Neutral Citation: [2015] IEHC 602

THE HIGH COURT

COMMERCIAL

[2014 No. 10269 P.]

[2015 No. 15 COM]

BETWEEN

SPV OSUS LIMITED

PLAINTIFF

AND

HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LIMITED,

HSBC SECURITIES SERVICES (IRELAND) LIMITED,

OPTIMAL INVESTMENT SERVICES S.A. AND

BANCO SANTANDER S.A.

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on 5th day of October, 2015.

Introduction

1. On 11th December, 2008, the world learned of the massive fraud conducted by Bernard L. Madoff and the liquidation of Bernard L. Madoff Securities LLC ("BLMIS") was commenced in the United States Bankruptcy Court for the Southern District of New York. A trustee, Mr. Irving Picard, was appointed to oversee the case under the Securities Investors Protection Act of 1970 ("SIPA") (the "Trustee"). These proceedings are just one of the many proceedings which resulted from the Madoff fraud.

Investment in BLMIS and the BLMIS liquidation

2. Optimal Multiadvisers Limited (OML) is an investment company incorporated in the Bahamas and structured as an 'umbrella fund' with several series of shares linked to different investment strategies. It is part of the well known Santander Group. OML typically created a trading subsidiary for each series of shares. In 1997 OML formed Optimal Strategic US Equity Limited ("Optimal Strategic") for the purpose of holding assets linked to OML's series of shares which, in this judgment, are referred as the Strategic Series shares.

3. Optimal Strategic invested nearly all of its assets including the Strategic Series shares through a brokerage account at BLMIS. Upon the collapse of BLMIS there were virtually no assets in the estate. In reality, the investment was now represented by the claims Optimal Strategic had in the estate of BLMIS and any non bankruptcy claims against third parties as it might have for the loss it had sustained.

4. In the 90 days preceding the liquidation of BLMIS, Strategic Series shares to the value of approximately US$151 million had been redeemed on behalf of investors in OML. Under US bankruptcy law, payments made within 90 days of the bankruptcy amount to preferential payments and can be recovered by the Trustee. The Trustee made a demand of Optimal Strategic for the return of US$151 million in respect of the redeemed shares. In return Optimal Strategic had a claim against the BLMIS estate in respect of the investments lost due to the fraud of Mr. Madoff. The net asset value of these investments as of November, 2008 was approximately US$2.9 billion. The net equity value was approximately US$1.5 billion. The value of Optimal Strategic's claim in the BLMIS liquidation therefore depended upon whether the claim was valued on a net asset value or on a net equity basis. There was a dispute between Optimal Strategic and the Trustee as to the correct basis upon which Optimal Strategic's claim should be valued. Ultimately this was resolved in favour of the Trustee and there was a decree by the Supreme Court of the United States of America giving effect to this result in June, 2014, after the Assignment the subject matter of these proceedings.

5. Under US bankruptcy law, customers of an insolvent broker dealer, such as BLMIS, who are in a SIPA liquidation, are entitled to preferential treatment in the distribution of assets from the debtor's estate. This is achieved through the creation of a fund, whereby customers holding allowed claims in the bankruptcy are entitled to share in such a fund based on the amount of their 'net equity' (the difference between the amount invested and the amount withdrawn). A claim against a SIPA estate is recognised to be a property interest.

6. Before Optimal Strategic would be allowed to share in this preferential customer fund, the Trustee insisted that Optimal Strategic would have to return the US$151 million it owed to the BLMIS estate. On 22nd May, 2009, Optimal Strategic entered into a settlement agreement with the Trustee whereby it returned certain amounts to the estate in exchange for an allowed customer claim in the SIPA case in the amount US$1,540,141,277.60 (which was essentially its net equity claim increased by the amount it was repaying under the Settlement Agreement) (the "Allowed Customer Claim"). The investors in the Strategic Series shares had no claims as individuals to the return of the Allowed Customer Claim. Their claim was indirect through Optimal Strategic.

7. The Trustee has brought a multitude of proceedings against many different parties seeking to swell the assets of the estate by means of recoveries from third parties. Inevitably this means that administration of the estate will take some time. There are many uncertainties in the process. This means that it is unknown whether all or part of the Allowed Customer Claim will in fact be paid out and it is unknown when this may occur. It is also not clear whether there will be a surplus to be distributed amongst the unsecured creditors of the estate. To date the Trustee has paid over approximately US$750 million in respect of the Allowed Customer Claim.

8. Optimal Strategic has a claim as an unsecured, non preferential, creditor in the BLMIS estate for the difference between any distributions in respect of the Allowed Customer Claim (approximately US$2.9 billion less US$1.5 billion). It is uncertain whether any distribution will be paid to unsecured creditors and, if so, how much. In addition, it has in fact received US$500,000 from the Securities Investor Protection Corporation ("SIPC"). There is also the possibility that it might receive a payment under a victim remission scheme established by the Department of Justice. These claims, together with the Allowed Customer Claim, are referred to as claims in the bankruptcy in this judgment. In addition, Optimal Strategic may have causes of action against third parties arising out of the loss of the investments due to the fraud of Mr. Madoff. In this judgment these are referred to as third party claims or non bankruptcy claims.

9. Thus, while obtaining the Allowed Customer Claim was a significant step in seeking the recovery of the lost investment, it did not imply that Optimal Strategic would immediately obtain funds for its investors.

The secondary market
10. Beginning in 2010, parties, including distressed debts investors and hedge funds, expressed an interest in purchasing allowed customer claims in the BLMIS liquidation. By 2011, a secondary market of selling and trading allowed claims in the BLMIS liquidation had begun. Several distressed debt investors and hedge funds interested in acquiring such claims contacted OML to inquire about purchasing an interest in Optimal Strategic's Allowed Customer Claim.

11. As a result of the emergence of an active secondary market for customer claims in October, 2010 the Trustee sought relief from the Bankruptcy Court to implement procedures for the assignment of allowed customer claims. On 10th November, 2010, the Bankruptcy Court issued a transfer procedures order. It established a procedure whereby the holder of an allowed claim could transfer his or her entire claim to a third party in a pre-approved manner. The Order prohibits the selling or assignment of part of a claim. This requirement was so that the Trustee could easily track the beneficiaries of customer claims and for other reasons of administrative convenience.

12. Given the emergence of the secondary market in allowed customer claims in the BLMIS liquidation and the Transfer Procedures Order, there was now a mechanism whereby the Allowed Customer Claim could be sold on to third parties, thereby realising funds which could be returned to the holders of the Strategic Series shares. However, all of the holders of Strategic Series shares would have to agree to sell all of their shares at an agreed price and only one buyer could purchase this very substantial claim. Thus there were very real practical challenges to actually selling the Allowed Customer Claim on the secondary market. To overcome this the directors of OML devised a mechanism whereby a holder of Strategic Series shares could receive an instrument which would allow such holder to take direct control of the disposal of his/her indirect interest in the Allowed Customer Claim and, if they so wished, to sell his/her indirect interest in the Allowed Customer Claim in the secondary market.

The transaction
13. The transaction involved four related steps. It could only be realised by completing all four steps. The first step was to be the Assignment of the Allowed Customer Claim to a new special purpose vehicle (the plaintiff) incorporated in the Bahamas for the purpose of giving effect to the scheme ("SPV"). Initially SPV was to be a 100% subsidiary of Optimal Strategic. SPV was to acquire the Allowed Customer Claim on an "as it, where is" basis. In consideration of the Assignment, SPV would issue 1,539,641,277.60 participating voting shares having no par value to Optimal Strategic ("the SPV shares"). Each SPV share notionally represented US$1 dollar of the Allowed Customer Claim (net of US$500,000 thousand already received from SIPC). The directors of OML (who were the same as those of Optimal Strategic) were to comprise the initial board of SPV. They were to serve until removed or replaced by resolution of the shareholders of SPV.

