NILQ 70(3): 357–369

Three aspects of litigation funding

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Abstract

This comment reviews three decisions of the Supreme Court of Ireland from the last three years which concern different aspects of litigation funding. Persona Digital Telephony Ltd v Minister for Public Enterprise *is about the direct provision of financial support for litigation, something which the Supreme Court invalidated as contravening the ancient principles of maintenance and champerty. In S*PV Osus v HSBC Institutional Trust Services *the Supreme Court unsurprisingly struck down an assignment of a right to litigate as also savouring of maintenance and champerty. Finally in* Moorview Development Ltd v First Active plc *the Supreme Court considered when a third party supporting litigation in circumstances not covered by* Persona Digital *might be required to pay the costs of the defendant should the litigation supported be lost.* Persona Digital *is a decision of mainly Irish significance, but the other decisions have implications for the wider common law in relation to two matters. The first is whether the difference between financing a claim and buying it is more than a matter of form. The second is the appropriate approach of courts wherever situated to making a non-commercial funder of civil litigation liable to pay the costs of an opposing litigant.*

Introduction

Modern civil (including family) litigation is well known to be formidably expensive. In addition to professional representation, a litigant has to find the means to pay for expert witness reports and other disbursements. Of course, if the litigation is successful, most if not all of these costs may be recovered from the other party, assuming the latter has the means to pay. But, if the litigation is unsuccessful, they must be borne by the litigant personally save to the extent that professional representatives are prepared to forego their fees.[1] For an unsuccessful litigant, however, this may only be half the battle. The 'loser pays' costs rule that is usually followed in England and Wales, Ireland and Northern Ireland exposes a losing litigant to the extremely heavy burden of meeting the successful party's costs. It is this, much more than having to fund one's own costs, that represents the real obstacle to accessing justice in the civil courts. But the defendant's access to justice must also be taken into account. To be sued in the civil courts requires any defendant to consider,

1 This is what is known in Ireland as 'no foal, no fee' and is the way that most road-traffic accident claims are funded in that jurisdiction. Professional representatives do not charge their clients any fees in the event that the case is unsuccessful. This means that cases tend only to be pursued if legal representatives believe the claim is strong.

first, whether they have any viable defence to the claim and, secondly, whether they can recover their costs in the event that their 'innocence' is established. A defendant sued by an impecunious litigant may end up having to pay a considerable sum to their professional representatives even though the court has decreed that the unsuccessful claimant is required to reimburse them for it. The wisdom of taking out legal expenses insurance is easy to see in this context, but it does not altogether remove the unfairness of giving claimants a free 'punt' on recovering compensation.

The scale of the access to justice problem, at least from the perspective of claimants, was placed in context by Lady Hale, President of the UK Supreme Court, in a recent contribution she made to the BBC's *Radio 4 Appeal*.[2] In appealing for a legal charity to assist persons undertaking legal proceedings in the civil and family courts, Lady Hale spoke of the impact of the savage cuts in civil legal aid in England and Wales during this last decade. The number of people granted legal aid has declined by 80 per cent over the last eight years, and the number of litigants in person has risen sharply. It is well known that Northern Ireland has experienced a similar problem and that judges are concerned about the rise in the number of litigants in person. A scan of the list of published judgments from the Irish High Court reveals a depressing number of cases where one of the parties self-represented. Many of these were cases with no viable defence where lending institutions sought to recover huge sums loaned to borrowers during the property boom of the previous decade. Lawyers were not prepared to undertake the defence of persons who could not pay their fees and legal aid was unavailable. If legal aid had been available, one suspects that a great many of these cases would have settled because advice would have been rendered to the effect that there was no answer to the claim.

It is in the above context that three major decisions of the Supreme Court of Ireland dealing with three different aspects of litigation funding fall to be considered. Litigation funding is where a third party provides financial support to a litigant to enable the bringing of civil proceedings. The first of these cases, *Persona Digital Telephony v Minister for Public Enterprise*,[3] concerned the direct financing of a claim for damages by a third party in exchange for a share of any damages recovered. The second, *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,[4] addressed the question of whether a litigant could assign for payment a claim for damages to a third party. For a litigant concerned about liability for costs this could be a means to obtain something for the claim while transferring the costs problem to the third party. These two cases address ways in which a claimant might obtain access to justice. The third, *Moorview Development Ltd v First Active plc*,[5] addressed the question of the defendant's access to justice by considering whether a third party who supports unsuccessful litigation can be required to pay the costs of the successful opponent.

