

# Litigation Funding in Ireland

David Capper\*

## Abstract

Costs are a severe barrier to access to justice in Ireland. Taxpayer support for litigation is virtually non-existent and contingency fees are not permitted. Lawyers may take cases on a speculative 'no foal no fee' basis but two decisions of the supreme court in recent years invalidated both direct third-party funding of another's lawsuit (*Persona Digital Telephony v. Minister for Public Enterprise* [2017] IESC 27) and the assignment of a legal claim to a third-party (*SPV Osus Ltd v. Minister for Public Enterprise* [2018] IESC 44). This paper reviews these two decisions and challenges the supreme court's reliance on the ancient common law principles of maintenance and champerty. This is significantly out of line with the approach of senior courts in other common law jurisdictions. The access to justice problem was acknowledged by the judges and the Irish Law Reform Commission is studying the issue. With the withdrawal of the United Kingdom from the European Union, Ireland has been presented with the opportunity to become a major common law 'hub' for legal services. Litigation funding would assist it to embrace this opportunity. The paper also takes a brief look at third-party costs orders in Ireland, used only in cases where altruistic funders provide funding for litigation. The paper's basic message is that, subject to appropriate regulation, third-party litigation funding should become lawful in Ireland.

**Keywords:** litigation funding, direct third party funding, assignment of claims, maintenance and champerty, third party costs orders.

## 1 Introduction

In his foreword to the Civil Justice Review, the outgoing President of the High Court in Ireland, Mr Justice Peter Kelly, acknowledged that Ireland was a high-cost legal jurisdiction.<sup>1</sup> Access to justice has been acknowledged to be a fundamental right guaranteed by Article 34 of the Irish Constitution,<sup>2</sup> and the European Court of Human Rights held in *Airey v. Ireland*,<sup>3</sup> that the unavailability of legal aid to enable the applicant to seek a judicial separation from her physically abusive husband was a denial of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. Yet, de-

spite the imperatives seemingly demanded in this, the supreme court denied that the state was under a constitutional obligation to provide legal aid for civil non-family litigation in *Magee v. Farrell & Ors*,<sup>4</sup> although the obligation to provide legal aid for someone charged with a criminal offence potentially carrying a serious risk of imprisonment was acknowledged in that case.

There is no civil non-family legal aid in Ireland. Contingency fees are unlawful under Section 149 of the Legal Services Regulation Act 2015, and there is no exact equivalent of the English conditional fee authorised by Section 58A of the Courts and Legal Services Act 1990. 'No foal, no fee' agreements, under which no professional fee will be charged to a solicitor's client in the event that the case is lost, have been in use for a significant period of time and are the nearest thing Ireland has to cost sharing arrangements between lawyers and clients.<sup>5</sup> After-the-event insurance is lawful.<sup>6</sup> Ireland follows the 'loser pays' costs rule and, in light of the very high costs of litigation, the losing party will likely face a crippling financial burden. The court does have discretion to vary or depart from this normal practice but there is no specific 'access to justice' or 'impecunious litigant' ground for doing so.<sup>7</sup> A scan of cases on BAILII indicates a very large number of litigants in person.

It is in the above context that Ireland's refusal, so far, to accept third-party litigation funding requires assessment. The structure of the paper is as follows. The next section discusses the current position with regard to conventional third-party litigation funding where A finances litigation brought by B against C in exchange for a share of any recovery obtained by B. Then, the paper discusses what may be described as an alternative form of litigation funding where B assigns its law suit against C to A for a discounted price. Since Ireland rejected third-party litigation funding in the conventional form, it was no surprise that this kind of litigation support was also rejected, but the supreme court's decision in *SPV Osus Ltd v. HSBC International Trust Services Ireland Ltd*<sup>8</sup> merits discussion because decisions from common law apex courts on assigning rights to litigate are a relative rarity. The third substantive section of the paper discusses third-party costs orders, a very important subject for those jurisdictions that embrace litigation funding.

\* David Capper, PhD, is a Reader at Queen's University Belfast, Ireland.

1 *Review of the Administration of Civil Justice* (Department of Justice and Equality, October 2020).

2 *Greenclean Waste Management Ltd v. Leahy p/a Maurice Leahy and Co Solicitors* (No 2) [2014] IEHC 314, [23-24] (Hogan J).

3 [1979] 2 EHRR 305.

4 [2009] IESC 60.

5 *McHugh v. Keane* (unreported, 16 December 1994, High Court); *Synnott v. Adekoya* [2010] IEHC 26 (Laffoy J).

6 *Greenclean Waste Management Ltd v. Leahy* [2014] IEHC 314.

7 H. Biehler, D. McGrath & E. McGrath, *Delaney and McGrath on Civil Procedure* (4th ed., 2018), 24-05-24-77.

8 [2018] IESC 44.

The issue is also important in Ireland because it is only the commercial funding of litigation by third parties with no interest in the litigation other than as a way to make money that is currently banned in this jurisdiction. The final substantive section will discuss and support the current officially sponsored consideration of reform in this area.

## 2 Funding Another's Claim

To recap, this section discusses cases where A provides funding for B's claim against C, in return for a share of any damages B recovers in the case. The Supreme Court of Ireland considered the legal legitimacy of this funding arrangement in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*.<sup>9</sup> The litigation that it was proposed to fund in this case was extremely complex and involved what Clarke J described as some of the most serious factual allegations made since the foundation of the Irish state in 1921.<sup>10</sup> The supreme court declared the funding arrangements illegal as violative of the ancient common law principles of maintenance and champerty. In brief, maintenance is the support of another's litigation without justification or excuse, and champerty is maintenance in consideration of a share of any recovery made. Maintenance and champerty have their origins in medieval times when rich landowners frequently bought up others' rights to sue as a way of harassing their enemies and acquiring more landholdings with the political and social influence this brought. Public administration and the civil justice system were weak at this time and unable to prevent the corruption of public justice which so frequently accompanied this misuse of litigation.<sup>11</sup> The approach of the supreme court in *Persona Digital* is in marked contrast to that of several other common law jurisdictions where the ancient principles of maintenance and champerty are also part of the law. Ireland treats third-party support for litigation that does not come from a pre-existing interest in the claim as automatically involving maintenance and champerty. England, by contrast, looks to the origins of maintenance and champerty in the corruption of public justice, and permits third-party financial support so long as there appears to be no tendency to corrupt justice. Purchasing or supporting another's claim in the conditions of medieval England would almost inevitably have corrupted justice but this is not the case today.<sup>12</sup> So long as the

funder does not attempt to control the litigation, but confines itself to a consultative and advisory role, there is no reason to invalidate its involvement. Indeed, courts in England welcome third-party support for litigation because it overcomes the obvious access to justice problems highlighted above. Common law jurisdictions like the United States, Canada, Australia and New Zealand have embraced litigation funding subject to similar safeguards. In those jurisdictions, of course, the problem of the overbearing feudal baron did not exist.<sup>13</sup> Ireland, however, takes the position that third-party litigation support is inherently risky and should not be allowed.

