



Supreme Court Rules against Litigation Funding in Ireland in *Persona*

23 May 2017

The Supreme Court has delivered its much anticipated judgment in *Persona Digital Telephony Ltd and another v The Minister for Public Enterprise and others* (Unreported, [Denham J](#), [Clarke J](#), [MacMenamin J](#), [Dunne J](#) and McKechnie J, Supreme Court, 23 May 2017) and has ruled against litigation funding arrangements in Ireland. In a four to one ruling with, McKechnie J dissenting, the court held that the separation of powers prevailed and the court was reluctant to interfere with the government's power to legislate.

The case raised issues in relation to the torts and offences of maintenance and champerty and whether they were a bar to professional third party funding of litigation. The court examined whether an agreement to fund where there is no connection between the plaintiffs and the funder other than the decision to fund is contrary to law.

The Supreme Court dismissed the plaintiffs' appeal against the [High Court's decision](#). The High Court had refused to grant an Order declaring that a litigation funding arrangement entered into by the Plaintiffs with a third party was not an abuse of process and/or not contravening the rules on maintenance and champerty.

In brief, Denham CJ stated that the rule against maintenance and champerty is still in force in this jurisdiction, and that the plaintiffs in the *Persona* proceedings had not come within any exceptions to the rule. She commented that she did not think that it made a difference whether the funding came before or during the proceedings.

For further information on any of the issues discussed in this article please contact:



Peter Bredin
Litigation Partner
DD: + 353 (0)1 674 1013
peter.bredin@dilloneustace.ie



Kieran Cowhey
Head of Litigation
DD: + 353 (0)1 673 1783
kieran.cowhey@dilloneustace.ie



Laura Butler
Litigation PSL
DD: + 353 (0)1 673 1850
laura.butler@dilloneustace.ie

Aidan Heffernan
Litigation Solicitor
DD: + 353 (0)1 667 0042
aidan.heffernan@dilloneustace.ie

Clarke J concurred with the Chief Justice's judgment, and stated that, while the courts cannot interfere with the existing laws in relation to maintenance and champerty on the basis of the doctrine of Separation of Powers, the courts could possibly act as a guardian of the constitution in the future in the event that the Government did not take any steps in relation to this issue.

Judge Dunne concurred with the Chief Justice. She also noted that it was not part of the court's role to change the criminal aspect of the rule against maintenance and champerty, but alluded to the fact that no one has been prosecuted for breaching the rule in living memory and that this may be something which the Government may wish to address. The Chief Justice did refer to a number of cases where in the civil context agreements had been deemed void due to their champertous nature.

The court distinguished the present case from the High Court's decision in [Thema](#) stating that the funder in that instance was held to have a sufficient connection with the plaintiff.

Comment

Developments in relation to litigation funding are being closely monitored here and abroad, and the Supreme Court's judgment will be read with interest. Whether this case becomes an issue in the government's current consultation on [crowdfunding in litigation](#) or spurs on legislation by the government remains to be seen. Either way, the archaic legislation seems unlikely to remain as it is indefinitely.

It remains to be seen if a constitutional challenge is taken as the court specifically noted that *"this was not brought as a constitutional challenge. Clearly, constitutional issues have been parked by the plaintiffs, perhaps for another day."*

The facts of this case and other cases on litigation funding have been discussed in prior [articles](#).

DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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