It may be obvious already that these cases are far removed in important respects from those that Lady Hale was speaking of. The cases above were all complex high-value commercial claims. In some commercial cases there may be something approximating to equality of arms between the parties, but in many the sheer size of the claim and the complexity of the litigation will mean that even a relatively prosperous business would be unable to bring the case and would risk potential liability to pay opponent's costs without financial support. That financial support is unlikely to be available unless the claim is very large, as funders are generally uninterested in supporting claims that do not offer

2 See *Irish Legal News* (29 July 2019).

3 [2017] IESC 27.

4 [2018] IESC 44.

5 [2018] IESC 33.

generous returns on the investment.[6] Small value claims may only attract litigation funding where they can be aggregated into a group action.[7] However, parties who would never have been entitled to legal aid even in its heyday have access to justice rights too.

Third-party funding

In *Persona Digital*[8] the claim was for damages (including exemplary damages) for misfeasance in public office, breach of statutory duty, breach of contract, breach of constitutional rights, and breach of rights under EU law; together with a declaration that the European Communities (Mobiles and Personal Communications) Regulations 1996 contravened EU law. In a previous judgment he had delivered in this litigation relating to the defendants' unsuccessful application to strike the case out for want of prosecution, Clarke J remarked that if the factual allegations made by the plaintiffs could be proved they would amount to some of the most serious factual findings made by a court in Ireland since the foundation of the state.[9] The litigation was horrendously complicated and there seemed no earthly way that the plaintiffs could go on with it without financial support. Financial support in the form of an undertaking to meet both the plaintiffs' costs of preparing and presenting the case as well as their potential liability for the defendants' costs should the litigation fail was obtained from Harbour Fund III, a leading provider of third-party litigation funding in England. The Supreme Court decided by a 4:1 majority that the third party's provision of financial support for the plaintiff's claim in return for a substantial cut in any damages recovered was barred by the ancient common law principles of maintenance and champerty.[10] Maintenance means providing support for litigation in which one does not have a legitimate interest. Champerty is maintenance in consideration of a share in any recovery obtained in the litigation. Maintenance and champerty ceased to be crimes and torts in England and Wales by section 14 of the Criminal Law Act 1967 and in Northern Ireland by section 17 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968, although in both of these jurisdictions the rule of public policy making a transaction vitiated by maintenance or champerty void was preserved. In Ireland the Statute Law Revision Act 2007 preserves both criminal and tortious liability for maintenance and champerty.

The attitude of the Supreme Court to the funding arrangements in this case appears to be significantly out of line with the approach to maintenance and champerty adopted by most other common law jurisdictions.[11] Since the early 1990s the courts in England

6 C Hodges, J Peysner and A Nurse, *Litigation Funding: Status and Issues Research Report* (Centre for Socio-Legal Studies, Oxford, University of Lincoln Law School 2012) 7, noting that third-party litigation funders tended not to be interested in claims below £1million.

7 Ibid 49.

8 [2017] IESC 27.

9 *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50, referred to at [2017] IESC 27, 2.1.

10 For more detailed commentary on this case, see M Baldock, 'Persona (non?) Grata: *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27' (2018) 37 Civil Justice Quarterly 186; D Capper, 'Third Party Litigation Funding in Ireland: Time for Change?' (2018) 37 Civil Justice Quarterly 193; D Capper, 'Supreme Court Rejects Litigation Funding' (2018) 41 Dublin University Law Journal 197.

11 R Mulheron, 'England's Unique Approach to the Self-regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 Cambridge Law Journal 570, at 573, where it is pointed out that the courts of England and Wales, Jersey, Canada, Australia, New Zealand, Bermuda and South Africa have accepted third-party litigation funding. The position in the USA varies significantly from state to state; see N Dietsch, 'Litigation Financing in the US, the UK, and Australia: How the Industry has Evolved in Three Countries' (2011) 38 Northern Kentucky Law Review 687.

have markedly relaxed their approach to litigation support arrangements.[12] English courts ask whether the particular funding arrangements entered into involve any real risk that the funder will take over the management of the litigation so that it effectively becomes the claimant, and the defendant is consequently faced with litigation brought against it by a party with whom it has no actual dispute. The reluctance of the Irish courts to adopt a similar approach appears to be due to a combination of three factors, with the third being the most significant.

