Neutral Citation: [2014] IEHC 314

THE HIGH COURT

[2009 No. 7548 P]

BETWEEN

GREENCLEAN WASTE MANAGEMENT LIMITED

PLAINTIFF

AND

MAURICE LEAHY PRACTISING UNDER THE SYLE AND TITLE OF MAURICE LEAHY & CO. SOLICITORS (No.2)

DEFENDANT

AND (BY ORDER)

DAS LEGAL EXPENSES INSURANCE COMPANY LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 5th June, 2014

1. Is after the event ("ATE") legal costs insurance illegal in this jurisdiction by reason of the tort of champerty or other analogous public policy considerations? This is essentially the issue which now arises following a direction in that behalf by the Supreme Court. That direction was given following an appeal by the defendant against an earlier decision of mine. My earlier judgment may be summarised by saying that I would not make an order for security for costs pursuant to s. 390 of the Companies Act 1963 ("the 1963 Act") by reason of the fact that the plaintiff had acquired ATE insurance, the insolvency of the plaintiff company notwithstanding: see *Greenclean Waste Management Co. Ltd. v. Leahy* [2013] IEHC 74.

2. In the present proceedings the plaintiff company sues for professional negligence arising from advices which were given initially in relation to the lease of certain industrial premises in 2001/2002. The plaintiff claims that the premises in question were in very poor condition at the end of the lease due to lack of effective maintenance coupled with wear and tear, so that a total refurbishment of the premises was required. The complaint here is that the defendants failed to advise it of the extent of its obligations under the repairing covenants under the lease.

3. In 2006 the lessor commenced an action in this Court claiming damages for breach of covenant against the plaintiff. These proceedings were ultimately settled the sum of €310,000, together with a contribution towards costs of some €150,000.

4. In these present proceedings, however, the plaintiff contends that the defendants were guilty of further and independent acts of breach of contract and professional negligence by, *inter alia*, failing to advise in relation to a relevant limitation period and by failing to disclose a material conflict of interest. So far as the latter point is concerned, it is contended that the defendants ought to have advised the plaintiff that it had a cause of action against a former principal of the firm who had given the original advice in relation to the lease. The defendants have denied that they were negligent in the manner in which they gave advise.

5. It was in response to the defendant's motion for security for costs that the plaintiff fell back on the existence of the ATE insurance. As I have just noted, I ruled that, subject to the insurer giving an undertaking not to invoke a particular clause of the insurance policy, I was prepared to treat the existence of the ATE insurance as sufficient security in respect of any costs application which the defendant might make if they were to be successful in defending the proceedings. It was for that reason that I refused to make the order for security for costs.

6. The defendant appealed that decision to the Supreme Court. By order dated 25th September, 2013, that court directed of its motion that the appeal on the merits should stand adjourned, but that the matter should be remitted to me in the first instance to determine whether, as a matter of principle, ATE was champertous, illegal or otherwise unenforceable in law. The court also made an order joining the ATE insurer, DAS Legal Expenses Insurance Co. Ltd. ("DAS"), as a notice party to these proceedings. In effect, therefore, I am obliged for this purpose to consider the present status of the nominate tort of champerty in this jurisdiction and, perhaps more particularly, its present day extent and reach.

The present status of the tort of champerty

7. In evaluating a question of this nature, the starting point is generally to examine the state of the common law in general and, specifically, the common law of torts at the date of the coming into force of the Constitution on 29th December, 1937. As I observed in *Healy v. Stepstone Mortgage Funding Ltd.* [2014] IEHC 134:

> "The common law as it existed immediately prior to the coming into force of the Constitution was carried over into our law by Article 50.1, save to the extent that such law was unconstitutional. While the common law is not frozen as of the date of the coming into force of the Constitution (29th December, 1937), in the case of the common law torts, the courts are, broadly speaking, confined to the general parameters of the law of torts as then existed as of that date. Entirely different considerations naturally apply where aspects of those common law rules are later found to be unconstitutional (as in *McKinley v. Minister for Defence* [1992] 2 I.R. 333) or where these common law torts have subsequently been modified, re-stated or even abolished by legislative enactment. Yet whatever might have been the case in the early days of the common law, the courts certainly do not have any authority now to invent entirely new categories of torts, as this is a matter which is reserved to the Oireachtas by Article 15.2.1 of the Constitution.
>
> Leaving aside the incremental change and development which are standard features of the common law method, the courts can generally only develop or supplement the law of torts where this corpus of law has been shown to be "basically ineffective" to protect constitutional rights in a particular case…"