14. The business objective of SPV was clearly set out at pp. 13-14 of the Information Circular dated 29th April, 2011, sent to the holders of the Strategic Series shares as follows:-

> *"The business object of SPV will be to hold the [Allowed Customer Claim] of USD 1,540,141,277.60 and attend to any business affairs incidental to and necessary to the proper administration thereof for the benefit of the shareholders of SPV until such time as any and all recoveries made by the Trustee have been distributed to SPV in respect of the [Allowed Customer Claim] and the Trustee shall have been discharged from the office of trustee for the liquidation of BLMIS. SPV's sole purpose is to hold the [Allowed Customer Claim] for the benefit of its shareholders and to act as a conduit through which the Strategic Series investors may dispose of their pro rata interest in the [Allowed Customer Claim]…*
>
> *Although the [Allowed Customer Claim] will no longer be directly held by Optimal Strategic, by virtue of Optimal Strategic's 100% ownership of SPV at incorporation current Strategic Series shares will continue to represent an indirect interest in the [Allowed Customer Claim]."*

15. The second step in the procedure was to afford the holders of the Strategic Series shares an option to either (i) exchange their shares for SPV shares, (ii) exchange their Strategic Series shares for shares in SPV and for those SPV shares to be sold or (iii) to retain their existing shares. The purpose of exchanging their Strategic Series shares for SPV shares was set out in the Information Circular at p. 14 as follows:-

> *"[e]ffecting such exchange would allow holders of Strategic Series shares to trade the SPV Shares… and, in as much as the SPV Shares will represent an interest in [Allowed Customer Claim], realise their interest in such a claim if they can find a buyer for the SPV Shares.*
>
> *Furthermore, holders of Strategic Series shares may mandate OIS, the investment manager of OML, to sell such SPV Shares on their behalf so that they receive any proceeds thereof in lieu of their SPV Shares."*

16. The third step was the compulsory redemption of the Strategic Series shares of those investors who elected to exchange them for SPV shares or to have their Strategic Series shares exchanged for SPV shares and sold by OIS.

17. The final step was then to be the sale of SPV shares for electing investors on the secondary market which was to be by way of an auction of the SPV shares. At any time prior to the auction, it could be cancelled. There was to be in effect a reserve price so that if the shares did not sell at the auction the investors would retain their new SPV shares.

18. The procedure was adopted and the Strategic Series shares representing the investment by Optimal Strategic in BLMIS were largely exchanged for SPV shares and the Strategic Series shares in OML cancelled. The SPV shares were in fact sold in three separate auctions to investors in the distressed debt industry. In exchange for the Assignment of Claim (discussed below in more

detail) SPV issued 1,539,641,277.60 voting shares to Optimal Strategic, the number of SPV shares being equal to the approved dollar amount of the Allowed Customer Claim. Thus each SPV share originally represented an indirect interest in US$1 of the Allowed Customer Claim. Optimal Strategic originally held 100% of SPV's shares. In accordance with the four step procedures OML there upon held auctions in May, 2011, May, 2012 and May, 2013 at which shares in SPV were sold to investors. In June, 2011 Allowed Customer Claims in the BLMIS estate were trading a roughly US$0.70 to US$0.75 on the dollar. After the last auction in May, 2013 hedge funds and distressed debt investors held more than 93% of the shares of SPV. These new shareholders in SPV were not affiliated with Optimal Strategic or OML. On 30th June, 2014, the new shareholders of SPV removed the original directors, being the directors of Optimal Strategic and OML, from the Board of SPV and in December, 2014 they instituted these proceedings.

The Assignment
19. Central to this scheme was the transfer of the Allowed Customer Claim by Optimal Strategic to SPV. This was by an assignment of claim agreement dated 6th May, 2011. It provided that by the Assignment of Claim, 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, (iii) voting rights, but only to the extent related to 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')."*

19. The Assignment was in the form approved by the Transfer Procedures Order. It provided that Optimal Strategic transferred and assigned to SPV all rights, title and interest in and to the Allowed Customer Claim *"together with any affirmative claims of the assignor against third parties."*

The present proceedings
20. The first named defendant, referred to as HSBC Custodian, held itself out as a provider of specialist trustee and custodial services and by an agreement entered into in November, 2002 with, inter alia, OML and Optimal Strategic it was appointed as custodian to, inter alia, Optimal Strategic. The second named defendant is referred to as HSBC Administrator. By an administration agreement dated December, 2002 between, inter alia, the second named defendant, OML and Optimal Strategic, HSBC Administrator agreed to act as administrator, secretary, registrar and accountant of Optimal Strategic (together "the defendants").

21. In these proceedings it is claimed that HSBC Custodian and HSBC Administrator are each guilty of breaches of contract, misrepresentation, negligence and breaches of fiduciary duties in relation to the services to be performed by them for Optimal Strategic. In effect it is asserted that the failures of the defendants in relation to the investments by Optimal Strategic in BLMIS have wrongly caused or substantially contributed to the loss of the investments. Allegations have been made that HSBC Custodian and HSBC Administrator should have been aware that these funds were exposed or that Mr. Madoff was engaged in a fraud; that if they had respectively acted promptly and in accordance with their contractual and fiduciary duties and obligations the loss sustained as a result of this fraud would have been either avoided or diminished. The claim is for damages in the sum of US$2,919,934,627.70, less a credit for payments actually received, which at present is approximately US$750 million.

22. At para. 9 of the Statement of Claim it is pleaded:-

> *"[b]y Deed of Assignment dated 6th May 2011 (the 'Assignment'), Optimal Strategic sold, transferred and assigned by way of an absolute assignment in writing, inter alia, all rights, causes of action or claims arising out of Optimal Strategic's investment in BLMIS to SPV Optimal SUS Ltd. (now known as SPV OSUS Ltd.) including the causes of action and claims the subject of these proceedings. The Assignment is governed by the laws of the State of New York. The Plaintiff will refer to the entirety of the said Assignment for the purposes of establishing the terms and the true meaning and effect thereof. Notice in writing of the said Assignment was giving to each of the Defendants herein on the 18th November 2014."*

The American proceedings
23. After the institution of these proceedings, Optimal Strategic instituted proceedings in New York seeking a declaratory judgment that the right to bring claims against third party service providers such as HSBC Custodian and HSBC Administrator was not assigned by Optimal Strategic to SPV by the Assignment. The proper law of the contract is the law of the State of New York and so this issue is to be determined in the courts of the State of New York.

The present Motion
24. The defendants argue that the present case is brought by a plaintiff who is unconnected with the underlying contracts which give rise to the claims. They argue that the Assignment did not assign third party claims such as this claim against the service providers. They accept, for the purposes of this Motion, that the Court must assume that in fact the right to sue third parties including the service providers was assigned. They say that this amounts to the assignment of a bare cause of action and that the assignment accordingly is void as being champertous. They say that it follows that the plaintiff has no entitlement to bring these proceedings and they seek the following reliefs:-

> *"1. A declaration that the Assignment of Claim dated 6 May 2011 between Optimal Strategic US Equity Ltd and SPV Optimal SUS Ltd (the 'Assignment') is contrary to public policy, void and unenforceable as a matter of Irish law.*
>
> *2. An Order dismissing or striking out the Plaintiff's claim as against HSBC [the first and second named defendants]."*

Maintenance and champerty
25. In *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 I.R. 654 Clarke J. accepted the definition of maintenance as set out in Halsbury's Laws of England (London: Butterworth & Co., 1907), vol. 1, at p. 51, para. 81, as:-

> *"the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in*

the action nor any other motive recognised by law as justifying his interference".

