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LITIGATION AND DISPUTE RESOLUTION

Crowdfunding The Irish Brexit Challenge

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Crowdfunding seems to be the new black --but is crowdfunding litigation legal?

The crowdfunding of the Irish High Court challenge to Article 50 by the British tax barrister, Jolyon Maugham QC, has been a resounding success, so far, with the target figure of £70,000 achieved in less than 48 hours from no less than 1800 contributors.

With such a popular cause, it may seem like crowdfunding litigation is a simple and straightforward strategy, but from an Irish perspective we have to question whether crowdfunding litigation is in violation of the rules against maintenance and champerty?

Crowdfunding

Crowdfunding is a means of funding a project or venture, by raising financial contributions from a large number of people or entities, and often through appeals to the general public. Crowdfunding can be used to fund a wide range of for-profit or non-profit ventures.

Maintenance and champerty

Maintenance is when litigation is supported or funded by a third party that does not have a legitimate interest in the case.

Champerty is a form of maintenance where the litigation is supported in return for a share of the proceeds if the litigation is successful.

There is a prohibition in Ireland in engaging in maintenance or champerty, whereas some forms of litigation funding are permissible in England and Wales and some other common law jurisdictions.

Most crowdfunding websites seek to reward participants for their investments by way of a financial return, but some litigation crowdfunding websites, such as Britain's first litigation crowdfunding website, Crowdjustice, seek donations with no financial interest in the outcome.

In Ireland, the doctrines of maintenance and champerty prevent the funding of litigation by parties with no legitimate interest in the litigation whether or not they receive a financial reward.

In a decision delivered on 20 April 2016 in *Persona Digital Telephony Limited v Minister for Public Enterprise (No 2)*, the High Court declared that professional third party funding of litigation is prohibited in Ireland.

In this case, the professional third party funding was provided on the basis that the third party funder would receive a share of the proceeds if the action succeeded. In that decision the Court stated:

It is clear that third party funding arrangements cannot be viewed as being consistent with public policy in this Jurisdiction or that modern ideas of propriety in litigation have expanded to such an extent to afford this Court the opportunity to characterise this funding arrangement as acceptable.

The main focus of this decision was the fact that the third party funding was provided by an entity which had no legitimate interest in the outcome of the case and on the basis that the entity would receive a share of the proceeds if the action succeeded. Further information on that decision is available [here](#).

The Persona decision is currently under appeal and so, depending on the outcome of the appeal, the landscape may change for third party litigation funding in Ireland.

Crowdfunding is different to ATE (after the event) insurance, which was the subject of a Court of Appeal decision earlier this year. The judgment in *Greenclean* delivered on 8 May 2015 recognised that ATE insurance has "crept into this jurisdiction". This decision upheld a decision of Hogan J in the High Court where it was held that an ATE policy was not an illegal contract as it did not savour of maintenance or champerty. However, the terms of the ATE insurance are important in gaining acceptance by the Court, for example, it is unlikely to be accepted by the Court if the terms are so prohibitive that the party is not covered. Further discussion of ATE insurance is available [here](#).

Given the magnitude of the impact across the EU and the effect on businesses and individuals if Brexit proceeds, it is likely that most, if not all, of the contributors to the Irish Brexit challenge, whether people or entities, would have a legitimate interest in the outcome of the Brexit challenge. The challenge does not appear to seek financial compensation and, if that is a correct interpretation, it should not be in violation of the rule against champerty. However, given the unequivocal decision in the Persona case (pending appeal), the contributors would need to establish that they have a legitimate interest and do not seek a share of any financial award if the proceedings are successful, in order to stay within the maintenance and champerty rules.

About the Author