

# The NUMBERS game



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**Crowdfunding has been successfully harnessed for financing legal actions in other jurisdictions. But what about Ireland – does this relatively modern phenomenon have potential here? Malachy Ryan crunches the numbers**

**I**n jurisdictions outside of Ireland, third-party funding (both crowd and private) has been successfully harnessed in the financing of legal actions. Platforms have developed that focus on specific legal areas. Particular platforms tend to avoid personal injury, divorce, and defamation in favour of commercial actions. Others place their focus on public-interest cases.

**Harbour Litigation Funding**, a British platform, has capital of Stg£400 million with which to fund cases and is currently the potential funder of a case before the Irish High Court (discussed later in this article), the outcome of which will be critical to the future of crowdfunding in Ireland.

A separate British platform, **CrowdJustice**, works on the donation model (see panel, p34), with excess profits donated to the **Access to Justice Foundation**. This charity fights public-interest cases and is currently funding a case taken by a Colombian trade union against a major British oil company.

Litigation crowdfunding in the US is now an established method of raising finance, with companies such as **LexShares** funding cases, some with a \$40 million claim value. The LexShares model works by allowing plaintiffs and attorneys to register their cases on the website, provided they meet the required criteria (for example, a high probability of success and a credible legal team). Investors also register with the website and choose which actions to fund. Platforms such as **Funded Justice** also fund smaller, less lucrative cases. Michael Helfand,

## at a glance

- The high cost of funding legal actions leaves many without redress and has resulted in perceptions of a two-tier legal system
- While the courts uphold the fundamental principles of justice and fairness within the courtroom, the financial barriers to entry are often prohibitive for legitimate plaintiffs
- In light of developments in other jurisdictions and the changes that crowdfunding has introduced, it is difficult to see how the Irish legal sector can continue to be isolated from international trends on the basis of what are seen in other jurisdictions as archaic torts





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a Chicago attorney and founder of Funded Justice, gives the example of an abused spouse who cannot fund her divorce as her spouse controls her finances.

### The price is right

The Financial Conduct Authority (FCA) in Britain published a 2014 policy statement that, while not specifically addressing crowdfunding for litigation, outlined the rules regulating the crowdfunding sector in general. The FCA has recognised the high-risk nature of investment-based crowdfunding, which is most analogous to crowdfunding for litigation.

The rules it has developed concern the provision of adequate information surrounding the investment. They require, for example, that investors must be sophisticated or high-net-worth individuals, or investing less than 10% of their net assets. When one considers the complexities of a large-scale commercial action, adequate provision of information regarding the risks involved is a high bar indeed, and could lead to disclosure of information to the other side.

The Association of Litigation Funders of England and Wales published a 2014 code of conduct that applies to subscribing members. The code includes provisions requiring members to undergo annual external audits and have a Stg£2 million minimum capital requirement. Crucially, member funders are

prohibited from taking control of litigation or settlement negotiations, and from causing the litigant's lawyers to act in breach of their professional duties. While helpful, these rules only apply to subscribing members.

Third-party financing of litigation in Britain was given an additional level of certainty in the 2005 case of *Arkin v Bochard Lines Ltd and others*. This established what is now known as the 'Arkin cap' – a third-party funder's liability to costs is capped at the amount of its contribution. However, some commentators foresee situations where investors may have to sign up to an indemnity for costs or similar arrangement. This, once again, puts the emphasis on the proper provision of information pre-investment.

### Countdown

The main obstacles to Ireland utilising crowdfunding for litigation are the medieval torts of maintenance and champerty.

Maintenance is defined in *Murdoch's Dictionary of Irish Law* as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither

an interest in the action nor any other motive, recognised by law, as justifying his interference".

Champerty is defined by Curzon's *Dictionary of Law* as the "maintenance of a person in a lawsuit on condition that the subject matter of the action is to be shared with the maintainer". Thus, the person funding the case receives a portion of the award.

The prohibition of these torts stems from the belief that people should not be able to 'traffic' in litigation. The courts continue to express their aversion towards both torts due to the fear of encouraging spurious litigation.

England and Wales abolished the torts of champerty and maintenance as far back as 1967 via sections 13 and 14 of the *Criminal Law Act 1967*. New South Wales followed suit in the *Maintenance, Champerty and Barratry Abolition Act 1993*. Ireland, however, has not only kept both torts on the books,

but the Law Reform Commission (LRC 97-2010) recommended that both maintenance and champerty are retained in law in Ireland.

