THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 56

[2015 No. 575]

[2014 No. 10269 P]

The President
Peart J.
Irvine J.

BETWEEN

SPV OPTIMAL SUS LIMITED

RESPONDENT

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED,

HSBC SECURITIES SERVICES (IRELAND) LIMITED,

OPTIMAL INVESTMENT SERVICES, S.A. AND

BANCO SANTANDER, S.A.

APPELLANT

JUDGMENT of the President delivered on 2nd March 2017

Introduction

1. This is an appeal by the plaintiff from a judgment delivered by Costello J. in the High Court on 5th October 2015 and subsequent orders. The case has its origins in the notorious events associated with financial projects operated by Mr. Bernard Madoff in the United States which came to public attention in late 2008. The essential facts are set out in tabular form in the next part of this judgment in generally chronological manner.

2. The relevant parties require some introduction. Optimal Strategic US Equity Limited (Optimal Strategic) was a trading subsidiary of Optimal Multiadvisors Ltd. (OML) which was itself a subsidiary of Banco Santander SA. Investors put money into two OML Funds which that company transmitted to Optimal Strategic for investment with Bernard L. Madoff Investments LLC (BLMIS). The respondents, the two HSBC defendants, were appointed as custodians and administrators in respect of those assets.

3. The activities of Mr. Madoff resulted in massive losses and the appointment of a trustee in bankruptcy under the Securities Investors Protection Act of 1970 (SIPA). That official sought to recover assets as far as possible and admitted certain losses as being Allowed Customer Claims which would be repaid if sufficient funds could be collected. Optimal Strategic had such a claim admitted in the amount of some US$1.5 billion. The Appellant, SPV Optimal SUS Limited (SPV) received an assignment of the claim from Optimal Strategic which included a bundle of rights and interests. SPV instituted proceedings against the HSBC defendants for negligence and other civil wrongs arising from their stewardship of the investments. SPV maintains the claim on the basis that the assignment encompasses the right to sue HSBC.

4. The two HSBC defendants sought to have the assignment declared contrary to public policy, void and unenforceable as being champertous in nature because it transferred a "bare right to litigate" and otherwise constituted "trafficking in litigation". It was agreed that the defendants' claim in this regard would be heard and determined in the High Court as a preliminary issue. Costello J. found in favour of HSBC on both grounds and made an order dismissing the proceedings. SPV appeals that decision.

The Facts Summarised in Tabular Form

I. Investors put money into two Optimal Multiadvisers Ltd (OML) Funds—namely:

(1) Optimal Strategic US Equity Ireland US Dollar Fund

(2) Optimal Strategic US Equity Ireland Euro Fund

II. OML transferred the money to Optimal Strategic

III. Optimal Strategic put the money into BLMIS

IV. HSBC provided custodian and administrative services in respect of the assets to BLMIS

V. On 11th December 2008 the liquidation of BLMIS began in the United States Bankruptcy Court for the Southern District of New York and a trustee was appointed under the Securities Investors Protection Act of 1970 (SIPA)

VI. On 22nd May 2009 the SIPA trustee agreed an Allowed Customer Claim for Optimal Strategic in the amount of US$1.54 billion

VII. On 11th November, 2010, the Bankruptcy Court issued a transfer procedures order allowing for claims to be sold but only in whole, not in part

VIII. The directors of OML devised a mechanism whereby the investors in their funds would be able to convert their entitlement to share in the Allowed Customer Claim into money or company shares that could be held or negotiated. This involved setting up a Special Purpose Vehicle which was initially a 100% subsidiary of Optimal Strategic. An Information Circular dated 29th April, 2011, sent to the holders of the Strategic Series shares – above at 1a & 1b – set out the business objective of the SPV at pages 13 and 14:

(1) To hold the Allowed Customer Claim of US$1.54 billion for the benefit of the shareholders of the SPV and to act as a conduit through which the Strategic Series investors may dispose of their pro rata interest in the claim

(2) the Allowed Customer Claim will no longer be held by Optimal Strategic but because of the 100% ownership the shares will continue to represent an indirect interest in the ACC

IX. The SPV was duly established and the shareholders were then offered the options of (a) exchanging their shares for shares in the SPV; (b) exchanging as in (a) and having the SPV shares sold; (c) keeping their existing shares.

X. By an agreement of 6th May, 2011, Optimal Strategic transferred the Allowed Customer Claim to SPV: this is the critical transaction at the centre of the case. In her judgment in the High Court, Costello J. quotes the relevant part whereby Optimal Strategic assigned to SPV:

> *"… (a) an undivided 100% interest… in Assignor's right, title, and interest in and to the allowed claim filed by the Assignor [The Allowed Customer Claim]… (b) all rights and benefits of Assignor related to the Purchased Claim including (i) any right to receive cash, securities, instruments, interest, penalties, fees or other property that may be paid or distributed with respect to the Purchased Claim, (ii) any action or claim…of any nature whatsoever, whether against the Debtor [BLMIS] or any other party, arising out of or in connection with the Purchased Claim, (c) all rights of Assignor under paragraph 13 of the [Settlement Agreement]…, (d) any other rights, action or claim arising out of the Assignor's investment in Debtor including, but not limited to, any claim the Assignor may have with respect to any current or future victim remission proceedings developed by the United States Department of Justice, and (e) any and all proceeds of any of the foregoing (collectively as described in clauses (a), (b), (c), (d) and (e) the 'Transferred Rights')."*

XI. In the result some 93% of the SPV shares were sold to hedge funds and distressed debt investors in a series of three share auctions prior to May, 2013. As of June, 2011 Allowed Customer Claims in the BLMIS estate were trading at roughly $.70-$.75 on the dollar.

