Dispute resolution funding has been in the spotlight in Ireland following the delivery of the Persona judgment by the Irish Supreme Court in May last year. In this edition of Vannin Capital’s In Conversation Series, Managing Director Rosemary Ioannou talks to Gavin Smith, Partner at Walkers Global on the growing demand for dispute resolution funding in Ireland with reference to the Persona judgment and other industry developments that are driving demand for change.

Rosemary Ioannou (RI): What is the current state of the law in respect to litigation funding in Ireland?

Gavin Smith (GS): A third party professional litigation funding agreement to support a party in legal proceedings ("LFA") is prohibited under Irish law as matters stand. I should add for completeness sake that a third party with legitimate interest in the proceedings, e.g. a creditor or a shareholder of a company that is a party to the litigation in question is permissible under Irish law. However, such third party funders risk being made liable for the costs of litigation if the party that they are funding ultimately loses the case in question.

The principal restrictions on professional third party litigation funding in Ireland arise from the torts of maintenance and champerty that were originally legislated for in the Maintenance and Embracery Act 1634 which was retained by the Statute Law Revision Act 2007. Whilst certain sections of the Maintenance and Embracery Act 1634 were repealed by the Land Law and Conveyancing Reform Act 2009, the sections addressing maintenance and champerty remain in force and were recently applied in the high profile Irish Supreme Court 2017 decision in Persona Digital Telephony Limited & Anor v Minister for Public Enterprise & Ors¹ ("Persona").

In that case, the Supreme Court of Ireland were, on appeal, asked to consider the legality of LFA to support a plaintiff in a public procurement a case relating to the historic award of Ireland’s second mobile telephone licence. The five judge panel ruled 4:1 in favour of dismissing the appeal and held that the LFA offended against the rules of maintenance and champerty. However, in so doing, the Irish Supreme Court stressed that it might well be appropriate to have a modern law on champerty and third party funding of litigation but that this choice of policy solution was very much a matter for the legislator or the Executive and not for the Courts.
Whilst after-the-event insurance policies, which cover the risk of adverse costs orders and certain disbursements, are considered permissible under Irish law\(^3\) they do not address the principal issues faced by parties funding litigation.

RI: Do you perceive there to be a need for the position to change?

GS: Yes I do. I think it is fair to say that the generally held view, today, among commercial litigation and dispute resolution practitioners in Ireland, is that a reform of the law that facilitates, albeit subject to appropriate criteria and parameters, litigation funding is something that clients really want and need.

Ireland is not alone in this, but the costs of running a significant commercial case has grown exponentially over the last decade or so - largely to do with the burden of complying with disclosure obligations given the vast growth in the amount of electronically stored information which requires to be assembled and searched for relevance. Indeed, I would go so far as to say that Ireland’s civil justice system has a problem in that it is currently precluding many parties from effectively vindicating their rights through prosecuting or defending proceedings by not having access to third party litigation funding.

RI: I understand that there was a very recent decision by the Supreme Court of Ireland which commented on funding?

GS: A decision was delivered by the Irish Supreme Court on 31 July 2018 in the case of SPV Osus Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors\(^4\). The case examined the torts champerty and maintenance in the context of assignment of claims (connected with Bernard L. Madoff Ponzi scheme litigation) rather than third party funding agreements. The judgment now establishes conclusively as a matter of Irish law that the assignment of the right to litigate is unenforceable unless the assignee has a genuine commercial interest in the assignment. This is in line with the English House of Lords decision in Trendtex\(^5\). Of greater significance from a litigation funding perspective, however, were the obiter remarks of Chief Justice Frank Clarke in his written judgment. He referred to his prior comments in his decision in the Persona case on LFAs and stated that “… there is a significant and, arguably, increasing problem with access to funding as a result of the costs associated with litigation”.

