

## Third Party Funding in Ireland: Persona non grata?



### *Persona Digital Telephony Ltd & ors v The Minister for Public Enterprise & ors [2017] IESC 27*

This week, the Irish Supreme Court dealt a blow to visions of Ireland becoming a post-Brexit litigation hub. It held that third party litigation funding, common in the UK and other countries, was unlawful.

The case was on appeal from the Irish High Court which had held that entering into a litigation funding arrangement with a highly respectable litigation funder breached the ancient concept of 'maintenance and champerty'. Maintenance and champerty (originating in medieval English law) prevents anyone without a bona fide interest in litigation from 'sponsoring' a case financially. In the UK, courts have moved to restrict the concept to allow third party funding within certain parameters, including restricting the ability of the funder from taking decisions on the course of the proceedings or any settlement. The Irish courts are leaning the other way by consistently finding that third party funding is not legal under the current regime. The Irish Supreme court's rejection is, however, grounded in the current law, essentially urging the legislator to modernise the law.

### From medieval to modern

The rules making maintenance and champerty unlawful originate in the common law of medieval England. More recently, the public policy that underpins the rules stems from a concern that those third party funders could manipulate the litigation and "be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."<sup>1</sup>

The Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty in England and Wales, although a contract in breach of the rules may still be unenforceable in certain circumstances. Since then, the popularity of litigation funding has grown quickly. Last year, Lord Justice Tomlinson recognised that "[t]hird party funding is a feature of modern litigation."<sup>2</sup>

Many other jurisdictions have followed suit. Third party funding is permitted in some form in Australia, the US and New Zealand. Hong Kong and Singapore adopted legislative measures last year allowing third party funding in some circumstances.

In many civil law jurisdictions an outright assignment of a claim to a third party has always been legally possible (although there are limits).

### The case

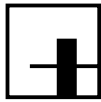
The Irish plaintiffs entered into an agreement with Harbour Fund III, LP. Under this agreement Harbour would provide financial backing to the plaintiffs' legal costs. The plaintiffs sought a declaration that this third party funding agreement was lawful.

Among other things, the plaintiffs argued that Irish law does not make maintenance and champerty a per se prohibition,

### The common law rules

**Maintenance** is the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse.

**Champerty** is an aggravated form of maintenance. It occurs when the maintaining party pays some or all of the costs of a party in return for a share of the proceeds of the action or suit.



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they are descriptions of circumstances which can give rise to public policy issues. As such, they were not asking the Irish Supreme Court to abolish the rules, but rather determine whether the litigation funding agreement in issue was likely to give rise to the mischief that the rules were intended to guard against. They submitted that this did not mean that every third party funding agreement would be valid, but this one was.

The Irish Supreme Court found for the defendants holding that the law of maintenance and champerty remains the law of Ireland and the plaintiffs had not advanced any exceptions to the rules. It acknowledged the developments in other common law jurisdictions but did not find them particularly helpful given the recent statements in Irish case law.

It recognised that the rules raised issues of public policy but these would involve complex situations more suited to a full legislative analysis. Interestingly, the question of whether the rules were constitutional was left open: “this was not brought as a constitutional challenge. Clearly, constitutional issues have been parked by the plaintiffs, perhaps for another day.”<sup>3</sup>

### Comment

In deciding the way it did, the Irish Court very nobly resisted the temptation to enter the fray of competition between courts across Europe to attract complex commercial litigation. It clearly sees the need for third party funding and calls on the legislator to introduce changes. Yet, the court is mindful of the bigger picture, indicating that inaction on the part of the legislator may mean that it may, as guardian of the constitution, have to intervene in the future and come to a different conclusion.

The big question is whether Ireland’s current caretaker government has the incentive (or the power) to embark on this project within the uncertain timescale envisaged by the Court. This may leave Ireland lagging behind both other common law and civil law jurisdictions in Europe and beyond.

It can only be hoped that in the current climate of change resulting from the Brexit referendum, the UK government will take great care to ensure that the preservation of the current attractiveness of the UK courts as a forum for complex commercial litigation in general and cartel follow on litigation in particular.

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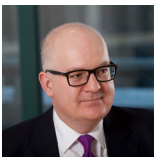
### Endnotes

<sup>1</sup> *Re Trepca Mines (No 2)* [1963] Ch 199, at 219

<sup>2</sup> *Excalibur Ventures LLC & ors v Texas Keystone Inc & ors* [2016] EWCA Civ 1144, at 1144

<sup>3</sup> *Persona Digital Telephony Ltd & ors v The Minister for Public Enterprise & ors* [2017] IESC 27, para 53.

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