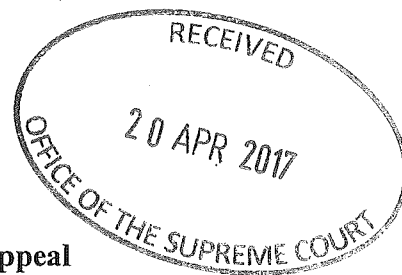


## SUPREME COURT

## Application for Leave and Notice of Appeal



## For Office use

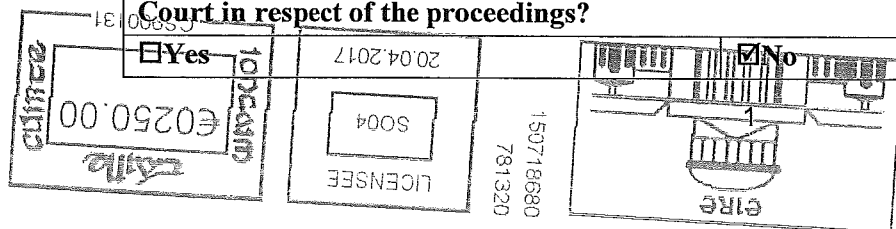
Supreme Court record number of this appeal		
Subject matter for indexing		

Leave is sought to appeal from			
<input checked="" type="checkbox"/>	The Court of Appeal		The High Court

## [Title and record number as per High Court proceedings]

SPV OSUS Limited		v.		HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, Optimal Investment Services, S.A. and Banco Santander, S.A.	
High Court Record No.	2014 No. 10269P 2015 No. 15 COM	Court of Appeal Record No.	2015 No. 575		

Date of filing	20 April 2017
Name(s) of Applicant(s)/Appellant(s)	SPV OSUS Limited
Solicitors for Applicant(s)/Appellants(s)	Mason Hayes & Curran South Bank House Barrow Street Grand Canal Dock Dublin 4
Name of Respondent(s)	HSBC Institutional Trust Services (Ireland) Limited and HSBC Securities Services (Ireland) Limited
Respondent's solicitors	Matheson 70 Sir John Rogerson's Quay Dublin 2
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	



If yes, give Supreme Court record number(s)		
Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why N/A		

### 1. Decision that it is sought to appeal

Name(s) of Judge(s)	Ryan P; Peart J; Irvine J;
Date of order / Judgment	2 March 2017 (Judgment); 23 March 2017 (Order perfected)

### 2. Applicant/Appellant Details

Appellant's full name	SPV OSUS Limited
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Original status	<input checked="" type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
		Applicant	<input type="checkbox"/>	Respondent
		Prosecutor	<input type="checkbox"/>	Notice Party
		Petitioner	<input type="checkbox"/>	

<b>Solicitor</b>			
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		DX no.	DX 11
Postcode		Ref.	43413.1
How would you prefer us to communicate with you?	<input checked="" type="checkbox"/> Document Exchange <input type="checkbox"/> Post		<input checked="" type="checkbox"/> Email <input type="checkbox"/> Other (please specify)

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<b>Counsel</b>			
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		<b>DX No.</b>	200148
<b>Postcode</b>	D07 R9CV		

### 3. Respondent Details

<b>Respondent's full name</b>	HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited
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<b>Original status</b>		<b>Plaintiff</b>	✓	<b>Defendant</b>
		<b>Applicant</b>		<b>Respondent</b>
		<b>Prosecutor</b>		<b>Notice Party</b>
		<b>Petitioner</b>		

<b>Solicitor</b>			
<b>Name of firm</b>	Matheson		
<b>Email</b>	dublin@matheson.com		
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		<b>DX no.</b>	2
<b>Postcode</b>		<b>Ref.</b>	
<b>How would you prefer us to communicate with you?</b>	<input type="checkbox"/> Document Exchange  <input type="checkbox"/> Post	<input type="checkbox"/> Email  <input checked="" type="checkbox"/> Other (please specify) Unknown	

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		<b>DX No.</b>	816200
<b>Postcode</b>			

<b>How would you prefer us to communicate with you?</b>	
<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> Email
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

