

Time warp

The Irish ruling in *Persona* is a 21st century case hamstrung by antiquity, argues **Stephen O'Dowd**

There are moments in a career that live long in the memory. Having considered hundreds of applications for Harbour's funding since I joined in 2011, few have been as compelling as the application made by Tony Boyle, director of Persona Digital Telephony and Sigma Wireless Networks Ltd, on 24 April 2013.

In my first conversation with him he described an extraordinary fight for justice that, without litigation funding, would wither and die on the vine. This was a fight Persona and Sigma had waged against the Irish state for nearly 20 years. It also involved one of Ireland's richest citizens, and it was a fight that had left the claimants financially exhausted.

The extraordinary nature of the Persona/Sigma case is encapsulated in these comments of the Irish Supreme Court.

Justice Clarke: '...should the allegations made come to be proven in a court of competent jurisdiction they would amount to among the most serious factual findings that would have been made by a court in this jurisdiction since the foundation of the state.'

Justice McKechnie '...it is important to understand the uniqueness of the case. It is not merely unusual or odd. It is not simply a case of a kind rarely met with. It is unique. There is no precedent at all; I have never heard of anything like it in this jurisdiction.'

BACKGROUND

The case concerns allegations of a state-run procurement process infected by corruption. Several parties, including Persona and Sigma, bid for a lucrative mobile network licence. Ultimately, the licence was awarded to Denis O'Brien, who created a business with it; one that he subsequently sold to BT for €1.5bn.

A government inquiry followed, one that lasted 12 years and concluded that Mr O'Brien was awarded the licence because he bribed the Irish state minister responsible for the procurement process; allegations that O'Brien has always denied. For Persona and Sigma, it was now a matter of proving the conclusions of the Moriarty Tribunal in the Irish High Court, but they found themselves unable to do so without financial help. Seeking access to justice, they turned to Harbour.

MAINTENANCE AND CHAMPERTY IN IRELAND

My first conversation with Tony involved summarising the ancient doctrines of maintenance and champerty, which concern the financial support of litigation by a stranger. Thankfully, such topics of conversation are rare because the doctrines are antiquated and largely obsolete. However, Ireland has yet to abolish civil and criminal liability for these restrictions, which arose to combat abuses in medieval England by feuding barons.

Incredible as it may seem, I had to explain that 14th century restrictions could frustrate a case involving the procurement of a network licence for mobile telephones.

FUNDING APPROVAL

It was resolved that Persona and Sigma would ask the Irish court to consider the permissibility of a funding arrangement with Harbour – specifically whether the arrangement was contrary to public policy and/or an abuse of process for involving excessive control or disproportionate profit.

The application for funding approval was hotly contested by the Irish state and Mr O'Brien, and evolved into a two-year battle that culminated in a hearing before the Irish Supreme Court. The court accepted a leapfrog appeal on the basis that the issues at stake were of



great public importance.

On 23 May 2017, the Supreme Court made a 4-1 majority decision that the funding arrangement with Harbour was void. This decision was made despite the court's acceptance that Persona and Sigma did not have the financial resources to continue their legal proceedings.

In delivering its decision, the Supreme Court made the following observations. Justice Dunne: '...since the foundation of the state, no prosecution has been brought against anyone in respect of the offences of maintenance and champerty... The offences remain on the statute book despite the fact that they have not been the subject of any prosecution in living memory.'

Justice MacMenamin: ‘There is at least an arguable case that maintenance and champerty have fallen into disuse.’

Justice Clarke: ‘It is difficult to take an overview of the circumstances of this case without a significant feeling of disquiet. Serious allegations are made against the state and others...[if proven] they would amount to amongst the most serious factual findings that would have been made by a court in this jurisdiction since the foundation of the state...it is at least arguable that there is a very real problem in practice about access to justice.’

Justice Denham: ‘I do have a concern that the defendants and third party who vigorously opposed the plaintiffs’ motion are beneficiaries if the case does not proceed.’

Justice McKechnie: ‘It is of immense concern that legislation of such enormous antiquity has the capacity of preventing any merit review of such allegations. Such, however, is what the defendants and the third party in this case agitate, precisely the same parties who would, if the allegations were sustained, be damnified in a manner heretofore unexpressed in the state’s history.’

‘The significance therefore of the decision arrived at on this application and its consequences cannot be overstated... It will surprise most lay people – and surely many on the professional side as well – that the more recent of the three statutes in play was enacted almost four hundred years ago; the earliest of the three, because of its antiquity, cannot be dated, with the best estimate being somewhere in the mid-

14th century....

‘It is clear that the state’s interests are not prejudiced by the funding arrangement in place, and neither has any legal or constitutional right of theirs been in any way impaired. If there is truth to the allegations made... justice demands that such be determined in a court of law.’

CONCLUSION

The English Criminal Law Act of 1967 abolished criminal and civil liability for maintenance and champerty. In 2013, at Harbour’s inaugural annual lecture, Lord Neuberger – the president of the Supreme Court of England and Wales – said: ‘...access to the courts is a right and the state should not stand in the way of individuals availing themselves of that right’.

It is important that a case such as the Persona/Sigma case can be litigated in a mature democracy. No case of this nature should be hamstrung by antiquity.

The Irish Supreme Court’s expressions of disquiet and the judges’ immense concern at their own decision are perhaps extraordinary, but they are of little practical assistance to Persona and Sigma.

Will the court’s decision spell the end of Persona’s and Sigma’s fight for justice? I believe not.

Stephen O’Dowd is senior director of litigation funding at Harbour Litigation Funding.

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