\(^3\) Greenclean Waste Management Limited v Leahy (No. 2) [2014] IEHC 314.
\(^4\) [2018] IESC 44.
\(^5\) Trendtex v. Credit Suisse [1980] Q.B. 629
to justice which arises in the context of the increasingly complex world in which we live, which in turn has increased the complexity of much litigation not least in the commercial field... I would wish to emphasise that I remain strongly of the view that it is necessary that some measures be taken to attempt to address this problem.... However, I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should give urgent consideration”.

RI: Practically, how far-reaching are those comments?

GS: It doesn’t change the legal position in that that professional third party LFAs are still unlawful in Ireland. However, the Chief Justice’s comments represent the most emphatic statement yet on the need for legislative consideration of litigation funding. It should also be noted that the Chief Justice, in calling on the legislature to take action, cautioned that if it failed to do so and an individual’s constitutional right of access to justice was breached as a result, the courts might have to step in to alter the parameters of the law of champerty.

RI: What do you anticipate the timing for any statutory change may be?

GS: In fairness to the Irish government, there is prior form in terms of taking corrective action where the Supreme Court highlights an urgent need for legislative reform. The judgment was delivered on the last day of the court term on 31 July 2018. I remain hopeful that we will see legislative proposals on litigation funding in the near term.

Watch this space!

[2018] IESC 44 at paras 2.1 to 2.9.
RI: Do you think that funding will be embraced by the disputes community in Ireland?

GS: Yes I do.

RI: Why do you think that would be?

GS: In this day and age, our clients are sophisticated and commercially focused. They demand clever solutions and options from their advisors. Certainly, from my perspective in Walkers, most of our clients are international financial services clients. They are well aware of and utilise LFAs in other jurisdictions, and if anything, are probably frustrated that it is not something that can be explored here. Therefore, if LFAs were legally permissible in this jurisdiction, I think there would be significant take up. In terms of traction early on, I think this would be especially true in the insolvency litigation space for reasons I have outlined earlier. I would add, however, that Ireland is a much smaller jurisdiction than the UK or Australia for example. Scale may dictate the type and number of litigation funders that enter the disputes market here. Take up will, I think, be impacted by the commercial terms available which in turn may be affected by the degree of competition for this business. Like any emerging market, I suspect that will develop over time.

RI: More generally, considering the Irish dispute resolution market, what cases are most frequently crossing your desk at the moment?

GS: Being a financial services-focused firm, we are still seeing more than our fair share of distressed debt and insolvency litigation cases. If you look at the commercial list of the High Court as a fairly decent barometer for trends in commercial litigation in Ireland, we still see approximately 50-60% of applications for entry to that list, involve non-performing loan (NPL) related litigation. This might surprise onlookers in terms of
where Ireland stands generally speaking in the economic cycle. However, there has been a lot of activity in recent years in terms of Non-performing loan ("NPL") sales from the major financial institutions (as they recalibrate their respective balance sheets) to mostly private equity players. The upshot of that activity from a dispute resolution perspective is that a lot of cases that would have been taken or progressed earlier were deferred or stayed while the loans and security were sold and so we are still in 2018 seeing cases emerge or progress as the new NPL holders deal with their loan portfolios.

The other major trend in the dispute resolution market in Ireland is in the financial services regulatory space, another sweet spot for Walkers.

The banking and financial crisis that emerged in 2008 brought home the need for certain fundamental legal reforms. In particular, it pointed to the importance of ensuring that financial and economic regulators have at their disposal sufficiently robust and comprehensive powers to discharge their functions effectively. The enforcement directorate of the Central Bank of Ireland (CBI) has grown hugely in the last number of years and the number of investigations and administrative sanction procedures that have been invoked by the CBI have risen sharply. We work closely with our Financial Services Regulatory group in representing financial institutions in relation to such procedures and any settlements arising from same. I would also see litigation arising from GDPR as one to watch in the near future.

RI: Are you seeing an increase in cases with Brexit looming or do you anticipate that there will be?

Certainly, we are seeing a significant increase in the utilisation of the Irish courts in the context of EU cross border merger applications in the context of Brexit related relocation of business from the City of London due to Brexit.