8. It cannot be doubted but that the common law torts of maintenance and champerty have long pre-dated the coming into force of

the Constitution and, accordingly, these nominate torts were carried over into our law by Article 50.1 of the Constitution. Unlike, moreover, the position in England and Wales, the scope of these torts has not been directly affected or altered by legislation. By contrast, s. 13(1)(a) of the (UK) Criminal Law Act 1967 abolishes "any distinct offence under the common law in England and Wales of maintenance (including champerty…"). Section 14(2) of that Act nonetheless provided that the abolition of these offences should not affect any rule of law "as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

9. This legislative change was nonetheless significant in altering the legal landscape, so much so that English case-law which post-dated this change may not necessarily be "of great assistance in determining the extent of the court's jurisdiction to order disclosure at an early stage of third party funder in a jurisdiction such as Ireland where champerty and maintenance remains the law": *Thema International Fund v. HSBC Institutional Trust Services (Ireland) Ltd*. [2010] IEHC 357, [2011] 3 I.R. 654, 661, *per* Clarke J. The actual significance of this legislative change may nonetheless be possibly overstated, since even the contemporary English case-law still evinces a suspicion of and a hostility to anything that smacks of trafficking in litigation: see, *e.g.*, the decision of the English Court of Appeal in *Simpson v. Norfolk and Norwich University Hospital NHS Trust* [2012] Q.B. 640, a case which is discussed further below. Besides, s. 14(2) of the 1967 Act may be thought to have expressly preserved the common law as champerty and maintenance in *civil* (as distinct from *criminal*) matters.

10. Maintenance may be defined as the improper provision of support to litigation in which the supporter has no direct or legitimate interest. Champerty, on the other hand: "is an aggravated form of maintenance and occurs when a person maintaining another's litigation stipulates for a share of the proceeds of the action or suit": *Camdex International Ltd. v. Bank of Zambia* [1998] Q.B. 22, 29, *per* Hobhouse L.J. Champerty may thus be described with only a little exaggeration as a secular form of simony within the legal system, for, as Hobhouse L.J. aptly put it in *Camdex International*, what "is objectionable is trafficking in litigation."

11. Given that this is the conduct which underlies the basis for the tort, the scope of application of the law of champerty must thus accommodate itself to modern social realities and must be interpreted accordingly. The torts of maintenance and champerty were first formulated at a time when the legal system was weak, when the independence of the judiciary was not necessarily secure and the rules ensuring the attendance of witness and providing for their protection against attempts to interfere or suborn them were still in their infancy: see *Giles v. Thompson* [1994] A.C. 143, 153, *per* Lord Mustill. Diverse concepts such as legal aid, representative actions, *pro bono* work, "no foal, no fee" arrangements and the involvement in litigation of community and voluntary groups and trade unions in support of their members all lay far into the future.

12. This reality had been recognised for quite some time by the English courts ever before the enactment of the 1967 Act. In *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd*. [1908] 1 K.B. 1005 the protagonists were rival manufacturers of certain machinery for the storage of cash. The defendants, having obtained contracts for the hire of their apparatus from three of the plaintiff's customers, agreed to indemnify the customers against any claims against them for breach of contract. The plaintiff then successfully sued their former customers and obtained an award of damages and costs. The defendants then paid these awards under the contract of indemnity, at which point the plaintiffs sought damages and an injunction for what they said amounted to maintenance.

13. The English Court of Appeal overturned a finding of maintenance by the High Court. The words of both Cozens-Hardy M.R. and Fletcher Moulton L.J. are still very much in point. As the Master of the Rolls stated ([1908] 1 K.B. 1005. 1012)::

> "Beyond all doubt there was a time when what the defendants did would have been regarded as criminal. But there is little use in citing ancient text-books on this branch of law. The law has been modified in accordance with modern ideas of propriety…It is common knowledge that contracts of indemnity are recognised and unquestionably valid, and none the less because they may involve and indeed contemplate the institution or the defence of an action…..The defendants had a business interest, a commercial interest, which fully justified the indemnities or guarantees which they gave…."

14. Fletcher Moulton L.J. also observed that the old common law of maintenance was formulated in a different era and was based on public policy considerations which no longer obtain.

