



## Confirmation of the Irish position on litigation trafficking

*SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44

November 2018

In the landmark decision of [\*SPV Osus Ltd v. HSBC Institutional Trust Services \(Ireland\) Limited & Ors\*](#), the Supreme Court held that the assignment of a right to litigate to an unconnected third party with no legitimate interest in the cause of action giving rise to the litigation is contrary to public policy and void under Irish law. For previous articles on this topic please click [here](#) and [here](#).

### Background

This case arises from the Bernard Madoff Ponzi scheme fraud. Optimal Strategic US Equity Ltd (“**SUS**”) invested in Bernie L Madoff Investments LLC (“**Madoff LLC**”). Madoff LLC collapsed due to a large scale ponzi type fraud and the liquidation of Madoff LLC commenced in the Bankruptcy Court of the Southern District of New York which provides for an “Allowed Customer Claims” (“**ACCs**”) procedure which carries an entitlement for investors to be paid in priority in the liquidation process. The SUS Allowed Customer Claims was valued at \$1.5billion.

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Although the ACC was the most substantial path of recovery for investors, the amount to be recovered was not fixed nor was the recovery immediate. A secondary market developed for Madoff ACCs which would allow those who had invested in entities run by Bernie L. Madoff to crystallise their losses and receive an immediate payment to realise their investment. Due to the structure of SUS, this option was not available to its investors. Consequently, SUS set up a special purpose vehicle, SPV OSUS Ltd (“**SPV**”) and assigned its bankruptcy claim to SPV. The majority of the original investors swapped their shares in SUS for shares in SPV. SPV subsequently sold its shares by way of auction which resulted in distressed debt investors holding approximately 93% of the shares in SPV.

SPV subsequently issued proceedings in Ireland against HSBC, the Irish based custodian and administrator, claiming an entitlement to the net asset value of the investments of SUS in Madoff LLC. HSBC challenged the standing of SPV to bring proceedings on the basis that an agreement assigning the bankruptcy claim to SPV amounted to maintenance and champerty and was contrary to public policy.

The High Court agreed with HSBC and held that the assignment of the bankruptcy claim to SPV was contrary to public policy, constituted litigation trafficking and was therefore void. SPV appealed the decision of the High Court to the Court of Appeal which upheld the ruling of the High Court. SPV subsequently appealed the decision of the Court of Appeal to the Supreme Court.

## Supreme Court

In dismissing the appeal, the Supreme Court confirmed that under the rules of maintenance and champerty, an assignment of a cause of action which involves the outright sale of a cause of action is unenforceable.

In upholding the decision of the Court of Appeal the Supreme Court noted the following:

- Following *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise & Other*<sup>1</sup>, where the Supreme Court held that it was offensive to public policy to allow a person unconnected with litigation to fund that litigation in return for some part of the proceeds, then the same public policy must apply with greater emphasis where a third party purchases the claim outright, removes the party from his or her proceedings, and converts them into a mere witness.

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<sup>1</sup> [2017] IESC 27

- In adopting the definition of champerty set out by Clarke CJ in *Thema International Fund plc v HSBC Institutional Trust Services (Ireland)*<sup>2</sup> namely that “[c]hamperty 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”, the Supreme Court noted that it will not enforce any champertous agreement as to do so would offend public policy.
- The House of Lords decision in *Trendtex Trading Corporation v Credit Suisse*<sup>3</sup> reflects the law in Ireland and the applicable test for the assignment of a right to litigate is whether the assignee has a genuine commercial interest in the assignment.
- That some common law jurisdictions have taken a more liberal attitude to the rules on maintenance and champerty and consequently a more liberal approach to the circumstances in which an assignment of a cause of action where there is a pre-existing genuine commercial interest will be upheld. The Supreme Court held that in considering whether a genuine commercial interest exists, the critical issue is whether the original wronged parties remain the parties pursuing the litigation. The Supreme Court therefore rejected the argument that SPV had a genuine commercial interest in enforcing the third party claim as 93% of the shares in SPV were now held by distressed debt investors and not the original investors in SUS.

## Legislative Intervention

In circumstances where maintenance and champerty are prohibited in Irish law and the legislature has not provided for any form of regulated third party funding, O'Donnell J observed that the decision in *Persona* must be followed. *Persona* addressed the issue of litigation funding as opposed to litigation trafficking and the Supreme Court held that it is a matter for the legislature to change the law in this area. O'Donnell J reiterated this sentiment in this case, although in respect of the assignment of the right to litigate.

Reflecting on *Persona*, Clarke CJ called again on the legislature to provide a legislative solution to issues such as litigation funding and the assignment of causes of action. He further stated that where the legislature fails to address these issues the courts may be left with no choice but to formulate its own unregulated change.

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<sup>2</sup> [2011] 3 I.R. 654

<sup>3</sup> [1982] AC 679

## Comment

It is clear that the assignment of a right to litigate to a third party with no legitimate interest in the litigation remains prohibited in Ireland and that it is likely to remain so for the foreseeable future.

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