First, reliance has been placed on the fact that maintenance and champerty remain as crimes and torts in Ireland. This is not particularly convincing because the issue must surely be whether litigation funding constitutes maintenance or champerty, not whether it could be the subject of criminal or civil proceedings if it were. Secondly, it is argued that decisions from other jurisdictions are of limited weight because the courts in Ireland have built up a substantial body of precedent hostile to anything that resembles maintenance and champerty. This is also unconvincing because the body of precedent mainly falls into two categories of case that provide only limited support for the current approach. One category consists of first instance decisions from the last decade that are hostile to third-party funding; none of these were binding on the Supreme Court. The other concerned two decisions, one High Court[13] and the other Supreme Court,[14] where the courts declared invalid heir-locator contingency fee contracts. In these cases an heir-locator discovered the identity of heirs entitled to inherit shares in the estates of persons who had died intestate, one in England and the other in the USA. The heir-locator approached the heirs, entering into contracts with them under which he would use his best endeavours to recover the heirs' entitlement for them, being paid a very large fraction of their entitlement in the event of success and nothing in the event of failure. The contingency was entirely bogus as the heir-locator was in possession of proof of the heirs' entitlement and had the identity of the deceased been revealed the heirs could have recovered their shares in the estate for a small fraction of the price they paid the heir-locator. These cases had basically nothing to do with any litigation being maintained and were instances of maintenance and champerty being used as tools to strike down contracts courts understandably found objectionable. In *McElroy v Flynn* an alternative ground for the decision was that the heir-locator falsely answered an heir's question as to the identity of the deceased. But misrepresentation may not always assist an heir challenging the contract because a person presented with the opportunity to acquire an unexpected benefit may not ask any questions that can be answered falsely.

The true reason why the Irish courts have such a deep suspicion of third-party litigation funding is because of its perceived inherent tendency to be litigation brought by a third party against the defendant. Irish courts continue to insist that any supporter of another's litigation must have a legitimate interest in that litigation. That interest must pre-exist the making of arrangements for the support of litigation, and it must be clear that the maintainer is supporting the litigation to protect that interest. Financial profit absent a pre-existing interest does not constitute a legitimate interest even if there is no evidence to suggest that the third party will take over the litigation or otherwise engage in any abuse of process. In large measure the approach of the Irish courts represents a

12 See *Giles v Thompson* [1994] 1 AC 142 (HL); R *(on the application of Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 (CA); *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665, [2003] QB 1175 (CA); *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA); *London and Regional (St George's Court Ltd) v Ministry of Defence* [2008] EWHC 526 (TCC).

13 *McElroy v Flynn* [1991] ILRM 294.

14 *Fraser v Buckle* [1996] 2 ILRM 34.

preference for a bright-line rule that says anything that smacks in any way of third-party involvement in another's litigation, as opposed to the pursuit of one's own pre-existing legal interests, is automatically void. If third-party litigation funding were to be embraced the Irish courts seem to fear that they would be required to engage in much case-by-case adjudication as to whether there was a real risk of improper interference with the administration of justice. The access to justice issue was not in any sense denied, but it was felt that any reform of this area of the law would require a detailed legislative regulatory scheme.[15] However, in his concurring judgment Clarke J made clear his position that if the legislature did not act then the courts may be forced to develop the common law,[16] and the dissenting judgment of McKechnie J would have involved an effective staying of proceedings to give the legislature time to act.

One of the dangers with third-party litigation funding that the Irish courts may be concerned about is the problem referred to above of exposing defendants to the risk of irrecoverable costs should they prevail in litigation with a claimant unable to meet a costs order. This issue will be returned to below, but for now it should be stated that in England the general practice is to require a litigation funder to meet a successful defendant's costs at least up to the level of the financial support provided.[17] For this to work satisfactorily funders need to be financially sound, transparent and ethically grounded organisations. A satisfactory regulatory system should really be in place. Although the approach of the Irish courts to litigation funding is out of line with most other common law jurisdictions, their preference for statutory regulation of this area is not exclusive. Even in England and Wales, a jurisdiction very much in the vanguard of relaxing the law on maintenance and champerty, there is a fairly detailed voluntary Code of Practice issued by the Association of Litigation Funders operating in this field. However, concern should be expressed over Professor Mulheron's revelation that in 2014 only seven out of 16 recognised funders in England had actually subscribed to the code.[18] A salutary tale about a non-subscribing litigation funder is provided by the debacle of *Excalibur Ventures LLC v Texas Keystone Inc*[19] where the Court of Appeal ordered the funder to pay the defendant's costs on an indemnity basis. In Singapore, section 5B of the Civil Law (Amendment) Act 2017 allows the Minister to make regulations exempting third-party litigation funding arrangements from maintenance and champerty in designated proceedings. In Hong Kong, the Department of Justice issued a Code of Practice for Third Party Funding of Arbitration effective from 1 February 2019. The Law Reform Commission of Ireland published an Issues Paper concerned with the administration of justice in 2016,[20] Issue 6 of which was concerned with 'Maintenance and Champerty' and asked directly whether third-party litigation funding should be introduced in Ireland. There may yet be legislative development, but this subject does not appear in the Commission's fifth programme of law reform. It is to be hoped that Ireland will embrace litigation funding, but the case for regulation of providers is also strong.

