

## Group Briefing

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# Is the door now closed to professional third party litigation funding in Ireland?

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Although the law on litigation funding in Ireland has evolved over recent years, a decision of the Irish High Court of 20 April 2016 has affirmed that professional third party litigation funding remains prohibited for now.

### LITIGATION FUNDING

Litigation funding is where a third party provides financing to allow legal proceedings to progress. There are different forms of funding. Some are allowed in Ireland and others are not. Much depends on the funding arrangement and the relationship between the parties.

Litigation funding in Ireland is subject to the rules on maintenance and champerty. Maintenance is the funding of litigation by someone with no legitimate interest in the litigation. Champerty is the funding of litigation in return for a share in the proceeds of the litigation. Since the 1600s, maintenance and champerty have been criminal offences and torts (civil wrongs) in Ireland.

The rationale for the prohibition on maintenance and champerty is to uphold the integrity of the litigation system, to prevent trafficking in litigation for profit, and to prevent people with an improper motive influencing litigation.

Unlike in some other common law jurisdictions, there has been no legislative change in this area in Ireland and the torts of maintenance and champerty remain part of Irish law.

### TYPES OF LITIGATION FUNDING

- » Funding by a professional third party litigation funder.
- » Funding by a person connected to a party to the proceedings.
- » Funding under an After the Event insurance policy.

### FUNDING BY A PROFESSIONAL THIRD PARTY LITIGATION FUNDER

Professional third party litigation funding is where a commercial organisation, unconnected to the litigation in question, funds the litigation with a view to making a profit. It is presently not allowed in Ireland. This was recently confirmed by the Irish High Court in *Persona Digital Telephony Ltd v The Minister for Public Enterprise*, which is the first case to have come before the Irish courts directly concerning the acceptability of professional third party litigation funding.

In the *Persona* case, the Irish High Court noted that there is a consistent line

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

of authority to support the view that maintenance and champerty remain unlawful in Ireland. The Court said that it is contrary to public policy and an abuse of process for a third party to provide financial assistance to support litigation in return for a share in the proceeds unless that third party has a genuine interest in the litigation. This is different to the position in many other common law countries, such as England and Australia, where the law in this area has evolved substantially over the years. Professional third party litigation funders now operate in those jurisdictions.

The *Persona* decision may be appealed to the Irish Court of Appeal or the Supreme Court. Indeed, the High Court specifically acknowledged that a decision of an appellate court may be necessary to determine whether public policy considerations support a move away from the traditional position.

Interestingly, the Court in *Persona* acknowledged that the issue of access to justice, and the question of whether the torts and offences of maintenance and champerty are truly “in accordance with law”, awaits a constitutional challenge of a type not brought within the *Persona* proceedings. It is, therefore, also possible that the constitutionality of the ancient torts of maintenance and champerty may be challenged in the future.

#### FUNDING BY A PERSON CONNECTED TO A PARTY TO THE PROCEEDINGS

Third party funding is, however, allowed where the funder has a lawful interest or some other legitimate concern in the litigation, e.g. as a shareholder or creditor of a company that is a party to the litigation.

Those who fund litigation in this way risk being made personally liable for the costs of the litigation if the party they are funding is ultimately unsuccessful.

#### FUNDING UNDER AN “AFTER THE EVENT” INSURANCE POLICY

In some cases, plaintiffs may decide to indirectly fund their litigation by taking out an “After the Event” (ATE) insurance policy. ATE policies generally insure plaintiffs against the risk of having to pay a defendant’s legal costs, and cover their own outlay, if they are unsuccessful in the proceedings. The cover is taken out after the dispute has arisen and the premium is usually only payable if the plaintiff is successful.

Unlike in the UK, ATE insurance is not on a legislative footing in Ireland. However, in 2015 the Irish courts in *Greenclean Waste Management v Leahy* upheld, for the first time, the legality of ATE insurance, finding that it did not offend against the torts of maintenance or champerty.

In that case, the Irish Court of Appeal also stated that an ATE policy can in principle provide sufficient security for a defendant’s costs. This means that a court can refuse to order a plaintiff who has adequate ATE insurance in place to put up security (e.g. cash or a bond) to cover the defendant’s legal costs if the plaintiff loses its case.

However, before refusing to make an order for security for costs, the courts will scrutinise the terms of the insurance policy to ensure that the plaintiff is adequately covered and that there are no ‘get out’ clauses for the insurer. (Read a more detailed article on this [here](#))

#### WHERE TO NEXT?

Although the High Court’s decision in the *Persona* case confirms that professional third party litigation funding is currently prohibited in Ireland, the door to such funding may not be closed indefinitely.

With the recent acceptance in principle of ATE insurance, it appears that the

attitude of the Irish courts to third party litigation funding is evolving, notwithstanding the absence of any legislative change to deal with the issue of litigation funding generally.

It may be that the Irish High Court’s decision in *Persona* will be appealed, and a separate constitutional challenge to the rules on maintenance and champerty may also be on the horizon. Legislative change to update the law in this area also cannot be ruled out.

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