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Recent Irish Supreme Court Decision on Assignment Of Claims, Third Party Litigation Funding and Champerty: A Prelude to Real Progress

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Synopsis

On 31 July 2018, Ireland's highest court, the Supreme Court, delivered a 5-judge unanimous ruling in *SPV Osus Limited v HSBC Institutional Trust Services (Ireland) Limited and Others*¹ in a case that examined the assignability of a cause of action under Irish law.

Background

The background to the proceedings has its origins in the Bernard L Madoff Investments LLC ('Madoff') Ponzi scheme fraud and the entitlement to make claims in the Madoff bankruptcy. As part of the Madoff bankruptcy, a company known as Optimal Strategic US Equity Limited ('Optimal') had a claim in the amount of US\$1.5bn which carried with it an entitlement to be paid in priority to the liquidation, as well as an unsecured, non-priority claim in the amount of c. US\$1.3bn.

Optimal represented the interests of a group of investors who had invested indirectly in Madoff. Subsequent to the discovery of the Ponzi scheme, a secondary market developed for claims in the Madoff bankruptcy. A procedure for assignment of claims in the Madoff bankruptcy was recognised by the Trustee in Bankruptcy and permitted by the court supervising the bankruptcy. The approved scheme required the assignment of not only the preferential claim in the Madoff bankruptcy but of all related claims by the assignor to the assignee.

Due to the manner in which the Optimal investors held their investments, they could not assign their claims so long as the cause of action remained vested in Optimal. In order to enable the Optimal investors to assign their claims in the Madoff bankruptcy (and all other related claims), Optimal assigned its claims against Madoff to SPV Osus Limited ('OSUS'), a special purpose vehicle set up specifically for this purpose.

The investors in Optimal were given the opportunity to take up shareholdings in OSUS commensurate with their interests in Madoff held through Optimal. Most

of the investors subsequently assigned their claims in the bankruptcy and all related claims to distressed debt investors such that the distressed debt investors ultimately held 93% of the shares in OSUS. Having gained control of the board of OSUS, the distressed debt investors then set about issuing proceedings against *inter alia* the custodian and administrator appointed by Optimal. As both the custodian and administrator were Irish companies, the proceedings issued in Ireland.

High Court and Court of Appeal

After OSUS issued the proceedings, the custodian and the administrator sought to have the proceedings dismissed on the basis that the assignment of the claims by Optimal to OSUS was 'contrary to public policy, void and unenforceable as a matter of Irish law'. The Irish High Court held that the assignment was void as comprising *inter alia* an assignment of a bare right to litigate and the Court of Appeal upheld this decision.

OSUS was granted leave to appeal to the Supreme Court to pursue the following issues:

- (a) The circumstances in which, as a matter of Irish law, an assignment of a cause of action will be recognised as valid (insofar as potentially relevant to the circumstances of this case); and
- (b) The application of the principles identified in the answer to (a) to the facts of this case for the purposes of determining whether the Court of Appeal was correct to determine that the assignment on which OSUS relies should not be recognised as a matter of Irish law.

Maintenance and champerty

Intertwined with the question as to whether or not there exists a right to assign a bare right to litigate under Irish law are the antiquated doctrines of maintenance

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¹ [2018] IESC 44.

and champerty. Unlike in England, where the torts were abolished more than 50 years ago, maintenance and champerty remain torts (and crimes) in Ireland and public policy dictates that effect should not be given to a transaction which constitutes either tort.

Maintenance is the unjustifiable provision of financial support for litigation in which the maintainer has no legitimate interests. Champerty is a particular form of maintenance which involves a person providing financial support for the action in return for a share of the proceeds. Maintenance, champerty and the assignment of a bare right to litigate are closely aligned and have similar public policy considerations underpinning their standing in Irish law.

The case made by the custodian and the administrator (and accepted by the High Court at first instance² and the Court of Appeal) was not that OSUS was guilty of the tort of maintenance or champerty but that the assignment by Optimal to OSUS of its claim in the Madoff bankruptcy and all of its other related claims, including the right to bring a claim against the custodian and administrator, should be void because it 'savours of champerty'.

This is the second decision of the Irish Supreme Court within 15 months to examine the impact of the anachronistic torts of maintenance and champerty on modern day litigation. In *Persona Digital Telephony Ltd & Anor v The Minister for Public Enterprise & Ors*,³ the Supreme Court, by a majority of 4 to 1, held that a third party professional funding agreement to support a party in legal proceedings amounts to champerty and is prohibited under Irish law. However, in so holding, there were a number of very strong judicial comments to the effect that the legislature and / or the Executive should ensure that these torts did not lead to an impermissible restriction on the constitutionally protected right of access to justice, which right might be said to be restricted if access to the judicial system was effectively denied because of the complexities and expenses involved with modern day litigation. As will be discussed further below, the Chief Justice in *SPV Osus* took the opportunity to forcefully reiterate some of the comments that he made in *Persona*.