15 [2017] IESC 27, judgment of Denham CJ.

16 Ibid 4.1–4.4.

17 *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655. This is the so-called *Arkin* cap.

18 Mulheron (n 11) 578.

19 [2017] 1 WLR 2221 (CA); D Capper, 'Litigation Funder's Liability for Costs' (2017) 36 Civil Justice Quarterly 287.

20 Law Reform Commission, Contempt of Court and Other Offences and Torts Involving the Administration of Justice (LRC IP 10–2016).

Assignment of rights to litigate

The facts of *SPV Osus*[21] are very complex, but for present purposes may be distilled as follows. Optimal Strategic US Equity Ltd (SUS) was a company entitled to make claims in the bankruptcy of the Bernard Madoff Ponzi scheme. Claims fell into two broad categories, secured and unsecured. Owing to the substantial time that investors in SUS would likely have to wait before receiving 'money in hand' from the Madoff bankruptcy SUS set up a special purpose vehicle (SPV Osus) and assigned the bankruptcy claims to it. This enabled investors in SUS to obtain liquid money for their bankruptcy claims by swapping shares in SUS for shares in SPV Osus. A majority of SUS investors did this and then traded their shares in SPV Osus to distressed debt hedge funds. SPV Osus issued proceedings in Ireland against the defendants, the Irish based custodian and administrator to SUS, claiming an entitlement to the net asset value of the investments of SUS. At all three levels of the court system in Ireland – High Court, Court of Appeal and Supreme Court – the defendants succeeded in blocking SPV Osus' claim on the ground that the assignment of the bankruptcy claims to SPV Osus was tainted by maintenance and champerty.

In the context of litigation funding the assignment of a claim often achieves substantially the same purpose as obtaining litigation support from a third party. The bottom line in each instance is that a party with a claim wants to get some money for it. Pursuing the claim involves taking legal proceedings, and often there is a risk of losing the case when it comes to court. The claimant could obtain litigation funding from a third party to cover the costs of preparing and presenting the case and indemnifying it against liability to pay the other party's costs if the claim fails. This will be in consideration of a share in any damages recovered. But this does not guarantee that the claimant will get any money, so assigning the claim to a third party for a sum reflecting, inter alia, the risk that the claim will fail, may be an attractive alternative. The third party takes over the running of the case, incurs all the costs of preparing and presenting it, and assumes all the risks involved if it fails. The claimant gets a 'bird in the hand' in exchange for selling to the third party the chance to recover more for the claim than it paid the claimant.

As the Supreme Court struck down third-party funding arrangements because of the potential risk that a third party with no legitimate interest *might* effectively take over the running of the case, it probably comes as no great surprise that it also struck down an assignment where the third party *would* take over the case. However, it should not be thought that the Supreme Court held that there is a complete ban on the assignment of a right to litigate. Neither should it be thought that in jurisdictions more relaxed about litigation funding that all assignments of rights to litigate are accepted. Third-party funding and the assignment of rights to litigate are similar in many ways but not identical. In both England and Ireland the key questions concern when the third-party assignee has a legitimate interest in the right being assigned and what is objectionable about the particular assignment. There is probably greater willingness in England to accept assignments than in Ireland and greater reluctance in Ireland to undertake case-by-case adjudications.

O'Donnell J's judgment for the Supreme Court provides a near comprehensive analysis of decided cases from England and other common law jurisdictions on this issue. At the outset of the analysis which will be conducted in this article, it is important to state that judicial acceptance of rights to litigate occurred before acceptance of third-party funding. A right to litigate is a chose in action and can generally be assigned, in England

21 [2018] IESC 44.

under section 136 of the Law of Property Act 1925, in Northern Ireland under section 87 of the Judicature Act (NI) 1978, and in Ireland under section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. Under all of these provisions, themselves generally declaratory of the common law, any right to sue which enforces a property right may be assigned. Anyone who owns any intangible right in property which cannot be protected without taking legal proceedings may assign the right to take those proceedings as part of the assignment of the property right. The property right could not be assigned otherwise. For present purposes the assignable property right that has most significance is a debt. On the face of things, the assignment in *SPV Osus* was the assignment of a debt, so one's first impression may well be that the courts should have allowed the claim by SPV Osus to proceed. The reason why they did not has to do with the still extant common law ban on the assignment of *a bare cause of action*. As the name indicates, a bare cause of action, or bare right to litigate, has no connection to a property right. A debt is a property right, but a right to sue for a monetary sum that does not constitute a property right is non-assignable.

