

# Third-Party Litigation Funding: Overview (Ireland)

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A Practice Note providing an overview of the law on third-party litigation funding in Ireland. It addresses, when, how, and who can seek funding, when and how to apply for funding, whether it can be used with other funding arrangements, the legal and ethical constraints that might affect funding agreements, issues related to disclosure, confidentiality, and attorney-client privilege, and the range of legal costs and expenses that the funding companies agree to cover. It also highlights recent developments in this field.

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Global legal counsel are often required to evaluate and assess their options for funding a civil case, particularly in jurisdictions where litigation is expensive and involves budgetary constraints, or where they would like to reduce the financial risk of pursuing a claim given the uncertainties associated with litigation outcomes.

Third-party litigation funding, also known as external dispute financing or third-party funding, is where a third party (with no prior connection to the litigation) agrees to finance all or part of the legal costs of the litigation, in return for a portion of any proceeds the funded litigant recovers by settlement or collection of a damages award. The use of third-party funding in international arbitration has been growing over the last several years in many jurisdictions, including the UK, US, continental Europe, Australia, Hong Kong, and Singapore. The mechanism is gaining more popularity and acceptance in civil and commercial litigation.

This Note provides an overview of the law on third-party litigation funding in Ireland, including:

- Who can seek funding.
- When to apply for funding.
- Whether it can be used with other funding arrangements.
- The legal and ethical constraints that might have an impact on funding agreements.
- The issues related to disclosure, confidentiality, and attorney-client privilege.
- The factors to consider when seeking funding.
- The terms of funding agreements.
- The legal costs and expenses that third-party funders usually cover.

It also highlights the recent developments that could influence the future landscape of third-party funding.

For more information on third-party funding for international arbitration, see *Practice Note, Third-party funding for international arbitration claims: overview*.

## Legal Position

The funding of litigation by third parties with no prior connection to the case is not generally permitted in Ireland as a result of the rules against maintenance and champerty.

Maintenance is the funding of litigation in which the funder has no interest. Champerty is the funding of litigation in exchange for a share of the proceeds of that litigation. Although the rules against maintenance and champerty have either been abolished or significantly eroded in other common law jurisdictions, they remain both criminal offences and civil wrongs or torts in Ireland under the English *Maintenance and Embracery Act 1634* (1634 Act), which was retained as a matter of Irish law by the *Statute Law Revision Act 2007*. For more on champerty, maintenance, and funding from an English law perspective, see *Practice note, Champerty, maintenance and funding* (UK).

## How the Irish Courts Have Treated the 1634 Act

The superior courts in Ireland have considered the impact of the 1634 Act in several cases between 2013 and 2018 and, to date, have continued to affirm the rules.

### The *Persona* Case

In what was the first Irish case to directly consider the acceptability of third-party funding in Ireland, *Persona Digital Telephony Ltd v The Minister for Public Enterprise & Others* [2016] IEHC 187 and [2017] IESC 27 (*Persona*), both the High Court and Supreme Court confirmed that the centuries-old common law principles of maintenance and champerty remain in force and that any changes to the law in this area must be driven by the legislature.

The *Persona* litigation relates to Ireland's award of the second mobile telephone licence in 1995. The two claimants, *Persona Digital Telephony* (*Persona Digital*) and *Sigma Wireless Networks Limited* (*Sigma*), were part of a consortium of unsuccessful bidders that competed for a mobile telephone licence, which was granted to *Esat Digiphone*. In 2001, *Persona* and *Sigma* brought High Court proceedings seeking damages for, (among other things) unlawful interference by the Minister for Communications in the competition. In 2015, *Persona Digital* and *Sigma* entered into an agreement with a professional litigation funder, *Harbour III Limited Partnership* (*Harbour*), to fund the continued running of their case. The precise details of that agreement were never made public.

*Persona Digital* and *Sigma* sought a High Court declaration that their arrangement with *Harbour* did not contravene the rules against third-party funding and their application was defended by the Irish State in reliance on the provisions of the 1634 Act. The High Court (Donnelly J.) found that there was a "consistent line of authorities" which demonstrated that the funding of litigation by a third party, with no independent interest in the litigation, was prohibited ([2016] IEHC 187). *Persona Digital* and *Sigma*, sought leave for a "leapfrog appeal," meaning a direct appeal from the High Court's decision 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 the rules on maintenance and champerty." (Ordinarily, an appellant must first appeal to the Court of Appeal, which was established in Ireland in 2014).

