**THE HIGH COURT**

[2022] IEHC 443

**[2021 6260 P]**

**BETWEEN**

**ATLAS GP LIMITED**

**PLAINTIFF**

**AND**

**DAVID KELLY, JULIE KELLY, TONY DALTON, MARY DALTON, SEAN MOONEY, GRAINNE MOONEY, MARIE FORRESTER AND ROSALIND MATTHEWS**

**DEFENDANTS**

**AND**

**ATTORNEY GENERAL**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Emily Egan delivered on the 19th day of July, 2022**

**Introduction**

1. This is an application by the defendants ("the JR applicants") to strike out these proceedings on a number of grounds. The case being made by the plaintiff ("Atlas") in these proceedings is that the JR applicants have committed the torts of maintenance and champerty. I have concluded that these proceedings are bound to fail, and I have no hesitation whatsoever in granting the JR applicants the reliefs sought.

**Background to the present application**

2. The JR applicants were granted leave by Holland J. to seek judicial review of a decision of An Bord Pleanála ("the Board") of 8th July, 2021 to grant to Atlas planning permission for the construction of a strategic housing development of 255 residential units, a childcare facility and associated works on a site off Church Road, Killiney, County Dublin ("the development").

3. These judicial review proceedings ("the judicial review") were issued during the long vacation on 12th August, 2021 on which date the matter was opened and adjourned to the Strategic Infrastructure List after the commencement of term. The Board and Atlas were served with a courtesy copy of the pleadings on 13th September, 2021.

4. Atlas pleads that on or about 1st September, 2021 it became aware of a flyer ("the flyer") widely circulated in the local community. Atlas's case is that the clear purpose of the flyer was to motivate third parties having no legitimate interest in the judicial review to fund the legal costs thereof. Atlas also contends that the flyer contained false, inaccurate and defamatory statements designed to mislead third parties into providing this funding.

**The flyer**

5. The flyer states that it is circulated by the Watson Killiney Residents Association ("the residents association") "*as part of our policy on informing residents of issues that will impact all of us*"; that the Board recently approved planning permission for the development at Watson Road and Watson Drive; that in response to this approval a group was formed by residents representing several local areas and a representative of the residents' association; that this group discussed what actions could be taken *"to protect the best interests of existing residents and amenities in our area"* as a result of which

members of the group have lodged an application for judicial review. The flyer indicates that "*Dun Laoghaire Rathdown's planning department strongly opposed the development stating that it would seriously and negatively impact the amenity of all residents in the area*"; that most strategic housing development applications are brought for judicial review with a high success rate in overturning decisions of the board; and that the legal team engaged by the group believe there is a strong case for this approval to be overturned. The residents' association is said to welcome new housing developments which must be sustainable development that does not detract from the amenity of the area. The flyer then sets out how the proposed development will affect "*us all in Watsons*" and refers to the exacerbation of problems with the Watsons sewage system, traffic on "*our*" small internal estate roads (which it was said would cause lengthy delay for residents and endanger the safety of children, pedestrians and cyclists), increased and constant noise, insufficient parking and potential increase in litter, anti-social behaviour and loitering throughout the estate. Under the heading "*Costs of judicial review*", the flyer observes that a judicial review costs approximately €60,000; that "*a number of locals have already committed money to this cost but that there are thousands still to raise*"; that "*the group are seeking community wide support to fund the legal process in order to protect our local amenities*"; and that any contribution that the reader can give would be welcome. The flyer requests that contributions are made directly to the "*campaign bank account*" the details of which are indicated and that cheques may be made out to the CSVW Residents Association and delivered to a particular address, which I understand is the address of Tony and Mary Dalton, the third and fourth named defendants herein. The flyer concludes that if the judicial review is successful, the residents' association would expect to recover a substantial amount of the legal fees.

6. In response to this flyer, Atlas's solicitor served a letter at the homes of each of the JR applicants on Friday evening 17th September, 2021. Each letter stated that the person to whom it was addressed was the author and/or was connected to the author of the flyer and maintained that the flyer was clearly defamatory, contained inaccuracies and baseless and fundamental untruths designed to emotionally inflame and mislead local recipients. The letter sought undertakings to cease and desist from circulating the flyer and *inter alia*, an apology, appropriate payment of damages and costs failing which High Court proceedings would be instituted. The letter also noted that if legal proceedings were issued the recipient could be held personally liable for payment of the damages and costs which would be "*very significant*".