This means that the validity of an assignment essentially depends on whether what is assigned is a debt or a bare right to litigate. This is not always an easy question to answer as a comparison of two cases makes clear. In *Camdex International Ltd v Bank of Zambia*[22] the assignor of a very large bank deposit assigned it to the plaintiff which sought summary judgment against the defendant bank. The defendant disputed the debt, but the Court of Appeal held that this made no difference to its assignability. Hobhouse LJ pointed out that the valuable commercial practice of selling a large quantity of uncollected debts to a factor in order to raise cash could not be carried out if the assignment of debts could be prevented by putting up a flimsy defence. By way of contrast, consider the earlier decision of Megaw J in *Laurent v Sale*.[23] The defendant finance house wrote to the assignors in July 1953 confirming that it had irrevocable instructions to pay certain fixed sums against shipments of copper wire. Nothing much happened until June 1956 when the assignors executed certain documents purporting to assign the sums said to be due from the defendants to the plaintiff assignees. By these documents the plaintiffs agreed to hand over to the assignors 25 per cent of any sums recovered from the defendants. In June 1959 the plaintiffs' solicitors drew the defendants' attention to the assignment and requested settlement of the claims otherwise legal proceedings would be instituted. Nothing was paid and on 1 July 1959, two days before expiry of the limitation period, the plaintiffs took out a specially indorsed writ seeking payment. The defendants contested the claim and also argued that the assignment was champertous. On a preliminary issue the judge upheld the defence of champerty. What took this case out of the inoffensive category of 'debt' and made it champertous was that the assignment was made in the clear knowledge that the debt was disputed, and the modest portion of 25 per cent of any recovery made also indicated that the parties to the assignment were engaging in speculative litigation trafficking. While there seems to be no reason for dissatisfaction with either decision, one is not left with a perfectly clear picture of when an assignment of a monetary claim is a debt and when it is a bare right to litigate.

Differentiating between the assignment of a debt and a bare right to litigate ultimately depends on whether the transaction involves trafficking in litigation. No attempt to define trafficking will be made here. As between assignor and assignee a speculative claim would indicate trafficking. In the absence of anything speculative between these parties the prospect of further on-trading by the assignee to another party and possibly beyond the

22 [1998] QB 22 (CA).
23 [1963] 1 WLR 829 (QBD).

latter would also indicate trafficking. It was this that undid the assignment of the claim under a letter of credit in *Trendtex Trading Corporation v Credit Suisse*.[24] The assignee financed the acquisition of a large consignment of cement to be sold by the assignor to an English company in Nigeria, the latter paying the assignor by letter of credit issued by the Central Bank of Nigeria. The assignor's claim under the letter of credit was assigned to the assignee but then sold on to a fourth party for a considerably larger amount. The original assignment actually contemplated that this would happen. Had the only parties involved been the assignor and assignee there would have been no concern about litigation trafficking. The assignee had no real prospects of being paid for the cement it enabled the assignor to acquire unless the letter of credit resulted in funds. Assigning the letter of credit claim for whatever it was considered to be worth is an unproblematic business judgment that cannot really be challenged. But the onward sale of this claim for a higher sum treats it like a saleable commodity. It is this that the Irish Supreme Court was hostile to and the prospect that SPV Osus' claims being traded onwards by distressed debt hedge funds effectively killed the assignments there. As O'Donnell J expressed it: 'It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not.'[25]

Trendtex raises another issue about assigning rights to litigate – the significance of the assignee having a pre-existing interest in the assignor's claim. There was no pre-existing interest in *Camdex International* and the assignment survived. Neither was there in *Laurent v Sale*, but that does not seem to have been a key factor in holding the assignment to be champertous. There was in *Trendtex*, but that did not save the assignment. So a pre-existing interest is not a requirement for a valid assignment. The true test is whether the assignment involves trafficking in litigation. However, there is no doubt that the presence of a pre-existing interest on the part of the assignee helps in cleansing the claim from the taint of litigation trafficking, and its absence may be an indicator of improper trafficking. Take the decision in *Simpson v Norfolk and Norwich University Hospital NHS Trust*[26] as an example. The assignor issued medical negligence proceedings against the defendant hospital, alleging that he had contracted MRSA as a result of the defendants' negligent failure to exercise proper infection control. He subsequently assigned this claim to the assignee, whose late husband had contracted the same condition in the same hospital while he was being treated for the cancer from which he died. The assignee had earlier instituted negligence proceedings against the hospital alleging that her husband's last days had been rendered more uncomfortable than they should have been because of the MRSA. These proceedings had been settled without admission of liability, but the assignee seems to have felt a measure of regret that she had not publicly exposed the defendants' failings, so she took an assignment of the assignor's claim for £1 and amended its value from £5000 to £15,000. By its very nature, a claim for damages for personal injury is not a debt, and this alone may be sufficient to explain why it was treated as champertous. But a reading of the judgment of Moore-Bick LJ discloses a very real concern about allowing rights to litigate to be bought up by persons pursuing personal public interest campaigns. However genuine and sincere the assignee was, this was not her claim and it would have been an abuse of the civil justice system to allow her to buy it up for a nominal sum and put the defendants to the expense of defending it when their dispute was with another person. In *SPV Osus*[27] O'Donnell J pointed out that defendants

24 [1982] AC 679 (HL).