The Supreme Court noted that to grant leave for a leapfrog appeal it had to be satisfied that the issues raised by an appellant involved a matter of public importance or that it is necessary in the interest of justice for an appeal to the Supreme Court and that there are exceptional circumstances which warrant a leapfrog appeal. The Supreme Court was satisfied that those criteria had been met in *Persona* and the appeal proceeded directly to the Supreme Court.

Ultimately, the Supreme Court dismissed the appeal, holding that the torts and crimes of maintenance and champerty continue to exist in Ireland and "a person who assists another's proceedings without a bona fide independent interest acts unlawfully." To the extent that it was argued that the Supreme Court should develop the law in this area to better align it with other jurisdictions, it noted that this was a matter for the legislature. However, Mr Justice Clarke (as he was at that time), expressed a "significant feeling of disquiet" with the result of the decision on the basis that it would lead to a very real possibility that the claimant may not be able to bring their claim to trial.

### **The SPV OSUS Case**

In July 2018, the Supreme Court delivered judgment in *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors [2018] IESC 44 (SPV OSUS)*. In this case, Optimal Strategic US Equity Ltd (SUS), a fund that had invested into the Bernard Madoff Ponzi scheme, claimed it was entitled to make a claim in the bankruptcy of Bernard Madoff in the US. A special-purpose vehicle (SPV) was set up and the bankruptcy claim was assigned to it. The Irish-based custodian of the bankruptcy challenged the SPV's standing to bring proceedings on the basis that the assignment of a right was contrary to public policy and was prohibited by virtue of the rules against maintenance and champerty.

The High Court found in favour of the custodian's application and held that the assignment constituted "trafficking in litigation." The High Court decision was upheld by the Court of Appeal which confirmed that an assignment of a bare cause of action is unenforceable under the rules against champerty unless certain exceptional circumstances apply (for example, an assignment of a bare cause of action that is incidental to the property transferred, or the assignment to a party who has a genuine commercial interest in the cause of action), none of which did in this case.

The matter was appealed again to the Supreme Court, which held that the assignment of a right to litigate to an unconnected third party with no legitimate interest in the cause of action is contrary to public policy and void under Irish law. While the judgment of Mr Justice O'Donnell acknowledged the public interest in litigation being more accessible to persons of ordinary means, he was of the view that "the objections of the common law to the commodification of litigation retain force and vitality." However, the judgment of Mr Justice Clarke, who was the Chief Justice at the time, went further. While he agreed with the legal position as set out by Mr Justice O'Donnell, he emphasised that the law as it stood created difficulties with parties' access to justice and called on the legislature to urgently reform the area, failing which the Supreme Court itself may be forced to intervene.

## **Other Funding Arrangements**

Although the 1634 Act prohibits funding of litigation by parties who have no legitimate interest in proceedings, there are certain limited situations in which it is permissible to fund litigation.

### **After the Event Insurance**

After the event (ATE) insurance is a form of litigation or legal expenses insurance which is taken out to cover specific litigious proceedings after the event. An ATE policy is generally tailored to a specific dispute but may be structured to cover adverse legal costs awarded to the other side (if the case is unsuccessful or abandoned) and security for costs. The policyholder's own legal fees, expenses and disbursements can also be covered, although insurers will not always pay these out during the litigation, opting instead to pay the policyholder only if it is unsuccessful. While this means that the policyholder must ensure that it has cash-flow arrangements in place to cover the day-to-day funding of the litigation, it does remove the risks associated with losing a case and an adverse costs award.

In relation to the premium, there are two potential ways that this can be structured. The most common is a contingency premium, where the premium is contingent on success and is therefore paid by the insured only if it wins the case.

The second is a deposit premium, which involves the entire amount being paid when the insurance is first taken out. While deposit premiums are usually cheaper than contingency premiums, they are, in practice, best suited to cases where there is a high degree of confidence in success or where there is no monetary award or settlement.

Typically, ATE insurers only consider cover where there is a good prospect of success (that is, more than a 60% chance of success).

ATE insurance has garnered a level of acceptance in Ireland.