XII. On 30th June, 2014, the new shareholders of SPV removed the original directors from the Board.

XIII. In December, 2014 SPV instituted the instant proceedings claiming that the two HSBC defendants were guilty of breaches of contract, misrepresentation, negligence and breaches of fiduciary duties in their obligations to Optimal Strategic, which wrongs caused or substantially contributed to the loss of its investments. The plaintiff is claiming some US$2.9 billion less credit for payments actually received which stands at approximately US$750 million at present.

XIV. Following the institution of these proceedings, Optimal Strategic sued SPV in New York seeking a declaration that the right to sue third parties such as the two HSBC defendants herein was not assigned by the agreement of 6th May, 2011, and that matter will be determined in that jurisdiction when the case is heard because the proper law of the contract is that of New York. However, for the purpose of this application before the High Court and the appeal it is assumed that the right to sue third parties was included in the transfer agreement. If the courts of New York hold in favour of Optimal Strategic on this issue, the question now under consideration will be entirely academic.

Judgment and Order of the High Court

5. By Order dated 19th October 2015, the High Court (Costello J.) declared that the Assignment of Claim dated 6th May 2011, between Optimal Strategic US Equity Limited and SPV Optimal SUS Limited insofar as it purported to assign to SPV Optimal SUS Ltd. the right to bring these proceedings against the first and second named defendants is contrary to public policy, void and unenforceable as a matter of law. The court ordered accordingly that the proceedings stand dismissed as being frivolous and vexatious and bound to fail. The court's reasons are contained in a written judgment delivered on 5th October 2015.

6. Costello J. reviewed the relevant Irish authorities and the English cases on which they relied and derived the following principles which she outlined at para. 40 of the judgment as follows:

(i) It is unlawful to fund or assign litigation in return for a share of the proceeds unless the funder or assignee has a lawful interest or some other legitimate concern in the litigation;

(ii) The assignment of a bare cause of action for purposes which the law does not recognise as legitimate savours of champerty;

(iii) Trafficking in litigation is contrary to public policy;

(iv) Wanton and officious intermeddling in the litigation of others is contrary to public policy;

(v) The scope of the law of maintenance and champerty must accommodate itself to modern social realities;

(vi) The law in relation to maintenance and champerty must be considered in the light of the constitutional right of access to justice;

(vii) The law in relation to maintenance and champerty must not place any unnecessary obstacles in the path of persons

with a legitimate claim;

(viii) The assignment of a cause of action that is incidental or ancillary to a property right or interest is not champertous;

(ix) The interest which a party maintains or enjoys in a suit which he is maintaining must exist independently of the agreement which gives him a share in the proceeds of the suit.

(x) The assignment of a cause of action to a party who has a genuine commercial interest in the cause of action is not champertous;

(xi) A shareholder or creditor of a company (or other entity) who already has an indirect link to the impecunious company (or other entity) may have an indirect and therefore legitimate interest in the litigation of the company (or other entity) and may lawfully fund the company's litigation;

(xii) Professional third party funders who make a commercial decision to 'invest' in litigation in the hope of making a profit commit the torts of either maintenance and/or champerty;

(xiii) In considering whether an agreement is champertous, the Court should look at the totality of the transaction;

(xiv) The Court is concerned with the substance rather than the form of a transaction in considering whether if offends the law of maintenance and/or champerty;

7. In light of her consideration of the facts of the case against this legal background, the judge concluded that the transaction offended against public policy because it amounted to the assignment of a bare cause of action and it also constituted trafficking in litigation:

> "In my opinion the assignment of the right to litigate third party claims by means of the Assignment in the context of the entire transaction for the sale of the shares in SPV on the secondary market amounts to the assignment of a bare cause of action for no legitimate reason recognised by Irish law. The assignment is not incidental or ancillary to the assignment of the Allowed Customer Claim and the other associated rights in the bankruptcy of BLMIS for the purposes of Irish public policy, whatever about the legitimacy of such an assignment under the laws of the State of New York. The purchasers of the shares in SPV on the secondary market have no genuine commercial interest in the taking or enforcement of these proceedings. The assignment of the chose in action to SPV with a view to the sale of the shares in SPV on the secondary market amounts to trafficking in litigation and has resulted in unlawful stirring up of litigation."
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> [*SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd & Ors* [2015] IEHC 602 at para.91]

The Plaintiff's Appeal

8. The plaintiff, SPV Optimal SUS Limited (SPV), appeals on the grounds that the High Court erred in:-

(a) failing to apply the appropriate standard and burden of proof in an application to dismiss the proceedings;

(b) finding that the assignment of third party claims was contrary to public policy;

(c) finding that the assignment of the third party claims was separate to the assignment of the Allowed Customer Claim;

(d) finding that the assignment of third party claims amounted to a bare cause of action, rather than an ancillary or incidental element of the Allowed Claim;

(e) holding that SPV did not have a genuine commercial interest in taking and enforcing the assignment of third party rights;

(f) finding that the transaction constituted "trafficking in litigation".