7. On 21st September, 2021, the solicitor acting for the JR applicants replied stating that the alleged defamatory statements were manifestly not made by any of his clients and that the actual authors of the flyer had not been contacted by Atlas. The letter emphasised that this correspondence had been sent only to the JR applicants, and, moreover had been hand delivered on a Friday evening. This it was said revealed that its real purpose was to intimidate the JR applicants with threats of spurious and vexatious litigation.

8. On 24th and 29th September, 2021 Atlas's solicitor sent two letters to the JR applicants seeking information it contended was necessary to determine if the judicial review

proceedings were the subject of illegal funding. This letter sought fifteen "*clarifications*" from the solicitor acting for the JR applicants, including the following details:

- *The names and addresses of the directors and members of the two residents associations;*
- *The identity of the ultimate beneficial ownership of both residents' associations.*
- *The role of both residents' associations in the proceedings.*
- *Details of the funding provided by both residents' associations.*
- *The identity of the holder of the bank account identified in the flyer.*
- *The names and addresses (to include Eircodes) of all the contributors to the funding of the judicial review and the interest of each funder.*

9. In reply, the solicitor for the JR applicants reminded Atlas that he did not act for the residents' associations, he stated that he did not have the information sought, and that, in any event there was no legal basis in law for seeking it. Atlas thereafter sought the relevant information by way of discovery and sought an order for discovery (in advance of delivery of the statement of claim and defence) as part of its interlocutory application to this court.

10. On 30th September, 2021 Atlas instituted proceedings for defamation (*Atlas GP Limited v David Kelly & Ors* Record No. 2021/5608P) ("the defamation proceedings") against the JR applicants in relation to the flyer. A motion to strike out the defamation proceedings is currently awaiting a hearing date.

11. The present proceedings were issued on 11th November, 2021, and thus prior to the application to seek leave to apply for judicial review in the judicial review proceedings. This timing is relevant because in the present proceedings, Atlas not only seeks damages for maintenance and champerty and a declaration that the judicial review proceedings have been funded by parties with no legitimate interest therein, but also an injunction restraining the JR applicants from taking any steps including the making of applications to court. On the same day as the present proceedings issued, Atlas issued a notice of motion seeking an interlocutory injunction restraining the JR applicants from taking any steps, including the making of applications to court pending the determination of the present proceedings. Atlas also sought orders directing the JR applicants to identify the names, addresses and descriptions of all parties funding or contributing to the judicial review and directing that any person providing funding would be notified of their potential liability for costs, together with orders for the retention of records identifying the amount and source of any third party funding.

12. Atlas has also brought a third set of proceedings ("the land law proceedings") against two of the JR applicants, Sean and Grainne Mooney, ("the Mooneys") claiming damages for defamation of title, nuisance, breach of restrictive covenant, breach of easement and

claiming that the Mooneys are estopped from challenging the impugned permission. The Mooneys are owners of a home built on land formerly held with the site by Atlas's predecessors in title. The land was sold by those predecessors in title to the developers of what is now the Mooneys' home. Atlas contends that the Mooneys are bound by a covenant in the deed of sale that those developers would not object to any planning permission in respect of the site. The Mooneys have also brought an application to strike out the land law proceedings which is currently awaiting a hearing date.

13. Holland J. granted the JR applicants leave to apply for judicial review of the Board's decision to grant the impugned permission on 14th December 2021. Atlas brought an application to set aside the grant of leave to apply for judicial review on 23rd December, 2021. This application was heard by Holland J. in the Strategic Infrastructure List over the course of three days. In a judgment of 28th April, 2022 Holland J. dismissed Atlas's application in all respects.

14. By notice of motion dated 1st December, 2021, the JR applicants seek an order striking out the present proceedings pursuant to O. 19 r. 28 of the Rules of the Superior Courts ("the Rules") or pursuant to the inherent jurisdiction of the court as failing to disclose any reasonable cause of action and/or as being bound to fail and/or as being frivolous and/or vexatious and/or as constituting an abuse of process, and/or as being brought for an improper and/or collateral purpose and/or for being an interference with the right of access to the courts. The strike out application and Atlas's interlocutory applications were listed for hearing before this court and ran for three days. At the conclusion of the first day of hearing, Atlas informed the court that it was withdrawing its interlocutory application. Finally, it may be relevant to note that the same solicitors and counsel act for Atlas and the JR applicants in all of the above proceedings.