#### 4. Information about the decision that is sought to appeal

Please set below:

- Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned  
  
(a) The Appellant seeks to appeal from the entire decision.
- (a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

The factual background to this matter is set out in paragraphs 1 – 19 of the judgment of the learned trial Judge (Costello J) and in tabular form at pages 3 to 6 of the judgment of Ryan P in the Court of Appeal and can be summarised as follows:

- i. In 1997, Optimal Multiadvisers Limited ('OML'), an investment company, formed Optimal Strategic US Equity Limited ('Optimal Strategic') for the purpose of holding assets linked to a series of shares (the 'Strategic Series shares').
- ii. Optimal Strategic invested nearly all of its assets in Bernard L. Madoff Investment Securities LLC ('BLMIS').
- iii. On 11 December 2008, BLMIS collapsed due to fraud and the liquidation of BLMIS was commenced in the United States Bankruptcy Court for the Southern District of New York. A trustee, Irving Picard (the 'Trustee'), was appointed to BLMIS under the Securities Investors Protection Act 1970 ('SIPA').
- iv. Upon the collapse of BLMIS, there was virtually no assets remaining in Optimal Strategic. The investment of Optimal Strategic in BLMIS was now represented by claims that Optimal Strategic had in the estate of BLMIS and other potential recoveries including any claims against third parties.
- v. On 22 May 2009, Optimal Strategic entered into a Settlement Agreement with the Trustee whereby it returned certain amounts to the bankruptcy estate in return for an allowed customer claim in the amount of US\$1,540,141,277.60 (the 'Allowed Customer Claim'). The Allowed Customer Claim is a property right. The investors in the Strategic Series shares had no claim as individuals to share in the Allowed Customer Claim. Their claim was indirect through Optimal Strategic.
- vi. In October 2010, the Trustee sought relief from the Bankruptcy Court to implement procedures for the assignment of allowed customer claims. On 10 November 2010, the Bankruptcy Court issued a transfer procedures order which established a procedure whereby the holder of an allowed claim could transfer it to a third party in a pre-approved manner ('Transfer Procedures Order').
- vii. The Transfer Procedures Order prohibits the selling or assignment of a part of an allowed customer claim. Accordingly, in order to comply with it, all of the holders of the Strategic Series shares would have had to agree to sell all of the Allowed Customer Claim to one buyer at an agreed price. To overcome this difficulty, the directors of OML devised a mechanism whereby a holder of Strategic Series shares could receive an instrument which would allow the holder to take direct control of his/her indirect interest in the Allowed Customer Claim and, if they so wished, to sell his/her indirect interest. The transaction involved four related steps as set out at paragraphs 13-18 of the Judgment of the High Court.

- viii. By Assignment dated 6 May 2011, Optimal Strategic, the Assignor, assigned to SPV Optimal SUS Ltd. (as the Applicant was then known), ('Assignee') various rights and interests. The Assignment was in the form approved by the Transfer Procedures Order (and is set out at paragraph 19 of the Judgment of the High Court).
- ix. The within proceedings were instituted in December 2014 and claim, *inter alia*, that the First Defendant, which acted as custodian to Optimal Strategic, and the Second Defendant, which acted as administrator of Optimal Strategic (collectively 'HSBC'), are each guilty of breaches of contract, misrepresentation, negligence and breaches of fiduciary duties. The claim is for damages in the sum of \$2,919,934,627.70 less a credit for payments actually received in respect of the Allowed Customer Claim which at present is approximately US\$750 million.
- x. The governing law of the Assignment is New York law and it contains a choice of law clause in favour of the New York courts. After the institution of these proceedings, Optimal Strategic, the Assignor, instituted proceedings in New York seeking a declaratory judgment that the right to bring claims against third party service providers such as HSBC were not assigned by Optimal Strategic to SPV.
- xi. HSBC accepted for the purposes of the hearing of the motion that the right to sue third parties including service providers had been assigned and that the assignment is not champertous under its governing law.

