength of the connection between the assignor and the assignee. Such a

connection is not sufficient on its own; what must also be considered is the possibility of onward transmission of the claim to a unconnected third party. How to assess those factors and the relationship between them is central to the findings made in this judgment.

SPV Osus

29. In *SPV Osus*, the Supreme Court directly addressed the issue of whether a "right to litigate" could be assigned. As the facts of that case are complex, I offer a high-level outline of them to establish context. The brevity of the description is not intended to disregard or omit the nuances of the decision. The claim in negligence in this jurisdiction arose out of the collapse of the Bernard Madoff Investments LLC due to a long running and very large-scale Ponzi-type scheme. Significant funds remained in that investment company but not enough to satisfy all investors in full. During the course of the difficult bankruptcy proceedings in New York City, certain funds invested provided for what was known as 'allowed customer claims' which carried an entitlement to be paid in priority. A secondary market in these 'allowed claims' developed and a sophisticated scheme was established to allow the investors of a particular fund to participate in the existence of the secondary market. That involved the creation of a special purpose vehicle and a complex transaction which allowed the assignment of the claims to the plaintiff/appellant. Essentially, what was at issue in those proceedings were assignments of allowed customer claims which carried an entitlement to be paid in priority in the liquidation proceedings before a New York court. A procedure for assigning these claims was recognised by the trustee in bankruptcy and permitted by the New York court supervising the bankruptcy. After a change of directors, the plaintiff company sued the defendants for, *inter alia*, negligence arising from the defendants' stewardship of a fund in which the clients of the fourth defendant had invested. The defendants attempted to have the assignment of the cause of action to the plaintiff declared null, void and unenforceable.

30. Ultimately, having discussed case law from this jurisdiction and from other common law jurisdictions, the Supreme Court held that the assignment of the cause of action was unenforceable. In so holding, the Supreme Court determined that an assignment of a cause of action is unenforceable unless the assignee had *a genuine commercial interest* in the assignment. The interest must *exist prior to or independently of the assignment or the transaction of which it formed part*, although there was a certain liberalisation of what may constitute a legitimate interest. What was not permitted was the commodification of litigation and, thus, what was not permitted were assignments designed and intended to facilitate third parties obtaining control of and ultimately benefitting from a claim. Such assignments were invalid because to purchase a claim outright, remove the party from their proceedings, and convert them into a mere witness at best was offensive to public policy.

31. While it is generally unhelpful to recite lengthy passages from previous judgments, some recital of the dicta from *SPV Osus* is necessary in order to understand the full import of the decision. I highlight para 26 as a particularly helpful passage in which O'Donnell J. identifies with great clarity the issues at stake concerning maintenance, champerty, public policy and assignment of bare causes of action. It is of particular note that he identifies champerty as always being regarded as more offensive to public policy than simple maintenance because it contemplated the possibility of pecuniary benefit for the person funding the litigation. Assignments of a bare cause of action can almost be seen as the obverse of champerty because the payment is made in return for the action itself. He observed that in its purest form, an assignment of a bare cause of action involves the outright sale of a cause of action which is then pursued by the assignee (who has no interest or connection to the action apart from the assignment) to the exclusion of the assignor.

32. Counsel for Coucal submitted that s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 ("the 1877 Act") was the starting point for an analysis of Irish law on

assignments. In *SPV Osus* O'Donnell J. recognised that the section represented a procedural change only, permitting in law what had previously only been assigned in equity. He said that the section illustrated that there are some cases, such as assignment of debts, which are permissible and other assignments which are impermissible and void. As Murray J. in *McCool v Honeywell Control Systems* said, "[t]he object [of s. 28(6)] was essentially procedural – to allow the Court to enforce assignments without joinder of the assignor, but only in the same circumstances as Court of Equity could previously do so and subject to three conditions. … Assignments which were unenforceable in the Courts of Equity could not be enforced pursuant to s.28(6)…"

33. In his thorough analysis of the Irish case law in respect of maintenance, champerty and public policy, O'Donnell J. observed that none of those decisions directly considered the law relating to the assignment of a cause of action, still less had they found one to be unenforceable. Thus, it was difficult to draw a hard and fast conclusion as to the law. I pause here to make the obvious point that since *SPV Osus* we now have such a case. Therefore, the law has been clarified to state that assignments of causes of action are unenforceable as contrary to public policy unless there is a genuine commercial interest in the assignment. The decision addressed when it may be said that such genuine commercial interest may arise.

34. O'Donnell J. also noted that the cases had adopted the somewhat archaic language of earlier case law which offered various descriptions of what was offensive such as "trafficking in litigation" and "officious intermeddling" in litigation. He said that those terms ought to be approached with caution as they obscured the fact that in all the cases where those terms were applied it was because "there is discerned, at present, an existing public policy which is found to justify the invalidity of the arrangement in certain circumstances". That language is applied after a transaction and does not explain, at least directly, why it is so offensive to public policy. O'Donnell J. pointed to the different use of language by the parties to *SPV Osus* e.g., pejorative

use of "trafficking" by the defendants and "monetising" by the plaintiff. He said that in the more modern references "investing in litigation" and "commoditisation of litigation" capture an important element of what is considered both dubious and offensive. In the present proceedings, the respondent, Coucal, has sought to characterise the finding in *SPV Osus* as one which prohibited "trafficking in litigation" thereby seeking to distinguish the present case. As we have seen that terminology is not one that is now preferred.

35. O'Donnell J. found it useful to consider the case law of England and Wales even though the crimes and torts of maintenance and champerty had been abolished there in 1967. These cases were illustrative of the public policies considerations applicable and the development of the common law, particularly with regard to the question of the assignment of causes of action. O'Donnell J. concentrated upon the important decision of *Trendtex Trading v Credit Suisse* [1980] QB 629 (CA), [1982] AC 679 (HL) ("*Trendtex*"), a case, as the citations suggest, which was decided after the significant statutory change in that jurisdiction in 1967.

36. The facts of *Trendtex* are also complex, but two specific matters stand out. First, as O'Donnell J. notes, "Oliver L.J. observed in the Court of Appeal, it would be difficult to find more closely interwoven commercial interests than those between Credit Suisse and Trendtex in this transaction". Second, and what was critical for the House of Lords, was that the agreement at issue expressly contemplated that Credit Suisse could assign the claim the subject matter of the agreement to an unconnected third party.

37. O'Donnell J. stated that in one aspect *Trendtex* was "a significant liberalisation of the law: the question was no longer whether there is a separate property interest, but rather whether there is a genuine commercial interest in taking the assignment" (para 76). However, the House of Lords nevertheless considered the assignment invalid and "the critical feature was the contemplated possibility (which occurred in fact) that the cause of action could be assigned to a third party unconnected to the relationship between Credit Suisse and Trendtex, and

accordingly not having the same commercial interest which would have justified the assignment to Credit Suisse". On this second aspect, the parties to this appeal placed different emphasis. Mr. Scully said that the direct statement in the assignment – *that "the right to sell the debt to the third party has not been excluded*"- makes it unenforceable, while Coucal laid great emphasis on the specific recital in the *Trendtex* assignment which made explicit reference to an onward specific assignment.