This position was confirmed in the Commercial Court by Mr Justice Clarke in the 2011 case of *Thema International Fund PLC v HSBC Institutional Trust Services (Ireland) Limited and others*. Notwithstanding the judge's reiteration of the prohibition on maintenance and champerty, he went on to find that a shareholder of a company involved in the litigation or an entity in a creditor relationship with the plaintiff could help finance the action.

Further judicial examination came in the 2014 case of *Greenclean Waste Management Limited v Leahy p/a Maurice Leahy Wade & Company Solicitors (No 2)*, which concerned the use of after-the-event insurance. Such insurance is designed to protect the plaintiff from paying the defendant's costs. The plaintiff, a "hopelessly insolvent" company, was suing its solicitors for professional negligence for not adequately advising it of obligations under a covenant to repair contained in a commercial lease. In light of the impecuniousness of the plaintiff, the defendant sought an order for security of costs under section 390 of the *Companies Act 1963*.

The High Court was asked to consider whether assistance via the after the-event (ATE) insurance policy was, in fact, maintenance or champerty. Mr Justice Hogan reiterated that agreements involving maintenance or

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### FOCAL POINT

## what it says on the tin

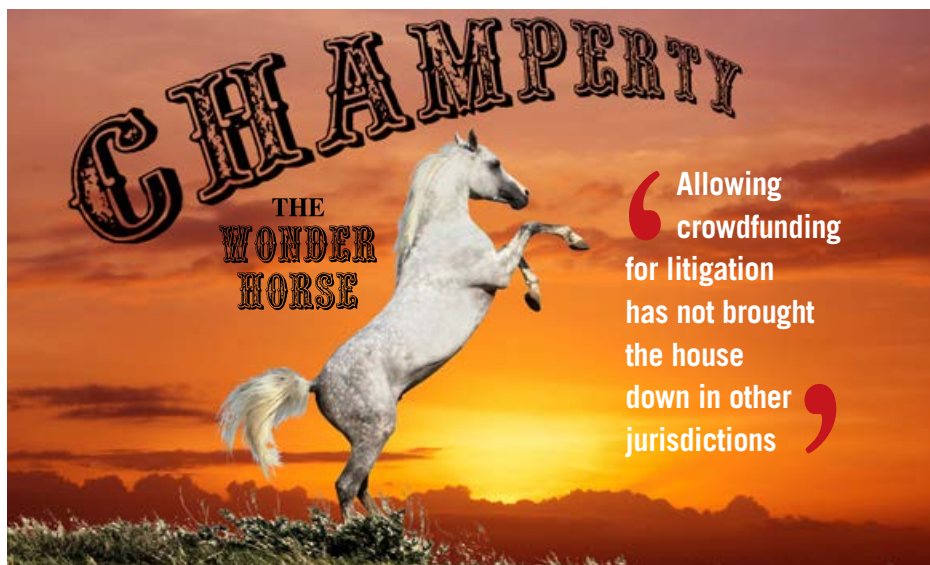
Crowdfunding is as it says – obtaining funding for a variety of purposes from as many parties as are willing to invest or contribute. The purposes of those seeking funding are as varied as the investors who participate. Many successful online platforms designed to facilitate crowdfunding have developed and are now regulated in England and Wales by the Financial Conduct Authority.

Crowdfunding in Ireland is not specifically regulated, therefore funding platforms require careful advice so as to avoid falling under the established definitions of a 'banking business' or within the *Prospectus (Directive 2003/71/EC) Regulations 2005*, the *European Communities (Payment Services) Regulations 2009* or the *Collective Investment Scheme Regulations*. According to the FCA (in a 2015 paper), almost Stg£1.3 billion in financing was raised through crowdfunding in Britain alone in 2014.

Crowdfunding can be divided into two categories:

- The non-financial return category, which is donation based, pre-payment or rewards-based (people give money to receive a reward, service or product), and
- The financial return models (investment in return for the issuing of equity or debt securities or units in a collective investment scheme or the lending of money in return for a financial reward), all of which have different characteristics for those seeking the money and those giving the money.

