AN CHÚIRT UACHTARACH
THE SUPREME COURT

Appeal No.:2022/000064
[2024] IESC 5

Charleton J.
O'Malley J.
Woulfe J.
Hogan J.
Murray J.

BETWEEN/

EUGENE MCCOOL (SUBSTITUTED AS PLAINTIFF FOR MCCOOL CONTROLS AND ENGINEERING LIMITED BY ORDER OF THE MASTER OF 8TH NOVEMBER 2017)

Plaintiff/Appellant

- AND -

HONEYWELL CONTROL SYSTEMS LIMITED

Defendant/Respondent

Judgment of Mr. Justice Brian Murray delivered 27th day of February 2024

1. The relevant background and the submissions made by the parties in the course of this appeal are detailed by Woulfe J. in his judgment. I adopt that account. In summary, the original plaintiff ('*the company'*) brings this action seeking damages for an alleged breach of a distribution agreement it entered into with the defendant in 1998. It says the breach occurred in 2001, and it instituted these proceedings in 2005. The action has had a protracted history, which Mr. McCool (who was at the time of the commencement of the action and until October 2020, a director of the company and its sole shareholder) attributes to the manner in which the defendant conducted its defence of the case. In 2017, and at a point when the company's then legal advisors had indicated their intention to cease to represent it, the company purportedly assigned the claim to Mr. McCool ('*the first assignment'*). This occurred in a context in which the company did not have the resources to continue to fund legal representation.

2. An ensuing application to the Master by Mr. McCool to be joined as a co-plaintiff resulted in an Order substituting him as sole plaintiff in the action. That Order was successfully appealed by the defendant to the High Court (Noonan J. [2018] IEHC 167). The decision of that Court was followed by the purported execution by the company (in 2018) of a further assignment ('*the second assignment'*). Another application was made by Mr. McCool on foot of that assignment, this time to be substituted as plaintiff for the company. That application was also unsuccessful, Simons J. ([2019] IEHC 695) deciding that it fell foul of principles of *res judicata* having regard to the decision of Noonan

J. Mr. McCool failed in his appeal against both High Court decisions ([2022] IECA 56), and this Court granted leave to appeal from that decision of the Court of Appeal ([2022] IESCDET 135).

3. While both transfers refer to the assignment of '*all of the Assignor's rights, title and interest'* in the claims arising from the contract with Honeywell, the resolution of the company approving the first assignment refers to the company assigning '*the legal proceedings against Honeywell … **in a suitable proportion**, whereby Eugene McCool could pursue the claim for damages against the Defendant …'*. In the course of the evidence adduced in both applications, Mr. McCool offered various explanations for the assignments. He averred on a number of occasions that the reason for the application for his joinder was '*to protect [the company] and advance the legal case to trial'*. At another point he averred that he was '*not making a personal claim or any form of contractual claim ... in this case against the Defendant'* and at another that he had '*undertaken to diligently continue the proceedings, solely for the benefit of the company and at no cost to the company'*.

4. Upon being asked by the defendant's solicitors a series of questions regarding the assignment, Mr. McCool advised them that the '*the initial consideration'* for the assignment was €1.00, '*with the balance to be agreed between the parties, using expert advice as to how and when this will be concluded'*. That e-mail made it clear that it was intended that there might be an onward assignment of the claims '*to protect our company'*. Provision was made in the

first assignment – but not the second – for the claims to be assigned both to third parties, and back to the company.

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5. Between them, the reasons for the decisions of Noonan J. and for that of the Court of Appeal were three-fold. First, that the first assignment was invalid because it improperly sought to avoid what was described as the rule established by this Court in its decision in *Battle v. Irish Art Promotion Centre* [1968] IR 252 ('*Battle*'). There, it was found that the managing director of a company could not represent it in legal proceedings to which the company was a party. Both Noonan J. and the Court of Appeal (the detailed judgment of which was delivered by Haughton J., with which Costello and Power JJ. agreed) concluded that an assignment which had as its object the avoidance of that rule by assigning the action to Mr. McCool and then seeking to have him inserted as plaintiff in a case which he could then present himself, was abusive of the Court process and thus unenforceable. Second, Haughton J. in addition concluded that the assignment was not absolute, this being a requirement for the enforcement in certain circumstances of an assignment of a chose of action pursuant to s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 ('*the 1877 Act'*). Third, the first assignment was found by both Courts to be champertous and unenforceable for that reason alone.[1]

[1] The Court of Appeal also agreed with the decision of Simons J. that, insofar as the application on foot of the second assignment was concerned, he was correct in finding that the issues raised by Mr. McCool were, indeed, *res judicata* as a result of the decision of Noonan J.. Nothing turns on this here: if the Court of Appeal was correct in its conclusions on any of the three issues as regards the first assignment, this also holds true of the second assignment, the differences between them not being material to anything now in issue in this appeal

6. The parties – and the Court – have proceeded on the basis that the order granting leave to appeal was addressed only to the first of these issues. The question of whether an assignment intended to avoid the consequences of the decision in *Battle* is for that reason alone invalid, is in itself an issue of some general importance. However, as the argument in the case has developed, it became clear that that issue could be viewed as a subset of a broader question. In particular, the more general issue arises as to whether, partly because of the constraint imposed on companies involved in litigation by the decision in *Battle* and partly because of other principles and rules of law affecting the conduct of litigation by bodies corporate and reflecting the separate legal personality of such entities, the Court should recognise a general public policy that precludes the assignment by a company of legal claims other than through the agency of an independent official such as a liquidator or receiver.