**Structure**

15. Although the strike out motion was quite broadly drafted, the JR applicants' submissions were more focussed and sought to have the proceedings struck out on two main grounds. It is submitted first that the proceedings are bound to fail, vexatious and frivolous and should be struck out pursuant to the court's inherent jurisdiction and second, that the proceedings are issued for an improper or collateral purpose, being the harassment, persecution and punishment of the JR applicants for instituting the judicial review proceedings.

16. I am fully satisfied that the first ground advanced by the JR applicants must succeed and that the court's inherent jurisdiction to strike out proceedings as bound to fail permits, and indeed compels, this court to strike out these proceedings. So clear is it that these proceedings fall to be struck out as bound to fail that it has not been necessary to consider the second ground advanced by the JR applicants, namely that the proceedings are brought for an improper purpose. Nor has it been necessary to consider the argument that the present proceedings, together with the other two sets of proceedings, are to be regarded as strategic litigation against public participation ("SLAPP"). However, in deference to the lengthy submissions of the parties, I will briefly contextualise this issue.

17. Although Ireland and the EU have not yet enacted specific anti-SLAPP legislation, the JR applicants submitted that Article 3.8 of the Aarhus Convention (UNECE Convention on Access to Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998) ("the Convention"), which provides that parties thereto shall ensure that persons exercising their rights in conformity with the Convention shall not be penalised, persecuted or harassed in any way, must inform this court's approach to the current application. To that end, the JR applicants served the proceedings upon the Attorney General and the court heard submissions setting out the State's position on the interpretation of Article 3.8 of the Convention, in the event that same arises for consideration by the court. The Attorney General's position was that this court is entitled to look at the whole history of the dispute between the parties in the exercise of its inherent jurisdiction to strike out the proceedings. The Attorney General submitted that the existing principles applicable in respect of applications to strike out proceedings provide the court with an adequate mechanism to protect and fully vindicate the JR applicants' constitutional right to access the courts and their rights pursuant to Article 3.8 of the Convention. The Attorney General observed that the conforming interpretative obligation, which requires this court to interpret those provisions of the Convention to the fullest extent possible, can be given expression through the application of the existing authorities governing the courts jurisdiction to strike out proceedings in an appropriate case.

18. On the facts of the present case, I fully accept that this is so. In making my decision on the present application, it has not been necessary for me to rely upon developments in Europe, or elsewhere, in relation to SLAPP litigation, or upon the provisions of Article 3.8 of the Convention. I have merely applied the well-known domestic principles on applications to strike out and have not found it necessary, by way of support or ballast for my decision, to have recourse to the interpretative obligation placed upon this court. The interpretative obligation would only be of key concern if this court were to determine that the domestic principles applying to applications to strike out proceedings did not entitle the JR applicants to the orders sought.

19. Indeed, so clear is it that these proceedings fall to be struck out as bound to fail that it has not even been necessary for this court to consider the second ground advanced by the JR applicants, namely that the proceedings are brought for an improper purpose.

20. Therefore, this judgment is based solely upon the first ground advanced, namely that the proceedings ought to be struck out pursuant to the court's inherent jurisdiction as bound to fail.

**Principles in respect of an application to strike out proceedings pursuant to the court's inherent jurisdiction**

21. The principles pertaining to an application to strike out proceedings as being bound to fail pursuant to the court's inherent jurisdiction are well known. In considering such an application pursuant to its inherent jurisdiction the court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case.

22. The jurisdiction to strike out proceedings is one to be "*exercised sparingly and only in clear cases"* (see Costello J. in *Barry v. Buckley* [1981] IR 306). As McCarthy J. stated in *Sun Fat Chun v. Osseus* [1992] 1 I.R. 425, the High Court should generally be slow to entertain an application of this kind. A judge considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action (Keane J. *Lac Minerals* [1993] 8 JIC 0601). If pleadings can be amended in such a manner as to save the action, then the proceedings should not be dismissed. The court in considering whether to strike out a claim must treat the plaintiff's claim at its high-water mark. The court can only exercise its jurisdiction to strike out a claim if, on the admitted facts, it cannot succeed. Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, an application to strike out proceedings as bound to fail is most unlikely to succeed.