Why Ireland has taken such a cautious and conservative approach to third-party litigation funding when its access to justice problems appear so severe seems curious.<sup>14</sup> The significance attached to maintenance and champerty as obstacles to litigation funding may be, in part, attributable to two factors. First, by the Statute Law Revision Act 2007, maintenance and champerty have remained crimes and torts in Ireland. This is in contrast to the position in England and Wales where Sections 13(1) and 14(1) of the Criminal Law Act 1967 abolished the crimes and torts of maintenance and champerty, although Section 14(2) retained the invalidating rules of public policy. Clarke J seems to have attached some significance to this in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd*<sup>15</sup> and Donnelly J's first instance judgment in *Persona Digital*<sup>16</sup> clearly does. Dunne J downplayed its significance in *Persona Digital*, pointing out that there had been no prosecutions for either of these crimes since the foundation of the state,<sup>17</sup> and McKechnie J in his dissenting judgment described it as unseemly for the state to be trying to block litigation brought against it by relying on crimes and torts apparently never invoked in the state's history.<sup>18</sup> The insignificance of this matter is shown by comparing the position in New Zealand where third-party litigation funding is permitted notwithstanding the continued existence of maintenance and champerty as crimes and torts.<sup>19</sup> The issue is whether litigation fund-

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); *Massai Aviation Services v. Attorney General* [2007] UKPC 12.

13 R. Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Appraisal of Recent Developments', 73 *The Cambridge Law Journal* 570, 573 (2014).

14 Ireland is not entirely alone in thinking that legislation is needed to remove any doubt about the validity of third-party litigation funding. In Singapore, the Civil Law (Amendment) Act 2017 abolished the torts of maintenance and champerty while retaining the rule of public policy. This was a prelude to the creation of an exemption from maintenance and champerty in the context of international commercial arbitration by the Civil Law (Third Party Funding) Regulations 2017. Hong Kong allows third-party litigation funding in domestic and international arbitrations through the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance 2017.

15 [2011] IEHC 357, [5.3].

16 [2016] IEHC 187, [27], [73].

17 [2017] IESC 27, [27].

18 [2017] IESC 27, [35] (McKechnie J).

19 *Saunders v. Houghton* [2010] 3 NZLR 331 (CA).

9 [2017] IESC 27. M. Baldock, 'Persona (non?) Grata: *Persona Digital Telephony v. Minister for Public Enterprise*' [2017] IESC 27, 37(2) *Civil Justice Quarterly* 186 (2018); D. Capper, 'Third Party Litigation Funding in Ireland: Time for Change?', 37(2) *Civil Justice Quarterly* 193 (2018); D. Capper, 'Supreme Court Rejects Litigation Funding', 41 *Dublin University Law Journal* 197 (2018).

10 [2017] IESC 27, [2.1].

11 P.H. Winfield, 'The History of Maintenance and Champerty', 35 *Law Quarterly Review* 50 (1919); M. Radin, 'Maintenance by Champerty', 24 *California Law Review* 48 (1935).

12 *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*

ing is maintenance or champerty, not whether this, in turn, is also criminal or tortious.

Of probably greater significance in explaining this reluctance to embrace third-party litigation support was that, when the courts in England were diminishing the potency of maintenance and champerty in the 1990s, the courts in Ireland breathed new life into the doctrines in two decisions concerned with heir-locator contracts. Heir-locators do what their name suggests, they locate heirs. If a solicitor administering an estate is having trouble finding the person entitled to inherit a share of it, perhaps because the individual is a distant relative who emigrated to a far-flung part of the world long ago, the research skills of an heir-locator paid on a 'bill by the hour' basis can be extremely valuable. However, heir-locators have been known to pick up the estates of 'no known heirs' deceased individuals listed on a public register. They then trace an heir and contract with that person to place him or her in possession of their inheritance, payment to be on a contingency basis. The heir will be told that he or she *may* be entitled to inherit from the estate of a distant relative, and that no charge will be incurred to the heir-locator for their work if nothing is recovered. If anything is recovered, the heir-locator will be paid a very significant share (one-third or 40% being far from unusual) for their work. What the heir is told is economical with the truth at best and downright dishonest at worst. There is no risk of nothing being recovered as the research has been done and the heir-locator knows that the heir is entitled to the inheritance. The heir cannot be given any significant information, such as the name of the deceased or any other heirs, as he or she would then be able to instruct a solicitor to recover their entitlement at a fraction of the heir-locator's contingency fee. The iniquity of these contracts is easy to see and maintenance and champerty have proved to be very useful devices for invalidating them and ensuring the heir-locator could not walk away with a wholly undeserved payment for work they were never asked to do and which in no way merits the enormous fee charged.

The first of these cases, *McElroy v. Flynn*,<sup>20</sup> illustrates the fact pattern more clearly. The heir-locator called on one of the two heirs (a brother and sister) one January evening and told her a story similar to the one above. When the heir asked if the deceased was a named individual, the heir-locator falsely answered that it was not. Blayney J invalidated the heir-locator contract that was made that January evening on the ground that it *savoured* of maintenance and champerty. He also made it clear that if it had been necessary to do so, he would have decreed rescission of the contract for the heir-locator's fraudulent misrepresentation about the name of the deceased. In this case, misrepresentation would have fitted the facts rather better than maintenance and champerty because there would have been no legal proceedings to which improper support could have been given. But misrepresentation is not a bulletproof de-

fence to the enforcement of an heir-locator contingency fee contract because a false statement will not always be made and, being oral, may be difficult to prove. Neither can there be certainty as to whether the contract is voidable on the ground of undue influence or unconscionable bargain as some cases might not fit that fact pattern. Maintenance and champerty offer the desired outcome every time. In light of the supreme court's subsequent acceptance of this as the invalidating ground of heir-locator contingency fee contracts in *Fraser v. Buckle*,<sup>21</sup> this is where the law on these contracts currently stands. But by expressing the Irish judiciary's unease with legal services being paid for any other way than by the client paying the lawyer for services the Taxing Master certifies as right and proper, the task of litigation funders in persuading the court that their support for litigation was innocent became difficult. Maintenance and champerty, dormant doctrines of the common law, were stirred to life and continue today to make their presence felt.