**(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute**

N/A

### **3. The relevant orders and findings made in the High Court and/or in the Court of Appeal**

#### *Findings of the High Court*

The learned trial judge found:

- that the assignment of the right to litigate third party claims amounted to the assignment of a bare cause of action for no legitimate reason recognised by Irish law.
- that the assignment of the cause of action against HSBC was not incidental or ancillary to the assignment of the Allowed Customer Claim and the other associated rights in the bankruptcy of BLMIS.
- that the Applicant did not have a genuine commercial interest in taking the assignment of the cause of action.

- that the assignment of the cause of action with a view to the sale of shares in the Applicant amounts to trafficking in litigation.

#### *Orders of the High Court*

- A Declaration that the Assignment dated 6 May 2011, between Optimal Strategic US 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.
- An Order dismissing the proceedings as being frivolous and vexatious and bound to fail in light of the declaration given.
- An Order that the Plaintiff pay the first and second Defendants' costs of the motion and proceedings to be taxed in default of agreement.
- An Order that execution on foot of the Order in respect of the dismissal and costs be stayed from the date of perfection for such period as provided in Order 58 or Order 86A of the Rules of the Superior Courts (as the case may be) for the lodging of an appeal and in the event of such appeal being lodged within that period that execution be further stayed until the final determination of such appeal.

#### *Findings of the Court of Appeal*

- The assignment of a bare cause of action is invalid because it savours of champerty or is actually champertous in itself (paragraph [35]).
- That there is no requirement to identify a specific public policy detriment in order that an assignment of a cause of action be invalid (paragraph [35]).
- The assignment of the cause of action constituted the assignment of a 'bare cause of action'.
- That where a cause of action is incidental to property, the interest must not be generated by the assignment itself (paragraph [35]).
- The principle is that the assignment of a bare cause of action is void unless it can be excused by an exception recognised in law and no specific impermissible object need be established (paragraph [38]).
- There is no need to identify a specific threat to the integrity of litigation or some



element of public policy in order to conclude that an assignment is champertous (paragraph [39]).

- The Applicant has no genuine commercial interest existing independent to or antecedent to the transfer itself (paragraph [43]).
- That it was not necessary to have to find that there was an intention on the part of the assignee to engage in trading in litigation (paragraph [51])

#### *Orders of the Court of Appeal*

- The appeal from the Judgment and Order of the High Court given on 5<sup>th</sup> October 2015 and made on 19<sup>th</sup> October 2015 be dismissed.
- That the Plaintiff do pay the first and second Defendants the costs of the appeal to be taxed in default of agreement.
- That the costs order be stayed for a period of 28 days from the date of perfection of the order and with the stay thereafter to continue pending the determination of the said application and to be further stayed pending the determination of the appeal if leave to appeal is granted.

### **5. Reasons why the Supreme Court should grant leave to appeal**

*In the case of an application for leave to appeal to which Article 34.5.3 ° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—*

**Please list (as 1,2,3, etc.) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and/or why in the interests of justice it is necessary that there be an appeal to the Supreme Court**

This appeal is brought pursuant to Article 34.5.3 of the Constitution. It is submitted that the decision of the Court of Appeal involves a matter of general public importance and that it is in the interests of justice that there be an appeal to the Supreme Court as set out below.

1. The question of whether the assignment of what is termed a 'bare cause of action' is contrary to public policy as savouring of champerty has not previously been directly addressed or decided by the Irish courts and there has been no guidance from the Supreme Court. While the judgment of the House of Lords in *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 ('*Trendtex*') in relation to the assignment of causes of action has been referred to in cases in this jurisdiction in the context of a discussion of the principles relating to champerty, there is no Irish decision prior to this case as to whether that judgment represents the law in this jurisdiction.