38. O'Donnell J. looked at how further cases had interpreted/applied *Trendtex.* He said that it was seen as establishing that a core question was the existence of a *genuine pre-existing commercial interest* (para 86). He considered the observations of Baroness Hale in the Privy Council decision of *Massai Aviation v A-G* [2007] UKPC 12 ("*Massai Aviation*"), a case specially highlighted in this appeal by Coucal, where Baroness Hale said that it was important to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy. In that case, company A ('Massai', formerly named 'CAASL') had a claim against the government of the Bahamas and its State airline. After commencing proceedings, company A decided to sell its business for what it could get excluding the lawsuit. A new company, company B ('Aerostar'), was established with a shareholding that exactly mirrored the shareholding of company A. Company B acquired all the issued share capital in company A. Company A then assigned the claim to company B, which was its sole shareholder, for just $10. Company B was added to the proceedings. The following day company B transferred its shareholding, for a significant sum, to company C ('Executive') while retaining the claim. Problems arose, as Baroness Hale observed, when company A no longer wished to continue the proceedings.

39. As the appellant highlighted in submissions, O'Donnell J. specifically noted that the particular circumstances of *Massai Aviation* where the defendants would have escaped

litigation if the assignment was void and thus, as Baroness Hale observed "not an attractive proposition", "may have framed the court's subsequent consideration and decision".

40. Baroness Hale characterised the transaction as simply the original owners retaining part of what they owned while disposing of the rest. No one could have objected if the entire business including the claim had been sold by company A to company C. She observed it was not off course to say that a shareholder will always have a genuine and substantial commercial interest in taking assignment of the company's claims and gave an example of a minority shareholder buying a substantial claim for a nominal sum in the hope of making a substantial profit which may be contrary to public policy. The court concluded that the identity of interest between the shareholders meant that the transaction should not be treated as void.

41. O'Donnell J. said the significance of *Massai Aviation* was perhaps in the interaction with the law relating to the fact that a limited company is a separate legal entity from its individual shareholders. As a matter of law, it could be said that there was intermeddling by company B in the proceedings brought by company A. While they were connected, it is normally a fundamental rule that incorporation creates a separate legal entity distinct from its shareholders. He said a question was whether this decision should be expanded upon or whether it represents no more than the pragmatic recognition that the fact that the claim was being pursued by parties, who, as a matter of fact, if not strict law, had always been involved in the underlying transaction giving rise to the claim, meant that the assignment should not be treated as void (para 88). As will be illustrated, O'Donnell J. made further comments on *Massai Aviation* at the end of his judgment to which I will return.

42. In his final analysis, O'Donnell J. held that the decision of the House of Lords in *Trendtex* was preferable to the decision of the Court of Appeal of England and Wales in a matter of law and logic. It liberalises the law in expanding the circumstances in which an assignment will be permitted, while maintaining a principle that causes of action can be void

for considerations of modern public policy. It gave a clear indicator of the features of an assignment which may make it void and unenforceable.

43. It is noteworthy that at para 94, O'Donnell J. rejected the plaintiff's test which was that an assignment would be void if it were established that "(a) the assignment had an improper purpose and (b) the assignment poses an identifiable and real risk to the administration of justice". This was not a desirable course for the court to adopt. O'Donnell J. also said that even if a broad approach was taken, there was no reason why both of the above had to exist before the assignment was unenforceable. He said even if the test were one or other of those limbs it would be a significant expansion of the law to date. A case by case approach would involve lengthy and unpredictable assessment but also would be inconsistent with the law to date which had never deemed it "necessary to demonstrate that any of the harmful features of maintenance, champerty or assignment should arise in the particular case; rather, it is sufficient that there is a perceived risk in the type of transaction which justifies the invalidation of any agreement of the particular type".

44. It is also of significance that O'Donnell J. rejected the Lord Denning M.R. case by case test (Lord Denning had said that it was a case-by-case test as to "[w]hat circumstances are such as reasonably to warrant the assignment?"). In rejecting this test, O'Donnell J. said it "would not be possible to tell at the date of any assignment if it was valid or not". O'Donnell J. stated:

> "Whatever the uncertainties of the present law, it is at least possible to be clear on what type of transaction would be enforceable, and, where there is doubt, to identify the features likely to affect the outcome. If the court were to adopt even a modified version of the test put forward by the plaintiff which, it should be said, is not supported by any authority) it would lead to considerable uncertainty, with the additional risk of putting the law of Ireland at odds with other common law countries, for no self-evident or persuasive reason."

Thus O'Donnell J., and the Supreme Court, applied the test adopted by the House of Lords in *Trendtex*.

45. O'Donnell J. accepted that an assignment of the right to litigate is unenforceable unless the assignee had a genuine commercial interest in the assignment but also accepted that the trend of the law post-*Trendtex* was towards a more liberal identification of interests which can be described as genuine, whether commercial or not (para 94). The question that had to be answered in that case was whether the assignment which formed part of a large comprehensive assignment of claims represented a sufficiently genuine commercial interest to permit the assignment to be enforceable in these proceedings.

46. At para 95, O'Donnell J. identified the public policy considerations at issue. He said assignments of a right to litigate are void as savouring of champerty or maintenance (which perhaps means that they offend the same public policy which underpins the prohibition of maintenance and champerty and the voidance of contracts which constitute maintenance or champerty) unless they are justified by a genuine (commercial) interest. He noted that even an argument to say it was in the public interest in making legal proceedings accessible to people (noting that in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27 ("*Persona Digital*"), the Supreme Court held that third party litigation funding was offensive to public policy), did not apply in a situation where the validity of the *assignment* of a cause of action was at issue. It is noteworthy that O'Donnell J. opined that in general "an out-and-out assignment of a bare right to litigate which has no redeeming feature, is, if anything, more obnoxious to underlying public policy than champerty and maintenance respectively". In so holding he said that it follows that the type of genuine interest which may be sufficient to justify a person maintaining another person's cause of action, may not itself justify a champertous agreement and still less an outright assignment.

47. From para 98 onwards O'Donnell J. addressed the range of public policy concerns at issue. The continued existence of the crimes and tort of maintenance shows that the concept of litigation as a dispute between individual parties of matters which have arisen between them remains an important value of the law. The idea of the administration of justice carries with it, normally at least, the belief that the resolution of disputes should be the business of the parties themselves and should be brought to the court because there is no other way of resolving it. The intervention of third parties, unless justified, distorts that pattern and the process. While the term "trafficking" is merely a description applied to a transaction of which the speaker disapproves, O'Donnell J. noted in this context it stems from the belief that the subject matter of the trading is a matter which should not properly be the subject of a commercial transaction.

48. O'Donnell J. directly addressed the argument that the assignment of a cause of action simply recognises commercial realities and promotes efficiency. A potential plaintiff, although wronged, may not be willing to engage in long-running, expensive litigation but may consider assigning at the outset, even with a substantial discount, to a party with greater resources. He acknowledged that on one view the objections of other common law systems to out and out assignments of a right to litigate "may seem like doomed Victorian priggishness which cannot survive in the face of modern commercial reality". He said however that the objections of the common law to the commodification of litigation retains force and vitality. He referred in particular to the view of the common law here and in other jurisdictions that litigation was not traditionally regarded as a social good to be encouraged. The costs of providing a court system were not justified on the basis of facilitating a commercial activity but rather because it is necessary for the administration of justice. He said: "It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not". He noted, *inter alia*, that if it was possible to assign freely claims in a market then it must be possible to make collateral agreements in relation to the giving of evidence to support such claims, yet this was

plainly undesirable. He said that the commoditisation of claims runs counter therefore to important interests in the administration of justice. Therefore, while there may be choses in action that can properly be assigned and of which assignment should be encouraged (e.g. the case of commercial debts), the general suspicion and antipathy of the common law to the trading in claims remains well founded.

