WOODSFORD
LITIGATION FUNDING

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Dear Mr. Justice Peter Kelly

Submissions to the Review of the Administration of Civil Justice: improving access to civil justice in the State; improving procedures and practices.

1. I refer to the notice dated 29 November 2017, inviting interested parties to provide suggestions regarding improving access to civil justice in Ireland.

2. I am a solicitor, admitted in Ireland and in England & Wales, and Chief Executive Officer of Woodsford Litigation Funding.

3. Particularly following the May 2017 decision of the Supreme Court in Persona Digital Telephony Limited & anor -v- Minister for Public Enterprise & ors, I urge your working group to recommend:

    a. First, legislation to remove or amend the obsolete, historic doctrines of champerty and maintenance that limit the use of third party litigation funding as a tool of access to justice.

    b. Second, rules to ensure that only reputable, solvent and professional third-party funders are permitted to operate in Ireland.

Third Party Litigation Funding Promotes Access to Justice

4. In a 2013 lecture, 'From Barretry, Maintenance and Champerty to Litigation Funding', the President of the UK Supreme Court explained why the historic doctrines have little relevance to the modern world. Lord Neuberger stated:

> *"In order for a state to remain inclusive it must not just express a commitment to the rule of law: it must provide effective mechanisms through which its citizens have genuine access to the courts. Only then can they begin to have equality before the law; only then can they hold the powerful to account; only then can they render their legal rights a true reality rather than words on paper. Where significant groups of citizens are financially unable to gain such access, one of the most important means by which inclusive societies prosper is missing or at best weakened. And as such, the potential for society to become extractive and, ultimately, to fail, markedly increases. If all members of society cannot gain genuine access to the courts, then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity. It is pleasing to note that, as so often, what is in the medium and long term interest of society coincides with principle, in this case the principle of the rule of law.*
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> *Thus, the public policy rationale regarding maintenance and champerty has turned full circle. Originally their prohibition was justifiable as a means to help secure the development of an inclusive, pluralist society governed by the rule of law. Now, it might be said, the exact reverse of the prohibition is justified for the same reason.*

5. We agree.

Regulating Third-Party Funding

6. Lord Neuberger also noted: "*The development and promotion of any form of litigation funding is not without risks*". Again, we agree. When considering how best to mitigate those risks, we suggest that Ireland should look to the experiences of other jurisdictions that have recently grappled with the historic principles of champerty and maintenance.

7. Hong Kong and Singapore have both recently permitted third-party funding, for international arbitrations. Each jurisdiction feared, correctly in our view, that they would lose their status as leading centres for the resolution of international disputes if they did not accommodate third party funding. Ireland should take note if it wishes to grow as a centre for international arbitration.

8. In the course of their reforms, the law reform bodies in each of Hong Kong and Singapore (which many would view as much more conservative, from a civil justice perspective, than Ireland) agreed that 'light touch' regulation was appropriate.

9. The same is true of the situation in the UK, where the Government confirmed in 2017 that the voluntary Code of Conduct of the Association of Litigation Funders (see further below) works well, and that there is no need for statutory regulation.

10. As long as Ireland takes some steps to ensure that only reputable, solvent and professional third-party funders, like Woodsford, are permitted to operate in Ireland, international experience suggests that self-regulation will be effective.

About Woodsford Litigation Funding

11. Woodsford Litigation Funding, is an international business based in London. Woodsford's principal business activity is litigation and arbitration funding, i.e. funding the legal fees and costs of parties in litigation or arbitration (usually the claimant/plaintiff) in return for a fee that is contingent upon the funder party's success in the action. Woodsford has provided funding in a number of jurisdictions, including in relation to litigation in England, France, the Netherlands and the United States, and international arbitrations seated in London, Washington D.C, and Stockholm.

12. Woodsford is a founder member of the Association of Litigation Funders (ALF), an independent body that has been charged by the UK Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England. Woodsford was actively involved in drafting the ALF's Code of Conduct, which sets out the standards by which all Funder Members of the ALF must abide. The ALF Code of Conduct, with which we comply, sets standards for the capital adequacy of funders, sets out the specific, limited circumstances in which funders may be permitted to withdraw from a case, and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. The ALF also maintains a complaints handling procedure, although we understand that no complaints have ever been made. Woodsford has certainly never been the subject of an ALF complaint. Woodsford's Jonathan Barnes was elected to ALF's board of directors in 2016.