Decision of the Supreme Court

In deciding whether the assignment of the cause of action from Optimal to OSUS was permissible under Irish law, the Supreme Court undertook a detailed analysis of the case law of England and Wales on the issue, in circumstances where the Irish authorities that were considered by the Court did not deal with

the specific issue. Having carried out its analysis, the Supreme Court ultimately endorsed the decision of the English House of Lords in *Trendtex Trading Corporation v Credit Suisse*.⁴ In summary terms, this decision said that an assignment of a right to litigate is unenforceable unless the assignee has a genuine commercial interest in the assignment.

In applying the test set down by the House of Lords in *Trendtex* and finding that the assignment of the claims from Optimal to OSUS was impermissible under Irish law, the Supreme Court rejected the argument put forward by OSUS that it had a commercial interest in the assignment of the right to litigate these proceedings as a consequence of the assignment of bankruptcy claim (which had been permitted in the US).

The decision of the Supreme Court confirms that the assignment of a claim to a party without a legitimate interest in the assigned dispute is unenforceable in Ireland. Notwithstanding the foregoing, the obiter comments of Chief Justice Clarke (discussed below) suggest that change could soon be on the horizon as regards the manner in which litigation in Ireland can be funded.

Political pressure on legislature

While the decision of the Supreme Court was delivered by Mr Justice O'Donnell, the consenting judgment of Chief Justice Clarke is arguably the more noteworthy. Just two pages long, Chief Justice Clarke stated that he agreed fully with the legal analysis of Mr Justice O'Donnell and that the purpose of his judgment was to reiterate comments that he had made in *Persona*.

In *Persona* Mr Justice Clarke (as then he was) noted that there was an increasing problem with access to justice as a result of *inter alia* the increasing complexity and cost of conducting litigation but that the choice of policy solution to this problem was very much a matter for the legislature or the Executive to address and not for the Courts to address by way of case law. Mr Justice Clarke did caveat this by saying that if it transpired that the constitutional right of access to justice was being denied and the legislature and the Executive were failing to act, that the Courts, as guardians of the constitution, might have no option but to 'take measures which would not otherwise be justified'.

In his concurring judgment in *SPV Osus*, Chief Justice Clarke stated that he was 'strongly of the view that it is necessary that some measures be taken to address (the problem with access to justice)'. Chief Justice Clarke stated that he 'remain(s) very concerned that there are cases where persons or entities have suffered

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- 2 Unreported, High Court, Costello J, 5 October 2015.
- 3 [2017] IESC 27.
- 4 [1982] A.C. 679.

from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court'. The Chief Justice went on to say that ensuring adequate access to justice was an issue to which the 'legislature should give urgent consideration'.

The Chief Justice was careful not to prescribe the solutions to the problem with access to justice and acknowledged that there may be solutions outside of the liberalisation of the laws relating to maintenance and champerty. The Chief Justice expressed the view that 'by far the best way of attempting to provide solutions is by means of legislation' to establish a properly regulated scheme or structure which would ensure that the potential benefits of liberalisation are not outweighed by any disadvantages which might flow from an entirely unregulated commoditisation of litigation. However, he warned that a 'point might be reached where the courts had no option but to go down (the route of effecting change) if it became clear that no real effort was being made on the part of the legislature to address issues such as those that came into focus on this appeal'.

Comment

The Chief Justice's judgment is unusual in so far as its sole purpose is to reiterate comments made more than a year previously about the perceived issues with access to the Irish legal system which the legislature has failed to address.

While it is evident from the Chief Justice's judgments in *Persona* (before he was Chief Justice) and in this case that he is conscious of the separation of powers under the Irish constitution, he has stated in unequivocal terms that the Courts will act if the legislature fails to ensure that one's constitutional right to access to justice is protected. One would hope and assume that the Irish legislature will turn its attention to this issue in the near future in light of the Court's concerns.

While one can only speculate as to how the legislature will chose to ensure access to justice in a meaningful way, there must be a very real possibility that a decision could be made to reform the existing Irish position on maintenance and champerty, and introduce a statutory code that would permit (within certain parameters) professional third party funding being available in Ireland.

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