However, there are some limits to the revival of maintenance and champerty. The Irish courts have acknowledged that these doctrines are not to be extended, especially since this would have a negative impact upon access to justice. So, in *O'Keeffe v. Scales*,<sup>22</sup> the supreme court refused to allow a cause of action to be stayed on the ground that it was being unlawfully maintained. The defendant would have to sue the maintainer in the tort of maintenance after the proceedings were over. There was to be no satellite litigation in advance of trial to determine if proceedings were being supported by a third party and what interest the latter might have.<sup>23</sup>

The rejection (for now anyway) of third-party litigation funding should be seen less as a reluctance to change the law<sup>24</sup> and more as a consciousness of the sheer size and scale of the new course that would have to be plotted. To remain faithful to precedent and the ancient principles of maintenance and champerty, all the Irish courts really had to do was what courts in other common law jurisdictions had done. This was to recognise that maintenance and champerty were rooted not in the support for another's litigation but the corruption of justice. So long as third-party funding did not involve corruption of justice, there is no reason to invalidate the funding arrangements in any particular case. But the supreme court seemed uncomfortable with the case-by-case adjudication that a test of corruption of justice would involve. It would cause uncertainty, likely prove to be unpredictable and generally give rise to lengthy satellite litigation. If there was a risk that litigation funding might cause corruption of justice in some cases,

20 [1991] IILRM 294 (Blayney J).

21 [1996] 1 IR 1 (Sct). D. Capper, 'The Heir-locator's Lost Inheritance', 60 *Modern Law Review* 286 (1997).

22 [1998] 1 IR 290 (Sct).

23 D. Capper, 'Staying a Maintained Cause of Action', 114 *Law Quarterly Review* 563 (1998).

24 Note, however, that in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd* [2011] IEHC 357, [5.6], Clarke J remarked that courts in other jurisdictions had changed the law and the courts in Ireland should not follow.

this was reason not to allow it in any case.<sup>25</sup> A prophylactic approach was preferred. A detailed regulatory scheme would be required and this would be better designed by the legislature. This is the body constitutionally charged with law reform and better equipped to formulate the detailed rules that the judicial process, which must concentrate on deciding the case before the court, cannot do so well.<sup>26</sup> But if the legislature failed to act, Clarke J served notice that the access to justice problem was so pressing that the courts would be forced to introduce law reform by judicial decision.<sup>27</sup> The emphasis on the need for regulation is reasonable. In England and Wales, the only regulatory framework is voluntary regulation through the Association of Litigation Funders (ALF) voluntary Code of Conduct. Somewhat concerning, Professor Rachael Mulheron pointed out that in 2014, only seven out of 16 recognised funders were members of the ALF.<sup>28</sup> Sir Rupert Jackson has emphasised the value of litigation funders being members of the ALF and adhering to the Code,<sup>29</sup> and the *Excalibur* case should serve as a salutary warning about the problems non-member funders can cause.<sup>30</sup> So, where we are with litigation funding in the conventional sense is as follows. If the funder is providing the funding with a view to making profit for itself from any damages recovered, and not because of any pre-existing interest it has in the litigation, this is something which in Ireland would be invalidated as contrary to public policy because it infringed the ancient principles of maintenance and champerty. The supreme court has acknowledged the access to justice context and signalled to the legislature that reform of the law is required. The story of that law reform so far is told in the fourth substantive section of this paper. However, it should be emphasised that it is appropriate for a person with a legitimate interest in the litigation, such as the shareholders of the claimant in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland Ltd*,<sup>31</sup> to provide litigation support. This is not maintenance or champerty.

### 3 Assigning a Claim

What is contemplated here is that, instead of B suing C with A's financial support, B assigns the claim to A for a discounted price. A takes over the prosecution of the case and B largely drops out of the picture, although A will need B's assistance in the provision of discovery, making witness statements, and ultimately giving evidence if the case goes to trial. B will often receive money 'upfront' for the claim although the contract of assignment may make payment conditional upon the happening of certain events such as settlement or a favourable judgment, or the performance of certain acts by B such as providing discovery and giving evidence. What B receives by way of payment is likely to be more secure than if A funds B to prosecute the claim, and the quantum would probably be less than B would receive if the case were successfully taken to settlement or trial with A's financial support, although a litigation funder's 'cut' of damages recovered is often large in any event. A, as the new claimant, will be liable to pay costs to the defendant if the case is lost but would very frequently be required to pay the successful defendant's costs under a third-party costs order even where A was simply funding B's case. B gets a measure of relief from the stress and anxiety of litigation and will not even be nominally liable for costs if the case fails.

There does not appear to have been very much use made of assignment in England or Ireland as a means of delivering access to justice for litigants. There is some evidence of its use for this purpose in the United States where claimants in urgent need of money to pay hospital bills or basic necessities have made use of it.<sup>32</sup> How attractive assignment would be to funders and funded parties is largely a matter of speculation at the moment but it could prove to be something they are willing to experiment with as the litigation funding industry develops.<sup>33</sup> It merits discussion in this paper because of the decision of the Supreme Court of Ireland in *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd*.<sup>34</sup> The specific context of that case was not, however, expressly one of access to justice.

The facts of this case were extremely complex, but for present purposes, the following brief summary should suffice. An investment fund called Optimum Strategic (OS) was owed sums totalling nearly \$2.9 billion by the bankrupt Bernard Madoff empire. Approximately \$1.5 billion of these claims were secured and the remainder

25 This was how O'Donnell J explained the reluctance to embrace case by case adjudication in the analogous context of assignment of a right to litigate in *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd* [2018] IESC 44, [19], [82].

26 *Persona Digital Telephony v. Minister for Public Enterprise* [2017] IESC 27, [3.7] (Clarke J).

27 *Ibid.*, [4.1-4.4]. McKechnie J's dissenting judgment in *Persona Digital* was driven by the need to address the access to justice problem. He proposed making no order in the case to give the legislature an opportunity to address the problem.