13. At Woodsford, we take pride in our professionalism and reputation. In addition to an executive team of legal and finance professionals who have worked globally with some of the best professional services firms in the world (including Debevoise & Plimpton, Sherman & Sterling, Addleshaw Goddard, KPMG and PwC), we have a non-executive investment advisory panel that includes Fidelma Macken, a former judge of the Irish Supreme Court, and the first woman to sit on the European Court of Justice, Shira Scheindlin (a former judge of the Southern District of New York), John Beechey (formerly president of the Court of Arbitration of the International Chamber of Commerce), and former partners of Clifford Chance and Latham & Watkins. Previous members of our investment advisory panel include Sir Roger Buckley, formerly an English High Court judge.

14. At the bedrock of our business sits our belief in facilitating access to justice. The guiding principle that we should make a positive contribution to a just society has been enshrined in our business by our Chairman Yves Bonavero, who established the AB Charitable Trust in 1990. The Trust's aims are the defence and promotion of human dignity. In October 2017, he established the world-class Institute of Human Rights at the internationally-renowned Law Faculty at the University of Oxford. We are proud to be connected to the institute and we share in its values.

Case Study

15. Our belief that the litigation funding industry was conceived to enable access to justice is borne out in our practice. For example, we funded the successful claimant, Norscot, in the case that has been reported at Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm), one of the most high-profile international arbitration cases of the last few years. It has been described as "landmark" by dozens of international law firms who have issued client alerts about the case.

16. In essence, the presiding arbitrator (Sir Phillip Otton, a former English Court of Appeal judge) in an ICC arbitration seated in London held that Essar was in repudiatory breach of an operations management agreement and awarded Norscot damages and various other sums under the agreement, totaling over US$12 million. In the award issued in December 2015, Sir Phillip concluded that Essar had deliberately put Norscot in a position where it could not fund the arbitration on its own, and that it was reasonable for it to obtain £647,000 of litigation funding from Woodsford on the terms that it did. Woodsford provided the funding on standard market terms.

17. The arbitrator was highly critical of Essar's conduct towards Norscot, both during the currency of the underlying agreement and also for most of the arbitration period. The arbitrator said that Essar had set out to cripple Norscot financially. He said that it was a David and Goliath battle, and Essar's conduct forced Norscot's managing director to re-mortgage his home for the best part of USD 1 million. He said that for over three years, Essar made and persisted in unjustifiable personal attacks and allegations of fraud and dishonesty against Norscot's personnel, which were so serious and without foundation that Norscot was entitled to costs on an indemnity basis. The arbitrator referred to the exploitative manner in which Essar had acted towards Norscot prior to and during the dispute and said that, as a consequence, Norscot had no alternative but to seek third party funding. In short, without financial assistance from Woodsford, Norscot would not have obtained justice, and Essar would have gotten away with its egregious conduct.

18. As matters stand, there are likely many examples in Ireland of egregious conduct going unchecked by reason of champerty and maintenance rules.

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19. This was the first case to come to the Supreme Court concerning the use of professional third-party funding to support a party in legal proceedings. The appeal was dismissed by the Irish Supreme Court who decided, in a 4-1 decision that a third-party agreement between a plaintiff and funder is contrary to maintenance and champerty under the Maintenance and Embracery Act 1634.

20. We respect the court's decision, but we believe that the Supreme Court has effectively invited legislative change.

21. McKechnie J. deferred the making of an order "until such time as the State has been given an opportunity to address the deeply disturbing situation of the appellants being unable to prosecute this action solely because of the continuing existence of ancient principles of law,

such as those of maintenance and champerty." He voiced his concern "that legislation of such enormous antiquity has the capacity of preventing any merit review of such allegations."

22. Indeed, the case had been described by the Supreme Court as "absolutely unique, without precedent or parallel" and it had been determined that there was a "significant public interest in having these matters of high public controversy determined in a court of law," which was then prevented due to lack of funding on the claimant side. Clarke J. said that "it is at least arguable that there is a very real problem in practice about access to justice [which] is growing."

Conclusion

23. The litigation funding industry is growing fast, and has become a multibillion dollar industry. The growth witnessed in funding has occurred in parallel with the opening of arbitral centres and has spurred the popularity of alternative forms of dispute resolution globally. Despite the size of the industry, there are remarkably few reported problems or disputes between litigation funders and the litigants they fund. This speaks well of both the litigation funders and the lawyers who advise litigants in relation to funding arrangements.

24. If the legislature in Ireland is at any stage minded to introduce any rules or regulations concerning funders and/or their involvement in proceedings based in Ireland, we would welcome an opportunity to comment on any proposals and provide more clarity on our role in civil litigation procedures.

Yours sincerely,

Steven Friel
Chief Executive Officer