49. The present case did not come within the decided cases and the issue, according to O'Donnell J., was whether the claim could be treated as permissible as being consistent with principle. Despite being asked to regard the taking of an assignment in the allowed customer claims in the particular circumstances as having created legitimate interests, O'Donnell J. rejected that argument. He was of the view that while the separate legal personality of a limited company may allow different persons to benefit indirectly, as shareholders, from a claim that the company may have, it was not in itself a reason to extend that outcome to persons who are in law different and distinct. He rejected that recognition of these transactions ought to be accepted as a further limited exception to the rule. He said it was hard to see how the assignment could be permitted to take effect in Irish law without substantially undermining the logic of the principle altogether. In respect of arguments about how the transaction which might be impermissible on its own but permissible if part of a larger transaction, O'Donnell J. said:

> "Hitherto, the law has regarded it as critical that the interest claimed to be legitimate and sufficient to justify an assignment should exist prior to and independently of the assignment or the transaction of which it forms part. That is not mere formalism, and to remove it would, in my judgment, undermine the principle to the point where it would be inevitable that the exceptions would eventually devour the rule."

50. O'Donnell J. then concluded:

> "If so, I cannot see that simply because of matters related to structure of the original investor here, or the size of the investment, or that the assignments here were an assignment to SPV Optimal Osus, which was, at the time, a connected party involving a common shareholding, can make a difference. The purpose of the assignment to SPV Optimal Osus, in much the same way as the assignment in *Trendtex Trading v. Credit Suisse* [1980] Q.B 629 (CA); [1982] A.C 679 (HL), was designed and intended to permit onward transactions (which indeed occurred) and, on this view, involved trading in claims. If it is true that Irish law would not enforce the assignment of this claim under the format of assignment approved by the trustee in the New York court if the assignee was an unconnected third party, it cannot, in my view, uphold an assignment to a connected party with a view to facilitating third parties obtaining control of, and ultimately benefitting from, the cause of action. Assuming for the moment that *Massai Aviation v. A-G* [2007] UKPC 12, [2007] 5 LRC 179 also represents the law in Ireland, it provides for an exception in the case of an assignment of a claim to a party where the shareholding is the same as that in the assignor at the time the cause of action accrued. That rationale would not have been available if the shares in Massai had been owned by, or were sold to, an unconnected third party, particularly if done with a view to prosecuting the claim."

McCool v Honeywell Control Systems

51. The Court of Appeal gave judgment in two appeals under the title *McCool v Honeywell Systems* on 11 March 2022 ([2022] IECA 56). The appeals concerned the entitlement of Mr. McCool to be substituted for the company as plaintiff, to enable him to continue the proceedings in circumstances where the company could no longer afford legal representation. He relied on purported assignments of those proceedings to him. Three main issues presented

themselves: a) whether in relying on the assignments Mr. McCool was wrongfully avoiding the "rule in *Battle*" (referring to the case *Battle & anor v Irish Art Promotion Centre Limited* [1968] IR 252) which says that a managing director and major shareholder was not entitled to continue the defence of proceedings on the company's behalf, b) the effect of the fact that the assignments were not absolute, this being a requirement for the enforcement in certain circumstances of an assignment of a chose in action pursuant to s. 28(6) of the 1977 Act and c) whether the assignments savoured of champerty. The latter issue is relevant to this appeal.

52. In the first assignment made by the company to Mr. McCool, it was expressly acknowledged by the assignor that the assignee may at any time "reassign any or all, of the transferred rights, together with all right, title and interest of the Assignee in and to this agreement." Accordingly, the assignment expressly contemplated on its face the possibility of a further assignment to a third party. Giving judgment for the Court of Appeal, Haughton J. examined in detail the caselaw on assignments of causes of action including *SPV Osus*, *Trendtex* and *Massai Aviation*. He distinguished the "significantly different" facts in *Massai Aviation* saying this was not a situation where the company had disposed of all of its business other than the claim in these proceedings, and that "the first assignment was not granted made to an entity with an identical shareholding to that of the Company". Haughton J. also considered the dicta of O'Donnell J. at para 110 as suggesting an inclination on the part of O'Donnell J. to confine *Massai Aviation* to its own facts, and certainly not to extend or apply it in circumstances where there is engagement with an unconnected third party funder and provision in the assignment for onward assignment or indeed where there is a possibility of onward assignment by virtue of s. 28(6) of the Judicature (Ireland) Act, 1877. Haughton J. held that even the narrow exception to the rule in *Massai Aviation* did not apply and that the assignment was not one to "a party with a pre-existing legitimate interest in the transaction giving rise to the claim". The Court of Appeal also accepted that the rule in *Battle* had been

correctly applied in the circumstances of the case by the High Court in concluding that the assignment was an abuse of process. It is important to note, therefore, that on the issue with which the present case is concerned, the Court of Appeal held that the assignment was invalid by reason of the possibility contained within it for onward transmission to a third party.

53. The Supreme Court granted leave to appeal solely on the narrow ground of whether an assignee of a corporate body's interest in litigation may be permitted to pursue the action by being substituted as a plaintiff in lieu of that company, irrespective of the purpose of the assignment. Woulfe J. gave judgment (O'Malley, Hogan, Murray JJ. conc.; Charleton J. diss), allowing the appeal on the narrow ground that an assignee of a company's interest in litigation may in principle be permitted to pursue the action by being substituted as plaintiff in lieu of that company, irrespective of whether the purpose of the assignment is to avoid the rule in *Battle*. As regards the remaining issues, namely whether the validity of any such assignment depended on the assignment complying with the conditions in s. 28(6) of the 1877 Act, and whether any applicable rules of public policy regarding champerty and any applicable rules of company law rendered it invalid, Woulfe J. said he was in broad agreement with the judgments of Hogan and Murray JJ. Charleton J. in his dissent, while not addressing champerty directly, considered issues of public policy especially with regard to separate corporate personality and the treatment of corporations differently to individuals in terms of litigation. Although not within the narrow ground on which leave was granted Hogan and Murray JJ. gave judgments which appear, to a certain extent, to be a response to the issues raised in the judgment of Charleton J.

54. Hogan J. addressed both the rule in *Battle* and whether the proposed assignment savoured of champerty although technically his views on the latter point were *obiter*. Contrary to the views of the High Court and the Court of Appeal he did not think that any such assignment could be invalidated on the ground that it savoured of champerty or that it otherwise

offended against public policy on this ground, provided that Mr McCool retained a significant – if indirect – interest in the outcome of the proceedings. There was no investing in litigation or commoditisation of litigation on the part of Mr. McCool, which words capture an important element of what is considered both dubious and offensive. Hogan J., contrary to Haughton J,, considered that O'Donnell J. had referred with approval to the Privy Council decision in *Massai Aviation* and that this was where he differed from the Court of Appeal's view that Mr. McCool could not bring himself within any of the *SPV Osus* exceptions because the proposed assignment was not "to a party with a pre-existing legitimate interest in the transaction giving rise to the claim". This, Hogan J. believed, was too strict a reading of *SPV Osus*. In this case Mr. McCool had a clear personal interest *qua* principal shareholder in the outcome of the proceedings and the assignment cannot be said to savour of champerty or to be contrary to public policy precisely because of this shared mutual interest.