7. Following the hearing of this appeal, the parties were invited to – and did – make further written submissions addressed to six questions raised by the Court. Those questions were directed to those broader issues and went significantly beyond the implications for such an assignment of the rules governing legal representation of companies. They included questions around whether an assignment of a claim from a company to a natural person was contrary to public policy by reason of the rules governing security for costs, the disposition by a company of its assets at an undervalue, or '*any other aspect of public policy'*. The parties were requested to comment on how the proceeds of this litigation would be disbursed were the proceedings successfully prosecuted, and to advise whether the High Court would have jurisdiction to order security for costs

against Mr. McCool. They were asked whether any proceeds of the litigation obtained by Mr. McCool would be, or ought to be, held on trust for the company and whether the assignment of a chose in action by a company in liquidation or receivership fell to be considered by reference to the same legal principles as governed an assignment by the company itself.

8. Charleton J. in his judgment has concluded that, for the reasons explained by him, there is a rule of public policy that invalidates the assignment of a claim by a company to a shareholder, director or other person save where the assignment is effected under the authority of an independent officer such as a liquidator or receiver. Woulfe J. in his judgment has concluded that it is appropriate to address only the issue arising from the decision in *Battle* and, that being so, that there is no rule of law that enables the invalidation of the assignment of a legal claim simply because the assignment is effected for the purposes of avoiding the consequences of that decision. Hogan J. in his judgment agrees with Woulfe J. but offers some views as to the operation of the rules of champerty and maintenance on assignments such as those in issue here.

9. I agree, generally, with the approach that has been adopted by Woulfe J. and Hogan J.. However, as I explain in this judgment, I am of the view that within the rubric of the case as they have defined it, it is possible to address some of the concerns underlying Charleton J.'s judgment *via*, in particular, the principles derived from the law of champerty and maintenance as they have been applied to assignments of a bare chose in action. Those principles allow the assignment of a bare legal claim only to a person who has a genuine commercial interest in

the subject matter of the claim. While the tendency has been to increasingly liberalise the definition of a '*commercial interest'* for these purposes, I can see no objection (where that test is met) to an assignment the intent or effect of which is to allow the assignee to protect that interest by representing himself in that suit if the law otherwise so permits. While, in theory, it is correct to say that the demands of public policy and the due administration of justice may in themselves generate a basis on which an assignment might be found unenforceable, the Courts should, I believe, be reluctant to extend '*public policy'* as a basis for the invalidation of otherwise proper assignments of legal claims further than it is clearly necessary to do. We should strongly incline to view the general legal prohibition on the assignment of a bare cause of action (described by Lord Roskill in *Trendtex Trading v. Credit Suisse* [1982] AC 679 at p. 703 ('*Trendtex'*) as '*a fundamental principle of our law*') as usually defining the outer boundary of the rules that secure the interest of the Courts in protecting their own processes in the specific context of assignments of this kind. Correctly understood and applied, that prohibition should provide an adequate safeguard against many of the concerns identified by Charleton J. in his judgment.

10. In this regard it is necessary to stress (as indeed was accepted in the course of argument) that the effect of the Determination by which this Court granted leave to appeal (as it has been interpreted by the Court) together with the decision of the Court of Appeal, is that the conclusions of the Court of Appeal as to the impact of the rules of champerty and maintenance on these specific assignments and the effect, having regard to the evidence adduced in this case, of the

provisions of s. 28(6) of the 1877 Act are final as between the parties to this action. I will, therefore, express no view in this judgment as to the correctness of those conclusions. To that extent, the only '*live'* issue in this appeal arises from the decision in *Battle* and, unusually, no matter how that is resolved, Mr. McCool (although the appellant in this appeal) must fail in the application he brought to be substituted as plaintiff in the case.

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11. At common law, contractual rights were generally incapable of assignment (there were some exceptions to this principle, which are not relevant here). The only mechanisms for obtaining the benefits associated with an assignment of such rights (novation or an acknowledgement from a debtor that he held rights for the benefit of a transferee) depended on the agreement of the debtor. In equity, by contrast, the assignment of both legal and equitable rights could be given effect to, but an agreement to that effect was generally enforceable only if an assignor who retained an interest in the right was joined to the relevant suit so as to bind him to the outcome.

