Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

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GETTING THE DEAL THROUGH

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Litigation Funding 2019

Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Ireland

Sharon Daly and Aoife McCluskey*

Matheson

1 Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding is not generally permitted in Ireland. The maintenance and champerty rules exist under the Maintenance and Embracery Act (Ireland) 1634 and prohibit third-party funding by third parties who have no legitimate interest in the proceedings.

The superior courts in Ireland have considered the impact of this old statute in a number of cases between 2013 and 2018 and, to date, have affirmed the rules still exist. In the context of third-party funding, an application was made in the case of *Persona Digital Telephony Ltd & anor v Minister for Public Enterprise & Others* (2016) to assess the legality of a third-party funding agreement. The plaintiff, Persona Digital Telephony Limited, was unable to fund the proceedings. A professional third-party funder from the UK was prepared to enter into a litigation funding arrangement. The plaintiff sought a declaration from the High Court that the litigation funding arrangement did not constitute an abuse of process or contravene the rules on maintenance and champerty.

While the High Court had some sympathy for the plaintiff, it affirmed that both maintenance and champerty are part of Irish law and are torts and criminal offences. The High Court found that to permit a litigation funding arrangement by a third party with no legitimate interest in the proceedings would necessitate a change in legislation and this could not be done by the High Court. This decision was unexpected, given some obiter dicta from the High Court in a judgment approving after-the-event (ATE) insurance that provided that the laws have to be interpreted in the context of modern social realities.

The decision was appealed to the Supreme Court to determine the question of: 'Whether third-party funding, provided during the course of proceedings (rather than at their outset) to support a plaintiff who is unable to progress a case of immense public importance, is unlawful by reason of maintenance and champerty.' The Supreme Court dismissed the appeal holding that the torts and crimes of maintenance and champerty continue to exist in this jurisdiction and it is for the legislature and not the courts to develop the law in this area and, in such circumstances, 'a person who assists another's proceedings without a bona fide independent interest acts unlawfully.' In July 2018, in the case of *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors*, which concerned the legality of an assignment of a cause of action, the Supreme Court called upon the legislature to urgently reform the area, failing which the Supreme Court itself may intervene. The Supreme Court has identified that:

> *urgent reform is needed so that the right of access to the courts can be rendered effective in a practical sense. It falls, in the first instance, at least, to the legislative arm of the State to take such measures as are necessary to this end. Given the complex nature of the issue involved and the multitude of ways (each with their own advantages and also drawbacks) in which it could be alleviated or remedied, it is a matter which should be resolved by the Oireachtas. The legislature is undoubtedly best equipped to carry out the sort of wide-ranging analysis, and balancing of important policy considerations, which would be required in order to ensure that the necessary change to the law can effectively vindicate the right of access to the courts. I urgently call for them to do so . . . where the legislature persistently fails to take corrective measures to vindicate a constitutional right, such as the right of access, responsibility in this regard will fall to be discharged by the judiciary. For my part, there will come a time when not to respond must constitute a neglect of responsibility; when that occurs, I will not hesitate to positively and decisively intervene in this area.*

While professional third-party funding arrangements are currently unlawful in this jurisdiction, the Irish courts have found that third parties who have a legitimate interest in proceedings, such as shareholders or creditors of a company involved in proceedings, can lawfully fund them, even when such funding may indirectly benefit them.

2 Are there limits on the fees and interest funders can charge?

Third-party litigation funding is not currently permitted in this jurisdiction. As such, there are no limits.

3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

Third-party litigation funding is not currently permitted in this jurisdiction by virtue of the common law rules on maintenance and champerty.

4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Because professional third-party litigation funding is not currently permitted in this jurisdiction, this question is not applicable.

5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No. See questions 1 to 4.

6 May third-party funders insist on their choice of counsel?

Currently not applicable.

7 May funders attend or participate in hearings and settlement proceedings?

Currently not applicable.

8 Do funders have veto rights in respect of settlements?

Currently not applicable.

9 In what circumstances may a funder terminate funding?

Currently not applicable.

10 In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Currently not applicable.

11 May litigation lawyers enter into conditional or contingency fee agreements?

Litigation lawyers may enter into conditional or contingency arrangements with clients, where any payment made at all by the client to the

solicitor is contingent on the success of the case. However, Irish lawyers are expressly prohibited from charging fees by reference to a percentage of damages awarded.

These arrangements are referred to as 'no foal, no fee' or 'no win, no fee' arrangements and are more common in personal injury claims involving an individual plaintiff than in commercial cases.