55. In his judgment, Murray J. remarked that the parties and the Court had proceeded on the basis that leave to appeal was only granted in relation to the issue of the rule in *Battle*, but that in the way the argument had developed, a broader issue arose as to whether the Court should recognise a general public policy that precludes the assignment by a company of legal claims other than through the agency of an independent official such as a liquidator or receiver. Such a claim was accepted in the judgment of Charleton J. Murray J. said he agreed, generally, with the approach that had been adopted by Woulfe and Hogan JJ; however, he thought it possible to address some of the concerns underlying the judgment of Charleton J. *via*, in particular, the principles derived from the law of champerty and maintenance as they have been applied to assignments of a bare chose in action.

56. Murray J. noted that the law had moved to a point that in the case of the transfer from one person to another of a bare power to bring an action, "the starting point is that it is bad, but can in certain circumstances be justified". *SPV Osus* decided that the line as to justification

should be drawn by reference to whether there was, in the language of the House of Lords in *Trendtex*, a genuine commercial interest on the part of the assignee in taking the assignment. He gave consideration to how the concept of a genuine commercial interest which was accepted, in Ireland, had developed in the UK case law subsequent to *Trendtex*. Murray J. drew his conclusions together at para 26. It is unnecessary to set these out in full, it suffices to refer to the following:

> (ii) An assignee who can identify a genuine commercial interest in the claim that has been purportedly assigned will be in a position to enforce the assignment, notwithstanding that it is of a bare right to litigate, if that interest existed prior to and independently of the assignment or the transaction of which it forms part. The need for the validity of the assignment to be tested at the point at which it occurs would suggest that that interest must exist at the time of the assignment.
>
> (iii) A shareholder and/or creditor of a company may have, for these purposes, a commercial interest in legal claims of the company – but only if their interest is sufficiently substantial to render it both 'genuine' and 'commercial'.

57. It may also be of some note that Murray J. said that as the law in this jurisdiction stands at present, "the fact that the assignee can point to a more general interest in pursuing a claim, whether to right a perceived wrong, or ensure that a wrongdoer is brought to account, is not in itself an interest for these purposes". The cases look at commercial interest in the round. Given that the interest must be assessed at the point at which the assignment is made, he was of the view that where a company was insolvent or the transfer would jeopardise its solvency, the shareholder will not have a true commercial interest in the underlying action; that interest will vest in the creditors. To the extent that Murray J. addressed *Massai Aviation*, he did so by reference to "the other extreme" from the major shareholder where Baroness Hale noted "for a

minority shareholder to buy a substantial claim for a nominal sum in the hope of making a substantial profit may well be contrary to public policy".

58. This Court asked the parties for further written and oral submissions to address the effect, if any, of the decision of the Supreme Court in *McCool v Honeywell Systems*. Counsel for the appellant submitted that the decision of the Court of Appeal remained undisturbed in so far as the issue of champerty was concerned. He said that Hogan J. could not reasonably be understood to have overruled the principle in *SPV Osus* concerning onward transmission. At its height, the reference to *Massai Aviation* as being the law was only significant as to the relationship between the parties and not as going to the vice at the heart of *Trendtex*. Counsel for Coucal submitted that the situation here was almost a mirror image of the facts in *McCool v Honeywell Systems* and pointed to the assignors as being the shareholders in the assignee (Coucal). There was a pre-existing relationship because Coucal had been created for this purpose prior to the assignment, thus satisfying the factor which Murray J. had emphasised in his judgment. Counsel also submitted that there was nothing in this assignment to show commodification of transmission. He referred to the consideration payable for the assignment and said that this sum was still due and owing by Coucal. Counsel referred to the difference between this transaction and that at issue in *Trendtex*, a distinction addressed further below. In the latter, onward provision was clearly provided for. He also submitted that if the Court was against him on that aspect, this Court should not follow *McCool v Honeywell Systems*. As Baroness Hale had said, one must look at the transaction as a whole. As part of his reply, counsel for the appellant submitted that if the assignment was enforceable, it would have implications for civil litigation as a whole as it would be a new form of group litigation.

59. I consider that the Supreme Court decision in *McCool v Honeywell Systems* must be approached on the following basis: First, the *ratio* of the case is solely that of the rule in *Battle*. Therefore, the judgment of the Court of Appeal on the finding of champerty still stands.

Second, while the judgments of Woulfe, Hogan and Murray JJ. indicated broad or general agreement with each other, the contents of those judgments indicated an acceptance that the decision on the issue of champerty and the provisions of s. 28(6) of the 1877 Act in the Court of Appeal was final between the parties and no views were expressed as to the correctness of those conclusions. The judgments of Hogan and Murray JJ. clearly gave further consideration to the meaning of "a genuine commercial interest" on the part of an assignee which should exist prior to and independently of the assignment or transaction of which it forms part. The assignment by a company of its cause of action to its 100% shareholder would not, it appears, have caused the Supreme Court any difficulty. I do not consider however that any of the judgments sought to cast doubt on the findings in *SPV Osus* insofar as they concerned the situation with regard to onward transmission of the cause of action. Murray J. in particular, was dealing with the issue of public policy about the implications for corporate law in response to the concerns of Charleton J. and thus was focused on the concept of genuine commercial interest where matters of conflict might arise between or among shareholders and creditors. Therefore the most pertinent Supreme Court decision remains *SPV Osus*.

Decision on the enforceability of the assignments

60. Counsel for Coucal submitted that the assignments at issue in these proceedings would not offend Irish law if litigated here. Counsel submitted that this is because Coucal has a genuine commercial interest in the assignment. This is so for two main reasons. The first reason is that Coucal was formed by its shareholders for this very purpose and there cannot be a suggestion that it is an unconnected third party. There is also full commonality between the original owners (although not all investors to the original scheme made these assignments to Coucal) and Coucal. Counsel submitted that *SPV Osus* can be distinguished on the basis that in *SPV Osus* there was third party involvement and profit by third parties, none of which exists in the present case.

61. Counsel said the second reason which rendered the present assignments valid arose from a direct comparison with the assignment in *Trendtex*. Counsel submitted that what was fatal in *Trendtex* was that it was assigned to a third party but there was uncontradicted evidence from Ms. Doreen Ryan that none of these investors intended to sell their shares. In the present case, counsel submitted, the possibility of assignment was quite theoretical. Upon being asked by a member of the Court whether one looked to the facts of the situation at the time of the hearing or at the time of the assignment, counsel responded by pointing to the facts in *Trendtex* and in particular in the judgment of Lord Roskill where the relevant recitals of the assignment are set out. This, counsel submitted, demonstrated that at the time of the assignment, an offer had been made by a third party to buy the rights and claims of any sort held by Trendtex; thus, counsel said, the critical distinction was that in *Trendtex,* it was clear that, even at the time of the assignment, the assignees intended to traffic in litigation whereas Coucal intended to prosecute the claim itself.

62. Counsel also relied upon *Massai Aviation* and said that the language of Baroness Hale "was taken up" by O'Donnell J. when he cited the *dicta* that referred to looking at the transaction as a whole. With reference to the public policy considerations referred to by the Supreme Court in *SPV Osus*, counsel submitted that there was no question of public policy being offended in this transaction.