28 R. Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments', 73 *Cambridge Law Journal* 570, 578 (2014).

29 R. Jackson, *Review of Civil Litigation Costs: Final Report* (2009), paras. 2.4 and 2.12.

30 *Excalibur Ventures LLC v. Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] 1 WLR 2221 (CA); D. Capper, 'Litigation Funder's Liability for Costs', 36 *Civil Justice Quarterly* 287 (2017).

31 [2011] IEHC 357 (Clarke J).

32 H.R. Weinberg, 'Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective', 64 *Kentucky Law Journal* 49 (1975); P.C. Choharis, 'A Comprehensive Market Strategy for Tort Reform', 12 *Yale Journal on Regulation* 435 (1995); P.T. Morgan, 'Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims', 66 *Missouri Law Review* 683 (2001); M. Abramowicz, 'On the Alienability of Legal Claims', 114 *Yale Law Journal* 697 (2005).

33 Assignment did not much feature in the Woodsford study of litigation funding. See S. Friel (ed.), *The Law and Business of Litigation Finance* (2020).

34 [2018] IESC 44; G. Rogers, 'Litigation Funding, Assignment of Actions and Access to Justice', 18 *Hibernian Law Review* 93 (2019); D. Capper, 'Three Aspects of Litigation Funding', 70 *Northern Ireland Legal Quarterly* 357 (2019).

unsecured. The structure of OS did not facilitate investors in realising their entitlements, so a scheme was designed with the approval of the United States Bankruptcy Court for the Southern District of New York, whereby investors in OS could swap their shares in OS for shares in a special purpose vehicle (SPV Osus). These shares could be traded on financial markets so that investors were able to liquidise their entitlements more conveniently. Most OS investors exchanged their shares in OS for shares in SPV Osus and then sold these on. Distressed debt investors eventually came to own 93% of the shares in SPV Osus and then turned their attention towards making something out of the \$1.4 billion of unsecured claims. In the case being discussed, SPV Osus made claims against the defendant custodians of OS's investments who were based in Ireland for, inter alia, breach of contract, breach of fiduciary duty and misrepresentation. The issue before the supreme court was whether these claims savoured of maintenance and champerty. Through the various share exchanges above, the claims had been assigned by shareholders in OS to SPV Osus in the very clear anticipation that future shareholders in SPV Osus would seek to litigate the claims and enhance the value of their shareholding.

Why this might be a problem and its relevance to assigning a claim so as to obtain access to justice must now be explained. A debt is a chose in action presumptively assignable under Section 136 of the Law of Property Act 1925 in England and Wales and Section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. However, there is a long-standing principle in both England and Ireland that a bare right to litigate cannot be assigned. The essential reason for this is that buying and selling rights to sue is considered to be trafficking in litigation and contrary to public policy. It is the very thing that the rich landowners did in medieval England and which the courts at that time banned as tending towards the corruption of public justice.<sup>35</sup> Clearly, if assigning a right to claim damages is contrary to public policy, then assignment is effectively useless as a means of delivering access to justice.

In light of the supreme court's decision in *Persona Digital*, its decision in *SPV Osus* that the assignment of the claims to be litigated in that case were also contrary to public policy came as no surprise. What needs to be done now is to explain why, as matters of legal doctrine and legal policy, the supreme court came to this conclusion. There are two stages to this analysis. The first stage is to explain the difference between a 'debt or other legal chose in action' which may be assigned and a 'bare right to litigate' which may not. The second is to explain what is so objectionable about assigning a bare right to litigate.

The distinction between a debt or other legal chose in action and a bare right to litigate is less than perfectly clear. If a right to litigate is ancillary to a property right in the sense that the property right could not be enjoyed without exercising the right to litigate, there is no ob-

stacle to assignment.<sup>36</sup> A debt which is not subject to any serious dispute can be assigned,<sup>37</sup> but if it is clear that legal proceedings will have to be resorted to in order to recover the debt, the assignment may well be invalidated.<sup>38</sup> The existence of any serious dispute about the debt would tip the case into a claim for damages for breach of contract or tort. The House of Lords has held that in these cases, the assignee has to have a pre-existing legitimate interest in the claim before the assignment can survive a challenge based on maintenance and champerty.<sup>39</sup> Before getting to this matter in detail, it is worth mentioning one Irish case concerned with the assignment of a debt. This was *Pepper Finance Corporation (Ireland) DAC v. Emerald Properties (Irl) Ltd and Ors.*<sup>40</sup> After the commencement of proceedings against guarantors of a very large lending facility which had been called in, the loan was assigned to the claimants. The defendants objected that this was the assignment of a bare right to litigate. The judge ruled that it was the assignment of a debt. He attached significance to the fact that the assignee was assigned the whole of the debt and that there was no division of any recovery between assignor and assignee. There was no discussion in this context of the defendants' disputation of the debt but it might be significant to point out that their attempt in these proceedings to dismiss an application for summary judgment failed.

In the seminal decision of *Trendtex Trading Corporation v. Credit Suisse*,<sup>41</sup> Trendtex sold a very large quantity of cement to a company in Nigeria, payment to come via a letter of credit issued by the Central Bank of Nigeria. Trendtex had originally acquired the cement with the assistance of Credit Suisse, which issued a letter of credit in its favour for this purpose. The Central Bank of Nigeria defaulted on its letter of credit obligations and Trendtex was unable to repay Credit Suisse. Having no other realistic prospect of being paid for the cement it enabled Trendtex to acquire, Credit Suisse took an assignment of Trendtex's claim in damages against the Central Bank of Nigeria. Credit Suisse sold on the assigned claim for a sum modestly in excess of what it paid for it, but that second assignee settled it for a sum more than seven times the amount it paid. Trendtex challenged the assignment to Credit Suisse as involving trafficking in litigation. The House of Lords held that if the assignment of this claim had stopped with Credit Suisse, there would not have been a problem. Credit Suisse clearly had a legitimate interest in taking an assignment of Trendtex's claim against the Central Bank of Nigeria and litigating it for its own benefit. It had no other realistic prospects of being paid for the cement it enabled Trendtex to acquire. It did not, however, have a

35 See n. 11 above and text.

36 *Williams v. Protheroe* (1829) 3 Y & J 129 (Best CJ); *Dawson v. Great Northern and City Railway Co* [1905] 1 KB 260 (CA); *Ellis v. Torrington* [1920] 1 KB 399 (CA).

