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A setback to litigation funding

PETER BREDIN · DILLON EUSTACE 29 JULY, 2016

In a closely followed civil case in Ireland, the Irish High Court has addressed the status of third-party funding, declaring it unlawful, and striking a blow to litigation funders looking to exploit the market. Dillon Eustace partner Peter Bredin explores the court's approach and future implications.

The judgment, handed down in April 2016 in the case of *Persona Digital Telephony v Minister for Public Enterprise*, is currently under appeal to the Court of Appeal.

Writing about the proceedings in the July-August 2015 edition of *CDR*, I highlighted that the plaintiffs had made an application to have the funding arrangement approved by the court, and that previous judgments did not bode well for the plaintiffs.

This decision is undoubtedly a blow for litigation funders and litigants wishing to engage them. Some believed that the Court of Appeal's finding in a separate case in 2015 that after-the-event (ATE) insurance was legal had opened a door to professional third-party funding. However, for the moment at least, that door remains closed.

SETTING THE SCENE

The *Persona* case arose from the controversial circumstances in which the state's second mobile phone licence was awarded in 1996. The plaintiffs were disappointed under-bidders for the licence,and chose to sue the state for the manner in which the competition had been run. To enable them to pursue the case, the plaintiffs came to a funding arrangement with **Harbour Litigation Funding**.

As a preliminary issue in the proceedings, the plaintiffs sought declarations that by entering into the funding arrangement, they were not engaging in an abuse of process and were not contravening the rules of maintenance and champerty. Harbour was not separately represented in the proceedings.

The offences of maintenance and champerty are still on the Irish statute books. As recently as 2007, the Statute Law Revision Act retained these offences. The situation is therefore

different from that under the law of England and Wales, in that Ireland has no equivalent to the UK's Criminal Law Act 1967, which abolished both the torts and offences of maintenance and champerty.

The court noted that this was the first case in Ireland which directly concerned the acceptability of third-party litigation funding. The issue was not new to the courts, however, and precedent was not on the side of the plaintiffs: in *Thema v HSBC* in 2011, the Commercial Court stated that professional third-party funding is not permitted.

Taking all of this into account, the plaintiffs faced many obstacles before even getting to the merits of their substantive claim against the state. It was little surprise, therefore, that both plaintiffs and the funder sought clarity from the courts before proceeding further with the litigation in a case in which the plaintiffs' legal costs were estimated at EUR 10 million, which the plaintiffs could not afford to pay.

THE ARGUMENTS

Relying heavily upon the *Greenclean v Leahy* judgments in 2014 and 2015, in which ATE insurance was recognised as lawful under Irish law, the plaintiffs' main arguments were that the scope of maintenance and champerty must be viewed in light of modern public policy and modern conceptions of right and wrong.

They argued that the protections needed when maintenance and champerty were first outlawed (to prevent oppressive litigation against individuals being sustained by unscrupulous men of power) are no longer warranted. Their arguments also touched upon the constitutional right of access to justice, as their evidence was that the plaintiffs could not prosecute the case without the funder's help.

The defendants submitted that the legislature had decided in 2007 that maintenance and champerty were contrary to public policy. They claimed that the plaintiffs were essentially asking the court to vary the scope of these torts and offences. This, they contended, was a task which fell outside the powers of the courts under the doctrine of the separation of powers, and was instead a matter for the legislature.

THE HIGH COURT'S ANALYSIS

The court's first task was to decide upon a preliminary objection raised by the defendants as to the court's jurisdiction to determine the issue raised by the plaintiffs. The defendants' point was that the lawfulness of the funding arrangement was not in dispute in the proceedings (which concerned the awarding of the mobile phone licence), and the plaintiffs were essentially asking the court for an advisory opinion. The court was satisfied, however, that the test for the granting of declaratory relief was met and that it could determine the issue.

Although, as previously mentioned, this was the first case in Ireland directly concerning the acceptability of third-party litigation funding, the torts of maintenance and champerty have been looked at by the Irish courts on several occasions in recent years.

In 1998, the Supreme Court held in *O'Keeffe v Scales* that the laws of maintenance and champerty still existed, and that a person assisting another to bring or defend proceedings without a *bona fide* independent interest acts unlawfully.

In 2011, the Commercial Court stated in *Thema* that: "In Ireland it is unlawful for a party without an interest (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds."

In *Persona*, the court held that the ingredients of champerty were met, as Harbour had no interest in the litigation independent of the funding arrangement with the plaintiffs, which arrangement was therefore unlawful.

The court recognised that properly policed professional third-party funding did not offend against public policy in other jurisdictions and that modern ideas of propriety may not necessarily regard funding with such suspicion, echoing the court's comments in *Greenclean* that the modern application of maintenance and champerty was not frozen by reference to the social conditions and public policy considerations which pertained several hundred years ago.

The court in *Persona* held, however, that it would be a matter for the appellate court or the legislature to amend the position which had been so clearly pronounced in the recent Irish judgments referred to above.

THE FUTURE

Amid reports of Burford Capital's funding of a FTSE 100 company's litigation portfolio, it is clear that litigation funding is now part of the mainstream in other jurisdictions and is evolving at pace. In Ireland, however, professional third-party funders, and their intending customers, must await the appeal in *Persona* or an amendment to the legislation. Unless granted priority, the appeal is unlikely to be heard for another year or more.

A significant point which the plaintiffs did not take in *Persona* w as to seek a declaration that the torts and offences of maintenance and champerty are unconstitutional insofar as they are an obstacle to an impecunious party's access to the courts. A challenge on constitutional grounds may yet emerge.

WHAT IS PERMITTED?

ATE insurance is lawful under Irish law, as held by the Court of Appeal in its 2015 judgment in *Greenclean*. As illustrated by that case, such insurance will not always (and in fact may rarely) be sufficient to defeat an application for security for costs.

Funding of litigation by a party who has a *bona fide* interest in the case, independent of the funding arrangement, or a sufficient connection with the funded party is also lawful. Illustrations of such arrangements or connections are a shareholder supporting litigation by a company, or a creditor funding litigation by a receiver. A funder in those circumstances must bear in mind the risk that he will be liable for adverse costs which cannot be met by the party he is assisting.

Charitable support by an unconnected party who does not share in any proceeds of the litigation is also lawful.

WHAT IS FORBIDDEN?

The current position in light of *Persona* is that professional third-party funding is unlawful, meaning that funders will likely be unable to enforce their agreement with their clients, and will therefore be cautious about doing business with Irish litigants. (This does not mean that a party who avails of such funding to pursue or defend a case will lose the case on that basis, as illustrated in *O'Keeffe* where an attempt to stay proceedings brought in an allegedly champertous manner failed.)

Dealing or trafficking in litigation, such as by way of assignment of a cause of action to a party who does not have a legitimate concern in the litigation, is also contrary to public policy and prohibited.

Since this Expert View was written, the Supreme Court of Ireland has agreed to hear the appeal in this case.

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