15. There is, nonetheless, no doubt at all that the tort of champerty not only still exists in this jurisdiction, but that it also has a practical vibrancy. This is well illustrated by the Supreme Court's decision in *O'Keeffe v. Scales* [1998] 1 I.R. 290, but also perhaps more recently by the judgment of Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Ltd.* [2011] IEHC 654, [2011] 3 I.R. 654.

16. In *O'Keeffe* the plaintiffs had incurred a significant liability to their particular solicitor and this bill of costs was included in a head of claim in an action for professional negligence brought by them against their former solicitor. The defendant contended that this arrangement amounted to champerty. The Supreme Court apparently indicated that the arrangement was not champertous, but indicated that even if it were, it could not be used to "deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims": [1998] 1 I.R. 290, 295, *per* Lynch J. It follows that even a champertous law suit should not be struck out on that ground, as the remedy in that situation is for the injured party to sue for damages for the tort of champerty.

17. In *Thema International* the question was whether the defendants (who were sued in their capacity as funds custodian) were entitled to details of third party funding of the plaintiff.

18. Clarke J. held that the defendants were not so entitled, provided that the plaintiff informed the third party funder kept appropriate records of such funding and that the third party funder was informed that it might be made amendable to a third party costs order. Clarke J. was, however, satisfied ([2011] 3 I.R. 654,659) on the facts that the third party funder had "a sufficient connection with the plaintiff so as to take that funding outside the scope of maintenance and/or champerty."

19. Clarke J. nevertheless went on to observe ([2011] 3 I.R. 654, 662):

> "In Ireland it is unlawful for a party without an interest (or some other legitimate concern including charity) to fund the litigation of another at all and, in particular, it is unlawful to fund litigation in return for a share of the proceeds. The only form of third party funding which is, therefore, legitimate in Ireland is one which comes within the exceptions to maintenance and champerty. Charitable intent, where the funder does not hope to benefit personally, would, of course, take the case outside the third party funder costs order jurisdiction identified in *Moorview*, for that jurisdiction is confined to persons who fund litigation which they hope will indirectly benefit them in capacities such as shareholders and creditors.
>
> That such parties are, even though they not be guilty of maintenance or champerty, exposed to potential orders for costs

> is clear….. However, such parties are not, in my view, in the same category as professional third party funders who make a commercial decision to "invest" in litigation in the hope of making a profit. After all, if the litigation is well founded then the shareholder or creditor is only getting their due. If an insolvent company has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are *bona fide* progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders). The law of maintenance and champerty always made a distinction between such parties and professional third party funders. It seems to me that it is appropriate to maintain that distinction."

20. Viewed thus, the principle expounded by Clarke J. in *Thema International* is really about trafficking in litigation. This is also the explanation for the unusual case of *Simpson v. Norfolk and Norwich University Hospital NHS Trust* [2012] Q.B. 640, a case where the plaintiff claimed to have suffered infection by reason of what was alleged to be the hospital's negligent failure to exercise proper infection control. He then purported to assign that claim for damages to the widow of another patient who had caught the same infection. While that other patient died of cancer, his widow maintained that the infection rendered his last days more difficult than would other have been the case. That claim against the hospital had, however, been settled without any admission of liability.

21. The English Court of Appeal held that the bare assignment for consideration of a cause of action for personal injuries was nonetheless unlawful. As Moore-Bick L.J. explained ([2012] Q.B. 640, 652):

> "…It is unlikely that a person would take an assignment of a cause of action if he or she did not have an interest of some kind (using the word broadly) in the outcome, …that an assignment of a bare cause of action in tort for personal injury remains unlawful and void. Since the law on maintenance and champerty is open to further development as perceptions of the public interest change, I do not think that it is possible to state in definitive terms what does and does not constitute a sufficient interest to support the assignment of a cause of action in tort for personal injury. However, I do not think that it is in the public interest to encourage litigation whose principal object is not to obtain a remedy for a legal wrong, but to pursue an object of a different kind altogether. If Mrs. Simpson's real concern had been to ensure that Mr. Catchpole was able to obtain compensation, she could have taken steps to enable him to pursue the litigation in his own name, but in truth her only interest in the litigation is to pursue a campaign against the hospital. In my view it would be damaging to the administration of justice and unfair to defendants for the law to recognise an interest of that kind as sufficient to support the assignment of a cause of action for personal injury, because the conduct of the proceedings, including aspects such as a willingness to resort to mediation and a readiness to compromise, where appropriate, is entirely in the hands of the assignee and is liable to be distorted by considerations that have little if anything to do with the merits of the claim itself. There is a real risk that to regard a collateral interest of this kind as sufficient to support the assignment of a cause of action for personal injury would encourage the purchase of such claims by those who wished to make use of them to pursue their own ends."