37 *Camdex International Ltd v. Bank of Zambia* [1998] QB 22 (CA).

38 *Laurent v. Sale & Co* [1963] 1 WLR 829 (QBD).

39 *Trendtex Trading Corporation v. Credit Suisse* [1982] AC 679 (HL).

40 [2021] IEHC 114 (Quinn J).

41 [1982] AC 679 (HL).

legitimate interest in onward trafficking of the claim to another party which itself had no interest other than seeking to make the substantial profit it made from taking that assignment.

In *SPV Osus*, the supreme court did not consider that any of the assignees of the shareholdings in what was originally OS had a legitimate interest in taking those assignments. Their interest was to make profit from litigating claims in court. The fact that this was accepted in Wall Street as a legitimate way for investors in a bankrupt corporation to realise their entitlements made no difference. The court looks to the legitimate interest of the assignee in *taking* the assignment, not the interest of the assignor in *making* it.<sup>42</sup> This approach would seem to require any legitimate interest of the assignee to predate the assignment. It would not allow the assignment of a large number of small claims to a commercial aggregator of claims for reasons of efficiency and convenience, an arrangement which met with the approval of Stuart Isaacs QC, sitting as a deputy high court judge, in *Casehub Ltd v. Wolf Cola Ltd*.<sup>43</sup> It might not allow the three personal litigants in *Jeb Recoveries LLP v. Binstock*<sup>44</sup> to assign their claims to a limited liability partnership in which they were the only partners.

What is said to be objectionable about assigning a right to litigate is that this involves trafficking in litigation. But the problem with this is simply assumed, and never really demonstrated. In *Massai Aviation Services v. Attorney General*,<sup>45</sup> Lady Hale pointed out that ‘trafficking’ is a pejorative. In and of itself, it is not objectionable; what matters is the thing being trafficked. If this is people or drugs, it is obviously bad, but why is trafficking in litigation bad? There is no sensible reason to fear that assignment will result in courts getting flooded with bad cases because commercially minded assignees do not buy up weak claims from which they will earn nothing. If a claim is good, why should there be any objection to it being brought by an assignee, especially if the victim of the wrong lacks the means to pursue it?<sup>46</sup> In *SPV Osus*, O’Donnell J maintained that courts were in the business of vindicating people’s rights and resolving disputes between the parties, not in facilitating funders to make profit.<sup>47</sup> ‘It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not’.<sup>48</sup> The rhetoric may be towering but the reasoning does not scale the same heights. There is not a lot of justice in someone with a good claim having to abandon it because they lack the means to assert it. Litigation funding and assignment enable impecunious

parties to achieve a measure of justice; imperfect justice, it may be conceded, but better than none at all.

If the rule about assignments were changed so that they were presumptively valid, there would still be cases where the assignment in the specific case should be barred. Some examples can be given from the reported cases. In *Simpson v. Norwich and Norfolk University Hospital NHS Trust*,<sup>49</sup> Mrs Simpson, whose late husband’s last days in the defendant’s hospital were made more uncomfortable than necessary because he contracted MRSA, took an assignment of another patient’s medical negligence claim for MRSA in order to highlight deficiencies in the defendant’s infection control. She had earlier settled a claim against the trust which she brought on behalf of her husband’s estate. The Court of Appeal refused to allow the assigned claim to proceed because Mrs Simpson lacked a legitimate interest in the assignor’s claim. There was no access to justice grounds capable of supporting this claim because it was sold for a mere £1. It should also be regarded as an abuse of the court’s process. In *Body Corporate 160361 (Fleetwood Apartments) v. BC 2004 Ltd and BC 2009 Ltd*,<sup>50</sup> the assignment to one defendant of the plaintiffs’ claims against two other defendants was declared contrary to public policy because it was potentially going to alter the statutory contribution regime applicable to joint tortfeasors for the benefit of the assignee defendant and to the disadvantage of those other defendants. If access to justice is to be facilitated by permitting more frequent assignment of claims, there will have to be a shift in focus towards allowing assignment unless this is shown to be contrary to public policy in the particular case. The supreme court in *SPV Osus* was against this because it would involve the uncertainty of case-by-case adjudication and satellite litigation.<sup>51</sup> In harmony with the supreme court’s approach in *Persona Digital*, there was a clear preference for the bright line rule over discretionary justice.

So, for the moment at least, Ireland has firmly set her face against the assignment of rights to litigate unless the assignee has a legitimate interest, probably pre-existing the assignment, in the assigned claim. This will effectively prevent assignment from serving as a vehicle allowing claimants to secure more effective access to justice. However, all hope is not lost because the supreme court indicated, mainly through the short concurring judgment of Clarke CJ, that legislative reform consisting of an effective regulatory regime would be welcome. As in *Persona Digital*, it was indicated that the courts may have to take action themselves if the legislature made no effort.<sup>52</sup>

42 See A. Tettenborn, ‘Assignment of Rights to Compensation’, *Lloyd’s Maritime and Commercial Law Quarterly* 398-406, at 392 (2006), criticising the approach of the courts on this ground.

43 [2017] EWHC 1169 (Ch), [2017] 5 Costs LR 835.

44 [2015] EWHC 1063 (Ch). This was to provide the assignors with protection against costs’ liability if their claims failed. Among the reasons why the court upheld the assignment was that the defendant could more easily obtain security for costs against the LLP.

45 [2007] UKPC 12, [19].

46 A.J. Sebok, ‘The Inauthentic Claim’, 64 *Vanderbilt Law Review* 61 (2011).

47 [2018] IESC 44, [86-87].

48 [2018] IESC 44, [91].

49 [2011] EWCA Civ 1149, [2012] QB 640 (CA).

50 [2014] NZHC 1514, [2014] 3 NZLR 758.

51 *SPV Osus Ltd v. HSBC Institutional Trust Services Ireland Ltd* [2018] IESC 44, [82] (O’Donnell J).

52 *Ibid.*, [2.1-2.9].