Clarke J. continued:-

> *"…a person guilty of maintenance 'acts unlawfully and contrary to public policy' and, therefore, is not entitled to enforce any agreement for any form of benefit made with the relevant litigant.*
>
> *[13] Champerty is a particular form of maintenance whereby the person concerned obtains a share in the subject matter or proceeds of litigation in return for assisting with funding the litigation concerned."*

26. In *Waldron v. Herring & Ors* [2013] IEHC 294, Edwards J. followed the decision of Clarke J. and held that:-

> *"'[m]aintenance' is the intermeddling of a disinterested party to encourage a lawsuit. 'Champerty' is the maintenance of a person in a lawsuit on condition that the subject matter of the action is to be shared with the maintainer. It is therefore unlawful for a party without a legitimate interest to fund the litigation of another, or to fund litigation in return for a share of the proceeds."*

27. It has long been the law, as was pointed out by Clarke J. in Thema, that the courts will not enforce any agreement for any form of benefit where the agreement savours of maintenance or champerty. This is so because it offends against Irish public policy. It matters not that the agreement in question is valid under the proper law of the contract in question. It is for the Irish courts to determine whether the enforcement of the agreement would offend against Irish public policy.

28. This is clear from the first modern Irish authority, *Fraser v. Buckle* [1994] 1 I.R. 1. In the High Court, Costello J. approved the passage in Binchy, *Irish Conflict of Laws* (Dublin: Butterworth (Ireland) Ltd., 1988) at p. 549, as follows:-

> *"Under Irish internal law of contract, a contract may be invalid as being opposed to public policy. The fact that application of a foreign law would be contrary to Irish public policy is a reason for holding it invalid, not because it offends against the public policy of some foreign law (such as its proper law) but because it offends against our own."(Emphasis added)*

29. On appeal to the Supreme Court [1996] 2 I.R.L.M. 34, O'Flaherty J. noted that champerty agreements have been held to be void by the English courts although the contracts were governed by a foreign law which deemed them to be valid. The Supreme Court upheld the decision of the High Court. It follows, therefore, that the question of the validity of the assignment under the law of the State of New York is not determinative of whether or not the agreement offends Irish public policy as savouring of champerty.

30. As the Court is concerned with Irish public policy, the decisions from other jurisdictions in relation to what is or is not acceptable are of limited assistance. There are a number of recent Irish decisions which provide clear guidance in this area.

Irish authorities

31. *Fraser v. Buckle* concerned an heir-locator contract. In the High Court, Costello J. stated at p.13:-

> *"'[m]aintenance' has been defined as the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference. 'Champerty' is a particular kind of maintenance, that is maintenance of an action in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof (See Halsbury's Laws of England (4th ed.), Vol. 9, para. 400). A helpful summary of the law, and the reasons why champertous agreements are condemned, is to be found in a judgment of Lord Denning M.R. in In re Trepca Mines Ltd. (No. 2) [1963] Ch. 199, at pages 219 and 220):-*
>
> *'Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened very much of late (see Martell v. Consett Iron Co. Ltd. [1955] Ch. 363) and I hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from campi partitio (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by Scrutton L.J. in Haseldine v. Hosken [1933] 1 K.B. 811, 831). The reasons 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 had declared champerty to be unlawful and we cannot do otherwise than enforce the law; and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957.'"*

32. Having considered the cases of: *Martell v. Consett Iron Co. Ltd.* [1955] Ch. 363; *Laurent v. Sale & Co* [1963] 1 W.L.R. 829; *In re Trepca Mines Limited* (No. 2) [1963] Ch. 199; *Trendtex Trading Corporation v. Credit Suisse* [1980] Q.B. 629 (C.A.); [1982] AC 679 (H.L.); and *Giles v. Thompson and related appeals* [1993] 3 All E.R. 321, he considered whether or not the heir-locators could be considered to have a legitimate interest in the litigation which they were maintaining so that no wrongdoing occurred. At p. 19, he held:-

> *"I cannot however agree that any of the decisions in the cases to which I have been referred or any part of the judgements in those cases oblige me to hold that the plaintiffs in this action had a legitimate and genuine interest in the proceedings in the New Jersey court such as would entitled them lawfully to maintain the defendants' claim in them. They had no interest in the estate of Evelyn Herbert, apart from the interest they acquired in the November, 1988 agreements.* ***As it is well established that the interest which the maintainer 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, and as the plaintiffs have no such interest in this case, I cannot agree that the agreements in this case are not champertous because of some interest which the plaintiffs had in Evelyn Herbert's estate prior to their agreements of November, 1988****."(Emphasis added)*

33. It is clear that Costello J. held that in order to have a legitimate interest in the litigation which a party is maintaining, that interest must exists independently of the agreement which gives him his share in the proceeds of the suit. He so held having considered the cases cited above and in particular the decision in *Trendtex*. The Supreme Court upheld the High Court in holding that the agreements were contrary to Irish public policy as savouring of a champerty. The reasoning of the High Court was endorsed.

34. The Supreme Court again considered the law in relation to maintenance and champerty in O'Keeffe v. Scales [1998] 1 I.R. 290. Lynch J. gave the decision of the Court and he held at p. 295 as follows:-

> *"[i]t is clear from these authorities that the law relating to maintenance and champerty still exists in this State. A person who assists another to maintain or defend proceedings without having a bona fide interest independent of that other person in the prosecution or defence of those proceedings acts unlawfully and contrary to public policy and cannot enforce an agreement with that other person for any form of benefit, whether it be a share of the proceeds of the litigation or a promise of remuneration, such as money or a transfer of property if the claim is successfully defended."*

Thus the maintainer must have a bona fide interest independent of the other person whose suit he purports to maintain.

35. In *Thema*, at paras. 22 and 23, Clarke J. stated:-

> *"[i]n Ireland it is unlawful for a party without an interest (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds. The only form of third party funding which is, therefore, legitimate in Ireland is one which comes within the exceptions to maintenance and champerty. Charitable intent, where the funder does not hope to benefit personally, would, of course, take the case outside the third party funder cost order jurisdiction identified in Moorview Developments Ltd. v. First Active plc [2011] IEHC 117, [2011] 3 I.R. 615, for that jurisdiction is confined to persons who fund litigation which they hope will indirectly benefit them in capacities such as shareholders and creditors.*
>
> *[23] That such parties are, even though they may not be guilty of maintenance or champerty, exposed to potential orders for costs is clear from Moorview Developments Ltd. v. First Active plc [2011] IEHC 117, [2011] 3 I.R. 65.* ***However, such parties are not, in my view, in the same category as professional third party funders who make a commercial decision to 'invest' in litigation in the hope of making a profit****. After all, if the litigation is well founded then the shareholder or creditor is only getting their due. 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."(Emphasis added)*

36. At para. 26 he made clear that the crucial distinction from the point of view of Irish public policy is the existence of an independent legitimate interest on the part of the funder of the litigation. He stated:-

> *"[h]owever, a third party funder who is not guilty of champerty (i.e. who has the sort of legitimate interest in the case identified in the champerty jurisprudence) is, in my view, in a different situation. They are, even if only indirectly,* ***already involved in the litigation****. Any company which lacks funds always has the possibility that its shareholders (or its creditors) may choose to provide further funding for a whole range of reasons not confined to potential litigation. Commercial judgment will often lead to parties with a direct interest in a particular enterprise investing further sums. There is, therefore, in my view a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation, on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand."(Emphasis added)*

37. In *Greenclean Waste Management Limited v. Leahy & Co. Solicitors* (No. 2) [2014] IEHC 314 Hogan J. had to consider whether after the event ("ATE") legal costs insurance was champertous. He noted that the scope of the application of the law of champerty must accommodate itself to modern social realities, but observed that there was no doubt at all that the tort of champerty not only still existed but that it also had a practical vibrancy. In addition he emphasised the constitutional right of access to justice as being important in assessing allegations of maintenance and champerty. He pointed out that Lynch J. made clear in *O'Keeffe* that the law in relation to maintenance and champerty must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonable statable claims. Hogan J. stated, at para. 24, that one of the principles flowing from the constitutional right of access to justice is that *"the courts should not place any unnecessary obstacles in the path of those with a legitimate claim."* The important word in this sentence of course is "unnecessary". He went on at para. 25 to state:-