The Nature of the Application in the High Court

9. The appellant, SPV OSUS, submitted that the jurisdiction to strike out proceedings on the ground that they are frivolous or vexatious or that they are bound to fail should be exercised sparingly and only in clear cases: *Barry v. Buckley* [1981] I.R. 306. In *McCourt v. Tiernan* [2005] IEHC 268, Clarke J. held that "in considering whether to make such an order the court must treat the plaintiff's claim at its high water mark" [para.6.4]. In similar vein, Mr. Justice Hanna in an ex tempore judgment in *Devrajan v. KPMG* [2006] IEHC 81 said that "if there is a dispute on facts between the parties, this must be resolved in favour of the party against whom the application to strike out has been brought." The High Court failed to consider the facts as most favourable to SPV. In O'Keeffe v. Scales [1998] IR 290, the Supreme Court re-iterated the high standard which is required to uphold an allegation of champerty, due to the consequences of such a claim on an action, saying that:

> "The appellant seeks to stifle the respondents' action before any plenary hearing and consequently she would have to make out a clear case if she were to succeed, analogous to the onus on a party bringing a motion to dismiss an action on the basis that the statement of claim discloses no cause of action or that the proceedings are frivolous and/or vexatious." [At p.295]

10. The appellant submits that the High Court erred in its assessment of the case by failing to take account of the following facts which were established in evidence or, alternatively, which were stated in evidence and which the court was obliged to accept for the purpose of the application:

(i) The primary purpose of the Assignment was the assignment of the Allowed Customer Claim;

(ii) the Allowed Customer Claim is a property right;

(iii) the Assignment arose from a substantial commercial transaction;

(iv) the principal asset of Optimal Strategic, following the collapse of BLMIS, was the Allowed Customer Claim;

(v) Professor Green averred that the assignment was one integrated transaction that is commonplace in the distressed investment industry;

(vi) Mr. Heerde averred that the transfer of causes of action was ancillary to the transfer of the Allowed Customer Claim;

(vii) the causes of action are an alternative method of recovery of the Allowed Customer Claim: this was acknowledged by Professor Mann on behalf of HSBC;

(viii) the Allowed Customer Claim and the assigned cause of action relate to the same loss;

(ix) at least some of the original shareholders in Optimal Strategic continue to hold shares in the plaintiff;

(x) while causes of action were assigned to the plaintiff pursuant to the Assignment and it is entitled to bring proceedings, there was no expectation at the date of the assignment that proceedings would be brought;

(xi) there has been only one Assignment. The causes of action were assigned to the plaintiff/appellant and there has not been any onward assignment.

11. The respondent, HSBC, argued that the case was not a motion for dismissal against SPV, but the trial of a preliminary issue as to champerty by agreement. If SPV was not entitled to bring proceedings because of champerty, the logical conclusion was dismissal of the proceedings and such an order was sought in the notice of motion. The principles outlined in *Barry v. Buckley* and other authorities are not applicable. In the analogous English case of *Laurent v. Sale & Co* [1963] 1 WLR 829, Megaw J. drew the inference as to the champertous nature of the agreement from the evidence, holding "because it is the only common sense view of this matter, I am unable to accept the suggestion that that inference should not be drawn". He also said:

> "In my view, the position is entirely different where the plaintiff in the action is one who does not have any original title in respect of the matter which he claims. He then has to show how he comes to the title to be plaintiff. That is an essential part of his cause of action…if the agreement is champertous and illegal; it destroys a necessary step in the plaintiff's title in action."

12. In my view, this ground of appeal cannot succeed. The High Court analysed the assignment in its factual context, as is apparent from the circumstantial detail set out in the judgment of Costello J, and then applied the legal principles. The court was not bound by inferences, conclusions and judgments expressed in affidavit evidence, but was required to exercise its own judgment on the issues. The parties agreed –properly and sensibly as it seems to me – that the legitimacy of the assignment be tried as a preliminary issue. There is no dispute as to the facts giving rise to the issue to be decided. It is true that facts are stated in the affidavits, including assertions as to the beliefs and behaviour of investors. If it were the case that the outcome depended on the resolution of an issue of fact, obviously that matter could not be decided on affidavit in a hearing devoted to a discrete question of law. But that was not the situation here. The circumstances that gave rise to the creation of the plaintiff SPV are not in dispute in any respect. The averments in the affidavits to which the appellant points, including for example that the assignment is one integrated transaction, that the claims in issue are ancillary, that they are alternative modes of recovery, or that they relate to the same loss, are suggested inferences, deductions or conclusions that are offered to the court but they are in no way binding in a consideration of undisputed facts and documents against the background of Irish law. Indeed, I would characterise these asseverations as being more in the nature of advocacy than points of fact and some of them are unfounded or incorrect or at the very least questionable on their own terms.

13. I do not think that the assertion that the assignment of the 6th May, 2011 is an integrated one, and that there is only one assignment and not two, or that it is routine, can be of assistance in deciding the case. It is quite clear that the third party claim as against HSBC is separate and distinct from the Accepted Customer Claim. It follows that the assignment must have transferred not one but two discrete rights or sets of rights. If the trustee in bankruptcy, who is concerned with the recovery of assets and the satisfaction of the investors' claims, was to default in respect of his obligations, the liability that would arise is wholly different from the proposed or suggested case against the third-parties. The heading of legal wrong is quite dissimilar. The right of action arises in quite distinct circumstances. In plain terms, we have two claims that do not depend on each other. They do have in common that they are both connected with the collapse of the funds operated by Bernard Madoff, but such coincidental historical background is not sufficient to establish a legal connection. Therefore, the appellant is in error in proposing that the third party claim is necessarily interconnected with the accepted claim by the nature of the assignment in a manner that immunises the latter from the charge of champerty. One cannot create interdependence or will it into being through the creative bundling of rights. To take another proposition, the fact that a party acquiring the bankruptcy claims would also wish to acquire the benefit of any third party right of action is not a matter of legal weight in determining the question of champerty. No doubt it could be said that a purchaser of any interest in any property would be keen to get in every possible asset connected with the property he buys. That does not establish a legally recognised relationship. Neither in my view can it be said that the proposed third party claim against HSBC is an alternative mode of recovery of the Allowed Customer Claim in the bankruptcy.