## 4 Third-Party Costs Orders

The access to justice issue here is the defendant's access to justice.<sup>53</sup> Defendants with limited resources sued by a claimant who lacks the means to pay the defendant's costs should the case fail may find themselves on the horns of a dilemma. It may ultimately be cheaper to settle the claim than to fight the case to judgment and then find that the claimant is unable to satisfy a costs order in the defendant's favour. In Ireland, security for costs may be ordered against the claimant if the latter is based outside the jurisdiction under the Superior Court Rules Order 29 and against a company under Section 52 of the Companies Act 2014, and this provides some measure of protection in advance. But the defendant's application may not succeed and the jurisdiction to award security is available only in the two specific cases mentioned, not simply because the claimant may be unable to satisfy a costs order. Where the litigation is funded by a third party, a costs order against it may be the just price the claimant's side of the dispute has to pay.

The position in England can essentially be stated as follows. Where litigation is funded by a third party for commercial profit and the defendant is the successful party, the funder is likely to be made answerable for the defendant's costs. The jurisdiction to make a third-party costs order is derived from Section 51 of the Senior Courts Act 1981. The House of Lords first recognised this jurisdiction in *Aiden Shipping Co Ltd v. Interbulk Ltd*,<sup>54</sup> and it may potentially be exercised against all third-party funders, whether the financial support is for commercial profit or other reasons. So far as commercial funders are concerned, the position was originally that a third-party costs order was generally limited to the amount of funding they provided. This was the *Arkin* cap, named after the decision in *Arkin v. Borchard Lines Ltd*,<sup>55</sup> and can be explained in terms of the nascent state of litigation funding in England at that time. The courts did not want to place excessively heavy burdens on the third-party funding industry for fear of killing it off altogether. Now that litigation funding is well established in England, it seems that third-party costs orders against commercial funders will not routinely be limited by the *Arkin* cap.<sup>56</sup> Amongst the wide range of other third-party funders are two broad classes of funders to whom a different approach may be taken. First, there are persons connected to the claimant, for example, directors or shareholders of the claimant company or a connected company within the same corporate group. As these persons may stand to benefit from successful litigation but are not normally liable for paying the costs if it fails, a third-party costs order may well be made against

them.<sup>57</sup> Secondly, there are 'pure' funders, who may be members of the claimant's family or other persons supporting the litigation out of sympathy with the claimant. A third-party costs order is not likely to be made against them.<sup>58</sup>

As Ireland does not 'do' commercial litigation funding at present, third-party costs orders will not be made in cases falling into the *Arkin* and *Chapelgate* class. But the supreme court has issued an important judgment in a case where the funder was the majority shareholder in the claimant company and would likely have benefitted handsomely from a successful outcome. This decision, *Moorview Development Ltd v. First Active Plc*,<sup>59</sup> based the jurisdiction to make third-party costs orders on Superior Court Rules Order 15, rule 13, concerned with joining a third party as a party to the action, and Section 53 of the Supreme Court of Judicature Act (Ireland) 1877, which is worded similarly to Section 51 of the Senior Courts Act 1981 in England.

In *Moorview*, the company sued the defendant for a wide range of reliefs arising out of the collapse of a property development project that consigned Moorview to insolvency. The litigation was supported by Moorview's principal shareholder, Mr Brian Cunningham, and in essence alleged that the defendant was responsible for the collapse of the project and Moorview's ensuing insolvency. The case proved to be almost devoid of merit and was dismissed without the necessity of the defendant calling any evidence. The defendant argued that costs should be awarded against Mr Cunningham because of his abuse of the corporate form. As principal shareholder, he stood to benefit from successful proceedings without being liable for costs if it failed. Mr Cunningham argued that this was an illegitimate piercing of the corporate veil but McKechnie J, for the supreme court, had little difficulty rejecting this argument.<sup>60</sup>

Mr Cunningham's second defence had rather more substance to it. This was that third-party costs orders should not be made in cases brought by insolvent companies because the right to seek security for costs provided the defendant with sufficient protection. McKechnie J agreed that security for costs should ordinarily be sought against a potentially insolvent company but failure to do so could not be regarded as a jurisdictional bar. In agreement with Clarke J at first instance, McKechnie J pointed out that where the company was arguing that its insolvent condition was brought about by the defendant's actions, ordering security for costs tended to pre-judge the issue.<sup>61</sup> The claimant's access to justice rights have to be weighed against the defendant's at this point.

McKechnie J provided the following non-exhaustive list of factors that were relevant to the exercise of the judicial discretion to make a third-party costs order in a case

53 D. Capper, 'Three Aspects of Litigation Funding', 70(3) *Northern Ireland Legal Quarterly* 357, 365 (2019).

54 [1986] 1 AC 965 (HL).

55 [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA).

56 *Chapelgate Credit Opportunity Master Fund Ltd v. Money* [2020] EWCA Civ 246 (CA).

57 *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd* [2004] UKPC 39, [2004] 1 WLR 2807 (PC).

58 *Hamilton v. Al Fayed (No 2)* [2002] EWCA Civ 665, [2005] QB 1175 (CA).

59 [2018] IESC 33.

60 [2018] IESC 33, [69-77].

61 [2018] IESC 33, [63].

brought by a company, emphasising that none of them were requirements that had to be satisfied.<sup>62</sup>

- a. The extent to which it might have been reasonable to think that the company could meet any costs if the case failed;
- b. The degree to which the non-party would benefit from the litigation if successful, including whether it had a direct personal financial interest in the result;
- c. The extent to which the non-party was the initiator, funder and/or controller of, and moving party behind, the litigation;
- d. Any factors which may touch on whether the proceedings were pursued reasonably and in a reasonable fashion; the required assessment of the conduct of the proceedings may of course lean either in favour of or against the making of the order sought;
- e. There is no requirement that there be a finding of bad faith, impropriety or fraud, though of course the same, if present, will support the ordering of costs against the non-party;
- f. Whether the non-party was on notice of the intention to apply for a non-party costs order; at what point in the litigation such notice was communicated will also be a relevant consideration, as will the extent of the notice so provided;
- g. Whether the successful party applied for security for costs in advance of the trial;
- h. The Court's discretion is a wide one, but it must be exercised judicially and, in all the circumstances, must give rise to a just result.

Applying these factors to the case at hand, it was clear that the company was hopelessly insolvent and, as principal shareholder, Mr Cunningham would be the person to benefit if the litigation succeeded. The case was wholly without merit and dismissed as disclosing not even a prima facie case. The way in which the proceedings were conducted was wholly unreasonable, having been amended on several occasions as each succeeding line of argument ran out of road.