25 [2018] IESC 44, at [15].

26 [2011] EWCA Civ 1149, [2012] QB 640.

27 [2018] IESC 44, [93].

in civil cases that have been assigned often require the assignor's co-operation in providing discovery and otherwise presenting their defence. This does not justify a complete ban on assignments of the right to litigate, but it should be borne in mind in considering whether assignment is justifiable in any particular case.

Trafficking in litigation can occur between assignor and assignee when the claim crosses the somewhat shadowy line between debt and bare right to litigate. Where there is contemplated further assignment of the claim to fourth and other parties, then it seems that the assignment will likely be declared unenforceable on the ground of maintenance and champerty. There appears to be no English decision where any possibility of onward sale has been permitted, so the prospects for the assignment in *SPV Osus* were not particularly good. However, it is difficult not to view that decision without some measure of regret. There is a well-established international market in distressed debt, these claims were acknowledged to be tradable in the USA, and Ireland is itself a sophisticated market in financial securities. It was suggested to the court that assignments like these should only be void if (a) they were entered into for an improper purpose, and (b) they posed an identifiable and real risk to the administration of justice. The Supreme Court's rejection of this argument is consistent with its reluctance to engage in case-by-case adjudication and its preference for statutory frameworks. The latter may provide a sound regulatory system for this area in terms of fitness to engage in this type of activity, although it may be doubted whether it could provide bright-line rules for distinguishing legitimate from illegitimate transactions.

Third-party costs orders

Where a third party supports unsuccessful litigation it may be required to pay the costs or part of the costs incurred by the successful defendant. The access to justice issue in this context is the defendant's access to justice. If a defendant is sued by a wealthy individual or a company with abundant assets, the defendant is in a better position to decide whether to contest the litigation based purely on an assessment of the merits. But, if the claimant has little in the way of resources itself, the defendant's decision becomes more difficult. A successful defence will probably result in the court awarding costs to the defendant, but if the claimant lacks the means to pay those costs, the defendant will have to decide whether contesting the litigation makes economic sense. Indeed, if the defendant's resources are less than plentiful, it may even be the case that competent legal representation is beyond its reach where there is limited prospect of recovering costs from the claimant.

In England and Wales the award of costs in proceedings in the High Court and Court of Appeal is in the general discretion of the court under section 51 of the Senior Courts Act 1981, and an equivalent provision applies in Northern Ireland under section 59 of the Judicature Act (Northern Ireland) 1978. A third-party costs order, making a third party who supports litigation pay the costs of another party, was first recognised in the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*,[28] and a considerable body of case law on this matter has built up since then. It might be thought that this issue is of little relevance in Ireland because the courts have set their face firmly against third-party litigation funding from professional funders. But the issue can still arise in Ireland where a controller and/or a major shareholder in a company funds litigation the company is involved in and also perhaps where a third party supports litigation for more altruistic reasons. An example of the latter can be found in *Hamilton v*

28 [1986] AC 965.

Al Fayed (No 2),[29] where Neil Hamilton's financial backers were not required to pay Mohammed Al Fayed's costs in his successful libel action against Mr Hamilton. This case raised issues of maintenance rather than champerty. The litigation was supported but not for a share of the spoils. The Court of Appeal decided that Mr Hamilton's political supporters had a sufficient interest in this litigation to free their financial support from the taint of maintenance and also to make a third-party costs order inappropriate. In factual scenarios like this the court would have jurisdiction to make a third-party costs order if the third party's support constituted maintenance, and even if it did not but where there is no maintenance a third-party costs order is unlikely.

The Supreme Court has decided in *Moorview Development Ltd v First Active plc*[30] that the superior courts in Ireland have the power to make a third-party costs order. This is both under Order 15, rule 13 of the Rules of the Superior Courts, concerned with joining a third party as a party to the action, and section 53 of the Supreme Court of Judicature (Ireland) Act 1877, the latter being a similarly worded provision to section 51 of the Senior Courts Act 1981 and section 59 of the Judicature Act (Northern Ireland) 1978. As the question of when it may be appropriate to make a third-party costs order was approached in the same way under each of these provisions, it is not proposed to say anything specific about the former.