In *Greenclean Waste Management v Leahy* [2013] IEHC 74 and *Greenclean Waste Management v Leahy* [2015] IECA 97, both the High Court and Court of Appeal considered an ATE policy in the context of a preliminary application for security for costs by the defendant. In this case, a liquidator had been appointed to the claimant company, Greenclean Waste Management Limited (Greanclean), and issued proceedings against its solicitors for negligent advice in relation to its obligations under a commercial lease. The claimant defended the preliminary application on the basis that it had ATE insurance and was therefore able to discharge the defendant's costs if unsuccessful. While declaring ATE insurance to be valid, the Court of Appeal provided useful observations on ATE policies and the principles to be applied to them, making clear that these policies must not be conditional or contain terms which entitle the insurer to avoid liability in the future.

The defendant appealed the decision to the Supreme Court which, after some deliberation, remitted the matter back to the High Court for it to consider whether ATE insurance cover can be considered a form of indirect and prohibited, litigation funding. In *Greenclean Waste Management Limited v Leahy (No.2) & Anor* [2014] IEHC 314, the High Court (Hogan J.) ultimately found that Greenclean's ATE insurance policy did not offend the rules against maintenance and champerty and was valid. The Court commented that the law must "accommodate itself to modern social realities" that were not in existence at the time of the 1634 Act, such as:

- ATE insurance.
- Legal aid.
- Representative actions.
- "No foal, no fee" arrangements (see *No Foal, No Fee Arrangements*).
- Pro bono work.

## Legitimate Interest

Third-party funding is permitted where the funder has a legitimate pre-existing interest in the litigation. For example, shareholders or creditors of a company involved in proceedings can lawfully fund them, even when the funding may indirectly benefit them. This position was approved in the case of *Thema International Fund plc v HSBC International Trust Services (Ireland) Ltd & Anor* [2011] IEHC 357. In this case, the defendant (HSBC), had sought disclosure orders in relation to the way the claimant was funding their case. In his judgment, Mr Justice Clarke stated:

"There is....in my view a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation, on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand."

A potential extension of this concept also arose during the course of argument in the *Persona* case, where the Court considered 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." In his judgment, Mr Justice MacMenamin commented that the validity of that type of funding remains unresolved. The purchasing of both the assets and liabilities of a company (including anticipated or pending litigation against the company) is common course. There is no obvious reason why an investor or purchaser of the shares in a claimant 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 claimant. However, the issue of whether there is any prohibition on a funder investing into a claimant company in this manner rather than simply funding the litigation for a share of the proceeds of the litigation, remains to be tested before the Irish courts.

## No Foal, No Fee Arrangements

While not a direct form of litigation funding, it is open to solicitors in Ireland to enter into conditional or contingency arrangements with clients where it is agreed that the solicitor will not charge professional fees to a client if they are unsuccessful in their claim. These are known as no foal no fee or "no win no fee" arrangements. No foal no fee arrangements assist claimants to access justice in certain cases. In the *Persona* case it was suggested by counsel for the State in their submissions that a no foal no fee arrangement could represent a viable alternative to the litigation funding agreement they were seeking to enter into (which was ultimately found to be unlawful). In her judgment, the then Chief Justice, Ms Justice Denham, was in favour of this manner of increasing access to justice, stating that, "[t]here is a long history at the Bar, and amongst solicitors, of taking cases on a 'no foal no fee' basis. Many of the most important cases have been taken in such circumstances." However, in practice, no foal no fee arrangements are more commonly used in personal injury and medical negligence cases than in commercial cases.

## Legal Aid

A limited form of aid is available in civil litigation through the Irish *Legal Aid Board* (Board). The Board provides civil legal advice and representation to people who cannot afford to pay for a solicitor. To qualify for civil legal aid, the applicant must satisfy financial eligibility requirements (*Means Test Criteria*) and pay a contribution towards the legal costs, unless the contribution obligation has been waived based on the applicant's financial resources (section 29, *Civil Legal Aid Act 1995* (as amended)). Certain areas of law, such as defamation, conveyancing and property disputes, are excluded.

The Chief Justice of Ireland, Mr Justice O'Donnell, has identified the development of the civil legal aid system as a key target towards increasing access to justice for claimants who may not currently be eligible for civil legal aid. A working group has been established for that purpose.