> *"[a]gainst 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 the true leitmotif which runs through all of this case-law in this area."*

38. He applied the principle to ATE insurance and held as follows:-

> *"26. In truth, the real objection to ATE insurance is the size of the premium and the fact that it is normally payable only after a positive court decision or settlement. At one level it is easy to represent this as simply a disguised method of investing in litigation and recovering a share of the proceeds of the action under the guise of handsome premium. If ATE coverage was confined to this, then I think the argument that it savoured of champerty and was therefore void as contrary to public policy would be almost unanswerable.*
>
> *27. Yet there is more to ATE then this… it should also be borne in mind that ATE also serves important needs within the community by facilitating access to justice for persons and entities who might otherwise be denied this. In this regard, ATE insurers provide a legitimate service by providing access to justice and this service cannot properly be regarded as simply as either investing in or trafficking in litigation.*
>
> *28. Taken in the round, therefore, I find myself inclining that ATE Insurance – at least in the form which it manifests itself in these proceedings – is not on the whole champertous or amounting to maintenance."*

39. It is clear that Hogan J. was of the view that what would otherwise have been void as contrary to public policy was saved as ATE insurance served an important need within the community by facilitating access to justice to persons who might otherwise be denied this. Therefore, he was of the view that ATE insurers provided a legitimate service which could not properly be regarded as either investing or trafficking in litigation. It was the service aspect of the transaction facilitating access to justice which saved it from otherwise offending public policy.

40. The following principles relevant to the current dispute emerge from these Irish authorities and the English authorities cited in the judgments:-

> (1) 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.
>
> (2) The assignment of a bare cause of action for purposes which the law does not recognise as legitimate savours of champerty.
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> (3) Trafficking in litigation is contrary to public policy.
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> (4) Wanton and officious intermeddling in the litigation of others is contrary to public policy.
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> (5) The scope of the law of maintenance and champerty must accommodate itself to modern social realities.
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> (6) The law in relation to maintenance and champerty must be considered in the light of the constitutional right of access to justice.
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> (7) The law in relation to maintenance and champerty must not place any unnecessary obstacles in the path of persons with a legitimate claim.
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> (8) The assignment of a cause of action that is incidental or ancillary to a property right or interest is not champertous.
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> (9) 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.
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> (10) The assignment of a cause of action to a party who has a genuine commercial interest in the cause of action is not champertous.
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> (11) 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.
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> (12) 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.
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> (13) In considering whether an agreement is champertous, the Court should look at the totality of the transaction.
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> (14) The Court is concerned with substance rather than the form of a transaction in considering whether if offends the law of maintenance and/or champerty.

The defendants' objections

41. In this case the defendants argue that the Assignment is void as savouring of champerty on two grounds. They say that the assignment of the third party claims and, in particular, this third party claim, amounts to the assignment of a bare cause of action. In addition they say that it constitutes trafficking in litigation. On either ground the Court should declare that the Assignment, insofar as it relates to the assignment of third party claims, savours of champerty and is void and unenforceable.

42. The plaintiff argues that the assignment of the Allowed Customer Claim is valid. The assignment of the third party rights is ancillary or incidental to the assignment of the Allowed Customer Claim. Therefore the assignment of the third party litigation rights is not the assignment of a bare right to litigate, as the defendants argue. In addition, the plaintiff argues that it has a genuine commercial interest in the enforcement of the third party claim. The sale of the Allowed Customer Claim and the third party rights does not amount to trafficking in litigation and the relief sought by the defendants should be refused.

Preliminary points

43. The parties are agreed upon certain preliminary points. The Court must look at the totality of the transaction and it must look at the substance rather than the form of the transaction. The law is evolving and the courts must not apply older authorities in a slavish fashion to modern situations. What was previously considered to be contrary to public policy fifty years ago may now be considered unexceptional and acceptable.

44. In *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679, Lord Roskill held at p. 703 as follows:-

> *"[m]y Lords, I do not therefore think that Mr. Brodie is correct in criticising the judgment of Oliver L.J. on the ground that the learned Lord Justice failed to distinguish between the interest necessary to support an assignment of a cause of action and the interest which would justify the maintenance of an action by a third party. I think, with respect, that this submission involves over-analysis of the position. The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for its own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."*

44. In *Martell v. Consett Iron Company Limited* [1955] 1 Ch. 263 at p. 415 Jenkins L.J. stated:-

> *"[b]ut it is an abuse of authorities to extract from judgments general statements of the law made in relation to the facts and circumstances of particular cases and treat them as concluding cases in which the facts and circumstances are entirely different and which raise questions to which their authors were not directing their minds at all."*

45. In *Massai Aviation Services & Anor v. The Attorney General & Anor* [2007] UKPC 12, Baroness Hale held:-

> *"19 But 'trafficking' is a pejorative term which takes the debate no further: it simple means trading in something (be it*

drugs or people) in which it is not permissible to trade. In order to decide whether the particular transaction is permissible, it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy."

46. It is thus clear that the Court must consider the totality of the transaction and not just its form. This means I must look at the circumstances of the Transfer Procedures Order and the restriction on the sale of interests in the Allowed Customer Claim, the terms of the Assignment and the Information Circulars, and the four steps in the transaction outlined in the Circular. I look to the fact that the losses arising from the fraud were indirectly but ultimately incurred by the holders of the Strategic Series shares and that the monies recovered will be paid to the holders of the shares in the plaintiff, which was a special purpose vehicle established to monetise the interests of the holders of the Strategic Series shares by the sale of shares in the plaintiff to third party investors.

47. Further, it is agreed that I should proceed for the purpose of this judgment on the basis that the third party claims were assigned by Optimal Strategic to SPV by the Assignment and that the Assignment is not champertous under the law of the State of New York, both of which propositions are currently contested before the courts in New York.

Assignment of a bare cause of action

48. It is common case that the assignment of a bare cause of action offends the rule against champerty and such an assignment is void. The assignment maybe saved if it is for a purpose which the law recognises as legitimate. As appears from the speech of Lord Roskill in Trendtex, quoted above, if the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in the taking the assignment and enforcing if for its own benefit, this is considered to be legitimate. The assignment of a debt and the right to sue to recover the debt would be a commonplace example of an assignment of a cause of action which the courts have long recognised as legitimate and not savouring of maintenance or champerty. In Thema, Clarke J. noted that charity might provide such a legitimate interest. In Greenclean, Hogan J. indicated that ATE insurance served an important need within the community by facilitating access to justice for persons who might otherwise be denied this and this was for a purpose which the law recognised as legitimate. In Martell, the plaintiffs had a common interest in protecting their rights as owners and occupiers of fisheries in the prevention of pollution of rivers. This was legitimate in the eyes of the law.

49. In this case, the plaintiff argues that the assignment of the right to sue the defendants is legitimate. It is not the assignment of a bare right to litigate as the assignment is:

(i) ancillary or incidental to the assignment of the Allowed Customer Claims or, in the alternative

(ii) that it has a genuine commercial interest in the litigation and therefore the assignment of the chose in action does not amount to the assignment of a bare right to litigate.

Ancillary or incidental: the law

50. While the law will strike down an assignment that is of only a bare cause of action, it will recognise the validity of an assignment of a cause action which is ancillary or incidental to a property right or interest. The two decisions of the Supreme Court, *Fraser v. Buckle and O'Keeffe v. Scales*, make it clear that the property right or interest must exist independently from the assignment of the cause of action. This is not to state that it must pre-exist the assignment of the cause of action, though frequently this will be the case. It has long been recognised that it is legitimate to assign debts together with the right to sue for the recovery of debts. The assignment of the cause of action - the right to sue for the debt - is incidental to the property right in the debt. They may, as a matter of fact, be created at the same time but the right to the debt is independent of the right to sue for the debt. In *Fraser v. Buckle*, Costello J. considered the speeches in *Trendtex*. In his judgment, he pointed out at p. 19 that *"it is well established that the interest in which the maintainer 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"* if that latter agreement is not to offend the law against champerty. At p. 20, he stated that the agreements which the law of champerty condemns are agreements by which one party agrees to maintain litigation in which he has no genuine interest in consideration for a promise to receive a share of the proceeds of the litigation.