In *Moorview v First Active* the essential facts were that Moorview sued First Active for a wide range of reliefs arising out of a property development project which collapsed and consigned Moorview into insolvency. Mr Brian Cunningham, the principal shareholder in Moorview, funded the litigation which alleged that First Active was responsible for the collapse of the development project and Moorview's insolvency. First Active prevailed in the litigation and, since Moorview was insolvent and could not pay costs, First Active sought a third-party costs order against Mr Cunningham personally. The thrust of First Active's argument was that Mr Cunningham had funded the litigation primarily for his own benefit. If Moorview had prevailed, as principal shareholder Mr Cunningham would have reaped the benefit of any relief obtained, and if Moorview lost he could escape any liability for costs by sheltering behind the company's separate legal personality. The Supreme Court affirmed the decision of Clarke J that Mr Cunningham should be required to pay First Active's costs.

In reaching the conclusion that the courts had power to make third-party costs orders under section 53, the Supreme Court[31] noted that the Irish provision did not contain the words 'by whom' that appear in the relevant UK legislation. However, this was considered to make no substantive difference, since legislation in other common law jurisdictions such as Australia and New Zealand also omitted those words and third-party costs orders had been recognised.[32]

Mr Cunningham argued that third-party costs orders were inappropriate in cases brought by insolvent companies for two main reasons. First, there existed adequate protection for the defendant through the security for costs provision. In rejecting this argument McKechnie J agreed with Clarke J that the existence of the security for costs provision cannot be a jurisdictional bar to a third-party costs order. Security for costs are sought at an earlier stage of proceedings when the company's argument may be that security should not be required because the reason the company is in a parlous financial

29 [2003] QB 1175 (CA).

30 [2018] IESC 33.

31 *Moorview v First Active* (n 5) Judgment delivered by McKechnie J.

32 Ibid [53].

condition is due to the actions of the defendant. But by the conclusion of the legal proceedings it may appear that there is little substance in these allegations.[33] Although not a jurisdictional bar, however, the availability of security for costs is a factor going to the exercise of the court's discretion. Ordinarily, security for costs should be sought and a failure to seek security without explanation is liable to lead to a dismissal of the application for costs. This is particularly so where proceedings are brought on behalf of the insolvent company's creditors by the liquidator. The latter should not be subject to a penalty for pursuing its important public interest function.[34] If security is obtained, that does not preclude the making of a third-party costs order because, inter alia, that security may prove insufficient to meet the defendant's costs.[35] These arguments are convincing as also is the rejection of Mr Cunningham's second argument against third-party costs orders in this context. This argument was that it was an illegitimate piercing of the corporate veil. Where a controller of a company brings proceedings for his or her own benefit the defendant is exposed to the serious injustice of an irrecoverable costs order if the case is lost, while if the case is won the controller would get to keep the damages.[36] That said, third-party costs orders remain an exceptional remedy not to be granted as a matter of course.

In determining whether a third-party costs order was appropriate in this case, the first question addressed was whether bad faith on the part of the funder was required. The Supreme Court was clear that this may be significant but is not a requirement. Where someone with a direct financial interest in the outcome of the litigation, such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or substantial shareholder, effectively pursues litigation at no risk to themselves, this is a powerful factor in favour of a third-party costs order whether or not there is any bad faith.[37]

As to the appropriate factors to take into account, the Supreme Court endorsed the approach taken by Clarke J. He laid stress on three questions:

1 the extent to which it might be reasonable to think that a company could meet an order for costs if the litigation failed;

2 the degree to which the non-party would benefit from the litigation if successful;

3 any factors touching whether the proceedings were pursued reasonably or in a reasonable fashion.[38]

Applying these factors to the case here it was clear that the company was hopelessly insolvent and that Mr Cunningham was the person who would benefit if the proceedings had succeeded. As for the way the proceedings were pursued, Moorview had amended the way it put its case on several occasions, yet First Active had succeeded in getting the case dismissed as disclosing not even a *prima facie* case.[39] So lacking in merit was Moorview's case and so unreasonable was the way it was pursued that there was no basis for making

33 Ibid [62]–[63].

34 Ibid [64], citing *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613.

35 *Moorview v First Active* (n 5) [65], citing *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038.

36 *Moorview v First Active* (n 5) [69]–[77].

37 *Moorview v First Active* (n 5) [87]–[91], citing *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (Tomkins J).

38 *Moorview v First Active* (n 5) [92]–[98].