2. In this appeal, the Applicant contends that the decision of the Court of Appeal in *Trendtex* ([1977] QB 529) to the effect that there is no longer a rule that you cannot assign a bare cause of action is to be preferred to the decision of the House of Lords that such a rule continues to subsist. It is worth noting that, in a series of decisions including *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1005, *Martell v Consett Iron Co. Ltd* [1955] Ch 363, *Hill v Archbold* [1963] 1 QB 686 and *Giles v Thompson* [1994] AC 143, the English courts have emphasised the need to develop and liberalise the law of maintenance and champerty in accordance with modern social and commercial realities. In the Irish decision of *Greenclean Waste Management Limited v Leahy* [2014] IEHC 314 ('*Greenclean*'), Hogan J noted (at paragraph [29]) that "*while the general parameters of the torts of champerty and maintenance are clear, the modern application of these principles is not frozen by reference to social conditions and public policy considerations which pertained several hundred years ago.*"
3. Even in the UK, the law in relation to the assignment of causes of action is far from clear. In that regard, it was observed by Lloyd LJ in *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, 506:

*"In his judgment in the Court of Appeal in Trendtex Trading Corp v Credit Suisse [1980] 3 All ER 721 at 749, 754, [1980] QB 629 at 664, 670 Oliver LJ referred to the 'maze of contradictory cases and oversubtle distinctions' which have bedevilled this branch of the law and to the confusion which has sometimes resulted. No single phrase has given rise to greater confusion than the rule, described by Lord Roskill in the House of Lords as still being a fundamental principle of our law, that you cannot assign a 'bare right to litigate' (see [1981] 3 All ER 520 at 531, [1982] AC 697 at 703)."*

Given the developments in the 35 year period since the decision of the House of Lords in *Trendtex* was handed down, it is far from clear that it would be followed by the UK Supreme Court today, still less that it should be followed by the Irish Supreme Court which is unconstrained by any prior authority.

4. A consideration of the questions as to when an assignment of a cause of action will be found to savour of champerty and/or to be contrary to public policy and whether the decision of the House of Lords in *Trendtex* represents Irish law will obviously have a significance that transcends the facts of this case. The decision on this issue will potentially have wide ranging implications in relation to assignments of causes of action generally.
5. It is worth noting in that regard that the assignment of the cause of action at issue here took place as part of a larger commercial transaction. The approach of the Court of Appeal requires a consideration of whether the assignment of a cause of action constitutes the assignment of a bare cause of action and, thus, of whether it is contrary to public policy in isolation from the larger commercial transaction of which it formed part. The determination of whether the approach adopted by the Court of Appeal in this regard was correct will have wider implications for many different types of transactions which involve the assignment of assets together with causes of action as part of a larger commercial

transaction.

6. A further matter which the Applicant submits is of general public importance and upon which leave is sought relates to whether it is necessary to consider and/or establish a risk to the administration of justice in order for a transaction to be condemned as champertous. The Applicant contends that the Court of Appeal erred in failing to adopt what has been described as the modern approach (*Morris v Southwark London Borough Council* [2011] 2 ER 240, pp.248-249) and which has been applied in many UK authorities including *Giles v Thompson* [1994] 1 AC 142, 164-165; *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] 4 All ER 97, *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, pp. 1432-1433 of considering on a case by case basis whether the impugned transaction poses a risk to the administration of justice before determining whether it should be condemned as contrary to public policy.
7. The Applicant respectfully submits that a determination by the Supreme Court as to whether the approach adopted in the modern United Kingdom authorities of a case by case analysis of whether the particular transaction poses a risk to the administration of justice should be followed or whether this issue is to be approached on the basis of an assumed and inchoate risk, is a matter of general public importance. It will establish the approach to be adopted in every case in which a contention is advanced that the assignment of a cause of action is contrary to public policy and, thus, will have wide ranging implications.
8. The third ground of appeal raises the question of whether, in order for a cause of action to be considered to be ancillary or incidental to a transfer of property so as to fall within an exception to the prohibition on the transfer of a bare cause of action, the cause of action has to protect or enhance the property transferred or whether it is sufficient that it be connected or relate to the property. The Applicant contends that legal test as to what is 'ancillary' or 'incidental' was, it is respectfully submitted, construed and/or applied by the Court of Appeal in an unduly restrictive manner.
9. There is a general public interest that the nature of the connection between a property right and a cause of action be clarified. It is of wider significance than the circumstances of these proceedings and is, it is submitted, a matter of general public importance. There has been no Supreme Court determination in respect of the applicable test as to whether a cause of action is 'ancillary' or 'incidental' to a property right in the context of the assignment of a cause of action. Clarification from the Supreme Court as to the relationship between a cause of action and the other property transferred for a cause of action to be considered ancillary or incidental is a matter of general public importance as it will impact on commercial transactions generally and how they are structured.
10. A further matter which the Applicant submits is of general public importance and which is

addressed by the fourth ground of appeal concerns the circumstances in which a party will be found to have a genuine commercial interest and/or a legitimate interest in an assigned cause of action (including whether it be a pre-existing interest). While it is clearly of relevance to the assignment under consideration, it has implications beyond these proceedings.