14. It is also argued that the third party claim is incidental and subsidiary to the bankruptcy claims. The question is a matter of legal interpretation and not a question of fact for an expert so an assertion in an affidavit that these epithets or either of them are appropriate does not decide the matter; in fact it does not go anywhere near establishing the point. The use of these qualifying adjectives is evidently not a matter of chance but is because the expression or similar description was used in one or more of the authorities. But it is still a matter for the court to decide in analysing and interpreting the assignment against the background of Irish law. I am accordingly in agreement with the approach adopted by the High Court to the consideration of the case in its factual and legal context.

The Assignment; the Nature of the Transaction

Appellant SPV OSUS Submissions

15. SPV OSUS submitted that champerty is directed towards protecting the integrity of the administration of justice; a key factor in deciding whether a particular transaction is champertous being whether any adverse impact on the administration of justice can be identified. The evidence did not disclose anything objectionable in what the Assignment seeks to achieve, still less any threat to the administration of justice requiring the intervention of the courts. HSBC did not seek to establish any risk to the administration of

justice. The assignment is valid under New York law, but it is accepted that that is not decisive. In *Greenclean Waste Management Ltd v. Leahy (No 2)* [2014] IEHC 314, the High Court held that After the Event ("ATE") insurance was not void by reason of maintenance or champerty. Hogan J. in the High Court said that this facility assisted access to justice which was a constitutional fundamental. In *O'Keeffe v. Sales* [1998] 1 I.R. 290, Lynch J. speaking for the Supreme Court, confirmed the survival of the law in this area, but warned that "it must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims". The appellant argues that Hogan J's analysis in *Greenclean* suggests an approach to the issue of champerty that questions, first, whether the case involves the transfer of a bare cause of action and, if so, a second question arises which is one of policy, namely: was the transfer done for purposes that the law recognises as being illegitimate? In this regard, Hogan J. stated:

> "Against this background it can be said that agreements which involve the trafficking in litigation or as in Simpson which concern the assignment of a bare cause of action for purposes which the law does not recognise as legitimate will be held to be void as contrary to public policy on the ground that they savour of champerty. That, in my opinion, is true leitmotif which runs through all of this case law in this area." [At para.25]

It was thus submitted that a bare cause of action will only be contrary to public policy when accompanied by an improper motive such as the pursuit of an agenda.

16. The appellant argues that the decision of the court places unnecessary obstacles to the pursuit of the plaintiff's legitimate claim without regard to its constitutional rights of access to the courts and the right to litigate. It also means that wrongdoers would escape liability for their acts in a legal black hole. Former indirect shareholders – the 7% who did not transfer their shares– would be restrained from suing.

17. There was only one assignment, not two, and there was not a sharp distinction between the bankruptcy claim and third party claims. It is a routine, integrated transaction comprising the assignment of a bundle of rights that is commonplace in the distressed investing industry, as the affidavit evidence established. The third party claim was incidental and subsidiary to the transferred property i.e. to the Allowed Customer Claim. It was for HSBC to establish the contrary and it did not discharge this heavy onus. The third party claim protects the property interest transferred; it is connected because it represents recovery of the same loss; it is an alternative source of recovery of the Allowed Claim; any party acquiring the Allowed Customer Claim would also seek to acquire any related causes of action. The plaintiff has a genuine commercial interest in the cause of action.

18. The High Court was wrong to hold that the plaintiff's shares could be sold and that "necessarily involves indirectly buying the right to sue third parties". It is often the case that the interest of the assignee in the transferred right of action is independent of the contract of acquisition but that is not a requirement – see, for example, the sale of a bank's loan book. The assignment in this case did not constitute professional trading in litigation or trading in litigation or trafficking in litigation. There was never an intention that the cause of action would be traded commercially as a commodity or a product. It was not stirring up litigation.

19. The presence of a genuine commercial interest on the part of the assignee has a curative effect against the risk of maintenance and champerty. In *Thema International Fund PLC v. HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 IR 654, Clarke J. highlighted a distinction between bona fide claimants and professional third parties;

> "If an insolvent company has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are bona fide progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders). The law of maintenance and champerty always made a distinction between such parties and professional third party funders. It seems to me that it is appropriate to maintain that distinction." [At p.662]

20. SPV submits that a further distinction can be drawn between cases like Trendtex and the current proceedings. In that case, there was onward assignment specifically for the purposes of facilitating a lawsuit. As stated by Lord Wilberforce:

> "The vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold by Credit Suisse to a third party, for a sum of U.S. $800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly 'savours of champerty', since it involves trafficking in litigation - a type of transaction which, under English law, is contrary to public policy." [At p.694]

21. The English Court of Appeal went on to outline the test in more detail in *Brownton Ltd v. Edward Moore Inbucon Ltd*. [1985] 3 AER 499:

