

Achieving more effective outcomes for court users, particularly vulnerable court users.**1 INTRODUCTION**

- 1.1 In response to the request for submissions of the review group chaired by the President of the High Court, Mr Justice Peter Kelly, established to reform the administration of civil justice in Ireland, we submit that the rules against maintenance and champerty should be liberalised to allow for a regulated system of professional litigation funding in Ireland. In our submission, this would assist greatly increasing the ability of all Court users to access the Irish justice system and achieve more cost effective outcomes.

2 ACCESS TO JUSTICE

- 2.1 The Supreme Court has recently confirmed the applicability of the ancient rules of against maintenance and champerty to third party funding in *Persona Digital Telephony Limited & anor. v. The Minister for Public Enterprise & ors.*[2017] IESC 27. Most other common law jurisdictions have modernised the rules in light of modern notions of public policy. There is an overwhelming tide of approval in most modern democracies for responsible litigation funding which facilitates access to justice. There is no principled or policy basis for Ireland to continue with its rigid position on the right application of the medieval doctrines of maintenance and champerty.
- 2.2 It must be recognised that for the vast majority of Irish citizens, litigation is beyond their means. The reality is that there is no properly funded civil legal aid system in Ireland and supports available are not effective at reducing economic barriers to the civil justice system. At present, plaintiff litigation is funded by a combination of private resources, informal and unregulated no-foal-no-fee arrangements and conditional fee arrangements that are structured to circumvent rules prohibiting them. Such arrangements are permitted as they clearly provide vital support to impecunious aggrieved parties who would otherwise be deprived of the right to seek redress in the Courts.
- 2.3 Litigation is often funded by lawyers who fund cases with their time and by paying litigation expenses. The influence of self-invested lawyers acting in cases gives rise to a danger of conflicts of interest arising and this potential difficulty could be alleviated by reform in this area.
- 2.4 The clear benefits that the liberalisation of the rules against maintenance and champerty would bring to the constitutional right of access to justice are closely aligned to the need for reform of the system of class-action litigation in Ireland. Legalisation of litigation funding and the implementation of a proper system of class-action litigation would combine to greatly improve the ability of citizens of all economic backgrounds to obtain proper access to justice.

3 THIRD PARTY LITIGATION FUNDING IN OTHER JURISDICTIONS

- 3.1 Third party funding is an accepted part of litigation in other jurisdictions, including Australia, Hong Kong, the United States and the United Kingdom. It is also an accepted practice in arbitration internationally.
- 3.2 In other common law jurisdictions, where the rules relating to third party funding have been liberalised, the funding is provided with clear, industry-standard agreements whereby the involvement and influence of the third party funders in the actual conduct of litigation is extremely limited. Appropriate checks and balances are maintained to ensure that the integrity of the administration of justice is preserved and that the litigant, with the guidance of his lawyer, conduct the case for his benefit.
- 3.3 In the UK, the Civil Justice Council introduced a Code of Conduct for Litigation Funders ("**the Code**") in 2011. The Code was then updated in January 2014 by the Association of Litigation Funders of England and Wales ("**ALF**"), which is an independent body that has been charged by the U.K. Ministry of Justice with the regulation of litigation funding in England and Wales. ALF defines litigation funding as a transaction in which *"a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial funder, who has no direct interest in the proceedings."* ALF's 2014 Code of Conduct includes, among other provisions, a capital adequacy requirement, a prohibition against interference with the lawyer-client relationship and conditions under which a funder may in very limited circumstances withdraw from funding agreements. Its members agree to disclosure requirements to claimants, including a requirement that the agreement must state whether and how the funder may provide input into settlement decisions without interfering in the lawyer/client relationship. It does not impose any disclosure requirements to the court or opposing parties. The Code also provides for a dispute resolution mechanism in the event of a dispute between the litigant and the funder.

The fundamental public interest which the doctrines of maintenance and champerty were designed to protect, namely, the protection from corruption or interference of the administration of justice, can be maintained through proper checks and balances while opening up the justice system to users who would otherwise be excluded. It is sometimes theorised that the liberalisation of the rules of maintenance and champerty in Ireland would lead to the opening of floodgates of unmeritorious litigation in a Court system already struggling to accommodate the workload before it. In reality, responsible third party litigation funders do not engage in spurious claims. ALF litigation funders in the UK employ internal investment committees which include retired senior judges and eminent lawyers who "*run the rule*" over each potential case for funding and only accept cases with merit and sound foundations.

4 CONCLUSION

- 4.1 There is an ongoing significant investment of time and effort undertaken by many public and private bodies in promoting Ireland as a leading venue to conduct business. Building on the success of developments such as the establishment of the Commercial Court and the Mediation Act, the introduction of litigation funding in Ireland would further strengthen Ireland as a place to do business and where there are modern structures to facilitate the resolution of disputes. It would also enhance Ireland's reputation as an open, democratic republic with liberal access to a fully functioning justice system facilitating the protection of individual freedoms and rights.
- 4.2 We recommend the abolishment of the rules against maintenance and champerty and the establishment of a regulated system of third party litigation funding, similar to the UK model. The liberalisation of these rules in other jurisdictions has proved successful and should be followed to increase access of all Court users to the Irish justice system.

**EVERSHEDS SUTHERLAND
16 FEBRUARY 2018**