12 What other funding options are available to litigants?

In the *Greenclean Waste Management v Leahy* (2014) case, ATE insurance policies were held not to offend the rules of maintenance and champerty. Such policies can be used as security for costs, providing the terms are not conditional. No foal, no fee arrangements are permitted whereby the lawyers defer billing until the case has been won. Finally, third-party funding is permitted where the funder has a legitimate pre-existing interest in the litigation. During the course of argument in *Persona*, the question arose of a 'hypothetical situation in which the funders might actually acquire a shareholding in the plaintiff companies, with the intention of procuring adequate funds to process the litigation'. MacMenamin J commented that the validity of that type of funding remains unresolved following *Persona*. The purchasing of both the assets and liabilities (including anticipated or pending litigation against the company) of a company is common course. The issue will be whether there is any prohibition on a funder investing into a plaintiff company in this manner rather than simply funding the litigation for a share of the proceeds of the litigation. There is no obvious reason why an investor or purchaser of the shares in a plaintiff company would not have the same rights and obligations as all other shareholders and, therefore, should be entitled to reap the rewards, if any, as a shareholder in the plaintiff.

13 How long does a commercial claim usually take to reach a decision at first instance?

The length of time for a commercial claim to reach a decision in the High Court can vary considerably depending on the complexity and urgency of the case. However, recent data provides that the average length of High Court proceedings, from issue to disposal, is approximately two years.

In certain circumstances, a claim may be transferred to a division of the High Court known as the Commercial Court. The Commercial Court runs extremely stringent case management procedures and generally, although not always, delivers judgment promptly. According to Commercial Court statistics, 90 per cent of cases are decided within one year. There are considerable delays in the appellant courts.

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

According to recent data, approximately 2.5 per cent of High Court cases are appealed. These decisions can be appealed to the Court of Appeal or, in certain circumstances, to the Supreme Court. The average length of such proceedings is approximately two years in the Court of Appeal and three years in the Supreme Court.

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no data publicly available.

16 Are class actions or group actions permitted? May they be funded by third parties?

There is no legislative framework, or formal procedure, in Ireland to facilitate class actions. However, multiparty litigation does occur and is often brought by way of 'representive action' and 'test cases'. The Irish Commercial Court has applied scheduling measures to ensure consistency and efficiency in its handling of multiparty litigation, in particular, in financial services litigation. Frequently, a small selection of cases are tried together on the basis that it is likely the others will follow the judgment.

For example, in 2008, the Commercial Court was faced with more than 50 individual shareholder claims related to the fraudulent investment operations run by Bernard Madoff, and the Commercial Court decided to take forward a small number of cases initially, as representative actions or test cases. In this instance, it was decided that two cases by shareholders and two cases by funds would be heard sequentially as a first step, and the Court stayed the other claims pending the resolution of the four test cases.

A similar approach was adopted by the Irish Commercial Court in relation to claims for the mis-selling of financial products that were initiated by over 200 claimants against ACC Bank in 2010. Five claimants' cases were heard as test cases and the remaining claimants agreed that 'the outcome of the litigation will determine the result of their claims, subject to the possibility of a separate trial on particular and unusual facts different to those in issue in these proceedings.'

Funding of the representative action by the class members does not offend the laws of maintenance and champerty, as the class has a pre-existing legitimate interest in the litigation. Professional third-party funding is prohibited.

The potential introduction of class actions in Ireland is under consideration by a group established to review and reform the administration of civil justice throughout the country.

The proposal by the European Commission to introduce a collective redress mechanism for consumers may also change the current position, if introduced.

17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The loser-pays rule applies in this jurisdiction.

As such, costs 'follow the event' or, more simply, the successful party is entitled to recover its costs from the unsuccessful party. However, costs are ultimately a matter of discretion for the court and it is common now for issues-based cost awards to be made.

In addition, costs are usually awarded on a party-party basis rather than solicitor-client basis, which means that only the costs reasonably incurred by the successful party in prosecuting or defending the litigation are recoverable. Typically, recoverable costs are 50 to 75 per cent of the total costs incurred.

In relation to whether the courts may order the unsuccessful party to pay the litigation funding costs of the successful party, third-party litigation funding is not permitted in this jurisdiction, as set out in question 1, therefore this question is not applicable.

However, the case law in this area confirms that a legitimate third-party funder would be exposed to pay the unsuccessful party's costs. In *First Active Plc v Cunningham* [2011] IEHC 117 the High Court held that Mr Cunningham, who was the beneficial owner, a director and a 'prime mover' of the plaintiff companies in related litigation *Moorview Developments Limited & others v First Active plc & others* [2009] IEHC 214, was personally liable for the costs arising from the related. It was inferred that Mr Cunningham had funded the *Moorview* litigation, and that he had brought it for his own benefit. Mr Cunningham appealed the judgment of the High Court to the Supreme Court denying that he was the funder of the proceedings and argued that the High Court had no jurisdiction to make such an order, and that, even if it did, such jurisdiction was wrongly exercised in this case.