> "(i) Maintenance is justified, inter alia, if the maintainer has a genuine commercial interest in the result of the litigation.
>
> (ii) There is no difference between the interest required to justify maintenance of an action, and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out and out assignment.
>
> (iii) A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest.
>
> (iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) - (iii) above, you must look at the transaction as a whole.
>
> (v) If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment.
>
> (vi) It is an open question whether, if the assignee does make such a profit, he is answerable to the assignor for the difference." [At p.509]

22. SPV submits that *Massai Aviation Services & Anor v. The Attorney General & Anor* (The *Bahamas)* [2007] UKPC 12 is the most equivalent case to that at hand. It involved proceedings brought by a company, CASSL, for loss of profits. Before the lawsuit was completed the shareholders decided to sell CASSL but maintained the lawsuit. A company known as Aerostar bought the share capital

and was eventually assigned CASSL's interest in the lawsuit. Aerostar sold its shareholdings to a third party, but maintained the lawsuit itself. In circumstances of onward assignment, the question arose as to whether this amounted to maintenance and champerty. Baroness Hale delivered the judgment of the Privy Council, finding:

> "This was not wanton and officious intermeddling in another person's litigation for no good reason. It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against these defendants and no good reason why these defendants should be permitted to escape any liability that they may have. This is not, of course, to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company's claims. To take an extreme example, 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. But that is not this case. Aerostar owned all the shares in CAASL and taken as a whole the transaction was a perfectly sensible business arrangement." [At para.21]

23. SPV submits that in the ordinary course of business, as evidenced by *Massai* and *Brownton*, the validity of the assignment is assessed on the date it is entered into. At the time of the assignment, SPV was a subsidiary of Optimal Strategic and as such, this was an intra-group transfer of a cause of action. The High Court also failed to address why some of the remaining original shareholders should be deprived of a remedy due to the selling of other investors' shares.

24. SPV argues that the main focus of the modern law of champerty is that of trafficking in or stirring up litigation. The test for trafficking in litigation is to be found in *Giles v. Thompson* [1994] AC 142:

> ". . . the issue should not be broken down into steps. Rather, all of the aspects of the transaction should be taken together for the purposes of considering the single question whether…there is wanton and officious intermeddling with the disputes of others in which the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse." [At p.164]

Stocznia Gdansja SA v. Latreefers Inc. [2000] AER 148 holds that "trafficking in litigation" envisages a purchaser who has "no proper reasons" to be concerned with the litigation. SPV argues that this is simply not true for the present proceedings. The High Court's finding that the assignment involved "professional trading in litigation" is untenable as there was never any such intention.

Respondent HSBC Submissions

25. The public policy consideration by the High Court was not a stand alone finding. Costello J's decision that the assignment was void and enforceable on public policy grounds was because the learned judge considered it to be nothing more than a bare cause of action and an attempt to stir up litigation. The prohibition on champerty is a general one that is triggered by the potential abuse it may give rise to. As was noted by Lord Denning MR, in *In re Trepca Mines Ltd (No.2)* [1963] Ch. 199 (and adopted by the High Court in *Fraser v. Buckle* [1996] 1 IR 1):

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law". [At p.219-220]

The Master of the Rolls went on to hold the assignments in question as clearly champertous and did not engage in a secondary analysis of whether or not the fears in question had come to pass. The High Court held in Fraser v. Buckle that even where there was nothing on the face of the assignment that might compromise the proper administration of justice, it may still be deemed contrary to public policy due to the dangers "associated with such agreements".

26. The correct test is whether a party with no genuine commercial interest could make a profit from the litigation. If so, the assignment is champertous. The court does not have to decide whether or not the hypothetical risks would, in fact, come to fruition. In *Trendtex Trading Corporation v. Credit Suisse* [1982] AC 679, the House of Lords found that the possibility of a third party profiting of out of the cause of action was condemnable even where the assignment envisaged such circumstances:

> ". . . the 'spoils', whatever they might be . . . were in effect being divided, the first U.S. $1,100,000 going to Credit Suisse and the balance, whatever it might ultimately prove to be, to the anonymous third party. Such an agreement, in my opinion, offends for it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils…" [At p. 704].

27. Similarly, in *Simpson v. Norfolk NHS Trust* [2012] QB 640, the Court found the champertous agreement void in circumstances where:

> "The conduct of the proceedings, including aspects such as a willingness to resort to mediation and a readiness to compromise, where appropriate, is entirely in the hands of the assignee and is liable to be distorted by considerations that have little if anything to do with the merits of the claim itself. There is a real risk that to regard a collateral interest of this kind as sufficient to support the assignment of a cause of action for personal injury would encourage the purchase of such claims by those who wished to make use of them to pursue their own ends." [At para.24]

28. It is immaterial whether New York law deems the assignment to be valid. The Court is only concerned with the public policy considerations under Irish law. As the Supreme Court noted in *Fraser v. Buckle* [1996] I.R. 1:

> "If a contract is valid under the proper law of contract, it will not be enforced if it offends against Irish public policy (Binchy, Irish Conflicts of Laws, p. 549 and Dicey and Morris, The Conflict of Laws (11th Ed.) Vol. 2, pp. 1225-1226 and pp. 801-802). Before the public policy issue is drawn down however, reference must be made to the proper law of contract in order to determine whether the contract is valid or invalid according to the foreign law. A choice of law will normally be given effect to providing it is bona fide and legal and not contrary to public policy. However, champertous agreements have been held void by the English courts although the contracts were governed by a foreign law which deemed them to be valid". [At p.7]

29. The terms of the assignment are manifestly incompatible with Irish public policy and so meet the high threshold proposed by the appellant, although HSBC does not concede that any higher or unusual standard applies. Any suggestion that the public policy question is tempered by the creation of a "legal black hole" for certain wrongdoers is rejected on the basis that the assignee is not seeking justice, but mere financial gain. To do otherwise would be to offend against the administration of justice which the law of

champerty seeks to protect. Additionally, there can be no issue as to upholding SPV's right of access to the courts as they are quite well positioned on a financial basis from the receipt of some of its Allowed Customer Claims. Furthermore, HSBC rejects the notion that a SPV has standing to make such a constitutional claim.

