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PERSPECTIVES

THIRD-PARTY LITIGATION FUNDING IN THE IRISH CONTEXT

BY **PAUL CONVERY**

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In the recent decision of *Persona Digital Telephone Ltd. and Sigma Wireless Networks Ltd v The Minister for Public Enterprise & Ors* [2017] IESC 27, the Supreme Court of Ireland confirmed that third-party litigation funding by an entity with no independent interest in the underlying proceedings is prohibited under Irish law.

This case arose as a consequence of the plaintiffs' allegations that there was impropriety in a tender process resulting in the award of a mobile phone licence in 1996. The plaintiffs were unsuccessful in their bid, alleged a resulting loss and so looked to sue a number of parties for that loss. However, financial constraints led to the plaintiffs seeking to avail of litigation funding from a third party and the

ensuing application for a declaration by the High Court as to the validity of the proposed funding arrangement, given the existence of the torts (and criminal offences) of maintenance and champerty in this jurisdiction.

The Supreme Court found that funding of this nature is contrary to the torts of maintenance and champerty, which prohibit financial assistance to a party to litigation by a person who has neither an interest in the litigation, nor any legally recognised motive justifying interference. Both maintenance and champerty are still recognised torts (and criminal offences) in Ireland and the Supreme Court in its judgment left it to the legislature to develop this complex area.

Maintenance and champerty

Maintenance has been described as “the improper provision of support to litigation in which the supporter has no direct or legitimate interest” (*Greenclean Waste Management Ltd v Leahy* (No. 2) [2014] IEHC 314) and champerty is a particular form of maintenance whereby a person obtains a share in the proceeds or spoils of the litigation in return for funding of the prosecution.

In England and Wales, following the implementation of the Criminal Law Act 1967, the crimes and torts of maintenance and champerty, both having been declared unlawful in 1275 by the Statute of Westminster, were formally abolished. From 1995 the area was further developed by statutory regulations and this has led to the rapid development of the business of litigation funding which has now become an integral part of access to the court system in England. The most straightforward development is professional funding, in which a third party funds a proportion of the claimant’s costs in return for a proportion of any damages that are awarded. Another innovation is litigation risk hedging, in which a plaintiff sells a proportion of its claim for a fixed sum. The English market has also witnessed a growth in after the

event (ATE) insurance which allows parties to obtain insurance against a claim after the event.

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Ireland maintains the status quo

The Statute Law Revision Act in 2007 was enacted after a long review process of statutes enacted before 6 December 1922. It repealed 3226 Acts and provided an express list of the statutes which remain in force. It expressly retained the Statute of Conspiracy (Maintenance and Champerty from an unknown date in the 14th Century) and the Maintenance and Embracy Act 1540, thus preserving the medieval torts and offences of maintenance and champerty in modern Irish law.

This 2007 Act was the first port of call by the Supreme Court in reaching its decision in the *Persona* decision. The 2007 Act and recent case law were held to show that both maintenance and



champerty are still recognised torts and crimes in Ireland.

This is further highlighted by various Irish cases advanced over the last few years.

In *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd & Ors* [2017] IECA 56, a case which originated in the Madoff Ponzi scheme which collapsed in 2008, the Court of Appeal examined the issue of third-party funding. The appellant had an assignment of a claim to recover assets in the Madoff bankruptcy from a Madoff investment entity. That assignment included a bundle of rights and interests and, on the basis that the right to litigate against the HSBC entities was ancillary to the assignment, SPV subsequently advanced a claim against the defendants for negligence and other civil wrongs. The two HSBC defendants sought to have the assignment declared contrary to public policy,

void and unenforceable as being champertous in nature because it transferred a “bare right to litigate” and otherwise constituted “trafficking in litigation”. The High Court and the Court of Appeal both dismissed the proceedings and held, *inter alia*, that the assignment of third-party claims was contrary to public policy.

In *Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] 3 IR 654, which again originated in the Madoff Ponzi scheme, the High Court held that the plaintiff was in receipt of a form of third-party funding but was satisfied on the evidence that the funder had a sufficient connection with the plaintiff so as to take that funding out of the scope of maintenance or champerty.

ATE insurance has garnered a level of acceptance in Ireland. In *Greenclean Waste Management Ltd*

v Leahy (no 2) [2014] IEHC 314 the Court accepted the validity of ATE insurance and held that it did not fall foul of champerty and maintenance doctrines. It also recognised that the availability of ATE insurance could be relevant when the Court is exercising its discretion in respect of whether or not to make an order for security for costs against a plaintiff. On appeal the policy was found to be ineffective but the Court's recognition of the concept is positive and potentially reduces the impact of at least one deterrent for a party considering instigating litigation, as the party can, in the right circumstances, at least meet an award of costs against it if it is unsuccessful.

Third-party funding and access to justice

In reaching its conclusions in *Persona* the Supreme Court acknowledged the difficulties for plaintiffs facing financial constraints but ultimately held that due to the separation of powers it is a matter for the legislature to deal with in a comprehensive way.

Many observers of the developments in this area will be disappointed by the outcome of the *Persona* case, although not surprised as, despite the rapid development of litigation funding as an industry abroad, the Irish judiciaries' hands are by and large tied in light of the continuing existence of medieval doctrines. It is broadly accepted that, while the doctrines were introduced to protect the courts and society from the abuse of litigation, as public policy evolved the necessity for that protection arguably

receded, as it did further in light of the increasing cost of litigation, to the stage that third-party funding is now accepted in a large number of common law and civil law jurisdictions.

Acknowledging the role third-party funding plays in society, Lord Neuberger, president of the Supreme Court of the UK, in the Harbour Litigation Funding First Annual Lecture on 8 May 2013, expressed a view that: "...access to the courts is a right, and the State should not stand in the way of individuals availing themselves of that right".

The Supreme Court of Ireland did leave the door open in Ireland for a case based on the constitutional right of access to justice. Clarke J. in his concurring judgment in *Persona*, held that certain circumstances could arise where, if there was a finding of a breach of constitutional rights and no action had been taken by the legislature, it could leave the courts "as guardians of the Constitution" with no option but to take measures that would not otherwise be justified.

Therefore, unless the legislature acts, there remains the possibility that a third-party funding case based on access to justice might force the Court's hand. **CD**



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