11. The concept of 'genuine commercial interest' or 'legitimate interest' in the context of an assignment of claim has not been considered by the Supreme Court. It is not clear whether the approach adopted in the United Kingdom in this regard following *Trendtex* will be followed and, if so, to what extent. Consideration by the Supreme Court of the parameters of the 'genuine commercial interest' and/or 'legitimate interest' test is of general public importance.
12. In respect of each of the grounds of appeal, the Applicant relies on Articles 34.1 and, in particular, on the constitutional right to access to the courts and the right to litigate. In *O'Keeffe v Scales* [1998] 1 IR 290, Lynch J stated that the law relating 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 reasonably stateable claims. Again, in *Greenclean*, Hogan J held that the law in relation to maintenance and champerty must be viewed, and, if necessary, modified, in the light of the constitutional right of access to the courts. In addition, the effect of the decision of the Court of Appeal is that the Applicant cannot vindicate its property rights. Accordingly, the appeal raises constitutional issues of wide import.
13. In addition to raising issues of general public importance, it is in the interests of justice that leave to appeal be given in respect of the issues identified in the grounds of appeal. It is submitted that the following factors demonstrate that it would be in the interests of justice to grant leave:
  - a. The effect of the decision of the Court of Appeal is that the Applicant cannot prosecute the within proceedings. The implications for the Plaintiff are draconian: it cannot litigate a claim which it acquired in the context of a commonplace transaction which has a legitimate objective and was structured so as to comply with the restrictions imposed by the order of a bankruptcy court.
  - b. A notable feature is that the evidence established that approximately 7% of the original indirect holders of Strategic Shares in OML became indirect shareholders in the Applicant, whose claim in these proceedings is valued at approximately US \$204,395,423.94. Those persons indisputably have a genuine commercial interest in the prosecution of the proceedings. The effect of the decision of the Court of Appeal is to deny the original indirect shareholders of the Applicant, who suffered huge losses on their investment with BLMIS through the Strategic series shares, access to the courts. To deprive those shareholders of their undisputed rights of recovery by applying a blanket rule is, it is respectfully submitted, an entirely

disproportionate interference with their property rights.

- c. The effect of the decision of the Court of Appeal is to create a legal 'black hole' because, on the assumption (which has been made for the purpose of the application) that the cause of action against HSBC has been validly assigned to the Applicant, neither the assignor nor the assignee can prosecute it. Wrongdoers are thereby allowed to escape liability for their wrongful acts. This is inimical to the interests of justice. The courts have acknowledged that it is not '*an attractive proposition*' that a wrongdoer would escape liability in this way (*Massai Aviation Service Ltd v AG* [2007] UKPC 12).
- d. The uncontradicted evidence adduced by the Applicant was that the Assignment was one integrated transaction that is commonplace in the distressed investment industry and that a purchaser of an allowed claim would want to obtain a transfer of any causes of action to protect its position. Given that the application involved the trial of a preliminary issue, the evidence adduced on behalf of the Applicant had to be accepted by the Court but was not. Rejecting uncontradicted evidence adduced by the Applicant and striking out these proceedings on that basis is inherently unfair.