30. HSBC submits that the terms "incidental" and "ancillary" in the context of a bare cause of action, do not equate to a mere relation to the Allowed Customer Claim. A tenuous connection is insufficient to save an assignment from being a bare cause of action. In assessing the alleged ancillary nature of a cause of action, a court must consider:

> "Whether the subject matter of the assignment was. . . property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity." [*Glegg v. Bromley* [1912] 3 KB 474, at p.490]

31. Likewise in *Trendtex, Roskill* LJ held:

> "Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. *Ellis v. Torrington* [1920] 1 K.B. 399 is an example of such a case. Scrutton L.J. stated, at pp. 412-413, that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought." [At 703]

32. The third party claims cannot be regarded as ancillary to the property acquired (the Allowed Customer Claims) in a legal sense. They cannot be said to form part of those claims and do not affect them in either a positive or negative sense. The evidence of SPV's experts is of little material value considering that their understanding is of New York law. These proceedings are concerned with champerty under Irish Law. HSBC further submits that it is unclear from the evidence advanced by SPV how the recovery of Allowed Customer Claims is predicated on third party claims.

33. The judgment of the House of Lords in *Trendtex* states in unambiguous terms that an agreement will, prima facie, savour of champerty where there is the possibility of onward transmission of the cause of action. General commercial interest can only be said to exist where a party (1) takes the assignment and (2) is enforcing it for its own benefit. HSBC submits that SPV fails on both fronts. This case is the antithesis of *Massai*; rather than an intra-group transaction, the intent of the assignment was the transfer of third party claims to parties who lacked a genuine commercial interest in same. SPV was only, ever so briefly, a wholly owned subsidiary of Optimal SUS. The intention was to transfer to other parties and this occurred. The special purpose vehicle was created for that very purpose. Trendtex also considers an agreement to fall foul of the law of champerty if the possibility of an onward transmission of a cause of action could be done with the view of earning some third party a profit. From the facts of this case, the lawsuit against HSBC has the potential to be quite lucrative, nearly $3 billion plus damages. The intention of the litigation is to yield a huge profit for SPV's investors. HSBC submit that the lawsuit falls in line with the recent English case of *JEB Recoveries LLP v. Binstock* [2015] EWHC 1063 wherein the High Court noted:

> "Trafficking in litigation . . .[is] a cause of action which was expected to be traded commercially between unconnected third parties as a commodity or in the language of the financial services industry, a product." [At para.56]

Discussion

34. The general understanding which is not in dispute is that champerty is a variety of maintenance, in fact a more severe or heinous version. Broadly speaking, maintenance is interfering in litigation by supporting it financially without having any legitimate interest in the case which could justify the interference. Champerty is taking a share in the outcome of the case in return for funding it. Neither of those descriptions – "definitions" is too precise a word – is apt to cover the issue that arises in this present case. That is not to say that this is unique because the situation has arisen previously. For the purpose of this case, I think that there is one clear rule that the court must recognise. That is that the assignment of a bare cause of action is invalid because it savours of champerty or is actually champertous in itself. The appellant SPV does endeavour to submit that the present application of the rule requires something more, namely, the identification of a specific public policy detriment that is a result of the impugned assignment. There is, however, little or no judicial support for this proposition. The decision in Fraser v. Buckle emphasises that the law against champerty seeks to guard against conduct which has the potential to undermine the administration of justice. The actualisation of the potential is not required. Agreements which seem innocuous can be considered contrary to public policy for savouring of champerty.

35. The English law is helpfully summarised in Guest on the 'Law of Assignment' by Professor Anthony Guest, from which the following quotations are taken from Chapter 4:

> "A chose in action is not assignable if the assignment 'savours of' or is conducive to maintenance or champerty. For this reason, a bare right of action, that is, the mere right to litigate, cannot in principle be assigned."

For this proposition, a line of authority from 1835 to 1998 is cited. The main qualification to the general rule is where the assignee has a genuine and legitimate interest in taking the assignment. One of the exceptions is where the right is considered to be incidental to the property transferred, such as in Dawson. In *Ellis v. Torrington* [1920] 1 KB 399 the assignment of covenants to repair with the right to sue for breach of covenant was made to the freehold purchaser. The right was considered as incidental to property, theoretically part of the property the purchaser had bought:

> "An assignment to support and enlarge a right which the assignee has already acquired will also be upheld."

Paragraphs 4 to 25 enter the important qualification, which finds echo in *Fraser v. Buckle* in the judgment of Costello J, that the interest that is relied upon to avoid the taint of champerty "must not be generated by the assignment itself". It must exist independently. This point directly contradicts a submission made by the appellant that it is often the case that the interest is independent of the acquisition contract but not a requirement.