22. Moore-Bick L.J. went on to conclude ([2012] Q.B. 640, 653) that the assignment in this case "plainly savours of champerty" and was therefore void: This was because

> "…it involves the outright purchase by Mrs. Simpson of a claim which, if it is successful, would lead to her recovering damages in respect of an injury that she has not suffered. Whether in those circumstances she chose to transfer all or part of the money to Mr. Catchpole would be entirely a matter for her, but nothing in the agreement obliges her to do so. She would not be required to hold any damages recovered in respect of pain and suffering and loss of amenity on trust for Mr. Catchpole since, if the assignment were effective, it would operate to transfer the whole of his interest in the property represented by his cause of action to her. In my view this is a case of an assignment of a bare right of action, in the sense that it is an assignment of a claim in which the assignee has no legitimate interest, and is therefore void."

23. Returning, nevertheless, to the observations of Cozens-Hardy M.R. in *British Cash*, the law as to champerty must be viewed "in accordance with modern ideas of propriety." Here it must be recalled that, as we have already noted, these rules were originally formulated in an era long before the advent of legal aid, trade unions and community and voluntary groups. Even more importantly, access to justice is, of course, a constitutional fundamental having regard not only to Article 34.1 of the Constitution, but also having regard to leading cases articulating this principle such as *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345 to *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275.

24. As Lynch J. made clear in *O'Keffee*, the law in relation to maintenance and champerty must be viewed – and, if necessary, modified - in the light of these modern principles and general constitutional understanding. One of these principles is that the courts should not place any unnecessary obstacles in the path of those with a legitimate claim. Indeed, this is why disproportionate legislative fetters on the right of access to the courts – such as the requirement contained in s. 2(1) of the Ministers and Secretaries Act 1924 to obtain the prior *fiat* of the Attorney General before suing a Government Minister which was at issue in *Macauley* – have generally been found to be unconstitutional. Accordingly, methods by which litigants can be assisted by others should be scrutinised with these principles in mind.

25. Against this background it can be said that agreements which involve the trafficking in litigation or – as in *Simpson* - which concern the assignment of a bare cause of action for purposes which the law does not recognise as legitimate will be held to be void as contrary to public policy on the ground that they savour of champerty. That, in my opinion, is true *leitmotif* which runs through all of this case-law in this area.

Does ATE insurance savour of champerty?

26. As I noted in *Greenclean (No.1*), ATE is a relatively new form of insurance product, at least so far as this jurisdiction is concerned. As the name implies, it is a form of insurance taken out in the wake of the specific event and it is often closely linked with "no win no fee" arrangements. The premium is generally high, but is only payable following successful costs recovery against another party or when the policy otherwise ends . In that judgment I also observed that:

> "While one could not deny but that features of this type of policy may suggest to some a form of contingency fee arrangement and may also possibly involve features of champerty (*i.e.*, sharing in the profits of litigation in which the party has no legitimate interest), it should also be acknowledged that ATE may well assist many in securing access to justice in a manner to which they might not otherwise have ready access. "

27. The policy states:-

"Your policy only covers you if you agree to pay your insurance premium and you have entered into a no win no fee agreement for your claim with your solicitor.

Your policy is linked to your no win no fee agreement and (unless it is ended earlier, in line with its terms) operates for the duration of your no win no fee agreement. The insurance premium due for your policy is payable at the end of your claim (by court decision or settlement) or when your policy ends if this is sooner. We can end cover under your policy if we and your solicitor agree that it is more likely than not that you will lose your claim."

19. The policy then continues referring to what is described as "a prospects clause". This provides:-

"We can end cover under this policy if we, after discussion with your solicitor, are of the opinion that it is more likely than not that you will lose your claim."

20. The object of this prospects clause is to enable the insurer to make a judgment based on an estimate of likely prospects of success as to whether the plaintiff's claim is likely to be successful. The policy goes on to say that the coverage extends to paying:-

"Your outlays and your opponent's legal expenses and outlays and we will indemnify you for your insurance premium for your policy;

(a) if you lose; or

(b) if your claim is withdrawn by agreement on us and your solicitor after the start date of your no win no fee agreement; or

(c) if, after a lodgement or tender, you win but a court awards you damages that are less than the offer to settle, provided your solicitor has advised you not to accept the lodgement or tender.