63. In my view, the law is clear that the validity of the assignment must be judged at the time it is made rather than by the circumstances existing at the time proceedings were brought. I consider that this is apparent from a) the rejection by the Supreme Court in *SPV Osus* of the test posited by Lord Denning M.R. that would adjudicate on the validity by reference to what was reasonable in the circumstances, and b) by the express rejection of such a test which, if followed, would lead to the impossibility of knowing *at the date of any assignment* if it was valid or not. O'Donnell J. made express reference to the fact that, at the date of the assignment

at issue in *Trendtex*, it was a "potential assignment by Credit Suisse to an anonymous third party" (see para 102 p 56 of judgment in *SPV Osus*). It was clear that the Supreme Court viewed the assignment as prohibited because of that *potential* for further assignment to a third party. Thus, it is necessary to look at the assignment at the time it is made. I also note that Murray J. in *McCool v Honeywell Systems* was of the view that the need for the validity of the assignment to be tested at the point at which it occurs would suggest that the interest must exist at the time of the assignment. Insofar as Hogan J. in *McCool v Honeywell Systems* at para 22 might be taken to imply that the validity of the assignment is to be assessed *at the date of enforcement*, I would reject that interpretation. That view is contrary to the explicit findings in *SPV Osus* and if adopted, would provide the uncertainty in establishing validity of the assignment which the Supreme Court expressly rejected.

64. The argument about the commonality between the original holders of the causes of action and the identity of the shareholders of Coucal has greater substance. It is made also with reference to the decision in *Massai Aviation*. These are the type of arguments that were submitted in *SPV Osus*, see in particular paras 106 and 107. In those paragraphs, the Supreme Court set out the arguments for and against enforcement of the assignments referring, *inter alia*, to the following: that they were required by the trustee in bankruptcy, approved by the court, and they did not take place in the context of a pre-existing commercial interest but the connection was created by the self-same transaction relied on as the assignments at issue. The Supreme Court also referred to the consideration that the same result could have been achieved by the original investor of a company with separate legal personality transferring all other claims and liabilities to another company leaving any potential claim against the defendants as the only asset in the original company and subsequently permitting the transfer of shares to persons who wished to see the claims pursued. O'Donnell J. said that while he saw the force of those arguments, he did not accept them. As set out in para 49 above, he said that while the

separate legal personality of a company may allow different persons to benefit indirectly as shareholders from a claim that company may have, that in itself was no reason to extend that outcome to persons who are in law different and distinct. The Supreme Court expressly accepted at para 109 that it was critical that the interest claimed to be legitimate and sufficient to justify an assignment should *exist prior to and independently* of the assignment or the transaction of which it forms part. That finding is strengthened by what is said in para 110 that "[i]f so, I cannot see that simply because of matters related to the structure of the original investor here, or the size of the investment, or that the assignments here were an assignment to SPV Optimal Osus, which was, at the time, a connected party involving a common shareholding, can make a difference".

65. What is perhaps in favour of Coucal's arguments is that the Supreme Court then went on to refer to the purpose of the assignment to SPV Optimal Osus, which in the same way as the assignment in *Trendtex,* "was designed and intended to permit onward transaction (which indeed occurred), and, on this view, involved trading in claims". Crucially O'Donnell J. said, "[i]f it is true that Irish law would not enforce the assignment of this claim under the format of assignment approved by the trustee in the New York court if the assignee was an unconnected third party, it cannot, in my view, uphold an assignment to a connected party with a view to facilitating third parties obtaining control of, and ultimately benefitting from, the cause of action" (para 110).

66. In that passage, the Supreme Court appears to indicate that a transfer to a company with a common shareholding but created for the purpose of receiving the assignment was a sufficient "connection" to render any assignment to that company a genuine commercial activity. In *Trendtex* the connections between the parties were close and pre-existing. In *SPV Osus* the connection was not so well-established. There may appear to be a tension between the apparent acceptance by the Supreme Court that the common law requirement that an assignment of a

cause of action will only be valid where the assignee had a prior and independent interest in the assignment, and the description of SPV Optimal Osus, a special purpose vehicle created for the sole purpose of accepting the assignment (para 20), as a "connected" party. The "connection" was a construct of the desire to implement, and the implementation of, the assignment. In *SPV Osus* the connection at the time of the assignment was that the plaintiff/appellant was 100% owned by an original investment fund and the directors were in common. In my view, the resolution of any apparent tension is to return to the finding in para 94 of the adoption of the test in *Trendtex* but the acceptance of the more liberal identification of interests which can be described as genuine whether commercial or not. The identification of whether a particular scheme is to be regarded as genuine falls to be considered in respect of the public policy considerations at issue. Those public policy considerations call for the rejection of the commodification of litigation. That is why the Supreme Court stressed that it was the fact that the assignments in *Trendtex* and in *SPV Osus* were "designed and intended to permit onward transactions" that led to them being invalid or unenforceable as contrary to public policy.

67. In the present case, the connection is that an investor in the scheme with Mr. Scully is a shareholder in Coucal to which the investor transfers his or her right to a claim against Mr. Scully. That is a factually different situation to all of the cases cited to the Court. It is different because a) this involves transfers of claims from individuals to a company established as a special purpose vehicle to receive those claims in which the individuals are shareholders, and b) what is involved is a series of individual assignments of separate causes of action that each individual possesses to a company in which the individuals become shareholders to what is apparently a *pro rata* extent commensurate with the individual claim. This commonality of identity between the original investors in the scheme and the shareholders of Coucal would appear to meet the requirement for a pre-existing genuine commercial interest in the claim as

contemplated by the Supreme Court in *SPV Osus*, notwithstanding that a small minority of the original investors did not become shareholders in Coucal. I do not consider it significant for the purpose of establishing the necessary connection between assignor and assignee that not all original investors made assignments to Coucal – what is at issue here is individual assignments of individual causes of action to the company Coucal which can then take a single action encompassing all the causes of action. Whether such a procedure – which may be considered a class action or group litigation – would be permitted in this jurisdiction is a separate question which was not directly raised in this appeal and was mentioned only in passing at a late stage. I think that viewing these connections as sufficient to come within the concept of commercial interest accords with the *obiter dicta* from the judgments of Hogan and Murray JJ. in *McCool v Honeywell Systems*.

68. A connection between the assignor and assignee is not, however, sufficient to permit the enforcement of the transaction. As O'Donnell J. stated in *SPV Osus*, the House of Lords decided in *Trendtex* that an assignment to Credit Suisse for its own purposes would have been valid, but the assignment was in fact void "because it contemplated and permitted the onward assignment of the cause of action to an unconnected third party who would have control of the litigation" (para 78). While the wording at para 78 of the judgment in *SPV Osus* may differ from the wording of para 109, ("contemplated and permitted" and "designed and intended") I have no doubt that they are intended to be synonymous because they both refer to the assignment at issue in *Trendtex*. What is required is a close consideration of the terms of the assignment at issue.