**6. Ground(s) of appeal which will be relied on if leave to appeal is granted**

**Please list (as 1, 2 , 3, etc) concisely:**

- 1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground**
- 2. the legal principles related to each numbered ground and confirmation as to how that/those legal principles apply to the facts or to the relevant inference(s) drawn therefrom**
- 3. the specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely**
- 4. the issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal**

**Ground 1**

**The Court of Appeal erred in law in holding that the assignment of a bare cause of action is champertous or savours of champerty and is contrary to public policy and void unless it comes within a recognised exception and there is no requirement to establish that the transaction had a champertous purpose or intention.**

The Court of Appeal did not accept the submission that the assignment of the cause of action was not ‘*a bare cause of action*’ but was part of a larger integrated commercial transaction and further that, where a cause of action was assigned as part of a larger transaction, it should not be considered to be the assignment of a bare cause of action in the absence of a champertous purpose or intention (paragraphs [34], [38] and [51]).

The Court of Appeal, thus, proceeded on the basis that the assignment of what is termed a “bare cause of action” is presumptively champertous and/or savours of champerty and the validity of such an assignment will only be upheld if it falls within one of the exceptions that have been developed at common law.

The Applicant contends that this approach does not and should not represent the law in this jurisdiction. An assignment of a bare cause of action should not *per se* be held to be contrary to public policy as savouring of champerty but only if it involves trafficking in litigation or otherwise takes place for a purpose which is not regarded as legitimate. It is submitted that such a conclusion is consistent with the approach identified in the decision of Hogan J in *Greenclean Waste Management Ltd v Leahy (No.2)* (*‘Greenclean’*) [2014] IEHC 314. The doctrine of champerty is founded on considerations of public policy. As the Court of Appeal acknowledged (paragraph [36]), public policy is not a fixed and immutable matter but it alterable by the passage of time. The focus of the law of champerty today is, it is submitted, on trafficking in litigation.

The approach adopted by the Court of Appeal led it to ignore the uncontradicted evidence to the effect that the purpose of the Assignment was to facilitate the shareholders of the Strategic Series shares to recover a sum in respect of their failed investment by selling their portion of the Allowed Customer Claim. The Court also disregarded the uncontradicted evidence that there had not been any onwards assignment of the cause of action and that there had not been any intention to commence litigation against third parties at the time that the Assignment was entered into.

The Court also failed to take into account the fact that the transaction was structured as it was in order to comply with the strictures of the Transfer Procedures Order issued by the Bankruptcy Court in New York and that it involved the transfer of a very valuable property right in the Allowed Customer Claim with the transfer of third party causes of action being a subsidiary part of the transaction.

The Court also failed to take into consideration the uncontradicted evidence of Professor Green on behalf of the Applicant that the Assignment (in its totality) “*was one integrated transaction that is commonplace in the distressed investing industry*”<sup>1</sup> and that the inclusion of litigation rights is customary for secondary trades and incidental to the primary purpose of allowing investors to realise the value of the Allowed Claim.

In respect of this and each of the grounds of appeal, the Applicant relies on Articles 34.1 and, in particular, on the constitutional right to access to the courts and the right to litigate, and on Article 40.3.1 which protects the freedom to contract.

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<sup>1</sup> Second Opinion of Professor Green, para. 4(a).

## Ground 2

**The Court of Appeal erred in law in holding that, when considering whether the assignment of a cause of action is contrary to public policy, there is no requirement to establish any risk to the administration of justice.**

The Applicant submitted before the Court of Appeal that an assignment of a bare cause of action will be invalid on the grounds that it savours of champerty only where a specific public policy detriment is identified as where it can be established that it creates a risk to the administration of justice. Thus, it is necessary to identify the negative impacts that the assignment has or could have on the administration of justice. It was urged upon the Court of Appeal by the Applicant that this issue must be approached on a case by case basis and consideration given as to whether, having regard to the terms of the transaction at issue, it posed a risk to the administration of justice.

The Court of Appeal rejected this contention (paragraphs [34] and [39]) and incorrectly stated (at paragraph [34]) that there was little or no judicial support for it even though the Court had been directed towards a large number of cases from the UK where this approach had been adopted. The approach adopted in the modern UK cases is also supported by the decision of Hogan J. in *Greenclean* who approved the decision in *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149 in which an analysis of the risks to the administration of justice had been undertaken.