51. If the plaintiff is to succeed in this argument it must establish the existence of an independent right or interest and that the right to sue third party service providers is ancillary or incidental to that right.

A genuine commercial interest

52. As it appears from the speech of Lord Roskill in *Trendtex*, quoted at para. 44 above, the House of Lords also recognised that if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit such an assignment did not savour of maintenance or champerty. The preceding passage in the judgment, at pp. 702-703, read as follows:-

"[m]y Lords, just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. 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. But, my Lords, as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired as, for example, an underwriter by subrogation: see Compania Colombiana de Seguros v. Pacific Steam Navigation Co. [1965] 1 Q.B. 101. My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Roles [1980] Q.B. 629, 657 when he said in the instant case that "the old saying that you cannot assign a 'bare right to litigate" is gone'. I venture to think that that still remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance."

53. *Trendtex* is the leading decision of the House of Lords in this area and was heavily relied upon by both the defendants and the plaintiff in their submissions. Trendtex, a trading company, instituted proceedings against the Central Bank of Nigeria ("CBN"). Trendtex had contracted to sell cement for shipment to Nigeria. The purchase price and demurrage would be paid under a letter of credit issued by CBN. It subsequently failed to honour the letter of credit. Credit Suisse had financed the transaction between

Trendtex and CBN. Repudiation of the letter of credit by CBN had left Trendtex heavily indebted to Credit Suisse. Credit Suisse agreed to guarantee all costs incurred by Trendtex in proceedings against CBN where it claimed damages amounting to US$14 million. Subsequently, in a series of agreements, Trendtex assigned to Credit Suisse the whole of its residual interest in a claim for breach of contracts against CBN. The agreement recited that an offer had been received from a third party to buy Trendtex's right of action against CBN for US$800,000.00. The agreement then provided (article 1) that Trendtex did not oppose the sale by Credit Suisse to a purchaser of its choice of all Trendtex's claims against CBN and recognised that it had no further interest in the case against CBN. Five days later the claim against CBN was assigned to a third party for US$1.1 million. A few weeks later the claim against CBN was settled for sum of US$8 million. Trendtex sought to set aside the transactions on the ground that the assignment to Credit Suisse was contrary to public policy and void as "savouring of champerty" insofar as it contemplated the possibility that a third party would make a profit out of the litigation even though it was not a party to the transaction.

54. Both Lords Wilberforce and Roskill, in their speeches, indicated that if the assignment in *Trendtex* had been no more than an assignment of Trendex's claim against CBN to Credit Suisse, the assignment in question would not have offended the law against maintenance and champerty. They were both clear that Credit Suisse had a genuine and a substantial interest in the success of the CBN litigation (in the words of Lord Wilberforce) or a genuine commercial interest in the litigation (in the words of Lord Roskill). They each agreed that the transaction offended the law against champerty because of the possibility that the cause of action would be further assigned by Credit Suisse to an anonymous third party who lacked the requisite interest which the House recognised was enjoyed by Credit Suisse in the litigation against CBN.

55. Lord Wilberforce stated at p. 694:-

> *"[t]he 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."*

56. Lord Roskill held that the assignment to the third party was champertous in the following terms at p. 703:-

> *"[b]ut, my Lords, to reach that conclusion and thus to reject a substantial part of Mr. Brodie's argument for substantially the same reasons as did Oliver L.J. does not mean that at least article 1 of the agreement of January 4, 1978, is not objectionable as being champertous, for it is not an assignment designed to enable Credit Suisse to recoup their own losses by enforcing Trendtex's claim against C.B.N. to the maximum amount recoverable. Though your Lordships do not have the agreement between Credit Suisse and the anonymous third party, it seems to me obvious, as already stated, that the purpose of article 1 of the agreement of January 4, 1978, was to enable the claim against C.B.N. to be sold on to the anonymous third party for that anonymous third party to obtain what profit he could from it, apart from paying to Credit Suisse the purchase price of U.S. $1,100,000. In other words, the 'spoils,' whatever they might be, to be got from C.B.N. 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, Credit Suisse taking the fixed amount which I have already mentioned."*

57. In *Thema*, Clarke J. noted that persons who might satisfy this test of having a genuine commercial interest would be existing shareholders or creditors of an impecunious company who had a claim against a third party. At par. 23 he noted that:-

> *"[i]f 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)."*

He drew a clear distinction between such parties and professional third party funders. If an assignee lacked the requisite genuine commercial interest in the litigation then the assignment is not saved from being champertous and the sale of the chose in action amounts to trafficking in litigation. Thus, the maintainer of the action must establish the existence of the genuine commercial interest apart from the assignment of the right to litigate.

Incidental or ancillary: application to the facts

58. By agreement of the parties, this case is to proceed on the assumption that the Assignment assigned not only the interests of Optimal Strategic in the Allowed Customer Claim and all other claims in the BLMIS bankruptcy but also its third party non bankruptcy causes of action. The defendants argue that simply because the third party claims were assigned in the same document in which the Allowed Customer Claim was assigned that the third party claims do not become incidental or ancillary to the Allowed Customer Claim for the purposes of the law of champerty. The fact that two rights - (1) the Allowed Customer Claim and the bankruptcy rights and (2) the non bankruptcy causes of action against parties other than the BLMIS estate - are assigned in the same Deed of Assignment does not as a matter of fact or law automatically and without anything more make the latter ancillary or incidental to the former. The Court must look to the substance of the transaction to see if this assignment of the non bankruptcy claims is legally incidental to the assignment of the bankruptcy claims. The defendants submit that the third party claims do not form part of the claims in the bankruptcy of BLMIS. They say it is not a claim against BLMIS but against third parties. As such it is a stand alone claim. It is not necessary for the securing of the Allowed Customer Claim or other rights in the bankruptcy of BLMIS. They submit that it is not necessary to assign the third party claims in order to protect the Assigned Customer Claim. They submit that the prosecution of a third party cause of action would have no impact on the quantum or recovery of that Allowed Customer Claim. They point to the fact that the Information Circulars provided to the investors in the Strategic Shares series made no reference whatsoever to the assignment of third party rights. The entire focus of the Circular is directed towards realising the interest of the holders of Strategic Shares series in the Allowed Customer Claim. They therefore say that it is neither incidental nor ancillary to the assignment of the Allowed Customer Claim. They say that the evidence advanced by the plaintiff to the contrary amounts to mere assertion and is insufficient to establish that the assignment of the third party litigation is incidental or ancillary to the assignment of the Allowed Customer Claim. If it fails to satisfy this test, then the assignment of the third party litigation rights amounts to the assignment of a bare cause of action which is prohibited by the law of champerty.

59. The plaintiff argues that the assignment of the cause of action against the defendants herein was ancillary and incidental to the assignment of the Allowed Customer Claim and the other claims in bankruptcy, that the transaction must be viewed as one integrated transaction and therefore the assignment of the cause of action against the third party service providers is not champertous.

60. Mr. John W. Greene, Jr., a director of the plaintiff swore an affidavit on 27th April, 2015, in the proceedings. At para. 35 he avers as follows:-

> *"I believe and am advised that [SPV] had a genuine commercial interest in entering into and enforcing the Assignment. I say that the Plaintiff has a direct and legitimate interest in the within proceedings. I say further that the Plaintiff had a genuine and legitimate commercial interest in entering into the Assignment. I say and believe that the Plaintiff was assigned the 'Transferred Rights' pursuant to the Assignment. I say and believe that the primary intention at the time of the Assignment was to allow Optimal Strategic shareholders to transfer their portion of the Allowed Customer Claim."*

61. In Mr. Greene's second affidavit, sworn on 26th May, 2015, he avers at para. 11:-

> *"I believe and am advised that the Plaintiff's right to bring claims arising out of Optimal Strategic's investment in BLMIS is incidental to the Allowed Customer Claim."*

He referred then to the evidence of Professor Bruce Green sworn on behalf of the plaintiff.