69. The design and intention of the assignment, or what is contemplated or permitted by the assignment, can only be determined by the wording in the assignment itself. The assignment by Ms. Doreen Ryan to Coucal is exhibited in the proceedings as an example of the assignments concerned. This is a very short document; it is striking that each page is split

in half with one side in English and the other in Polish. The Polish version is said to prevail but there has been no suggestion that the English language version is incorrect. It is headed "Contract of Assignment for A Debt" but as discussed above there is no doubt that this is the assignment of the cause of action that the assignor had against Michael Scully for abuse of his power of attorney together with all rights pertaining to it. The assignee is said to acquire the "future debt" the cause of action for the amount of 835,007.10 PLN as a conditional debt provided the court rules that the Share Purchase Agreement (between the assignor and Michael Scully) is null and void. That is said to be payable to the assignor within 7 days of the date of the assignment. If that was the extent of the assignment, on the basis of the commonality of interests, it would seem that the assignment may be viewed as genuine. What in my view is highly significant is that the assignor is said to state *inter alia* that "the right to sell the Debt to the third party has not been excluded". It is explicitly stated in written submissions of the respondent that "the Assignments merely provide, in bare and legalistic terms, for the *possibility* of onward transmission" (*emphasis* in original).

70. Counsel for Coucal makes the argument that there was affidavit evidence as to the intention of the investors/shareholders not to sell on the assignments. In my view that cannot be the determining consideration. The intention of the investors must be assessed by what they have agreed and not by some type of parole evidence as to what the parties say they meant. Why, if the investors and Coucal had no intention that the causes of action would be assigned further, did they not state that expressly and why did they include an express permission for onward transmission of the causes of action?

71. Moreover, the validity of an assignment must be capable of being assessed from the time it is created. Otherwise, it would create uncertainty if its validity depended on gathering, at some later date, evidence as to the intention of the parties as to onward transmission of the assignment of the cause of action. Thus, the claim by Coucal that there is no "practical"

possibility of onward assignment is an argument that does not withstand scrutiny because what is required is an examination of the assignment as agreed between the parties.

72. Coucal relied upon the decision of the High Court of England and Wales (Simon Baker QC) in *JEB Recoveries LLP v Binstock* [2015] EWHC 1063 (Ch) to say that this type of assignment of a cause of action by individuals to a company with whom they are connected as shareholders represents a connection which is sufficiently genuine to be valid. There are a number of differences between the assignments at issue there and those here (e.g. the assignment was not limited to a cause of action but included debts) but the most important one is that nothing in the decision indicates that the assignments contemplated onward transmission of the cause of action. It may also be observed that the transaction in *Massai Aviation* is not recorded in the judgment as having included a clause for onward transmission. We do not know the reasons why the present assignment was structured as it was but it certainly directly contemplates, as Coucal accepts, the possibility of onward transmission. The practicality or otherwise of that is not something that this Court can put much store in as it would involve speculation as to why this might have been included: did Coucal wish to retain the ability to sell the claim onward at some point if that became a commercially viable option? Merely saying it was not intended to sell on the claim or that it was impractical to do so is insufficient; this clause was permitting the very thing that was found to be unacceptable in *SPV Osus*. For the foregoing reasons, I do not accept the submission of counsel that the type of recital in an assignment as found in the transaction in *Trendtex* was required before an assignment would be rendered unenforceable.

73. The appellant accepted that the comments in *SPV Osus* concerning the decision in *Massai Aviation* were *obiter* as indeed they were in *McCool v Honeywell Systems*. Accepting however that it appears that a pre-existing commercial interest in the cause of action by a shareholder in the assignee is a sufficient connection, that is not the end of the matter. In light

of the particular findings by the Supreme Court in *SPV Osus* that an assignment to a connected party that contemplates and permits the onward transmission of the assignment itself to an unconnected third party is unenforceable, the Court must apply that *ratio decidendi* to the facts of the present case. The decision of this Court in *McCool v Honeywell Systems* also emphasised that the contemplation of an onward transmission to another party would render the assignment unenforceable although the Court also rejected the validity of the assignment on the ground that it was not an assignment to a party with a pre-existing legitimate interest in the transaction giving rise to the claim.

74. Counsel for Coucal also submitted that none of the public policy reasons identified by O'Donnell J. in *SPV Osus* were engaged by the facts of this case. For the reasons I have set out that is not correct. The public policy reasons relate to the commodification of litigation and are clearly engaged where an assignment is designed and intended to permit onward transmission to an unconnected third party.

75. It may not be necessary other than for the sake of completeness to record that no concerns were raised in this appeal about access to justice. Access to justice concerns were raised in but were not central to the decisions in both *Persona Digital* and *SPV Osus*. The evidence in the present case came from Ms. Doreen Ryan who swore two affidavits on behalf of Coucal in these proceedings. While she sets out the background to what she says are the "devastating consequences for the investors" from, what she terms, "the fraudulent and illegal actions" of the appellant, nowhere does she suggest that the investors cannot afford legal representation as a result. Indeed, she never explains the reason why Coucal was set up other than to say that the 63 investors "assigned their claims … to Coucal to enable it to take action on their behalf against Michael Scully in Poland in 2015". That averment indicates the purpose of setting up Coucal but not the reason for it. She also says that she confirms that the shareholders have no intention of selling their shares in Coucal to third parties or otherwise of

"trafficking" in litigation nor was it ever intended that they would do so. This is not to criticise Ms. Ryan or those advising her, the point being made is that this is not an access to justice case. This Court simply does not know the reason why it was felt that it was necessary, or even preferable, to make the assignments to Coucal. It must also be acknowledged that as Murray J. stated in *McCool v Honeywell Systems*, under the law in this jurisdiction stands at present, the fact that the assignee can point to a more general interest in pursuing a claim whether to right a perceived wrong, or to ensure that a wrongdoer is brought to account, is not in itself an interest for the purpose of deciding whether the interest is a genuine commercial one.

76. I must therefore reject the submission so ably made by counsel for Coucal that the present assignments to Coucal can be distinguished from the assignments at issue in *Trendtex* and thus would not fall foul of the test in *SPV Osus* because there was no intention to permit the onward transmission of the assignment. It is my view, for the reasons set out above, and considering that the assignments at issue clearly contemplated and permitted, and thus were designed and intended to permit, onward transmission of the causes of action to third parties, they would not be enforceable in this jurisdiction. The validity of the transaction has to be judged from the time it is made and must be interpreted by what is stated therein. Thus, the assignments to Coucal represent the commodification of litigation and thus would be clearly prohibited by Irish public policy if there was an attempt to rely upon them in litigation in this jurisdiction. That conclusion is compelled by the binding authority of *SPV Osus*. The Court must now turn to the separate question of whether the public policy interests in this jurisdiction that would not permit enforcement of these assignments permits or requires the Court to refuse to recognise or enforce the Polish judgments which were obtained on foot of these assignments.

Public Policy, the Prohibition on Assignments of a Bare Cause of Action and Enforcement of Judgments

77. The general principles applicable to the public policy ground exemption under the Regulation have been set out above. I will now turn to some previous cases in this jurisdiction where those general principles have been applied.

78. The High Court (Finlay Geoghegan J.) in *Fairfield Sentry Ltd v Citco Bank Nederland NV* [2012] IEHC 81, was asked to refuse to recognise a conservatory order of the Dutch courts. It was argued that recognising that order would breach the principle of *pari passu* distribution amongst unsecured creditors of an insolvent company in Ireland, and thus should be refused. However, the High Court held that there was no basis for the proposition that a *pari passu* distribution was so fundamental a principle of Irish law as to form part of Irish public policy for the purposes of the relevant Article of the Regulations.

79. In *Sporting Index Ltd v O'Shea* [2016] 3 IR 417 ("*Sporting Index*"), the contention was that relevant UK judgments should not be recognised under the predecessor to Article 45(1)(a) because the judgments arose from a gambling debt. The High Court (Mac Eochaidh J.), while acknowledging the exceptional nature of non-recognition, held that public policy objections to recognition of the judgment were clearly triggered, since gambling contracts were unenforceable in this jurisdiction and thus it would be a manifest breach of Irish public policy to enforce it through Brussels 1 Recast.