36. Maintenance and champerty are kinds of abuse of process. They are thought to undermine the integrity of litigation. It is sometimes difficult or somewhat difficult to define just what it is about these kinds of activity that represents a threat to public policy in the protection of the integrity of the court and litigation process. It may be impossible to characterise or define fully the nature of champerty as it applies in all circumstances. The courts approach the question in each case by reference to the underlying principles that can be derived from authority by inductive reasoning. And yet, there is general recognition that these are vices that should not be tolerated. The rationale may be that litigation is a matter for the parties in dispute; if they cannot find a way of resolving the issues between them then they come to the court. This process is interfered with or potentially contaminated when others become involved without having any legitimate interest or concern in the proceedings. Their motivations may be quite different from litigants

who are genuine, in the sense of persons or parties directly involved in the dispute. There is no doubt that the courts do not countenance trading in litigation, whereby one party not otherwise connected becomes involved for the purpose of profit. Litigation is not a commodity to be traded or discounted and so a simple or bare cause of action may not be the subject of an assignment. That would be the situation if for example a person with a claim for personal injuries were to assign it to another party whose intention was to pursue the action in the name of the original plaintiff with a view to gain. Admittedly, new situations arise where it might appear at first sight that the rules against champerty and maintenance would operate to invalidate a contract or assignment or arrangement but they do not have that effect. That is why the courts say that public policy has to move with the times, what was condemned previously is not necessarily wrong today, commercial practices must be taken into account and obviously they change with the times.

37. There have indeed been very substantial changes in attitude to maintenance and champerty, particularly in England since the changes in legislation were introduced to allow for Conditional Fee Arrangements (CFAs). After the Event (ATE) insurance which came more or less with those agreements was not considered contrary to the rules against maintenance and champerty. Ultimately, there were aspects of the regime that dramatically changed the relationship between plaintiffs and defendants which in turn had to be adjusted. It was eventually decided that there was an imbalance between a plaintiff who was protected by insurance from any risk, and a defendant who was liable if the plaintiff succeeded to pay extra for the plaintiff's solicitor's success fee and also the ATE premium, which massively increased the defendant's exposure. That is the English background to the question that arose in *Greenclean*.

38. The appellant finds in the judgment in *Greenclean* the proposition that champerty is interference in another party's litigation for a purpose not permitted by law. That is of course correct. It is however submitted that this directs the focus of a court's enquiry to identifying whether any improper purpose exists. The implication is that failing identification of some specific impermissible object champerty will not be established. However, that is not a correct reading of the judgment and is not the law either in Ireland or England. The principle is that an assignment of a bare cause of action is void unless it can be excused as an exception recognised in law.

39. Before considering the nature of the transaction effected by the assignment in this case, I conclude that champerty does not require something more than the transfer of a bare cause of action. The objector does not have to identify a specific threat to the integrity of litigation or some other element of public policy. There is a clear rule that is subject to recognised exceptions. The category of excusing circumstance is not closed, as it seems to me. This acknowledgement takes account of changing times and admits the possibility of some unforeseen circumstances that would justify another exception being recognised or it might mean some new example being accepted of an existing heading. The appellant submits that the modern understanding of this civil and, in Ireland, criminal wrong requires that there should be some identified infraction or attack on a specific public policy interest. HSBC rejects this argument, proposing that the authorities are clear that the transfer of a bare cause of action constitutes champerty, which may be excused if it can be brought within one of the recognised exceptions. In my view, it is clear from the authorities in this jurisdiction and in England that the general statement in Guest on Assignment as quoted above is correct.

40. It seems to me that the remaining questions that arise for resolution on this appeal are as follows: –

> (i) Is the assignment of the third party claims in the deed of 6th May, 2011, the transfer of a bare cause of action?
>
> (ii) If the answer to question 1 is No, the appeal must be allowed. If the answer to question 1 is Yes, is it excused by reason of a recognised exception?

41. We begin by looking at the assignment of 6th May, 2011. The assignment expressly deals with the Accepted Customer Claim that the bankruptcy trustee admitted in respect of the investors who lost money as described in the earlier statement of the facts in this judgment. There is, therefore, for the purpose of these proceedings, a transfer of a right of action from a party with an interest to a different entity. There is also a prospect of recovery outside of the trustee's activities in the possibility that the US Department of Justice may establish a fund. The third party claim stands separate as a non-bankruptcy cause of action. So, the first point is that the bankruptcy claims and this cause of action in suit are different and separate. True, the claims are included in the same document but that does not establish a legal connection or relationship between them that affects the legal status of the third party claim. It could not do so. Any number of different causes of action or claims could be put into one document and that coincidence by itself is insufficient. We therefore have an assignment of the claim against HSBC.

42. The claims are not connected in the sense of being dependent one on the other. The fact that the trustee allowed a certain level of claim has nothing to do with whether there is a case in negligence against HSBC for the way it supervised the operation of the funds that gave rise to the loss. The nature of the claims is different. The circumstances giving rise to the claims are not the same. Yes, they have their historical origin in a general way in the same events. It is also true that if it were not for the fraudulent or unlawful activities that resulted in the losses sustained by the investment funds, there would not be a claim against HSBC. But again that does not make them the same. There is a relationship in time and circumstance but that is not sufficient. They do not arise out of the same loss, but it could be said truly that they have their origins in the same factual circumstances. In these circumstances, it is apparent that the assignment involves the transfer of a bare cause of action and that the rules of champerty prima facie apply and the assignment is unenforceable unless one or more of the exceptional circumstances applies. It is not a bare cause of action if it is sufficiently connected with another legal right or interest.