12. This is key to an understanding of s. 28(6) of the 1877 Act. This made provision for the assignment of debts or other legal choses in action following the fusion of the legal and equitable jurisdictions effected by that statute. The object was essentially procedural – to allow the Courts to enforce assignments without joinder of the assignor, but only in the same circumstances as Courts of Equity could previously do so and subject to three conditions. These were (a) that the

assignment had to be absolute and not purport to be by way of charge, (b) it had to be in writing under the hand of the assignor, and (c) express notice of the assignment had to be given to the debtor. Assignments which were unenforceable in the Courts of Equity could not be enforced pursuant to s. 28(6), even if they complied with those conditions, while assignments that did not comply with those three conditions could still take effect in equity, but only if the conditions otherwise applicable in equity were observed.

13. An assignment of a chose in action is not enforceable if it '*savours of*' maintenance or champerty. As evident from Hogan J.'s consideration of the authorities, maintenance arises where a person supports litigation in which they have no legitimate interest, while champerty – a specific instance of maintenance – occurs when the person maintaining the litigant stipulates for a share in the proceeds in the litigation. As he also explains, champerty has always been viewed as more offensive to the law than maintenance, and the policies that underlie both principles will operate to render ineffective the assignment of bare causes of action where there is no legally sufficient interest on the part of the assignee in taking the assignment.

14. When it is said that assignments are thus void '*as savouring of champerty'*, what this means is that they offend the same public policy that animates the prohibition of maintenance and champerty. The reasoning behind this was explained by O'Donnell J. (as he then was) in the course of his judgment in *SPV Osus Ltd v. HSBC International Trust Services (Ire.) Ltd.* [2018] IESC 44, [2019] 1 IR 1 ('*SPV Osus*') at para. 26: assignments of a bare cause of action

are almost the obverse of champerty because they involve payment in return for the action itself. He continued:

> '*As such, assignment is perhaps if anything more offensive to public policy: in its purest form, an assignment of a bare cause of action involves the outright sale of a cause of action which is then pursued by the assignee (who has no interest or connection to the action other than that created by the assignment itself) to the exclusion of the assignor.'*

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15. The authorities (considered in detail in the course of the judgment in *SPV Osus*) show the development of the principles by which an invalid transfer of a cause of action may be differentiated from a valid one. Thus, an assignment of a mere right of litigation is bad, it has been said, but an assignment of property is valid, even if the property is incapable of being recovered without litigation. Where the right assigned is part of a larger transaction (such as the conveyance of property) to which the cause of action is related, the transfer of that right will be enforced. The fruits of an action are property, so the assignment of those proceeds is not void. And the cases are clear that the assignment of a debt is the assignment of a property which will not for that reason alone be viewed as champertous, even though – necessarily – that assignment includes the right to sue to recover the debt (*Camdex International Ltd. v. Bank of Zambia* [1998] QB 22). In this way, the law has moved to a point at which assignments of property incorporating an ancillary or consequential right to a cause of action are presumptively not champertous and the question of justifying the acquisition

of a right to enforce the debt does not arise, while in the case of the transfer from one person to another of a *bare* power to bring an action, the starting point is that it is bad, but can in certain circumstances be justified.

16. In corralling that justification there is, as O'Donnell J. described it in *SPV Osus*, '*a line which cannot be said to be particularly clear, or to have remained in the same location over the years'* (at para. 54). The decision of the House of Lords in *Trendtex* sought to draw that '*line'* in cases involving the assignment of causes of action by reference to whether there was what Lord Roskill described as a '*genuine commercial interest'* on the part of the assignee in taking the assignment. That interest '*should exist prior to and independently of the assignment or the transaction of which it forms part*' (*SPV Osus* at para. 109). *SPV Osus* decides that this is the test for the validity of the assignment of a bare cause of action in Ireland. The underlying policies driving this rule arise from the fact that assigned litigation loses its character as an action brought by a party to vindicate their right to seek compensation for legal wrongs, and the prospect that the transaction will enable the assignee to profit from the transaction. What is thus undesirable, as Fletcher Moulton LJ framed it in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 KB 1006 at p. 1014 is '*wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever'* or, as it was put by O'Donnell J. in *SPV Osus* '*the commercial trading of a claim to an unconnected third party with the possibility of profit'* (at para. 102).