80. *Gwyn-Jones (No. 1)* involved, *inter alia*, a claim that enforcement of the judgment would be contrary to public policy because it was claimed that the underlying judgment was so connected with a fraud perpetrated upon the applicant that the courts of this jurisdiction ought not give effect to it. The Court of Appeal (Murray J.) held that in theory, where it was established that the EU member state judgment had been procured by fraud, this may provide a basis on which the courts in this jurisdiction may, exceptionally, refuse enforcement or recognition. If there is a remedy for an alleged fraud in obtaining the judgment in the jurisdiction in which it was obtained, then the defendant ought ordinarily to pursue his or her

remedy there. Murray J. held that the courts in this jurisdiction ought normally not entertain a challenge to a judgment to which the Brussels 1 Recast applies where it would not permit such a challenge to an Irish judgment. This means that the power should operate exceptionally, should arise only where the person resisting recognition and enforcement establishes a knowing a deliberate deceit of the court and where the fraud alleged affects the impugned decision in a fundamental way. The Court of Appeal rejected the application to refuse recognition on the facts before it.

81. In *Gwyn-Jones (No.1)* Murray J. observed that Mac Eochaidh J. had *correctly* rejected a contention based upon a judgment of Dunne J. in *Emo Oil v Mulligan* [2011] IEHC 552 ("*Emo Oil*") to the effect that the public policy exception was limited to cases involving a breach of fundamental rights. Murray J. also noted that *Sporting Index* assumes that Member States are entitled to identify particular categories of clearly defined transactions which are so objectionable to their own policy that they will not merely refuse to enforce them within their domestic law but may also refuse to permit their enforcement if concluded pursuant to the law of another Member State and found valid by the courts of that other State in accordance with that law. He said "[t]he commentaries suggest other similar examples – arrangements for the commission of a criminal offence or intended to circumvent a trade embargo imposed under the law of the Member State addressed or acts facilitating the payment of a bribe (see Dickenson and Lein 'The Brussels 1 Regulation Recast' Oxford, 2015 at para 13.296). In all of these cases the public policy is specific and capable of clear and narrow expression".

82. Counsel for Coucal took issue with the decision in *Sporting Life Index*. He did so because it was, in his submission, incorrect to view public policy as akin to a mere prohibition. Counsel for Coucal pointed to para 23 of *Sporting Life* where Mac Eochaidh J. referring to the Gaming and Lotteries Act, 1965, stated: "Because this rule was enacted by the Oireachtas, I am bound to find that the rule is essential in the legal order of the State. The rule reflects public

policy on the control of gambling. It is an essential measure in as much as the Oireachtas has considered it necessary for the purposes of controlling gambling." Counsel clarified that he was not making an argument that only public policy as indicated by the Oireachtas in legislation as distinct from common law could come within Article 45(1)(a). If such an argument were to be made, I would swiftly reject it. There are many aspects of public policy that can be identified in the common law and there are others that may come directly from the Constitution. The public policy at issue here is one that has origins in statute law pre-dating the foundation of the State but arises more directly from the common law. Not only are maintenance and champerty torts and crimes in Ireland but, as O'Donnell J. said in *SPV Osus* "an out-and-out assignment of a bare right to litigate which has no redeeming feature, is, if anything, more obnoxious to underlying public policy than champerty and maintenance respectively".

83. The principal submission on behalf of Coucal was that it was only public policy grounds that form an essential part of the Irish legal order that can be deployed to prohibit enforcement of judgments and that the public policy rule prohibiting enforcement of these types of assignments is not such an essential part of our legal system. That argument is, as I understand it, made up of two components. First is that it cannot be essential because it could be amended by ordinary legislation, and the second is that only fundamental rights are to be protected. In my view, the first argument is unsound and finds no traction in the case law of the Court of Justice nor in the other examples found in the Dickenson and Lein text referred to by Murray J. in *Gwyn-Jones*, to which examples counsel referred. Some of the examples given in Dickenson and Lein (the text of which was produced to the Court), such as "facilitating human trafficking or illicit trade in body parts", are clearly outrageous and are prohibited in a variety of international Conventions. Others, such as "the operation of an unlawful cartel agreement", would appear to represent policy choices that may vary from time to time and country to country e.g. how to define a cartel and what ought to make or does make such an agreement

unlawful? The authors also refer to UK legislation which forbids the enforcement in the UK of an award of multiplied damages, but they also refer to "outrageously disproportionate awards of damages". Thus, these are policy choices by one State which may not necessarily coincide with the legal order of the place in which the judgment was granted.

84. In any event, while Murray J. said of the decision in *Sporting Index* that it *assumes* that Member States are entitled to identify particular categories of clearly defined transaction which are so objectionable to their own policy that they will not merely refuse to enforce them within their domestic law but may also refuse to permit their enforcement by recognising the judgment of another Member State, I do not believe he was rejecting that assumption. I say this because it was clear that Murray J. was bolstering the assumption made by referencing Dickinson and Lein. Moreover, and this has specific relevance to the second argument, that of fundamental rights, Murray J. stated explicitly that Mac Eochaidh J. had *correctly* rejected the contention based upon the judgment of Dunne J. in *Emo Oil* that it was only fundamental rights that came within the public policy exception.

85. In support of his contention that it was only when fundamental rights were at issue that public policy considerations could give rise to a refusal to recognise a judgment, counsel for Coucal submitted that there was a lack of reasoning as to precisely why Mac Eochaidh J. rejected the proposition of Dunne J. in *Emo Oil* to that effect. In my view, Mac Eochaidh J. set out his reasons in the judgment. He said that he did not read Dunne J. as saying that it was only where fundamental rights were breached that the exception could be invoked. Instead, he viewed her judgment as noting that the cases where the exemption had been invoked to date had involved such circumstances.

86. Even more fundamentally, however, the relevant decisions of the CJEU do not support such a view. The Court of Justice in *Apostolides* posited two ways in which the public policy exemption could arise. This was either where "…the infringement would have to constitute a

manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought *or* of a right recognised as being fundamental within that legal order" (*emphasis* added). Thus, a breach of a rule of law regarded as essential in the legal order of the State is a standalone ground of public policy on which recognition of a judgment of a member state may be refused.

87. I also observe that the appellant cited Regulation (EU) 2015/848 (recast) on Insolvency Proceedings, Article 33 of which permits a Member State to refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment in such proceedings "where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles *or* the constitutional rights and liberties of the individual" (*emphasis* added). The appellant submits that this Regulation makes the distinction between the different aspects of the State's public policy express and that this is instructive in considering the scope of public policy for the purpose of Article 45(1)(a). In my view, that language is similar to that used by the CJEU at para 44 of *Diageo Brands BV v Simiramida* cited at para 23 above. This also demonstrates that the public policy may involve objective values recognised by the State which do not necessarily confer rights on individuals.