We will pay your opponent's legal expenses and outlays arising from any order the court makes against you but not for order for costs where there has been non-compliance with the rules or order of the court."

21. Outlays are defined earlier in the agreement as:-

"Payments you or your solicitor make to others involved in your claim. These include the costs of mediation which you are liable, court fees, expert fees, accident report fees and Commissioner for Oath fees but not things like postage, travelling and other similar expenses".

22. The policy further recites that the insurer will appoint the claimant's solicitor "to represent you according to our standard terms of appointment." The claimant is then further required to co-operate with the solicitor and the policy also states that the cover will end at once if:

"(a) your solicitor refuses to continue to acting for you with good reason; or

(b) you dismiss your solicitor without good reason; or

(c) your no-win no-fee arrangement ends for any reason; or

(d) you stop your claim without our agreement and that of your solicitor; or

(e) you do not give suitable instructions to your solicitor."

23. It will be seen that the ATE policy is contingent on the operation of a "no win no fee agreement" and enhanced co-operation with the solicitor nominated by the ATE insurer. Counsel for the defendant, Mr. Allen SC, was sharply critical of the fact that the insured was required to co-operate so extensively with the solicitor nominated by the ATE insurer as a condition of the policy, but this it seems to me to be really not very different in principle to subrogation obligations undertaken by the insured under what one might term to be a conventional insurance policy. It cannot be said that the nominated solicitor exercises an objectionable degree of control over the conduct of litigation and, in any event, the litigant remains free to discharge that solicitor and reject that advice, albeit at the cost of the termination of the ATE policy.

24. In passing it may be noted that Lord Mustill took a similar view on this point in *Giles v. Thompson* [1994] A.C. 142, 162. In that case the plaintiffs had suffered damage to their motor vehicles for which the defendants were to blame. The plaintiffs had entered into agreement with car hire companies who specialised in hiring vehicles to such plaintiffs while their own were being repaired. One of the agreements provided that the car hire companies should have the right to pursue defendants for these costs in the name of the plaintiff, with the litigation conducted by the solicitor chosen by the car hire company.

25. The House of Lords decided – in the admittedly different atmosphere of the aftermath of the enactment of the 1967 Act – that these arrangements were not champertous, as the car hire companies had a legitimate interest in recovering these costs. Lord Mustill specifically rejected the argument that the nominated solicitor clause was objectionable, because the motorist still retained ultimate control of the proceedings, even if the termination of the solicitor's retainer meant that the hiring charges of the motor vehicle were payable immediately. In my view, this reasoning also applies by analogy to the present situation.

26. In truth, the real objection to ATE insurance is to the size of the premium and the fact that it is normally payable only after a positive court decision or settlement. At one level it is easy to represent this as simply a disguised method of investing in litigation and recovering a share of the proceeds of the action under the guise of a handsome premium. If ATE coverage was confined to this, then I think the argument that it savoured of champerty and was therefore void as contrary to public policy would be almost unanswerable.

27. Yet there is more to ATE than this. There are certainly some cases – even if doubtless a minority of cases - where ATE is payable to cover the insured's legal costs even where the insured has lost the litigation. The premium is also payable where the coverage is terminated in advance of the determination of the proceedings. It should also be borne in mind that ATE also serves important needs within the community by facilitating access to justice for persons and entities who might otherwise be denied this. In that regard, ATE insurers provide a legitimate service by providing access to justice and this service cannot properly be regarded as simply

regarded as either investing in or trafficking in litigation.

28. Taken in the round, therefore, I find myself inclining to the conclusion that ATE insurance – at least in the form in which it manifests itself in these proceedings – is not on the whole champertous or amounting to maintenance. And reverting to the previous simile of secular simony, it may well be that if the venerable judges and jurists who first formulated the torts of champerty and maintenance sometime between the days of the Yearbooks of the courts of Henry IV and the emergence of the nominate law reports in the 16th and 17th centuries were to realise the direction in which the common law might now be heading, they would doubtless rise from their graves and affix their own theses of protest outside wherever the legal equivalent of Wittenberg Cathedral happens to be.

29. Yet, as Cozens-Hardy M.R. recognised over 100 years ago in *British Cash*, 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.

Conclusions

30. It follows, therefore, that, for the reasons just given, I have concluded that the plaintiff's ATE insurance policy does not amount to either maintenance or champerty and that the insurance policy is accordingly valid.