It is submitted that, given that the effect of a finding that an assignment is void as savouring of champerty is to preclude the Applicant from litigating its claim against HSBC, and thus interferes with its constitutional right of access to the courts, this is only justifiable if there is an actual identified risk rather than an entirely abstract and generic potential risk to the administration of justice based on concerns about abuse of the court process originating in medieval times. This is particularly so where the transaction is a routine one which was entered into for legitimate purposes. It is submitted that an approach (paragraph [34]) whereby “*Agreements which seem innocuous can be considered contrary to public policy for savouring of champerty*” is not permissible given the constitutionally protected rights of access to the courts, to litigate and to property. It is an entirely disproportionate interference with those constitutionally protected rights.

It is further submitted that any consideration of whether a particular transaction poses a risk to the administration of justice and is contrary to public policy also requires a balancing of the risks to the administration of justice including the fact that access to the courts is denied and that wrongdoers will escape liability.

In the High Court, HSBC clarified that it was not making any allegation that the administration of justice had been adversely affected by the transfer of the claim against HSBC (Day 1, p. 138). Therefore, if, as contended by the Applicant, it is necessary to establish an actual risk to the administration of justice, the Assignment would not have been found to be contrary to public policy.

### Ground 3

**The Court of Appeal erred in law in holding that, in order for a cause of action to be considered to be ancillary or incidental to a transfer of property so as to fall within an exception to the prohibition on the transfer of a bare cause of action, the cause of action has to protect or enhance the property transferred and it was not sufficient that it be connected or relate to the property.**

It has long been recognised that the assignment of a bare right to litigate is permissible if it is incidental and/or ancillary and/or subsidiary to a property right. The law has become 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 it down as being a bare cause of action.

The Applicant contended that the cause of action against HSBC was ancillary and/incidental to the transfer of the Allowed Customer Claim, an accepted property right and that the background to the Assignment was relevant. The scale of the transaction underlying the Assignment is a significant factor in considering what is ancillary/incidental. The assignment of the cause of action took place as an integral part of a large commercial transaction whereby all rights of recovery in respect of the lost investment in BLMIS were assigned to the Assignee. The Assignment (which encompassed, inter alia, the Allowed Customer Claim and the assignment of the cause of action against HSBC) was one integrated transaction that is commonplace in a bankruptcy situation.

The Court of Appeal analysed the position at paragraph [13] and appears to have accepted that there is a connection between the Allowed Customer Claim and the assigned cause of action. It acknowledged that the proceedings arise from the same factual circumstances as the Allowed Customer Claim (at paragraph [42]) but did not consider this relevant to assessing whether they were ancillary/incidental to it. It is submitted that this is, in fact, a very relevant factor to be considered. The Court of Appeal also noted that any recovery in respect of the Allowed Customer Claim impacts on any recovery in these proceedings and vice versa. It did not accept, however, that the assignment of the cause of action against HSBC was ancillary/incidental to the Allowed Customer Claim. The Court appeared to have considered that two rights had to be *dependent* on each other in order for a cause of action be considered ancillary/incidental. It is submitted that the Court of Appeal's interpretation as to when a right is legally ancillary or incidental to a property right is unduly narrow and restrictive and that, where a cause of action is related to or connected to a property right, it is – as a matter of law – ancillary or incidental thereto. It is not necessary that the cause of action be dependent upon or protective of the property right. Where a property right can impact upon recovery in a cause of action, and where a cause of action impacts recovery in respect of a property right, there is a sufficient connection such that the cause of action is incidental and/or ancillary to the property right.

Here, the transaction underlying the Assignment was a very substantial one. The Allowed Customer Claim was in an amount of US\$1,540,141,277.60. It represented almost the entirety of the assets of the Assignor. The principal asset of Optimal Strategic, following the collapse of BLMIS, was the Allowed Customer Claim. The assigned cause of action against HSBC provides an alternative method of the recovery of the loss represented by the Allowed Customer Claim and could make up the shortfall in the recovery of the Allowed Customer Claim. The Applicant submits where a cause of action can 'make good' a property right, it is ancillary or incidental to the property right. Indeed, the expert evidence of Professor Mann on behalf of HSBC was that, on one view, the cause of action against



HSBC represented an alternative method of recovery of the Allowed Customer Claim<sup>2</sup>. Furthermore, the Applicant adduced uncontradicted evidence from Professor Green<sup>3</sup> who explained that a purchaser of an allowed claim would want to obtain a transfer of any causes of action to protect its position. He noted that a secondary purchaser would not want to run the risk that the original holder would bring, post-assignment, any litigation claims that could impair the secondary purchaser's ability to recovery on the claim. Because of the principle of double recovery, the assignment of claim was, thus, necessary to protect the Plaintiff's interest.