17. However, notwithstanding the breadth of some of this language, the law in Ireland at this point requires that the interest which will render a bare assignment of a right to litigate non-champertous be a commercial one and this, as I have earlier observed, is what was decided in *Trendtex*: Lord Roskill did not, it is to be stressed, frame the test by reference to whether the interest was legitimate, worthy, or non-abusive, but by whether it was '*commercial'.* As the law in this jurisdiction presently stands, the fact that the assignee can point to a more general interest in pursuing a claim, whether to right a perceived wrong, or ensure that a wrongdoer is brought to account, is not in itself an interest for these purposes (see, in particular, *Simpson v. Norfolk Hospital NHS Trust* [2011] EWCA Civ. 1149, [2012] QB 640 as considered in *SPV Osus*). This is not to out-rule entirely the possibility that the law may develop in the future so that in some situations an interest which is genuine, which is defined and circumscribed, and which is non-commercial will suffice (and see in this regard Guest *The Law of Assignment* 4th Ed. 2021 at para. 4-41). As Hobhouse LJ observed in *Camdex International Ltd. v. Bank of Zambia* '*there is a tendency to recognise less specific interests as justifying the support of the litigation of another'* (at p. 29). However, in Ireland this has not yet happened and, for my part, I do not see how the decision in *SPV Osus* can be properly interpreted as envisaging anything other than a pre-existing economic or proprietary interest as sufficing (although I note that some decisions in the United Kingdom may suggest a broader approach based upon *inter alia* an identity of interest, rather than a pre-existing and purely commercial stake in the action).

18. While various categorisations of the circumstances in which such an interest has been identified have been suggested (and see most recently Mulheron '*The Modern Doctrines of Champerty and Maintenance'* (Oxford 2023) pp. 202-217) the cases have not gone so far as to say that the mere fact that a person has a desire to see a wrong to a company litigated where they were involved in the circumstances giving rise to that wrong (whether as shareholder or otherwise) is for those reasons alone a sufficient interest such as to render the assignment of a bare right to litigate enforceable. There have been cases in which an assignment of a claim from a company to a director was upheld where the director's personal reputation was demonstrably damaged by the wrongful dishonouring of cheques which formed the subject of the claim (*Nicholson v. Knox Ukiwa and Co.* [2008] EWHC 1222) and, as I explain shortly, there are cases in which it has been found that a shareholder may take a valid assignment of a legal claim from a company where their shareholding in that company is substantial. That, however, is as far as the law has been taken. Some of the policy considerations outlined by Charleton J. in his judgment might well suggest that it should not go further.

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19. Where the 100% shareholder in a company takes a full and absolute assignment of a claim of the company he has (if the company is solvent) acquired something in which, certainly, he had no proprietary interest prior to the assignment, but in which he very much had a commercial interest – albeit an indirect and derivative one. The authorities after the decision in *Trendtex* speak with one voice when they conclude that a derivative interest in the form of a shareholding or by virtue

of being a creditor of an entity which transfers a cause of action *is capable* of constituting a sufficient commercial interest for these purposes. While, on one view, this might jar with established conceptions of the separate legal personality of the company, and indeed might at first glance appear in tension with the rule in *Foss v. Harbottle* (1843) 2 Hare 461, there can be no objection to treating a shareholding as giving rise to such an interest once it is remembered that the purpose is not to say the shareholder '*owns'* the claim or is entitled without more to maintain a direct action on foot of it, but instead to allow a formal legal assignment to take place so that the chose in action *becomes* that of the shareholder, the shareholder in consequence assuming the burdens as well as the benefits of the litigation. The cases stress that the question of whether such an assignment may take place must be answered by looking at the requirement of '*commercial interest'* in the round, and not by reference to strict requirements of ownership. The interest, it has been suggested, must be assessed at the point at which the assignment is made, as it is then that the validity of the agreement must be ascertainable (*Brownton v. Edward Moore Inbucom Ltd.* [1985] 3 All ER 499 at p. 509 (per Lloyd LJ)) (although there have been cases in which an assignment to a person who has ceased to be a shareholder at the time of the assignment have been upheld, albeit without any discussion of the point – *Eurocall Ltd. v. Energis Communications Ltd.* [2010] EWHC 1730).

20. Once it is understood that the interest in the chose in action which allows the enforcement of the assignment of a bare right to litigate must be genuine, commercial, and independent of the assignment, it is immediately obvious that

the mere fact that the assignee is or was '*a'* shareholder in the assignor cannot, in itself, be sufficient without regard to the extent of the shareholding relied upon or context in which it was acquired. Even if one assumes that an '*identity'* of interests that is not strictly economic or proprietary may in itself in some circumstances be sufficient to meet the *Trendtex* test (and, to repeat, that is not at present the law in this jurisdiction) '*a'* shareholding alone and without more is not enough.

21. In differentiating a genuine interest for these purposes from one that is insufficient to ground the assignment there are two reference points. At one end, it is clear that there does not have to be a mathematically precise equivalence between the '*commercial interest'* and the benefit obtained by the assignee from the transfer. This would be impractical, unjustified and would render the validity of an assignment subject to undesirable uncertainty. The law does not, it has been said, contemplate a '*carefully defined partial assignment'* (*Brownton v. Edward Moore Inbucom Ltd.* at p. 505 per Megaw LJ). The assignee may quite properly, it is clear, make a reasonable profit on the transaction– that will very often be whole reason it was entered into.