62. Prof. Green swore an affidavit on 22nd May, 2015. He said that he had been instructed by the plaintiff to consider the Assignment and to furnish his Opinion as to the nature of the rights the subject matter of the Assignment and whether the Assignment is champertous under the laws of the State of New York. To that extent his evidence is not directed towards the issue for determination by this Court. Even if the assignment of the cause of action the subject of these proceedings is not champertous under the law of the State of New York, this does not mean that it is not champertous under Irish law.

63. In his replying affidavit, sworn on 23rd June, 2015, Prof. Green states at para. 4(a):-

> *"[t]he Assignment included the transfer of the allowed SIPA Claim to SPV as well as causes of action, including the types of claims being pursued before this court. The Assignment was one integrated transaction that is commonplace in the distressed investing industry."*

In his Opinion, Prof. Green states:-

> *"The inclusion of the litigation claims [non bankruptcy claims against third parties] as part of the Transferred Rights was **only incidental** to the primary purpose of allowing investors to realize over a $1 billion of market value and is customary for secondary trades. Secondary purchasers **typically want all rights** the seller has that arise under, as a result of, or in connection with a claim, and there is nothing improper about that what so ever."(Emphasis added)*

He then gives a footnote:-

> *"For example, **a secondary purchaser would not want to run the risk the original holder would bring, post-assignment, any litigation claims that could impair the secondary purchaser's ability to recover on the claim**."(Emphasis added)*

64. Mr. Matthew Heerde, legal counsel of the plaintiff and a member of the New York State Bar, swore an affidavit on 27th April, 2015. At para. 14 he averred:-

> *"[t]he transfer of the causes of action against third party service providers was ancillary to the transfer of the Allowed Customer Claim. Under the laws of the state of New York, the causes of action were freely transferrable. New York General Obligations Law § 13-101 states: 'any claim or demand can be transferred,' with limited exceptions inapplicable here."*

At para. 16 he stated:-

> *"Here, SPV has acquired the right of payment of $1,570,108,675 against the BLMIS estate (along with the right to receive payments made by the BLMIS estate to general unsecured creditors). Supplemental to that transfer, SPV has also acquired the right to pursue causes of action, relating to the Allowed Customer Claim **against the BLMIS estate**. There is no indication that SPV intended to 'stir up litigation 'in an effort to secure costs,' but rather all evidence indicates it intends to pursue legitimate property interests and related causes of action."(Emphasis added)*

65. Professor Steven Shavell, Professor of Law and Economics at Harvard University swore an affidavit on 23rd May, 2015, furnishing his Opinion as to the nature of the rights the subject matter of the Assignment and whether the Assignment is champertous under the laws of the State of New York. At p. 7 he stated:-

> *"…the Assignment allowed the rights to litigation to be monotized. Buyers of shares in SPV on the secondary market presumably ascribed a value to the litigation rights that they purchased along with the Allowed BLMIS claim. It is standard in secondary markets for distressed assets that all rights and claims associated or related to an asset are included in the rights being transferred. Without the inclusion of the litigation of rights, buyers of SPV shares might not have been willing to purchase, or to pay the prices they did for the shares. Among other things, **if, the right to litigate did not travel with the Allowed BLMIS claim**, buyers may have been wary that the pursuit of such rights by another party could impair the value of the Allowed BLMIS claims."(Emphasis added)*

66. The plaintiff submits that this evidence establishes that the sale of the non bankruptcy claims was incidental to and indeed an integral part of the assignment of the Allowed Customer Claim and the other claims in the BLMIS estate. It submits that accordingly this satisfies the requirement that the assignment of the causes of action against the third parties be incidental to the assignment of the Allowed Customer Claim and therefore prevents the assignment from falling foul of the law of champerty. It says that Irish public policy should reflect the new reality emerging in relation to secondary markets in bankruptcy claims and accept that the transaction is not contrary to public policy.

67. Neither Prof. Green nor Mr. Heerde explain how the assignment of non bankruptcy claims is incidental to the assignment of all the claims against the BLMIS estate. Mr. Heerde's evidence amounts to a mere statement that the transfer of the causes of action against third party service providers was ancillary to the transfer of the Allowed Customer Claim. As a matter of fact this is true. It does not advance the legal argument. Professor Green states that secondary purchasers typically want all rights the seller has that arise under, as a result of or in connection with a claim, being, in this case, a claim in the BLMIS estate. This falls very far short of

establishing that the assignment of non bankruptcy claims is ancillary or incidental to the assignment of claims in the bankrupt estate. On the contrary, he emphasised that the inclusion of the litigation claims against third parties as part of the transfer right was only incidental to the primary purpose, which was the sale of the Allowed Customer Claim and associated rights in the bankruptcy. He says that secondary purchasers would not want to run the risk that the original holder would bring any litigation claims that could impair the secondary purchaser's ability to recover on the claim. His emphasis and focus is upon recovering the claim in the bankruptcy estate. The plaintiff has not adduced any evidence that the failure to assign the non bankruptcy litigation rights would impair the ability to recover upon the claim in the bankruptcy, as was suggested was a possibility by Professor Green. Professor Shavell's Opinion acknowledges the possibility of the third party litigation rights not travelling with the bankruptcy claim, which would suggest that they are not automatically and without something more incidental to the bankruptcy claims.

68. In argument, Mr. McGrath S.C., for the plaintiff, urged that the bringing of proceedings could delay payment by the Trustee on foot of the Allowed Customer Claim (and other possible claims) while the Trustee awaited the outcome of the litigation. The Trustee would wish to ensure that if damages were recovered from the third parties in respect of losses arising from the fraud of Mr. Madoff that there should not be a double payout in respect of the same loss suffered by the investors in Optimal Strategic. This argument is not supported by the evidence adduced by the plaintiff. None of the four affidavits go so far. The height of the evidence is to suggest that the price achievable in the secondary market for the shares in SPV might be reduced if the non bankruptcy claims were not included in the rights to be transferred.

69. The plaintiff argued that Optimal Strategic was, in reality, assigning the remnants of the investment with BLMIS in circumstances where all that was left of that investment was the prospective rights of recovery either from the BLMIS estate or from third party litigation. It argued that, as the third party claim it arose out of the investment by Optimal Strategic in BLMIS and the Allowed Customer Claim also arose out of the same investment therefore the two claims were related. The defendants, in reply, said that this was not the correct test. If this were correct, it followed that there were no circumstances in which an assignment of the third party claims could be champertous as they all arose out of the investment in BLMIS. There would be no requirement of an independent interest in the cause of action. On this basis it was submitted that the analysis of what the law meant by incidental or ancillary must be incorrect. They submitted that the claims against the service providers are different in kind to the claims made against the BLMIS estate.

70. In argument, Mr. McGrath S.C., for the plaintiff, pointed out that the Information Circulars made no reference whatsoever to the assignment of the right to third party litigation. He emphasised that such litigation was not contemplated by the directors of OML and SPV when they devised the scheme.

71. These arguments raise certain difficulties. It seems to me that the failure to make any reference whatsoever to the assignment of the right to third party litigation in the Information Circulars could equally be taken to support the view that assignment of these rights was not incidental to the assignment of the claims against the bankruptcy estate. Certainly, it would appear that the holders of the Strategic Series shares were not being informed that these rights were to be assigned. Furthermore, Optimal Strategic is disputing the fact that these third party rights were assigned as part of the Assignment. While I am accepting for the purposes of this case that the Assignment included assignments of the third party litigation rights, the fact that such point is being contested in the courts in New York is at least suggestive of the fact that assignment of such rights is not invariably part of the assignment of claims in bankruptcy estates and therefore that it is not inevitable that the assignment of non bankruptcy litigation rights is ancillary or incidental to the assignment of the claims against the bankruptcy estate.

