

Group Briefing

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Supreme Court confirms continued prohibition on Professional Third Party Litigation Funding in Ireland

The Supreme Court of Ireland has confirmed, in its decision in the case of *Persona Digital Telephony Ltd v The Minister for Public Enterprise*, that professional third party funding is not permitted in Ireland as it offends against the rules on maintenance and champerty.

The Court found that it was bound by the existing law, saying that any change to the position would require new legislation or, potentially, a successful constitutional challenge.

BACKGROUND

The applicants in *Persona* claimed they needed funding to pursue their case against various parties, including the State. The matter relates to allegations made by the applicants arising from the granting of a mobile telephone licence by the State in 1995.

The applicants argued that their funding arrangement with a professional third party funder did not constitute unlawful maintenance or champerty but was rather an arrangement which would enable access to justice for a claim of public importance to be heard.

The respondents argued that the proceedings should not be allowed to go ahead in light of the funding arrangement as the offences of maintenance and champerty remain on the Irish statute books, having been retained in 2007, and that the Law Reform Commission has not recommended a change in the law to allow professional third party litigation funding.

DECISION

Chief Justice Denham gave the leading judgment, with Dunne J, McMenamin J and Clarke J concurring, and McKechnie J dissenting.

In concluding that the funding arrangement was unlawful by reason of the rules on champerty, Denham CJ observed as follows:

» This was the first case to come before the Irish Courts which raises the issue of the potential use of a third party professional funding agreement to support a party in legal proceedings.

- » The issue to be considered is whether an agreement to fund, as in this case, where there is no connection between the plaintiffs and the funder other than the funder's decision to fund, is contrary to law.
- » The offence of champerty still exists in Ireland, albeit there are exceptions which might arise where a party has a genuine interest in providing funds, such as for example, a shareholder of an impecunious company. The arrangement in this case did not fall within any of those exceptions.
- » The facts that the funding was to be provided during the course of the proceedings (rather than at the outset) and that the proceedings concerned what was described as a matter of public importance were not relevant.
- » It is for the legislature or the executive to address complex issues of public policy, and not for the Court to attempt to develop the law to fill the gap in an ad hoc or piecemeal fashion.

Interestingly, Denham CJ also referred to modern issues, such as Ireland's status as an international trading State, issues arising in international arbitrations, and in Ireland's Commercial Court, as reasons why it might be appropriate to have a modern law on champerty and third party funding of litigation. Denham J stated, however, that this is a question that is more suited to a full legislative analysis.

ACCESS TO JUSTICE

The case was not a constitutional challenge against the rules on maintenance and champerty so this was not an issue the Supreme Court was required to consider. Notwithstanding this, all four concurring judges, and Clarke J in particular, observed that there were valid arguments to be made around the constitutional right to access to justice and what that might mean for the constitutionality of the law relating to professional third party litigation funding in a modern context.

Although he concurred with Denham CJ's judgment and reasoning, Clarke J observed that it is a source of disquiet that it is a real possibility that this case, which concerns serious allegations against the State and others, might not go to trial because of the applicants' funding difficulties.

Clarke J sought to address the constitutionality of the rules on maintenance and champerty on hypothetical grounds and made a number of interesting observations in relation to what he described as the *"increasing problem"* around the question of access to justice. Clarke J highlighted the following matters in this regard:

- » Whether the right of access to the courts needs to be looked at on a broader basis which could involve, at least in some cases, a consideration of whether that right is effective in practical terms.
- » The differences between the Irish legal system and other legal systems, including the numbers of judges, research support for judges, and the fact that common law systems such as Ireland place much of the burden of ascertaining the facts and researching the law on the parties themselves.
- » The complexity of modern litigation and the consequent difficulty for a lay litigant to represent themselves in any meaningful way, including in relation to compliance with disclosure obligations and large volumes of documentation.
- » The risk that *"no foal, no fee"* arrangements are now less effective in providing access to justice arising from the costs/outlay required to be incurred in order to bring a case to trial.

Clarke J noted that any finding that the constitutional right of access to justice was being impaired, at least in some cases and some circumstances, could lead to the courts *"altering the parameters of the law of champerty"*.

Clarke J concluded that any issues around access to justice must be addressed by the legislature as a matter of public policy, with the caveat that *"circumstances could arise where, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified"*.

CONCLUSION

Clarke J's observations indicate that the Courts could reconsider the position if neither the legislature nor the government take action in light of a definitive finding that the rules on champerty and maintenance amount to a breach of constitutional rights.

However, in the absence of such a finding or new legislation to deal with the issue, it is clear that professional third party litigation funding is going to remain unlawful in Ireland for the foreseeable future.

KEY CONTACTS

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