22. At the same time, a point will be reached at which the commercial interest of the assignee in the subject of the suit is so clearly attenuated and remote that it is not a real commercial interest at all. The holder of 5% of the shares of a company who takes the assignment of a cause of action of potentially substantial value on the basis that he or she will retain 100% of the proceeds has entered the zone of what Legatt LJ in *Advanced Technology v. Cray Valley* [1993]

BCLC 723 at p. 734 described as '*absurdly disproportionate'.* Similarly, in *Turner v. Schindler & Co.* Court of Appeal 28 June 1991 (recorded by Guest at para. 4-40 and by Smith and Leslie '*The Law of Assignment'* (3rd Ed. 2018) at para. 23.66) an assignment was found to be void for maintenance where a right of action of significant worth was assigned to director, shareholder and creditor for £1.00.

23. While I am conscious that some commentators see requirements of proportionality of this kind as properly located not in the requirement of a '*commercial interest'* but instead as part of a second, distinct and more generally framed inquiry into whether the assignment is contrary to public policy, however one categorises it the English cases show some division of opinion as to whether the test is more intrusive. In *Brownton v. Edward Moore Inbucom Ltd.* at p. 509 Lloyd LJ rejected a test based upon a requirement of '*reasonable*' proportionality between the pre-existing commercial interest of the assignee and the assigned benefit. Yet, the judgment of Lord Roskill in *Trendtex* spoke of an assignment being valid to the extent of the assignee's commercial interest (at p. 703) and such a requirement appears to have been accepted in *Circuit Systems Ltd. (in liq.) and anor. v. Zuken-Redac UK Ltd.* [1996] 3 All ER 748 ('*Circuit Systems'*). There, a company assigned a pending claim to its 98% shareholder in circumstances in which it could no longer afford to support the litigation. The terms of the assignment provided that if the action was successful, the assignee would pay to the company 40% of the proceeds. The shareholder was joined as a plaintiff. At a preliminary hearing it was found that the assignment had been entered into for the purposes of allowing the shareholder to pursue the claim for

the benefit of the creditors of the company and for his own benefit by '*tapping into the legal aid fund*' (which was not available to the company), and possibly with a view to avoiding an obligation to provide security for the defendant's costs. The assignment was thus found contrary to public policy and struck down.

24. While some aspects of the subsequent decision of the Court of Appeal were overturned on appeal (in one of a number of appeals under the title *Norglen Ltd. (In Liquidation) v. Reeds Rains* [1999] 2 AC 1 '*Norglen'*), the consideration by the Court of an argument that the assignment was champertous (in a judgment of Simon Brown LJ with which, in this respect, Staughton LJ and Thorpe LJ agreed) was not questioned. In the case of a shareholder, he accepted counsel's formulation that the '*genuine commercial interest in taking the assignment and enforcing it for his own benefit … must be a proportionate interest'* (at p. 760). On the facts before the Court, he concluded, '*it is impossible to argue that a 98% shareholding, as here, does not justify an assignment on terms that the first 60% of the proceeds of the litigation will go to the assignee'*. At the other extreme, however, '*for a minority shareholder to buy a substantial claim for a nominal sum in the hope of making a substantial profit may well be contrary to public policy'* (*Massai Aviation Services v. Attorney General* [2007] UKPC 12 at para. 21).

25. This is unhappily imprecise, but what can be said is that while in all of these cases the comments appear to have been *obiter*, at the very least they point strongly to what seems to me to be the commonsense conclusion that a small

creditor or shareholder may not without more take for himself the whole benefit of the assignment of a substantial claim from the company. Moreover, they require the assignee, if challenged, to establish not merely that they have a derivative commercial interest in the assigned suit, but that this interest is by reason of the substance of his or her shareholding or debt '*genuine*' and that the assignment thus enables the protection of that interest, rather than facilitates trafficking in it. I will leave for a case in which the issue is fully argued, the question of whether a more rigorous test requiring a reasonable relationship between the pre-existing commercial interest and the assigned cause of action is appropriate in this jurisdiction. Nor will I address here the hypothetical issue of whether any such difficulty can be avoided by an agreement to hold the proceeds of an action on trust for the assignor, or for that matter whether the law should impose a trust to that effect.

26. There are some general conclusions to be drawn from the foregoing:

(i) An assignment of the nature in issue in these proceedings – being the purported transfer of a '*bare right to litigate'* – is prima facie champertous and thus unenforceable.

(ii) An assignee who can identify a genuine commercial interest in the claim that has been purportedly assigned will, if that interest existed prior to and independently of the assignment or the transaction of which it forms part, be in a position to enforce the assignment notwithstanding that it is of a bare right to litigate. The need for the validity of the assignment to

be tested at the point at which it occurs would suggest that that interest must exist at the time of the assignment.

(iii) A shareholder in or creditor of a company may have, for these purposes, a commercial interest in legal claims of the company – but *only* if their interest is sufficiently substantial to render it both '*genuine'* and '*commercial'*.