The concept of the non-financial reward model is not new and has been around for centuries – for example, appeals made to the public for funds to achieve common good objectives, such as the Statue of Liberty. Indeed, crowdfunding has been mentioned as an important source of future funding for charities.



champerty would be held void for public policy. However, he went on to say that “while the general parameters of the torts of champerty and maintenance are clear, the modern application of these principles is not frozen by reference to the social conditions and public policy considerations which pertained several hundred years ago. The law must accordingly move on and assess whether, by reference to modern conceptions of propriety, ATE insurance amounts to trafficking in litigation. For the reasons I have given, I conclude that, on the whole, it does not and that insofar as the insurer provides financial assistance to the litigant, it has a legitimate interest in the outcome.”

It must be noted that this case was appealed to the Court of Appeal, which delivered judgment on 8 May 2015, finding that Judge Hogan had erred in on focusing only on the prospectus clause of the ATE policy, which allowed the insurer the void the policy for a myriad of reasons.

While an ATE policy is conceptually very different to a crowdfunding model of financing litigation, the above cases demonstrate how the Irish legal system is being forced to examine analogous international developments that raise valid questions of both the maintenance and champerty rules.

#### Deal or no deal?

In light of developments in other jurisdictions and the changes that crowdfunding has introduced, it is difficult to see how the Irish legal sector can continue to be isolated from international trends on the basis of what are seen in other jurisdictions as archaic torts. Indeed, the very question of crowdfunded litigation is now directly before the courts in a case involving the Persona/Sigma consortium.

The consortium was a bidder in the 1996 competition to secure the 2G mobile phone network licence in Ireland awarded to ESAT Digifone.

As the consortium cannot fund the action, it is proposed that the case be funded by the British funder, Harbour Litigation Funding. An affidavit of a director of both companies in the consortium states Harbour Litigation’s role in the process is limited solely to being a funder; it cannot halt proceedings or change counsel, and it must at all times abide by the code of conduct required by Association of Litigation Funders.


Counsel for the defendants are seeking disclosure of the funding arrangement and claim that it is contrary to the rules of maintenance and champerty. Counsel for the plaintiff state that there is no valid reason for this information to be divulged and, indeed, it may give the defendants a significant advantage – it may allow them to know at what point funding would be stopped. The decision of Ms Justice Donnelly is expected in the coming days and will have huge implications for the sector in Ireland.

#### Wheel of fortune

Access to justice is a cornerstone of common law jurisprudence. The high cost of funding legal actions leaves many without redress and has resulted in a perceived two-tier legal system, in which justice is far from blind. While the courts uphold the fundamental principles of justice and fairness within the courtroom, the financial barriers to entry often prohibit legitimate plaintiffs from even climbing the steps.

Allowing crowdfunding for litigation has not brought the house down in other jurisdictions. In fact, organisations such as CrowdJustice have shown how they can promote and often be the only parties available to facilitate the legal rights

of those who cannot afford it. The litigation funders take their businesses seriously; only cases with a strong chance of success and good legal counsel are funded. This, in itself, reduces the likelihood of spurious litigation. This is underpinned by the judiciary, who have been effective guardians of the floodgates. A regulatory framework similar to that of Britain could be imposed on the sector with the addition of judicial insights, such as the *Arkin* cap.

Depending on Ms Justice Donnelly’s judgement in the Persona/Sigma case, we may see change sooner than rather than later. However, it is more likely that legislative intervention of the type effected in England and Wales and Australia will be required to properly facilitate crowdfunding for litigation in Ireland. In many ways, Ireland is behind the curve in not allowing crowdfunding for litigation. It is not a panacea to the problem of access to justice, but it certainly  is a step in the right direction.

### look it up

#### Cases:

- *Arkin v Bochard Lines Ltd and others* [2005] EWCA Civ 655
- *Greenclean Waste Management Limited v Leahy p/a Maurice Leahy Wade & Company Solicitors (No 2)* [2014] IEHC 314
- *Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy Wade & Company Solicitors* [2015] IECA 97
- *Thema International Fund PLC v HSBC Institutional Trust Services (Ireland) Limited and others* [2011] IEHC 357

#### Legislation:

- *Criminal Law Act 1967* (Britain)
- *European Communities (Payment Services) Regulations 2009*
- *Maintenance, Champerty and Barratry Abolition Act 1993* (New South Wales)
- *Prospectus (Directive 2003/71/EC) Regulations 2005*

#### Literature:

- Financial Conduct Authority (Britain) (2014), *A Review of the Regulatory Regime for Crowdfunding and the Promotion of Non-readily Realisable Securities by other Media*
- Law Reform Commission report (97-2010), *Consolidation and Reform of the Courts Acts*