39 Ibid [99]–[106].

any kind of nuanced costs order, where the third party might bear some of the defendant's costs on some issues but not on others.[40]

The last issue considered in relation to the appropriateness of the costs order in this case was one of some importance so should be considered separately. This is whether the defendant gives reasonable notice to the funder that it intends to seek a third-party costs order. To be able to do this, the defendant would need to know that a third party stood behind the claimant and the identity of that party. In England there is authority that, if a defendant wishes to make an application that a third-party funder posts security for any third-party costs order that the defendant may subsequently seek, the defendant may seek disclosure of the identity of the funder.[41] In New Zealand the Supreme Court held in *Waterhouse v Contractors Bonding Ltd*[42] that the identity of a litigation funder should be disclosed as a matter of course at the commencement of the litigation. The Federal Court of Australia requires the existence and details (redacted in certain circumstances) of third-party funding arrangements to be disclosed before the initial case management conference.[43] All this is principally in the context of professional for-profit third-party funding where the identity of the funder is less likely to be known or suspected. There may not be much of a problem here where the funder is a controller or major shareholder in a company and the jurisdiction does not allow for profit-driven litigation support. Returning to the question of notice, the Supreme Court did not consider giving notice of an intention to seek a third-party costs order to be a jurisdictional requirement but did consider that it would normally be a matter to take into account in deciding whether that order should be made in a particular case. Notice should be given as soon as an intended applicant would be in a position, if called upon to do so, to demonstrate reasonable grounds for making such an application. In this case the letter giving formal notice of the defendant's intention to seek a third-party costs order was given two months before the trial was due to begin. Although most of the costs in this case had still to be incurred at this stage, there would still have been a very significant sum thrown away if the claimant's funder were to withdraw support in the face of a probable application for a third-party costs order. Despite the relative lateness of the formal notice, a third-party costs order was still made, two other considerations supporting this being that this was the first case recognising the power of the Irish courts to make such orders and the giving of informal notice of a likely application to make Mr Cunningham liable for costs before most costs had been incurred. A partial costs order could also be made allowing for recovery of only those costs incurred after the third party was on notice.[44]

In concluding his discussion of third-party costs orders in the context of controllers of corporate claimants, McKechnie J warned that the above was not an exhaustive list of factors to be taken into account in applications for third-party costs orders, that some factors would be of little significance in some cases, and that there are no rigid rules applying to the question.[45]

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40 Ibid [107]–[110].

41 *Reeves v Sprecher* [2007] EWHC 3226 (Ch), [2009] 1 Costs LR 1; *Merchantbridge & Co Ltd v Safron General Partner I Ltd* [2011] EWHC 1524 (Comm), [2012] 2 BCLC 291.

42 [2013] NZSC 89.

43 *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd* [2016] FCA 306.

44 [2018] IESC 33, [111]–[121].

45 Ibid [122]–[128].

Finally, there was a brief observation that, in the case of 'pure funders' like Neil Hamilton's supporters in *Hamilton v Al Fayed (No 2)*,[46] the UK jurisprudence that third-party costs orders would seldom be granted against them 'seems a reasonable rule'.[47] What is significant about that is its apparent acknowledgment that non-commercial third-party funding of litigation may not be considered objectionable in Ireland. If it be the case that third-party costs orders are not likely to be made in these cases it probably also follows that they would seldom be made in cases where a public body funds litigation on behalf of an impecunious person. An example of this is the *Ashers Bakery*[48] case where the Equality Commission in Northern Ireland funded Gareth Lee's ultimately unsuccessful discrimination case against a bakery which refused to decorate a cake with the slogan 'Support Gay Marriage'. This potentially put the bakery in the position where it would have had to decide whether to defend this litigation from its own resources in the knowledge that it was unlikely to recover its costs if it won, or settle out of court on the grounds that the costs were prohibitive. In the end, the Christian Institute funded Ashers' defence and both parties agreed to bear their own costs. That there is no guarantee of the defendant in a case like this receiving financial support from its own 'white knight' draws attention to the important responsibility public bodies bear when they are considering providing litigation support.

Conclusion

Litigation funding in Ireland is not exactly on the move. Profit-motivated litigation funding has been rejected, and the assignment of a right to litigate will likely suffer a similar fate unless it is a near unanswerable debt claim that will not be onward traded by the assignee to someone else. Although the approach to third-party funding rests upon a very conservative and somewhat misconceived notion of maintenance and champerty, the concerns about regulating a third-party funding profession have a measure of legitimacy. *SPV Osus* is an instructive case in that it demonstrates how the assignment of claims presents different issues from third-party funding of claims. The difference between the two is not purely a matter of form. *Moorview* is another deceptively valuable decision because it provides useful guidance on the operation of third-party costs orders where the funder is a controller or major shareholder in an insolvent company. The issues discussed in this article are thus mainly, but not exclusively, jurisdiction-specific.

46 [2003] QB 1175.

47 [2018] IESC 33, [127].

48 *Lee v McArthur* [2018] UKSC 49.