(iv) Therefore, an assignment from a company of a right to litigate a claim to such a shareholder or creditor will *not* be contrary to public policy *if* the shareholder or creditor enjoys a substantial interest in the company's claim by reason of the extent of their shareholding or debt.

(v) It may be that the law also requires a reasonable proportion between the share of the proceeds of the claim taken by the assignee, and their commercial interest in that claim.

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27. While this can all be neatly theorised, and while it may be easy to apply in a solvent company where the shareholding of the assignee is significant and can be directly related to the proportion of the proceeds he or she is to retain if the claim is successful, the rules as I have stated them become more difficult if applied to a shareholder in an insolvent company, or a company the solvency of which would be jeopardised by the transfer. This is not addressed in the

authorities to which I have referred – presumably because it will in those circumstances usually be easier to challenge the disposition under company law. Nonetheless, having regard to the approach Charleton J. has adopted it is important to observe that is hard to see (to take that example) that there is any proportion between a 98% shareholding in a company and the taking of 60% of the proceeds of a claim enjoyed by that company if, in fact, even with the full benefit of the claim the 98% shareholding is by reason of the insolvency at the time of the assignment, worthless. Even aside from the intervention of company law, in that situation, the persons who have '*a genuine commercial interest'* in the suit are not the company's shareholders, but its creditors. Describing the shareholder, in that circumstance, as having a commercial interest in the suit would not merely defy reality, but would legitimise the divestment of the creditors' interests in what may be a significant asset in an insolvency (noting, of course, that assignments by liquidators will fall to be treated quite differently – see *Irish Bank Resolution Corporation Ltd. (In Special Liquidation) v. Morrissey* [2014] IEHC 527, [2014] 2 IR 399).

28. Assuming that the '*genuine commercial interest'* that is required to facilitate an otherwise unenforceable assignment of a bare cause of action must exist and be gauged at the time of the transaction in question, it seems to me that in many cases in which a company might wish to transfer a cause of action to a third party (and in almost all those circumstances that might give rise to the public policy concerns identified by Charleton J. in his judgment) such an assignment may well not be enforceable. The assignee must have some '*commercial'* interest (and therefore an assignment to a person who is not, at the time of the

assignment, a shareholder would present some difficulties). The '*interest'* of the shareholder in the suit must be of sufficient substance to be '*genuine'* (and therefore such an assignment to a person with a small shareholding would not appear permissible, at least if the assigned claim is one of any substance and value). Where a company is insolvent or where the transfer of the cause of action will jeopardise its solvency, the shareholder will not have any true commercial interest in the underlying action: that interest will vest in the creditors. And even where the assignee's shareholding is substantial and the company fully solvent at the time of the transaction, the benefit the shareholder obtains from the assignment may have to be proportionate to his pre-existing commercial interest.

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29. I agree with the judgments of Woulfe J. and Hogan J. insofar as they conclude that the objection raised by the defendant as based on the decision in *Battle* is misplaced. The Court in that case did not, in truth, formulate any new principle of company law. Instead, it declined to create a new exception to a long-established rule of general application. The *rule* is that only a solicitor or barrister can exercise a right of audience in a Court of law,[2] and the *exception* is that a person who is not so professionally qualified may exercise such a right of audience where they are a party to a case.[3]

[2] The entitlement of barristers to exercise that right of audience is rooted in the common law, while the right of audience of solicitors is provided for by statute (s. 17 Courts Act 1971).
[3] The exception is, now, commonly related to the constitutional right of access to the Courts (see Quinn *Companies in Court and the Limits of their Legal Personality: An argument against the strict application of the rule in Battle'* (2022) 67 Ir. Jur. 55).

30. What the Court decided in *Battle* was that it would not allow the managing director of a company to represent it in Court. In doing so, the Court simply gave effect to the logical consequence of the decision in *Salomon v. Salomon* [1897] AC 22 to hold that because a company was in law a distinct person from its controllers, managing director and/or shareholders, this exception to the rule that legal representation was required in the course of proceedings before a Court of law did not apply. The managing director of the company was not the company and was not, therefore, a party to the case. As Ó Dálaigh CJ put it '*[t]his is an infirmity of the company which derives from its own very nature'* (at p. 254): '*companies as fictitious persons, are physically incapable of appearing in person, so they can only appeal through, or be represented by, someone else'* (R. Keane '*Company Law'* 5th Ed. 2016 at para. 13.12). The general rule has since been abated somewhat in cases of an exceptional kind (*Coffey v. Environmental Protection Agency* [2013] IESC 11 & 31, [2014] 2 IR 125) but the exception is tightly controlled, arising only in rare circumstances (*Allied Irish Bank plc v. Aqua Fresh Fish Ltd.* [2018] IESC 49, [2019] 1 IR 517 at para. 22). The basic principle has been most recently affirmed by this Court in *Gaultier v. Registrar of Companies* [2019] IESC 89.