72. It was argued that the assignment of the causes of action against third parties was necessary to protect the Allowed Customer Claim. It was pointed out that the bringing of third party proceedings could, or possibly even would, prejudice further payment out by the Trustee in Bankruptcy in respect of the Allowed Customer Claim. The Trustee would await the outcome of the third party litigation before determining when and how much more he should pay out in respect of the Allowed Customer Claim in light of the possible recovery from these proceedings. This argument is based upon the fact of third party proceedings rather than the identity of the plaintiff. If the purpose of the assignment of the right to pursue the third party claims was in order to protect the Allowed Customer Claim (and other lesser claims in the BLMIS estate) then by its actions in instituting these proceedings the plaintiff has triggered the very event which, according to its counsel, was sought to be guarded against by taking the assignment in the first place. This would suggest that the risk (if any) in bringing the proceedings is not so great as was suggested in argument and is not such as would justify the Court, in the absence of further evidence, in concluding that assignment of the third party causes of action are necessary to protect the Allowed Customer Claim. On the contrary, it would appear that in the eyes of the plaintiff the risk is out weighed by the potential commercial benefits in bringing the proceedings. Certainly, it does not reinforce the idea that assignment of the third party rights is necessary to protect the proprietary interest in the Allowed Customer Claim.

73. I am not satisfied that the plaintiff has established that the assignment of the cause of action against the defendants is incidental to the assignment of the claim against the estate of BLMIS. In my judgment, for a cause of action to be incidental to the assignment of a property right or interest (such as the Allowed Customer Claim), it must relate to the protection or realisation of that other interest which is independent of the assignment of the cause of action. So in *Irish Bank Resolution Corporation Ltd. v. Morrissey* [2014] IEHC 527, the assignment of litigation to enforce a debt was incidental to the assignment of the actual debt. In *Waldron v. Herring*, the assignment of a cause of action for damage caused to a building was incidental to the rights of a mortgagee in possession realising its security.

74. Further, in my judgement if the cause of action is to be described as ancillary to the Allowed Customer Claim it must be a claim in the bankruptcy of BLMIS. It cannot encompass non bankruptcy third party claims.

75. I therefore reject the argument that the assignment of the third party litigation rights is either incidental or ancillary to the assignment of the Allowed Customer Claim and associated bankruptcy rights. This is not a basis for holding that the assignment of the third party litigation rights is not void for champerty.

Genuine commercial interest: application to the facts

76. The plaintiff argued in the alternative that it had a genuine commercial interest in the enforcement of the claim of Optimal Strategic against the defendants and that it is entitled to enforce that assignment. The defendants point out that the commercial interest cannot arise from the agreement that is impugned. This is a correct statement of Irish law and arises from *Fraser v. Buckle and O'Keeffe v. Scales.* In Thema, Clarke J. elaborated upon the indirect interest in litigation which would justify a party taking an assignment of a cause of action or funding the litigation of another. In all the cases cited to me where shareholders or creditors of companies have been held to be entitled to either fund the litigation or to take an assignment of the cause of action and to pursue the litigation to enforce the claim on their own behalves, the shareholders or creditors had pre-existing interests, albeit indirect, in the claim of the assignor. The courts were concerned with the identity of the person or persons pursuing the litigation, whether directly or indirectly. Thus in *Trendtex*, all were agreed that Credit Suisse had sufficient genuine commercial interest in the outcome

of the litigation between Trendtex and CBN to take an assignment of the claim of Trendtex against CBN but the unknown party to whom Credit Suisse assigned the claim did not.

77. The crucial distinction which the courts seek to draw is between pursuing such an indirect genuine commercial interest on the one hand and the trafficking in or purchasing of litigation on the other hand.

78. In this case the plaintiff had not yet been incorporated when the wrongful events, the subject matter of this litigation, are alleged to have occurred. The plaintiff is a special purpose vehicle which was set up for the purpose of enabling investors in Strategic Series shares to monetise their interest. The Information Circular of 29th April, 2011, stated at p. 13 as follows:-

> *"[t]he business object of SPV will be to hold the [Allowed Customer Claim] of USD 1,540,141,277.60 and attend to any business affairs incidental to and necessary to the proper administration thereof for the benefit of the shareholders of SPV until such time as any and all recoveries made by the Trustee have being distributed to SPV in respect of the [Allowed Customer Claim] and the trustee shall have been discharged from the office of Trustee for the liquidation of BLMIS. SPV's sole purpose is to hold the [Allowed Customer Claim] for the benefit of its shareholders and to act as a conduit through which Strategic Series investors may dispose of their pro rata interest in the [Allowed Customer Claim]."*

79. It is true to say that originally the shares in SPV were held by Optimal Strategic and that when the Assignment was effected there was thus no change in the holders of the indirect interest in both the Allowed Customer Claim and all the Transferred Rights as defined in the Assignment, including the third party claims. However, crucially, the avowed purpose of the entire scheme was that the shares held by the holders of the Strategic Series shares could be exchanged for shares in SPV on a pro rata basis and these SPV shares could then be sold to secondary purchasers. It was thus intended that at the end of the process most, if not all of the parties who suffered the loss arising from the Madoff fraud, would have sold their interest to third parties who had not been involved in the investment and thus who did not suffer the loss. Furthermore, the purchasers of the shares may be (indeed almost inevitably will be) parties who had no prior interest in the failed investment. They are purchasing shares in SPV which, in the scheme as established, necessarily involves indirectly buying the right to sue third parties. The shares are intended to be auctioned for sale in the secondary market for claims in the BLMIS estate. The purchasers will ascribe a certain value to the third party litigation rights according to Prof. Shavell. This, as a matter of fact and law, is trading in litigation. It will amount to trafficking in litigation if there is no genuine commercial interest legitimising transactions which otherwise the courts have traditionally condemned.

80. The courts are concerned with the identity of the person or person prosecuting or benefitting from the litigation. In considering the issue of a genuine commercial interest in relation to shareholders of the company, the critical matter is whether or not it is the original shareholders who, through the company, actually suffered the loss and who thus have the genuine commercial interest in pursing the litigation themselves, who are prosecuting the litigation either by taking an assignment of the chose in action through a new company in which they are also shareholders or through any other suitable vehicle or whether it is persons who had no connection with the original loss. The critical issue is whether the original wronged parties remain (directly or indirectly) the parties pursing the litigation. This is to be contrasted with such wronged parties realising their interest in the cause of action by selling it to a third party who then pursues it for the benefit of that third party. This is clear from the case of Laurent v. Sale & Co., quoted above, where Megaw J. held at p.834:-

"[i]n 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."

81. Furthermore, if, as the authorities state, a prior existing commercial interest in the matter that gives rise to cause of action is a powerful consideration in support of the assignment being legitimate and not contrary to public policy as being champertous, the reverse must also be true: the absence of such prior existing commercial interest weighs heavily against the legitimacy of the transaction.

82. I do not accept that any of the decisions in the cases to which I have been referred or any part of the judgments of those cases oblige me to hold that the plaintiff in this action had a genuine commercial interest or a legitimate and genuine interest in taking an assignment of the non bankruptcy litigation rights. Just as the plaintiff's evidence and arguments to the effect that the assignment was ancillary or incidental to the assignment of the Allowed Customer Claim were unconvincing to my mind, so also is the alternative argument that it had a genuine commercial interest in taking the assignment of the third party litigation rights.