43. Another basis of exclusion from champerty is where an assignment of a right of action is made to a party with a genuine commercial interest in taking it and enforcing it for its own benefit. *Trendtex* considered this exception although holding in the particular circumstances that a provision for onward trading of the cause of action to an anonymous third party involved the likelihood of profit and savoured of champerty. There is in this assignment no genuine commercial interest existing independent or antecedent to the transfer itself. The only claim that the plaintiff has or could have in an action against HSBC arises from the assignment itself and not otherwise. In Fraser v Buckle, Costello J. endorses this requirement which is generally accepted. The appellant is incorrect in saying that while it is often the case, the requirement of an independent basis is not essential. Neither is the example of a bank disposing of loans a precedent establishing the opposite because the assignment of a debt is permitted by law.

44. As indicated above, there is no requirement on a party objecting to a transaction on the ground of champerty to establish any specific infringement or threat to public policy. The law presumes that the transaction is wrongful and unenforceable if it constitutes or savours of champerty. In this jurisdiction, maintenance and champerty remain as crimes as well as civil wrongs.

45. The appellant invokes the decision of the English Court of Appeal in Brownton, but at page 509, the court enumerated elements of a test of genuine commercial interest including at (iii): "A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest".

46. Is the assignment of the third party claims connected with a property right? The suggestion is that it is intimately involved and connected with the Accepted Customer Claim which was the principal purpose of the assignment. Secondly, it is suggested that this third party claim assists with the Accepted Customer Claim or is protective of it. But the third party claim does not protect the bankruptcy claims. They are simply not related. If the Accepted Customer Claim in the bankruptcy process did not actually result in payment of the amount specified and agreed, it is true that the third party claim if successful might make up the difference. Again, however, that is more a matter of coincidence and that has nothing to do with a legally accepted relationship. The plaintiff has obtained an assignment of two sources of recovery, potentially in one case and predictably in the bankruptcy depending on the ultimate outcome of the trustee's efforts by way of recovery. It is of course the case that it will have to give credit for the amount recovered in the Accepted Customer Claim but that is a consequence of legal rules prohibiting double recovery.

47. It is argued that the third party claim is incidental and subsidiary to the bankruptcy claims. It is not. The words incidental and subsidiary appear to have their origin in *Dawson v Grade, Northern & City Railway Company* [1905] 1 KB 260 and a glance at the facts of that case reveals the aptness of the characterisation and the chasm of understanding that lies in endeavouring to associate the instant case with that authority. Leaseholds were assigned to the claimant together with the benefit of sums of money that he might be entitled to recover under the Lands Clauses Consolidation Act, 1868 for damage previously done to the structure of houses and trade stock on the leased land. It was held that the assignment was valid since it was incidental and subsidiary to the conveyance of the land. The legal relationship or connection is clear.

48. It is true that characterising the assignment as savouring of champerty does inhibit the plaintiff's capacity to sue. It does indeed interfere with its access to the courts and its right to litigate, which are recognised constitutional rights. But the whole purpose of champerty and maintenance is to prevent actions being pursued that are illegitimate because they are contrary to law and because they offend the integrity of the legal system and are abuses thereof. If the enforcement of this law results in the escape, so to speak, of a party from a potential liability arising from alleged wrongdoing, that may be considered an unfortunate consequence. But it cannot be a reason for permitting a claim that is contrary to law.

49. SPV submits that *Massai* is the most equivalent case to the matter in suit here. The relevant facts appear above in the summary of the appellant's submissions at para 21. There is, however, a material difference that militates against the validity of the comparison. Aerostar purchased the capital of the company and was subsequently assigned the company's interest in the lawsuit. Aerostar then sold its shareholding to a third party but maintained the lawsuit itself. The significant difference is that the company in its original ownership or that of Aerostar held the right to litigate the action. How did it lose that right by selling its shareholding? It is clear that Aerostar would have been within its rights to dispose not only of the company but also of the right of action and the purchaser would have been in a position to receive it, without the taint of champerty. Aerostar was at all material times entitled to the benefit of the right of action; it was free to assign it with the shares or to retain it. In the event, it retained the right of action. The vendors in *Dawson v. Grade*, *Northern & City Railway Company, Ellis v. Torrington* and *Williams v. Protheroe* and the other classic authorities were obliged to sell the rights in issue; the courts found that they were entitled to do so. By the same reasoning, Aerostar was not obliged to dispose of its right of action and it was not in breach of the law of champerty by retaining it. The case, accordingly, is not of assistance to SPV.

50. In *Greenclean*, there was a legitimate commercial purpose behind the insurer's involvement in the case in supporting the claimant. Such insurance was a feature of litigation in UK since the 1990 reforms. Here, the plaintiff is not supporting the litigant, but purchasing the right to litigate this particular claim.

Conclusion

51. In my judgment, the High Court judge was correct in her analysis of the law and its application to the facts of the case. The appellant has not established any basis for overturning the result. The court was correct to hold that the impugned transaction gave rise to the potential sale of the right to sue third parties. The court did not have to find that there was an intention on the part of the assignee to engage in trading of litigation, whether professional or otherwise. I am satisfied that the High Court was correct in the conclusions it reached, and in the order it made dismissing the proceedings herein.

52. I would accordingly dismiss the appeal.