## Advantages of Third-Party Litigation Funding

One of the most common arguments in favour of litigation funding is that lawful funding arrangements are often necessary to ensure proper access to justice and it has been recognised that the rules against maintenance and champerty can interfere with this access. Courts in many other jurisdictions have relaxed the prohibition against maintenance and champerty in recognition of the need to ensure access to justice and interpreted the doctrines in light of modern public policy. In other jurisdictions that have deemed third-party funding to be permissible, the right of access to justice has played an important, and fundamental role in the judicial analysis (see, Donnelly BL, Catherine, O'Callaghan BL, Ellen, *The case for litigation funding*, Vol. 24, No. 4 (The Bar Review 2019, pages 107 to 111)). There is also a potential prejudicial impact for a claimant with a legitimate claim who is not able to proceed with litigation.

See *Recent Developments*.

## Recent Developments

Calls for reform in relation to the law around third-party litigation funding in Ireland have continued to grow and it appears likely that there will be a significant amount of change in the near future.

## The EU Bar Association and Irish Society of European Law Report

On 29 January 2020, the former Chief Justice, Frank Clarke, published a report in relation to litigation funding and class actions in Ireland in the context of access to justice, which was prepared by the EU Bar Association and Irish Society of European Law (*Joint report by the Irish Society for European Law and the EU Bar Association on litigation funding and class actions in Ireland*). The report strongly recommends that proper provision be made in Ireland for representative class actions and litigation funding on the basis that they are "essential mechanisms of access to justice."

## Review of the Administration of Civil Justice in Ireland Report

In October 2020, a civil law review group chaired by the former President of the High Court, Mr Justice Peter Kelly, prepared a report on the administration of civil justice in Ireland (*Review of the Administration of Civil Justice: Review Group Report* (Kelly Report)). The review undertaken was broad and involved consultations with the public and the group's own research and analysis across multiple jurisdictions. As a result, the Kelly Report is extremely detailed, running to over 450 pages. It made over 90 recommendations and when implemented, they will represent the most significant reform to civil law in the history of the Irish State.

The Kelly Report highlighted the conflicting policy considerations surrounding the issue of third-party litigation funding, namely the importance of access to justice and the significant risk of "commoditisation" of litigation. It concluded that a detailed analysis of the position by the *Irish Law Reform Commission*, which is currently in progress, must be received and reviewed by the legislature before any policy decisions are taken. However, it did recommend the introduction in the meantime of a limited form of litigation funding for insolvency matters.

## Litigation Funding for Insolvency Matters

An action plan to implement the recommendations in the Kelly Report was published by the *Department of Justice* in Ireland on 27 May 2022 (*Kelly Implementation Plan*). The Kelly Implementation Plan provides for legislation to be drafted in 2023 to allow for:

- A limited form of third-party funding for liquidators, receivers, administrators under the *Insurance (No.2) Act 1983*.
- The Official Assignee and trustees in bankruptcy to fund proceedings that are intended to increase the pool of assets available to creditors.

This represents a significant and welcome change in the insolvency arena where funding litigation is an especially significant issue.

## New Forms of Multi-Party Action - Funding Required?

Currently, under Irish law, third-party litigation funding is unlawful, except where it comes within limited exceptions to the rules against maintenance and champerty (see *Other Funding Arrangements*). However, there is a significant amount of change on the horizon in relation to multi-party litigation in Ireland which increases the importance of the impending reforms in litigation funding.

The Kelly Report and its implementation plan provide for legislation to be drafted in 2023 for the introduction of a comprehensive multi-party action procedure in Ireland (similar to the group litigation order process in the UK), by 2024.

The introduction of the *Representative Actions Directive (2020/1828)*, which was published in the *Official Journal of the European Union* on 4 December 2020, will bring further change in this area. In March 2022, the Irish government published the *General Scheme of the Representative Actions for the Protection of the Collective Interests of Consumers Bill 2022* (Scheme), which will transpose the Representative Actions Directive into Irish law by 25 June 2023. The Representative Actions Directive gives protection to the collective interests of consumers in Europe by providing a means to bring redress and injunctive representative actions arising out of the infringement of consumer rights by traders located in a member state.

The Representative Actions Directive expressly requires member states to ensure that the costs associated with taking a representative action do not create a financial obstacle and it is suggested that court fees must be limited and access be given to legal aid or public funding. However, considering how this requirement is being implemented under the Scheme, it is not entirely clear how these actions are to be funded in Ireland. While the Scheme does provide for regulations to be made to remove court fees, and a "modest entry fee" to be charged to consumers to join an action, there is no scope in its current form for any type of public funding or legal aid.