The Supreme Court dismissed Mr Cunningham's appeal on all grounds. While the Supreme Court noted that costs orders against non-parties are the exception rather than the rule in litigation, it confirmed that the Irish courts have a broad discretion to make such orders. The Supreme Court noted that one of the factors it would take into account in considering whether to make a costs order against a non-party is whether the non-party was on notice of the intention to apply for a non-party costs order. This factor is consistent with the approach taken in *Thema International plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, where the plaintiff was ordered to undertake that the third-party funder (shareholders in the plaintiff) be notified of the potential for third-party costs liability and to keep proper records of third-party funding. This should ensure that HSBC could pursue the third party for costs at a later stage, if appropriate.

18 Can a third-party litigation funder be held liable for adverse costs?

The Irish courts have recognised a jurisdiction under the Rules of the Superior Courts to make an award of costs against a legitimate third-party litigation funder (eg, a shareholder or creditor). See question 17.

19 May the courts order a claimant or a third party to provide security for costs?

A defendant may make an application to court to seek security for costs from a claimant; however, it is at the court's discretion whether or not to make such an order.

It is important to note that different rules apply to foreign individuals and corporations than apply to Irish citizens and corporations. It is virtually impossible to obtain an order against an individual based in Ireland, the European Union or the territory covered by the Brussels Convention. The court grants such an order only in the following circumstances:

- if the claimant is resident outside the jurisdiction and not within the European Union or the European Free Trade Area (EFTA);
- if the defendant has a prima facie defence to the claim and verifies this on affidavit; or
- if there are no other circumstances that obviate the need for security for costs.

The defendant applies for security for costs by way of request to the claimant. If the claimant fails to agree to provide security within 48 hours of receiving the request, the defendant can make an application for security for costs to the court by notice of motion and grounding affidavit.

Security for costs can also be sought against an Irish corporate claimant. It is generally easier to obtain an order against a corporate claimant than an individual claimant, as a company has the benefit of limited liability. The defendant must establish a prima facie defence and demonstrate that there is reason to believe that the claimant would be unable to pay a successful defendant's costs. The onus then shifts to the claimant to establish that the order should not be granted. If an order is granted, the proceedings are stayed until the claimant provides the security. If the claimant does not provide the required security, its claim is dismissed.

Typically, security is a percentage of the predicted costs where there is evidence that the party is impecunious. In cases where the security is granted as the party resides outside of the EU or EFTA, it will be calculated on the basis of the additional cost of enforcement of a judgment.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

See question 19.

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted in this jurisdiction. It is a relatively new product on the market and is not yet commonly used. However, as a result of a 2014 case confirming its legitimacy, it may become more popular. There are no other similar types of insurance available to claimants.

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no obligation on a party to proceedings to disclose a funding agreement that is in place between itself and a legitimate third-party funder. An opposing party can make an application for disclosure of such an agreement, but this may not be granted.

In the recent *Persona* High Court case, the Court was asked to determine whether professional funding contravened the laws of maintenance and champerty. The judge held that a funding agreement was to be disclosed to the extent that it was necessary for the Court to determine the issue of whether the funding was lawful. He held that information relating to budgeting and method of payment, etc, was to be redacted, and that while it may later become relevant, such information was not relevant at the time and did not need to be disclosed. He stated that he was:

> *of the view that where the disclosure of the details of the funding agreement might confer an unfair and disproportionate litigation advantage, there should be careful scrutiny of the necessity for production of the document for the fair disposal of the issue.*

As such, it appears that a party may be compelled by the court to disclose a funding agreement to the extent that it is necessary to determine a particular issue, but that the courts will be reluctant to so do if it would result in an unfair advantage to the party seeking disclosure.

23 Are communications between litigants or their lawyers and funders protected by privilege?

Yes. To the extent that the agreement is lawful it would be a privileged communication if the dominant purpose was the preparation and defence of the litigation.

24 Have there been any reported disputes between litigants and their funders?

There have been no reported disputes between litigants and their funders in Ireland.

25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

No.

* *The authors would like to thank Valerie Sexton for her contribution to this chapter.*

Matheson

Sharon Daly **sharon.daly@matheson.com**
Aoife McCluskey **aoife.mccluskey@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2119 / 2091
www.matheson.com

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