



March 2017

## Litigation Funding Update

The Court of Appeal has published its decision in [SPV Optimal Osus Limited v HSBC Institutional Trust Services \(Ireland\) Limited & Others](#) (Unreported, Court of Appeal, 2 March 2017) [2017] IECA 56. In a [previous article](#) the market for litigation funding and after-the-event insurance in Ireland as alternative means of funding commercial litigation claims was examined.

The decision in *Osus* is particularly relevant as *Persona Digital Telephony v Minister for Public Enterprise* on the issue of litigation funding is listed for hearing in the Supreme Court on 3 April 2017.

In *Osus* the Court of Appeal upheld [Costello J in the High Court](#) and dismissed the plaintiff's claim. In the High Court Costello J held that the court was required to take into account the entire transaction when considering if the assignment was champertous. The High Court was of the opinion that it was unlawful to fund or assign litigation in return for a share in the proceeds unless the funder had some lawful interest or legitimate concern in the litigation and the Court of Appeal has agreed.

The *Osus* case stems from the Madoff litigation and involves complex issues in relation to assignment of funds and has a fraught history. The High Court heard preliminary issues of whether the nature of the particular assignment in so far as it related to third party claims, was void as being champertous and contrary to public policy and this is the issue that was appealed.

Ryan P in the Court of Appeal held that “[m]aintenance and champerty are kinds of abuse of process. They are thought to

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*undermine the integrity of litigation.*” He noted the substantial change in attitude to the concept of litigation funding in the UK and the legislation and that they allow for conditional fee arrangements and after the event insurance. The court found that “[t]he principle is that an assignment of a bare cause of action is void unless it can be excused as an exception recognised in law.” The court draws a distinction between this case and *Greenclean Waste Management Ltd v Leahy (No 2)* ([Unreported, High Court, Hogan J, 5 June 2014](#)) [2014] IEHC 314 and ([Unreported, Court of Appeal, 8 May 2015](#)) [2015] IECA 97:

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

We await the decision in *Persona* in the coming months for further discussion on this issue.

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