31. Where an individual takes a lawful assignment of a legal claim from a company and either institutes proceedings on foot of that claim in his or her own name, or (where the proceedings are extant when the assignment occurs) is substituted as plaintiff in the action, that individual is entitled to represent themselves in the proceedings. This is because they are a party to the case with all of the

consequences that follow (including personal liability for the defendant's costs), and the exception to the rule requiring professional legal representation applies. There are, as I have explained, well established rules that give effect to the public policy that litigation should not be traded, and that a person should not be entitled to assign a legal claim to a stranger or interloper. But if the assignment is legally effective, it is because the assignment has been made to a person with a genuine commercial interest in the suit. The law has determined that the public policy against trafficking in litigation is not impaired in this situation, or at least not sufficiently impaired to justify invalidating the assignment. That, it appears to me, properly defines what should generally represent the outer limits of public policy insofar as the integrity of the administration of justice is concerned.

32. That being so, it is not necessary to embark upon a consideration of whether the statements in the case of *Fitzroy v. Cave* [1905] 2 KB 364 suggesting that motive and intent are not relevant to the validity of an assignment were correct when made or still represent the law (but it is to be noted that *Fitzroy v. Cave* was a case involving the assignments of *debts* the transfer of which is viewed as a transfer of *property* and that these comments may not necessarily apply to assignments of a cause of action). Whether or not, however, they are correct, they do not affect the fundamental issue as presented by the defendant – that is whether the assignments are bad because they represent an abuse of the Courts' process.

33. As a matter of theory, certainly, it can be said that the entering into an agreement that directly impacts upon the conduct of litigation is *capable* of constituting an abuse of process. Thus, while the range of circumstances in which conduct will be found abusive of the Courts' process is not closed, they will usually fall into one of four categories – (a) proceedings that involve a deception on the Court or are fictitious or constitute a sham, (b) proceedings in which the process of the Court is not being fairly or honestly used but is employed for an ulterior or improper purpose or in an improper way, (c) proceedings which are manifestly without foundation or which serve no useful purpose, or (d) multiple or successive proceedings which cause or are likely to cause oppression (and see in relation to this classification *Jeffery & Katauskas Pty Ltd. v. SST Consulting Pty Ltd.* [2009] HCA 43, (2009) 239 CLR 75 at para. 27).

34. Here, the objection was that the assignment was entered into for an improper purpose. That cannot be addressed without understanding the purpose of the '*rule'* which it is contended the assignment improperly sought to avoid, and the reasons the law allows the assignment to take place. The effect of the rule to which effect was given in *Battle* is that a non-lawyer should not be able to represent other parties in Court, and the policy underlying that rule lies in the purposes of both regulating the proper conduct of legal proceedings, protecting the administration of justice and of protecting consumers of legal services (see the comments of Fennelly J. in *Coffey v. Environmental Protection Agency* [2013] IESC 11, [2014] 2 IR 125 at para. 30). While the consequence of the decision in *Battle* is one of the disadvantages that travel with the benefits of incorporation this is not a state of affairs directed to making litigation more

difficult for companies – it just so happens that the existing exception to the rule requiring representation by a qualified lawyer cannot be availed of by an artificial legal person. That rule is thus not properly viewed as being intended to protect company assets, minority shareholders, creditors or (for that matter) defendants to actions instituted by limited liability entities. The effect of the law is, instead, to carve a narrow exception to the general obligation that a litigant be represented by lawyers, conditional only on the non-lawyer who exercises a right of audience being a party to the action. And where the law *permits* an assignment to a person who can then represent themselves there is nothing *per se* wrongful with their taking the assignment so that they can do just that.

35. There is, therefore, no reason to cast the rules regulating legal representation before the Courts as a normative principle that invalidates a contract of assignment of the kind in issue here, no more than rules of law that expose a company to the prospect of security for costs, or which preclude them from obtaining legal aid (neither of which were found by the House of Lords to afford a basis for refusing to enforce the assignment of a claim in *Norglen*). The proper resolution of these issues was, I think, well put by Bingham MR in *Eurocross Sales Ltd. and anor. v. Cornhill Insurance plc.* [1995] 4 All ER 950 at p. 958: rules such as these '*provide a safeguard against a defined risk: it cannot in our view be legally objectionable to remove the risk so as to remove the need to provide the safeguard.'* Mr. McCool's counsel framed it with similar elegance in their written submissions: the effect of an otherwise valid assignment in the context of an application for substitution is not to circumvent the rule in *Battle*

in some illegitimate or improper way, but simply to render any consideration of the rule meaningless and incapable of giving rise to an abuse of process.

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36. My conclusions are as follows:

(i) The agreement in issue here comprised the assignment of a bare cause of action. Such an assignment is unenforceable as a matter of public policy *unless* the assignee had a genuine commercial interest in the subject matter of the assignment that pre-existed the assignment and was independent of it.