Factor (f) above was of particular importance in the court's decision, so will be considered separately. To be in a position to give notice to a funder or supporter of the litigation that the defendant intends to seek a third-party costs order, the defendant would need to know the identity of that funder. In jurisdictions where professional third-party funding is permitted, there are procedures enabling the defendant to find this out. For example, in New Zealand, the supreme court decided in *Waterhouse v. Contractors Bonding Ltd*<sup>63</sup> that the identity of a litigation funder should be disclosed as a matter of course at the commencement of the litigation.<sup>64</sup> In Ireland, there is no professional third-party funding, so it is likely only to be in cases of 'pure' funders like Neil

Hamilton's backers in *Hamilton v. Al Fayed (No 2)*<sup>65</sup> where the identity of any funder would be any kind of mystery. In those cases, it is thought likely that Ireland would follow the English practice and not make a third-party costs order against the funder. It would most likely be in cases where a principal shareholder, senior director or other member of a corporate group was backing the claimant where this issue would arise. Here, the presence of likely candidates for litigation supporter would probably be fairly obvious or readily ascertainable, so the giving of notice is not likely to be a serious difficulty.

McKechnie J did not consider the giving of notice of intention to seek a third-party costs order to be a requirement but did state that whether or not notice was given would be a proper matter to take into account in deciding whether to grant the third-party costs order. When notice is given is also important. This should be as soon as the applicant was in a position to demonstrate reasonable grounds for making the application if called upon to do so. In *Moorview*, the letter giving formal notice of the defendant's intention to seek the order was delivered 2 months before the trial was due to begin. Most of the costs in the litigation had still to be incurred at this stage but a still significant sum would have been thrown away if the claimant's funder had withdrawn then. Despite this relatively late notice, the third-party costs order was still made, the court taking account of the fact that this was the first case recognising the power of the Irish courts to make orders of this kind.<sup>66</sup>

The issue of notice of intention to seek a third-party costs order returned to the supreme court in *WL Construction Ltd v. Chawke and Bohan*.<sup>67</sup> An important feature of this case was that the first instance and Court of Appeal decisions in this case predated the supreme court's decision in *Moorview Development Ltd v. First Active Plc*. The claimant company sued the defendants for payment for work done under a building contract. The company's claim was riddled with inconsistency and reliant upon perjured evidence given by its principal shareholder, Mr Loughnane. It was dismissed by the trial judge, Noonan J, as failing to demonstrate any prima facie case. The judge made a third-party costs order against Mr Loughnane in large measure because of his litigation misconduct and because he would benefit from a judgment in the company's favour without being liable for costs if the case was lost. The company was not so hopelessly insolvent as the claimant company in *Moorview* but a very similar kind of abuse of the corporate form would have occurred if Mr Loughnane had not been made to pay costs. The notice issue was that Mr Loughnane had not been given any notice of intention to seek a third-party costs order against him.

Noonan J regarded the lack of notice as immaterial. The defendants could not know the findings of the court until the evidence had been given and were not expected to

62 [2018] IESC 33, [125].

63 [2013] NZSC 89.

64 This issue is discussed more thoroughly in D. Capper, 'Three Aspects of Litigation Funding', 70(3) *Northern Ireland Legal Quarterly* 357, 368 (2019).

65 [2002] EWCA Civ 665, [2003] QB 1175 (CA).

66 [2018] IESC 33, [111-121].

67 [2019] IESC 74.

alert Mr Loughnane in advance of any suspicions they had about the veracity of the case he was making against them, being entitled to keep their powder dry for cross-examination.<sup>68</sup> The Court of Appeal allowed Mr Loughnane's appeal, Hogan J describing the failure to give him notice as a due process violation contrary to the fair procedures guaranteed by Article 40.3 of the Constitution.<sup>69</sup> In the supreme court, Mr Loughnane argued that he should have been given some notice of the intention to seek a third-party costs order before the hearing commenced, and that this could have been done without disclosing any information about likely lines of cross-examination. Notwithstanding this argument, the supreme court allowed the defendants' appeal and reinstated the third-party costs order. Although the supreme court's judgment in *Moorview* had not been delivered at the time of the high court and Court of Appeal decisions in this case the jurisdiction to make third-party costs orders had been recognised in three other first instance judgments by that time.<sup>70</sup> Furthermore, this was a truly exceptional case 'permeated by the dishonesty of Mr Loughnane' and his abuse of the corporate form.<sup>71</sup> Giving notice, like all other factors in the exercise of this judicial discretion, is a factor to be weighed in the balance and not a requirement.

A third-party costs order was made against an insolvent company's liquidator in *Eteams International v. Bank of Ireland*.<sup>72</sup> The liquidator caused the company to bring proceedings challenging a sale of the company's uncollected book debts to the bank as an unregistered charge. The litigation was unsuccessful although the Court of Appeal observed that it was far from frivolous or vexatious. The point in issue had not been determined in Ireland and involved extensive consideration of authority from 'the neighbouring jurisdiction' (England). The reason for making the third-party costs order against the liquidator stemmed from the company's lack of standing to bring the proceedings itself. Section 280(1) of the Companies Act 1963 allowed the liquidator, or any contributory or creditor, to apply to the court to determine any question arising in the winding up of the company, but not the company itself. This was confirmed by the decision of the Court of Appeal in *Tucon Process Installations Ltd v. Cooney*.<sup>73</sup> If the liquidator had brought these proceedings himself and costs had been awarded against him, he would have been entitled to an indemnity from the company that would have ranked as a first priority expense in the liquidation. No evidence was provided to the court as to why the liquidator caused the company to bring the proceedings, whether because he feared it was so insolvent it would be unable to indem-

nify him had he brought them himself or for any other reason.