Trafficking in litigation

83. As was pointed out by Baroness Hale in *Massai Aviation Services*, trafficking simply means trading in something in which it is not permissible to trade. In *Stocznia Gdanska SA v. Latreefers Inc & other appeals* [2000] All E.R. (D) 148 at para. 61 it was held that:-

> *"[a]buse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word 'trafficking', something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. 'Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' maybe a form of trafficking in litigation. Lord Mustill's words, quoted by Simon Brown LJ in the context of an application to stay, are powerfully descriptive of the kind of plain and obvious champerty of which Chadwick LJ considered Faryab v. Smyth itself not to be an example."*

In *Thema*, Clarke J. clearly indicated that a party with no pre existing indirect interest in the relevant litigation who simply buys into the litigation is trafficking in litigation and commits the tort of a champerty.

84. In *Trendtex*, Lord Wilberforce made clear the critical distinction between the valid and the invalid assignment. If the assignment in that case had simply been to *Credit Suisse* there would have been no objection to the transaction. However, the vice in the agreement lay in the introduction of the third party:-

> *"[i]t 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."*

85. Lord Roskill pointed out that article 1 of the agreement showed that it was not designed to enable Credit Suisse to recoup their own losses by enforcing Trendtex's against CBN. The purpose of article 1 of the agreement was to enable the claim against CBN to be sold on to an anonymous third party and for that anonymous third party to obtain what profit he could from the litigation. He held, at p. 704, that the agreement offended:-

> *"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".*

86. The plaintiff argued that in this case there was only one assignment and that there was no onward assignment and that therefore the Assignment was lawful applying the *Trendtex* test. The plaintiff also argued that the purpose of the transaction was to assign the Allowed Customer Claim and the purpose for which SPV was set up was to trade in the Allowed Customer Claim. It was submitted that the current litigation was not contemplated at the time of this transaction and was not so much as mentioned in the Information Circulars. It was urged upon the court that there was therefore no intention to trade in litigation and there could be no trafficking in litigation.

87. However, this submission ignores the fact that the Court has to look at the whole transaction. The test as established in *Trendtex* is whether or not there is a contemplated possibility of a further third party involvement in the litigation for a profit. In this case not only was it a contemplated possibility, it was the whole purpose of the transaction. As Mr. Greene, Jr., stated at para. 33 of his first affidavit sworn on 27th April, 2015:-

> *"…the Assignment effectively gave shareholders in Optimal Strategic the ability to sell their pro rata interest in the Allowed Customer Claim and the Transferred Rights."*

The Information Circular of 29th April, 2011, stated at p.14:-

> *"[e]ffecting such exchange [of strategic series share for shares SPV] would allow holders of Strategic Series shares to trade the SPV Shares…".*

It is clear that the transaction was set up to sell the Allowed Customer Claim and third party claims. This clearly involves the onward sale of litigation. This fact is clearly acknowledged by Professor Shavell on behalf of the plaintiff when he states that the Assignment allowed the rights to litigate (i.e. third party claims) to be monetised. He stated at p. 7 of his Opinion:-

> *"[b]uyers of shares in SPV on the secondary market presumably ascribed a value to the litigation rights that they purchased along with the allowed BLMIS claim."*

88. In my judgment the transaction as a matter of fact involves the sale of litigation. It is not the same as the purchaser of the business of a company incidentally purchasing an existing suit or cause of action as part and parcel of the business it is acquiring. The purchasers of SPV shares are purchasing with a view to either receiving distributions arising from the pro rata distribution of payments of the Allowed Customer Claim and other bankruptcy remedies and third party litigation proceeds, or so they, in turn, may sell the shares in SPV to other parties, presumably for a greater sum than they paid for them in the first place. They are not engaged in any business other than the realisation of claims to the greatest extent possible. This to my mind is professional trading in litigation. It is what is condemned as trafficking in litigation and is prohibited by Irish public policy.

89. A further test of the transaction is; does it amount to intermeddling or stirring up of litigation? It is clear that this suit would not have been brought if the cause of action had not been assigned to SPV and the control of SPV passed to parties who were not originally investors in the Strategic Series shares. The claim is now being brought on behalf of the persons who did not suffer the injury in respect of which damages are sought against the defendants (though it is likely that a small percentage of the shareholders in SPV are the original investors in the Strategic Series shares). This is not a situation where an impecunious plaintiff is being facilitated in the bringing of a claim that otherwise could not be brought such as arose in the case of Greenclean. The Trustee of the BLMIS estate has paid US$750 million on foot of the Allowed Customer Claim to date. The plaintiff says that this enables it to fund this litigation and that it does not require the investment of the purchasers of its shares to enable it to bring the case. This of course also means that had Optimal Strategic not entered into this elaborate transaction and if it had retained both the Allowed Customer Claim and all other rights that it would have received these monies and would have been in a position to fund this litigation if it saw fit.

90. The plaintiff pointed out that the Santander related companies (the ultimate parent of Optimal Strategic) held the majority of the Strategic Series shares. Holders of Strategic Series shares had instituted proceedings in Florida and Switzerland against, *inter alia*, the defendants. No proceedings were commenced against the defendants when Santander was in ultimate control of Optimal Strategic. If they, the majority of those who suffered as a result of the fraud, elected not to institute proceedings against the defendants and the proceedings, as a matter of fact, were only instituted once they had sold their controlling shareholding in SPV, it seems very clear to me that these proceedings have been brought, not in order to secure damages for the injured party, but rather are the very type of wanton or officious intermeddling in the litigation of another which has been condemned by the courts for centuries.

Conclusion

91. 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.

92. In light of these conclusions the defendants are entitled to a declaration that the Assignment of Claim dated 6th May, 2011, between Optimal Strategic U.S. Equity Limited and SPV Optimal SUS Limited insofar as it purported to assign to SPV Optimal SUS Limited 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.

93. It was agreed between the parties that the question as to whether or not the Assignment insofar as it purported to assign to the plaintiff the right to institute and maintain these proceedings was champertous or savoured of champerty and was void was to be

tried as a preliminary issue. On 9th March, 2015, the Court gave the first and second named defendants leave to issue the present application. There does not appear to have been an order directing the trial of a preliminary issue as such. For the reasons set out in this judgment, I am satisfied to make the declaration sought in para. 1 of the Notice of Motion, as amended, quoted above at para. 24. That being so, the question that remains is whether or not the proceedings ought to be dismissed or struck out, as is sought in para. 2 of the Notice of Motion.

94. In the submissions on behalf of the plaintiff, counsel argued that the jurisdiction to strike out in proceedings at a preliminary stage is to be exercised sparingly. Of course this jurisprudence is well established. In deciding whether or not to grant the relief sought it is necessary to consider the Statement of Claim and to assess what part of the plaintiff's claim, if any, survives after the declaration I have made. In this regard the judgment of the Supreme Court in *O'Keeffe v. Scales* is important. Lynch J. stated at p. 295 that if the case of the plaintiff was to be struck out, the defendant:-

> *"…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."*

In the preceding paragraph, Lynch J. stated that a person who is unlawfully maintaining or champertously prosecuting or defending proceedings:-

> *"…cannot enforce an agreement with that other person for any form of benefit, whether it be a share of the proceeds of the litigation or a promise of remuneration, such as money or a transfer of property if the claim is successfully defended."*

95. This was reiterated by Clarke J. in *Thema*. Of course in this case there is no agreement between SPV and the defendants which is sought to be enforced. But if the plaintiff is to succeed in these proceedings, it necessarily would require the Court to enforce that assignment. Without the assignment it has no interest at all in the relevant events and causes of action. I am satisfied that the plaintiff, which was incorporated after all of the events the subject matter of these proceedings had occurred, has no cause of action in contract, misrepresentation or tort or any fiduciary claim against the defendants other than one which is based upon the assignment of the chose in action enjoyed by Optimal Strategic against the defendants. On that basis I see no purpose in simply staying the proceedings, as has occurred in some of the cases cited in argument. Accordingly, I dismiss the proceedings as being frivolous and vexatious and bound to fail in the light of the declaration given above.