(ii) A shareholder in or creditor of a company may have a genuine commercial interest in a claim of the company for these purposes. However, the assignment to such a person of that claim will not be enforceable if the shareholding or debt is so small as to render their interest insubstantial for the purposes of the applicable test.

(iii) Moreover, it is arguable that there is a requirement that there be a reasonable proportion between the percentage share of the proceeds of the claim taken by the assignee, and his or her *pre-existing* commercial interest in the claim.

(iv) Even if this is not ultimately accepted as a correct statement of the law in this jurisdiction, for the reasons explained in the course of this

judgment it will in many cases in which an insolvent company purports to assign a claim to one of its shareholders or creditors, be extremely difficult to establish a pre-existing interest of sufficient substance to render the assignment valid having regard to the rules of public policy as I have outlined them.

(v) The mere fact that an assignment of a legal claim is made solely for the purposes of enabling the assignee to pursue that claim while representing himself in circumstances in which he could not exercise a right of audience on behalf of the company does not, in itself, render the assignment unenforceable.

37. Charleton J. in his separate judgment raises a number of concerns around the prospect that companies might, in the absence of a specific rule precluding the assignment by them of claims to their officers, or others, and thereby avoid various rules of law, as well as the legal provisions which preclude a company from gratuitously transferring its assets to its shareholders. Very similar arguments were raised in *Eurocross Sales Ltd. and anor. v. Cornhill Insurance plc.*. They were addressed by Bingham MR in his judgment (at p. 960), as follows:

'*We do not reach this decision without some unease. One need not be clairvoyant to foresee the possibility of abuse if the practice were to become prevalent of impecunious companies, unable to meet anticipated orders for security, assigning claims to penniless directors who would*

then litigate the claims without giving security, perhaps with the benefit of legal aid and taking advantage of the rights accorded even in the higher courts to unrepresented personal litigants. These are not fanciful risks. But we think that the safeguard must be found (a) in the fiduciary duty owed by directors to their companies, which must ordinarily prohibit transfer of a company asset to a director at an undervalue; (b) in the right of the Legal Aid Board to refuse the grant of legal aid where it would be unreasonable to grant it; and (c) if need be, in amendment of the rules of court. On the facts and argument in this case, we do not think that the apprehension of future abuse would justify the court in making any order other than that which we propose. As Samuel Johnson observed, "Sir, you must not neglect doing a thing immediately good from fear of remote evil."'

38. I agree with these observations. Moreover, I would add this. There could be no question of the holder of a shareholding acquired (or reacquired) for the purposes of an assignment of a claim to him or her having a '*genuine commercial interest'* in the claim that was independent of the assignment, and such a transfer would be unenforceable. Similarly, a person holding a small interest in the company will not have a sufficient commercial interest in a claim of any value and substance for these purposes. And where a company is insolvent, not merely will the disposition of an asset to a shareholder or other person potentially involve an unlawful return of capital and/or (as the quotation from the judgment of Bingham MR acknowledges) a breach of directors' duties, but for the reasons I have outlined earlier, a shareholder or creditor taking an

assignment in those circumstances may face some considerable difficulty in establishing the necessary commercial interest in the assigned claim to which I have earlier referred.

39. While even in a solvent company the rules governing capital maintenance may continue to prohibit the transfer of an asset to a shareholder at an undervalue (see *Aveling Barford Ltd. v. Perion Ltd.* [1989] BCLC 626), whether there has been such a transfer will depend on whether the company has obtained an up-front payment for the assignment that is commensurate with the likely value of the claim and/or been guaranteed an adequate proportion of the proceeds of the action, if successful. A solvent company which transfers its legal cases to an impecunious shareholder or director (where such a person can fulfil the requirements I have outlined in this judgment) with a view to the company ultimately obtaining the benefit, but not the burdens, of litigation would, on the established law, be exposed itself to the costs of the action. And, of course, in extreme circumstances, an agreement of this kind would face the prospect of not being enforced because it was a sham and/or because (depending on whether the assignment had crossed the line from guaranteeing the company a share of the proceeds of the action, and rendering the assignment conditional or partial) it was not an absolute assignment for the purposes of s. 28(6) of the 1877 Act. But, in my view, the appropriate way of addressing these concerns is not to create a new rule of public policy that might hamper entirely legitimate assignments of legal claims, but instead to rely on the existing law – both company law and the law derived from champerty and maintenance – to address abuses if and when they arise.

40. In these circumstances – and noting that this does not affect the enforceability of the assignments the subject of the appeals from the judgments of either Noonan J. or Simons J. – Mr. McCool is correct insofar as he contends that the Court of Appeal erred in finding that an assignment that is entered into for the purposes of avoiding the operation of the decision in *Battle* is for that reason alone invalid. The decision of that Court on the other issues stands.