In making the third-party costs order, the supreme court leaned particularly on factors (d) to (h) from McKechnie J's judgment in *Moorview*.<sup>74</sup> In light of the Court of Appeal's decision in *Tucon*, the decision to continue the proceedings in the company's name 'pushed the borders of reasonableness'<sup>75</sup> under factor (d). There was no bad faith or fraudulent intent within the meaning of factor (e) but there was 'impropriety'.<sup>76</sup> The bank had placed both the company and the liquidator squarely on notice of its intention to seek costs against the liquidator personally, although no application for security for costs was ever made.<sup>77</sup> The liquidator argued that he had not used the corporate entity in his own self-interest, seeking only to recover money for the benefit of creditors. MacMenamin J acknowledged this but pointed out that the liquidator had offered no explanation as to why he had proceeded in the way he did.<sup>78</sup>

Two judgments of the supreme court above (*Moorview* and *WL Construction Ltd*) show a refreshing willingness to make people responsible for bringing meritless cases into court pay for wasting the court's time, causing delays throughout the civil justice system, and exposing defendants to potentially heavy costs burdens in proving they were not responsible for the claimant's alleged losses. Yet there remains some tension between these decisions and the supreme court's decisions refusing to recognise commercial litigation funding and assignment. Mr Cunningham and Mr Loughnane would still have had to pay their own legal teams for presenting these cases in the event that the claims failed, unless the lawyers were acting on a speculative basis, unlikely given the probable costs involved. They were not permitted to seek financial assistance from a third-party funder. One cannot help but think that had their cases been subjected to rigorous scrutiny by a commercially minded litigation funder, they might possibly have seen the light and abandoned their claims. Two very expensive litigation debacles might have been avoided. *Eteams* was a very different kind of case, with less in the way of access to justice issues, as the defendant bank was not a party of limited means. However, the proper procedure should still be used and well-resourced defendants not avoidably exposed to irrecoverable costs orders.

## 5 Conclusion – Reform

Although the jurisprudence of the Irish courts about maintenance and champerty is full of references to how these principles are not to be extended and must be adapted to changing circumstances, the outcome of the decisions suggests that the courts are trapped in some

68 [2019] IESC 74, [19] (O'Malley J).

69 [2019] IESC 74, [22].

70 [2019] IESC 74, [61], citing *Thema International Fund Plc v. HSBC* [2011] 3 IR 654 (Clarke J); *Used Car Importers of Ireland v. Minister for Finance* [2014] IEHC 256 (Gilligan J); *McCann v. Trustees of Victory Christian Fellowship* [2014] IEHC 655 (Donnelly J).

71 [2019] IESC 74, [67].

72 [2020] IESC 23.

73 [2016] IECA 211.

74 [2018] IESC 33, [63], [125].

75 [2020] IESC 23, [34] (McMenamin J).

76 [2020] IESC 23, [34].

77 [2020] IESC 23, [34-35].

78 [2020] IESC 23, [37], [39].

kind of time warp. Financial support for litigation from a commercial funder is maintenance and champerty per se. A principle that was grounded in the need to protect the purity of justice continues to regard commercial funding of litigation as an evil to be avoided when courts in England, where these ancient principles originated, have recognised that what was true of medieval times is no longer true today.

Irish law on assignment of rights to sue has not moved on from the *Trendtex* decision in the early 1980s. Courts then looked to the legitimate interest of the assignee in justifying the assignment of a right to litigate because that was a more innocent age when the access to justice problem was nothing like so dire as it is today. The legitimate interest of the assignor needs to be afforded considerably more weight than it currently receives.

The need for proper regulation of the litigation funding industry is acknowledged and the preference for a statutory scheme recommended by the Law Reform Commission and approved by the legislature is understandable. But is there really any reason why Ireland could not follow the English practice of self-regulation through the Association of Litigation Funders' (ALF) Code of Practice? Concern has been expressed, as noted above, that a significant number of litigation finance providers are not members of the ALF. That concern should not be overemphasised. This is an extremely tough market in which to make profit. Funders must get their due diligence right. They must back winners. Funding losing cases will lead to insolvency. To be a successful operator will require a company to be very well run and staffed by highly competent personnel. Operators unable to adhere to high standards in the matters listed above will not live long as the experience of the claims' management companies of yesteryear surely demonstrates. The *Excalibur* debacle,<sup>79</sup> where the non-ALF funder was required to pay the successful defendant's costs on an indemnity basis, should surely serve as a powerful signal that membership of the ALF and adherence to its rules is the only way.

We conclude with a brief account of where the reform process in Ireland is going. In 2016, the Law Reform Commission published an issues paper on the subject of contempt of court and other torts and offences concerned with the administration of justice.<sup>80</sup> This contained a list of the following questions relating to maintenance and champerty:

- a. Should the crimes and torts of maintenance and champerty be retained or abolished: (a) as crimes; (b) as torts?
- b. If the answer to 6(a) is that they should be abolished, should evidence that an agreement is champertous render it void?
- c. Should third-party funding of litigation be permitted? If so, in what circumstances?

- d. If permitted, should third-party funding be regulated by legislation or should it be subject to self-regulation?

It should be noted that the list above was only a small part of a longer issues paper. It was part of the Law Reform Commission's fourth programme of law reform but has not been carried forward into the fifth programme that commenced in 2019. However, the author has been informed that the Commission is still considering litigation funding and intends to publish a report on it.

The issues discussed in the current paper were the subject of some consideration by the *Review of the Administration of Civil Justice* published in October 2020.<sup>81</sup> Chapter 9 of this report contains some recommendations of significance in the present context. To deal with the problem of high costs, a majority recommendation favoured a set of non-binding guidelines on costs levels, while a minority recommendation favoured maximum costs levels with safeguards for exceptional cases. As far as third-party litigation funding was concerned, the review acknowledged the improved access to justice this could deliver for poorly resourced claimants. But it was also conscious of what it described as the risk of 'commoditisation' of litigation, including the incentivising of dubious claims and the imposition of a 'litigation culture' on an already heavily burdened court system. It was considered that a more detailed examination of this topic by the Law Reform Commission should be awaited. Third-party litigation funding should be made available for insolvency office holders trying to pursue claims and recover assets for the benefit of creditors. The review was against the adoption of contingency fees as it feared this would encourage a litigation culture. No recommendation for reform of protective costs orders was made as it was felt that the common law could develop sufficiently in relation to that.

There does not appear to be much air of urgency in all this, which is disappointing in view of the serious issues raised in this paper. It could also prove to be something of a missed opportunity in another sense. Brexit has left Ireland as one of only two common law jurisdictions in the European Union, the other being Cyprus. A legal services hub, including dispute resolution services, could be developed for international litigation. Litigation funding would surely facilitate disputants to use this hub and lucrative invisible income could be generated. If this income stream were to flow, one imagines that the resources necessary to capture it, more courts, judges and arbitrators, would surely follow. The Civil Justice Review's concerns about over-burdening the court system would probably dissolve in that eventuality.

79 *Excalibur Ventures LLC v. Texas Keystone Inc* [2016] EWCA Civ 1144, [2017] 1 WLR 2221 (CA).

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

81 *Review of the Administration of Civil Justice* (Department of Justice and Equality, October 2020).