Given that the Allowed Customer Claim and the third party cause of action both arose from the same loss and represented alternative methods of recovering that loss, as underlined by the need to give credit in these proceedings for the recovery on foot of the Allowed Customer Claim coupled with the fact that the evidence established that there were good reasons why the assignee of the Allowed Customer Claim would want to take an assignment of the third party causes of action, it is submitted that the Court of Appeal erred in not finding that the assignment of the cause of action was ancillary and incidental to the transfer of the Allowed Customer Claim.

#### **Ground 4**

**The Court of Appeal erred in law in holding that the assignee of a cause of action does not have a sufficient commercial interest where the assignment takes place as part of an integrated transaction and recovery on foot of that cause of action would impact on other property acquired by the assignee as part of the same transaction.**

The law recognises as legitimate the assignment of a cause of action where the assignee has a genuine commercial interest in taking the assignment and enforcing it for his own benefit (*Trendtex*). What constitutes a 'genuine commercial interest' or a 'legitimate interest' should be broadly interpreted in accordance with the general trend in the common law world towards recognition of a wider range of interests as providing such an interest.

For the reasons set out in Ground 3, it is submitted that the interest of the Applicant in protecting the property right in the Allowed Customer Claim that it was acquiring was sufficient to constitute a legitimate interest or a genuine commercial interest in taking an assignment of causes of action against third parties as part of the same transaction.

The Court of Appeal also held that the interest must pre-exist the Assignment and arise other than from the Assignment (paragraph [43]). It is submitted that this is erroneous and represents a narrower test than that applied in the UK (*Giles v Thompson* [1994] 1 AC 143). In the High Court, HSBC accepted that it was not necessary for an assignee of a cause of action to have a pre-existing interest (Day 1, p.148).

#### **Name of solicitor or (if counsel retained) counsel or applicant / appellant in person:**

**Solicitor:** Mason Hayes & Curran  
**Counsel:** Emily Egan McGrath BL  
Peggy O'Rourke BL  
Declan McGrath SC  
John Gleeson SC

<sup>2</sup> Affidavit of Professor Mann, para 22.

<sup>3</sup> Paragraph [34] and footnote 4 of his first report.

## 7. Other relevant information

Neutral citation of the judgment appealed against [2015] IECA 236
References to Law Report in which any relevant judgment is reported

## 8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

<ol style="list-style-type: none"><li>1. An Order setting aside the Order of the Court of Appeal dated 23 March 2017 dismissing the appeal of the Applicant against the Judgement and Order of Costello J. delivered on the 5 October 2015 and made and perfected on 19 October 2015 and 17 November 2015.</li><li>2. An Order dismissing HSBC's application for a declaration that the Assignment of Claim dated 6 May 2011 between Optimal Strategic US 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 Defendant is contrary to public policy, void and unenforceable as a matter of law.</li><li>3. An Order dismissing HSBC's application to strike out the within proceedings.</li><li>4. An Order that HSBC pay the Applicant's costs of this Appeal, the appeal to the Court of Appeal and the High Court motion.</li></ol>
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What order are you seeking if successful?						
Order being appealed:	set aside	<input checked="" type="checkbox"/>	vary/substitute			
Original order:	set aside	<input checked="" type="checkbox"/>	Restore		vary/substitute	

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution
N/A
If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention
N/A

Are you asking the Supreme Court to:		
Depart from (or distinguish) one of its own decisions?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please give details below:		
N/A		

Make a reference to the Court of Justice of the European Union?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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Will you request a priority hearing?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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If Yes, please give reasons below

Signed: Mason Hayes & Curran.  
Solicitors for the Applicant/Appellant

Please submit your completed form to:  
Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.