88. Is the prohibition in this jurisdiction on enforcement agreements amounting to assignments of a bare cause of action which is a clear statement of public policy, a rule of law which can be regarded as essential in the legal order of the State? In my view it is such a rule. This is not the type of rule choice, such as *pari passu* distribution among unsecured creditors, which is procedural in nature and not essential to the legal order within the State. The public policy choice at issue here is an essential feature directly related to fundamental principles. I have set out at paragraphs 46 to 50 above the policy considerations at stake in these situations as they were identified by the Supreme Court in *SPV Osus*. That decision demonstrates that the commodification of claims runs counter to important interests in the administration of

justice. It was said that the general suspicion and antipathy of the common law in the trading in claims remains well founded. This is a matter going to the heart of what in this jurisdiction is (at present) a public policy choice not to permit the resources of the justice system to be used for the facilitation of a commercial transaction rather than to address a genuine dispute between parties. To ask the courts to enforce a judgment arising from this type of unenforceable (in this jurisdiction) assignment is to ask the courts to engage in the very thing that the public policy finds offensive; engaging these courts in the facilitation of a commercial activity rather than in administering justice between two parties with a genuine dispute.

89. The public policy rule behind the prohibition on assignments of causes of action unless in clearly defined and permitted circumstances, is undoubtedly one which comes clearly within the concept of a rule of law which is essential in the legal order of the State. The expressions "offensive" and "more obnoxious" were used by O'Donnell J. with reference to public policy considerations. Indeed, I would observe that this type of language would never be used to describe a rule such as *pari passu* distribution and I reject the submission of counsel for Coucal that the public policy considerations at stake here is much closer to the *pari passu* rule than to the examples given in Dickinson and Lien such as bribery. That flies in the face of the seriousness of the issue of public policy at stake here.

90. I think it is also appropriate to refer to the dicta of Murray J. in *McCool v Honeywell Systems* who said: "We should strongly incline to view the general legal prohibition on the assignment of a bare cause of action (described by Lord Roskill in [*Trendtex*] as '*a fundamental principle of our law*') as usually defining the outer boundary of the rules that secure the interest of the Courts in protecting their own processes in the specific context of assignments of this kind." In saying this Murray J. was cautioning against extending public policy as a basis for the invalidation of otherwise proper assignments of legal claims further than it is clearly

necessary to do but he was nonetheless approving of the prohibition as a fundamental principle of law which protects the processes of the courts.

91. It is not sufficient to say that this particular rule against enforcement of transactions savouring of champerty may be changed by legislation. The courts must operate on public policy considerations as they are at present and not on what they might become. Policy itself, not being based upon fundamental immutable rights, is almost by definition subject to change. In *SPV Osus*, O'Donnell J. expressly stated that policy changes over time. A legal system is entitled to change its views on what is essential in its legal order. Moreover, that the issues of maintenance, champerty, third party funding and assignment of bare causes of action give rise to a variety of difficult and often competing interests (which themselves may change over time) is clear from the decisions of the Supreme Court in *Persona Digital* and in *SPV Osus*. The comments of Clarke J. (as he was then) speaking for the majority in the *Persona Digital* and giving a concurrence in *SPV Osus* give clear voice to the concerns arising from their prohibition. Many of those raise concerns about access to justice. As stated above no access to justice concerns arose here in any event.

92. On the question of public policy, I have noted above that the Law Reform Commission have issued a consultation paper on these issues. This is itself an indication that the Commission views these matters as requiring significant review and research before any reform is undertaken. In its consultation paper, the Commission expressly states that it does not give any views on how the law ought to be reformed in the particular area. It is noteworthy that the Commission identified a number of policy consideration opposing liberalisation on the law on assignment that may go beyond those identified with the commodification of litigation in *SPV Osus*. There would be an increase in vexatious and meritless proceedings, the possibility of under compensation, increase in costs of litigation, increase of insurance premiums and costs of doing business, a potential undermining of the relational nature of civil wrongs as between

wronged party and wrongdoer, and it may not be appropriate for all types of legal proceedings. Chief among the policy considerations supporting liberalisation of the law concerning bare assignments is access to justice. Others are equality of arms, increasing the assets available to creditors of insolvent debtors and corporate anomaly. These are not issues for this Court, they are only mentioned to demonstrate the depth and complexity of making this public policy choice. The Law Reform Commission also said that the Supreme Court in *SPV Osus* had noted that "a number of jurisdictions that have lifted restrictions on litigation funding (whether by case law or legislation) have retained significant restrictions, including in some instances complete bans on assigning 'bare' causes of actions".

93. The recognition and enforcement of judgments may only be refused under Article 45(1)(a) where it is "manifestly contrary to public policy". This, as Murray J. said in *Gwyn-Jones (No 1)*, underscores the exceptional nature of the public policy ground. Therefore, what must be assessed is the public policy ground itself and whether the ground itself is an exceptional one. I have no hesitation in so finding here. This is public policy directly related to the administration of justice. It stems from torts and crimes (maintenance and champerty) still extant in this jurisdiction, being torts which involve the administration of justice (for further reading see the Law Reform Commission Issues Paper on "Contempt of Court and Other Offences and Torts involving the Administration of Justice" 2016). The Supreme Court has clarified that "an out-and-out assignment of a bare right to litigate which has no redeeming feature, is, if anything, more obnoxious to underlying public policy than champerty and maintenance respectively". The public policy considerations are essential to the legal order in this State and the prohibition is a fundamental principle on which the courts of this jurisdiction must operate. Such a public policy is therefore of such an exceptional nature that it comes within the provision of Article 45(1)(a) of the Regulation.

Second Public Policy Ground: The Polish Rule of Law Issue

94. Considerable argument was heard on this issue by the Court. There had been extensive exchanges of affidavits on this issue of judicial independence (and also on the issue of whether the law in Poland prohibited champerty) before the High Court. The appellant maintained that the public policy issue here was directly related to the vital importance of upholding the principle of judicial independence in connection with the appointment of judges generally. The appellant rejected the application of the two-step test adopted in extradition cases pointing out that criminal cases and civil cases were distinct as the interests of victims did not apply in cases concerning the recognition and enforcement of judgments in civil and commercial matters. In any event, in light of the clear situation where a judge who was subject to removal by the Minister had actually heard this case, the two-step test was met.

95. The appellant was particularly critical of the High Court's refusal of the request for a preliminary reference. The necessity for a referral was also strongly pressed in this Court. The appellant had a fall-back position which was if this Court did not refer, it ought to await a decision in a referral from Poland as set out above (C-43/22 *Prokurator Generalny*).

96. In light of the specific request of the appellant for the preliminary reference, and in light of the finding that the Court cannot enforce this judgment on the ground of public policy, I consider that it is neither necessary nor appropriate that this Court would engage with this second ground related to the issue of public policy. A reference to the CJEU ought not to be made where the case can be disposed of on other grounds. Similarly, it is not appropriate to give the Courts views on this particular ground in circumstances where that is not necessary.

Conclusion

97. For the reasons set out in this judgment, the appeal must be allowed. The appellant is entitled to an Order pursuant to Article 45(1)(a) of Brussels I (Recast) refusing recognition of

the Orders of the Court of Appeal in Warsaw dated 10 June 2021 and 7 July 2021 as set out in Schedule 1 to the originating Notice of Motion.

As the appellant has been entirely successful in this appeal, it would appear the appellant is entitled to the costs of the appeal. Should the respondent wish to contend otherwise, an application to the Registrar ought to be made on or before 17 May 2024 for a short hearing date on the issue of costs.

As this judgment is being delivered electronically, my colleagues, Ní Raifeartaigh and Binchy JJ. have read this judgment in draft and have authorised me to indicate their agreement with the judgment and the proposed orders.