The Scheme does contain a provision for third-party funding of representative actions in certain cases insofar as permitted under national law. The Scheme does not purport to alter the existing prohibition on third-party funding of litigation under Irish law. Rather, it provides that where the court is assessing the admissibility of a representative action, it must have regard to several matters, including the funding sources of a representative action. Where an action is funded by a third-party insofar as permitted under Irish law, the court must ensure that any conflicts of interest are prevented, and the funding does not divert the action away from the protection of the collective interests of consumers.

## Commentary in Favour of Third-Party Funding of Litigation

In March 2022, the current Chief Justice, Mr Justice O'Donnell, stated that consideration of the reform and regulation of third-party funding models was one of several areas in which efforts could be made to improve access to justice in Ireland (*Independent.ie: Chief Justice urges consideration of litigation funding reform*). Mr Justice O'Donnell was speaking at a conference held in 2021 for the launch of *Chief Justice's Access to Justice Working Group Conference Report*. Mr Justice O'Donnell said there had to be a recognition that it was not enough to provide courtrooms and judges when "ordinary citizens, or indeed, substantial businesses" face many barriers that limit their capacity to bring disputes to court and obtain a speedy and fair resolution. The move is likely to put further pressure on the Department of Justice to agree to the expansion of the civil legal aid scheme, which critics say is too narrow and difficult to qualify for under the current Means Test Criteria (see *Legal Aid*).

In the case of *SPV OSUS*, Chief Justice Clarke stressed that if these practices are to be permitted in the future, then this must be achieved by way of legislative change, after consideration of all the competing interests. He stated that:

"[T]here is a problem which requires to be addressed, but ... by far the best way of attempting to provide solutions is by means of legislation. ... It is at least arguable that permitting entirely unregulated third party funding, as was at issue in *Persona*, or the unregulated assignment of causes of action, as is at issue in this case, as a means of solving the problem of access to justice runs the real risk of creating more problems than it solves." (at paragraph 2.2).

The joint report by the Irish Society for European Law and the EU Bar Association on litigation funding and class actions in Ireland strongly recommends that proper provision be made for litigation funding as it is an essential mechanism to access justice. The Kelly Report also clearly recognises the various issues to access to justice in Ireland and the potential impact third-

party funding can have in this area. The Kelly Implementation Plan has provided for the introduction of a limited form of litigation funding for insolvency matters by 2024.

In addition, on 13 September 2022, a non-legislative Resolution was adopted by the *European Parliament* recommending to the *European Commission* that after the *Representative Actions Directive (2020/1828)* becomes operational on 25 June 2023, a new directive should be proposed to establish common minimum standards for third-party litigation funding across the EU (see *Legal Update, Commercial third-party litigation funding: European Parliament calls for minimum standards at EU level*).

## Recent Developments in Third-Party Funding of International Arbitration

Legislative change is on the way in the area of third-party funding of international arbitration in Ireland, which was put in question following the *Persona* Supreme Court decision ([2017] IESC 27). This question looks set to be answered with the proposed legislative amendments confirming that the prohibition on third-party funding will not apply to international commercial arbitration. This is a significant step forward to clarify the position of third-party funding for international commercial arbitration in Ireland.

The legislative amendments have now been published in the draft Courts and Civil Law (Miscellaneous Provisions) Bill 2022. This is a new bill that will make a variety of miscellaneous amendments to various existing pieces of legislation across a wide range of areas.

## Future of Third-Party Funding in Ireland: Role of the Legislature

The Kelly Implementation Plan confirmed that it is for the legislature to determine what other forms of litigation funding may be permitted in Ireland in the future. Steps are already being taken to clarify the position regarding third-party funding of international arbitration in Ireland. It remains to be seen if Ireland will follow other common law jurisdictions that have banished the civil and criminal crimes of maintenance and champerty from their legislation to extend this to permitting litigation funding.

The publication by the Irish Law Reform Commission of its report and recommendations from its June 2016 Issues Paper is still awaited. At Issue 6 of its June 2016 Issues Paper on "*Contempt of Court and Other Offences and Torts Involving the Administration of Justice*," the Irish Law Reform Commission opened up the retention of the related crimes and torts of maintenance and champerty to public consultation, along with the question of whether third-party funding of litigation should be permitted.

However, if the European Commission takes up the September 2022 recommendation from the European Parliament that the Commission should consider and propose a new directive to establish common minimum standards for third-party litigation funding across the EU, then this would help accelerate reform of third-party litigation funding in Ireland.

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