In terms of horizon scanning, the departure of the United Kingdom from the European Union in March 2019 will have a significant impact on Ireland. Depending on how things play out, it is quite possible Ireland will become a much more popular legal jurisdiction for directors of international corporates and their advisors to consider on the basis of;
• our pro-business, English speaking, common Law justice system;

• the Irish judiciary’s international record of integrity, commercial awareness, fairness and impartiality;

• the experience and expertise of the Irish legal profession;

• the record and commitment of the Irish Government to respond to the changing nature and demands of international business e.g. through the set up of our fast track Commercial Court in 2004, our dedicated Competition list, the adoption of the UNCITRAL Model law in the Arbitration Act 2010, and

• the advantages arising from Ireland’s continued membership of the European Union, including that Irish judicial decisions are recognised and enforced throughout the European Union7, the benefits of uniform interpretation of rules regarding jurisdiction and choice of law and the ability for other legal procedures in Ireland to be recognised and enforced throughout the European Union (including insolvency proceedings where the “centre of main interest” is in Ireland).

Walkers’ Dispute Resolution & Insolvency practice in Ireland is led by partner Gavin Smith, who has been practising exclusively in that arena for over 17 years.

Gavin has extensive experience in a wide range of litigation and dispute resolution matters with particular emphasis on financial services litigation, financial services regulatory investigations and disputes, high value claims in contract and tort, shareholder and investment disputes, securities litigation and insider dealing proceedings, professional negligence, judicial review proceedings, pension scheme disputes and policy disputes in insurance and reinsurance contracts.

He has significant experience in relation to Irish High Court, Commercial Court, Court of Appeal and Supreme Court proceedings and other alternative dispute resolution mechanisms such as arbitration and mediation.

In addition Gavin has also acted for insolvency practitioners, companies and creditors in many recent high profile insolvency matters. In particular, he has extensive experience in advising banks and other security holders in relation to distressed loan situations, the enforcement options and remedies available and in the implementation of the preferred option(s), as well as acting for appointed Receivers.

Gavin has also wide experience in liquidations and examinerships as well as advising on formal and informal restructurings and reorganisations.

As part of the Vannin Capital team, Rosemary has been at the forefront of the development of dispute resolution funding over recent years, both in the UK and globally. She has particular experience funding insolvency claims, competition claims and group actions both in the UK and across the globe.

Rosemary is a solicitor of the Courts of England and Wales. Before joining Vannin, she was a Senior Associate in the Litigation department at Allen & Overy LLP in London, where she trained and qualified. While at Allen & Overy, Rosemary spent time on secondment at the Court of Appeal as Judicial Assistant to Lord Justice Dyson (now Lord Dyson) and at TUI Travel Plc.

Rosemary has extensive experience in a wide range of corporate and financial disputes both in England and internationally, acting for large corporations, banks and other financial institutions. She also has expertise in managing complex cross jurisdictional disputes both as a practicing solicitor and funder.

She regularly contributes to articles and presents on a wide range of topics in connection with dispute resolution funding, with a particular focus on the benefits of funding to well capitalised claimants, the global growth of funding and its impact on the dispute resolution landscape and the development of group actions across the world.

In 2017, Rosie was elected Executive Committee Member of the RUSSIAN AND CIS ARBITRATION NETWORK (RCAN) and in 2018 to the Executive Committee of RAIDAR.
Established in 2010, Vannin Capital is the global expert in legal finance, supporting law firms and corporations in the successful resolution of high-value commercial disputes.

From single case funding, to portfolio finance and enforcement arrangements, we offer creative capital solutions that are tailored to our clients’ needs.

Our global team of legal and financial experts cover the key commercial litigation and arbitration centres from our offices in London, Jersey, Paris, New York, Washington, Sydney, Melbourne and Bonn. More than just capital, we combine global experience with local knowledge to deliver the highest standard of service and expertise to our clients around the world.

A market leader, we are a member of the Association of Litigation Funders of England and Wales (ALF), conducting our business to the highest standards in line with its code of conduct.