23. The burden of proof lies on the defendant at all times to establish that the plaintiff's claim is bound to fail. The plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. Nor should the court require a plaintiff to be in a position to show a *prima facie* case, but merely a stateable case, to successfully resist an application to strike out.

24. Atlas relies heavily upon a statement of McCracken J. in *Ruby Property Company Ltd v. Kilty* [1999] IEHC 50 (referred to by Clarke J. (as he then was) in *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207) stating:

> *"It is quite clear that the Court can only exercise the inherent jurisdiction to strike out proceedings where there is no possibility of success."*

25. The defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. In *Salthill*, Clarke J. stated that the factual allegations put forward by the plaintiff ought not be assessed on the basis of whether they disclosed evidence which, if accepted, would lead to success in the proceedings. Rather, the question was whether the defendant had established that it was impossible that any such evidence would be produced at trial. However, in assessing whether there is a possibility of the proceedings succeeding, the court is permitted, and indeed required, to analyse whether the plaintiff's factual allegations amount to no more than a mere assertion for which no evidence, or no credible basis for believing that there could be any evidence, has been put forward (*Keohane v. Hynes* [2014] IESC 66)

26. Atlas also emphasised that it is extremely unusual for an application to strike out as bound to fail to be brought, still less granted, prior to the delivery of the statement of claim. This is undoubtedly true and indeed the only case open to me in which the court had struck out proceedings as bound to fail prior to the delivery of the statement of claim was *Barry v. Buckley*. *Barry v. Buckley* was a case in which the plaintiff sought specific performance of a contract; and Atlas contends that, as a pure documents case, it can readily be distinguished from the current proceedings.

27. Any consideration of whether the proceedings ought to be struck out as bound to fail must commence with an analysis of the claim advanced which, in this instance, is a claim for maintenance and champerty.

**Maintenance and champerty**

28. Maintenance and champerty are criminal offences and torts of considerable vintage in this jurisdiction and of even greater vintage in the jurisdiction of England and Wales. The rules of maintenance and champerty emerged at a time when the legal system was weak, the independence of the judiciary less secure and the rules ensuring the attendance of witnesses and providing for their protection against attempts to interfere or suborn them were yet to be developed. The concern was that the legal system lacked the strength or impartiality, in the words of Lord Mustill in the decision of *Giles v. Thompson* [1994] 1 AC 142 to "*resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power*"; the rules of maintenance and champerty were intended to ensure that the purity of justice would not be undermined or corrupted.

29. In *Persona Digital Telephony v. Sigma Wireless Network* [2017] IESC 27, Denham C.J. accepted that maintenance and champerty remained on the statute book by virtue of s. 3 of the Maintenance and Embracery Act, 1634 and identified the elements thereof:

> *"Maintenance may be defined as the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share if the litigation succeeds.*
>
> *Maintenance and champerty are offences which evidence a public policy"*

30. The difference between maintenance and champerty was noted in *SPV OSUS LTD v HSBC International Trust Services* [2018] IESC 44 where O'Donnell J. (as he then was) stated:

> *"Champerty has always been regarded as more obnoxious than maintenance, because it involves not merely the involvement in the proceedings of a third party, but also the possibility that the party will recover some proportion of any award of damages if the claim is successful."*

31. In *Green Clean Waste Management Ltd* [2014] IEHC 314, Hogan J. observed that maintenance may be defined as the improper provision of support to litigation in which the supporter has no direct or legitimate interest and that champerty, on the other hand, was an aggravated form of maintenance which occurs when a person maintaining another's litigation stipulates for a share of the proceeds of the action or suit. Champerty, Hogan J. stated may thus be described with only a little exaggeration as a secular forum of simony within the legal system for what is objectionable is *"trafficking in litigation".*

32. The parameters of maintenance (and champerty) have been clear for over a century. In *British Cash and Parcel Conveyors Ltd v Lamson* [1908] 1 KB 1006 Fletcher Moulton L.J. stated:

> *"Maintenance is directed against wanton and officious intermeddling with the disputes of others in which the (maintainer) has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse."*

33. The torts (and of course the crimes) of maintenance and champerty must not be pushed too far. In *O'Keeffe v. Scales* [1998] IR 290 the Supreme Court, per Lynch J. stated:

> *"While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction it must not be extended in such a way as to deprive people of their constitutional right of access to the Courts to litigate reasonably stateable claims."*

34. To this end, it has for some time been clear that the range of interests and relationships which may justify the provision of funding is not closed and is properly the subject of development by the common law. The organic nature of the law in this regard, was noted by Costello J. (and he then was) in *Frazer v. Buckle* [1994] 1 IR 1 who cited with approval the following observation of Denning M.R. in *Re Trepca Mines Ltd* (No. 2) [1963] CH 199:

> *"Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened very much of late (see Martell .v. Consett Iron Co. Ltd., 1955 Ch. 363) and I hope they will never again be placed in a strait waistcoat."*

35. The imperative to reflect modernity in this area of the law is, itself, quite ancient. In *British Cash and Parcel Conveyors Ltd v. Lamson*, decided over a century ago, the English Court of Appeal overturned a finding of maintenance by the High Court and the Master of the Rolls stated:

> *"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 the law. The law has been modified in accordance with modern issues of propriety."*

36. One finds a recent endorsement of this line of thinking in *SPV OSUS Ltd* in which O'Donnell J. stated:

> *"Maintenance is the unjustifiable provision of financial support for litigation in which the maintainer has no legitimate interests. Over time, the common law has greatly relaxed the prohibition on third party support for litigation, recognising that there are a number of legitimate reasons for such support."*

37. Later in the same judgment, O'Donnell J. stated:

> *"The law particularly in relation to maintenance has undergone considerable development over time. The development has been towards a greater tolerance of agreements to support litigation and a narrowing of the scope of maintenance."*

38. The law of maintenance and champerty must therefore be viewed in accordance with modern ideas of propriety and even more importantly in recognition of the fact that access to justice is a constitutional fundamental. Although the general parameters of the torts of maintenance and champerty are clear, the modern application of those principles is not frozen by reference to the social conditions and public policy considerations which pertained several hundred years ago. The court must assess whether those who provide financial assistance to a litigant have a legitimate interest in the outcome of the proceedings and must be cautious not to place any unnecessary obstacles in the path of those with a legitimate claim. As noted by Hogan J. in *Green Clean Waste Management Ltd*, when the torts were initially developed, 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 organisations in support of their members, all lay far into the future.

39. An early example of this tolerance towards litigation brought by community or voluntary groups to pursue a common interest is evident in *Martell v. Conset Iron Company Ltd* [1955] Ch. 363. As some of the features of this case resonate strongly with the present proceedings, it merits some attention. In *Martell*, proceedings were brought against the defendant for pollution of a river in Durham by effluent from the defendant's works who sought a stay on the grounds that same were illegally maintained. The proceedings had been brought on the advice of the Anglers Cooperative Association ("ACA"), an unincorporated body formed to promote the interests of anglers and others interested in fisheries and inland waters. The ACA had a total membership of 250,000 members and had established a fighting fund for the purposes of promoting or opposing litigation affecting anglers and others interested in fisheries and inland waters. A member club of the ACA requested assistance in connection with the underlying proceedings and was advised to arrange for the riparian owner to be joined as co-plaintiff, which she agreed to do on the basis that she was indemnified against any liability arising from the legal proceedings. Proceedings were thereafter commenced in the name of the riparian owner and six trustees of an incorporated trustee company formed by the ACA.

40. In response to the defendant's application, the court noted that maintenance consists of an officious intermeddling in a suit and stated that if the maintainer has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, ceased to be so. A community of interest would provide a defence to a charge of maintenance. The court stated:

> *"Accordingly, I would hold that an association of a number of persons individually interested as riparian owners or holders of fishing rights in the preservation from pollution of the waters of various rivers in different parts of the country could, without being guilty of the crime or tort of maintenance, support with any funds at*

*their disposal actions brought by individual members to restrain the pollution of the rivers to which the interests of those members related..."*

41. In considering what amounted to a community of interest, the court noted that membership of the ACA was not limited to persons having a legal interest in the specific river in issue and that support had been sought from every member of the public whether or not they had such interest and indeed whether or not they were anglers. Because of this, the defendant had argued that illegal maintenance could still be imputed to those members who had no relevant interests and that an investigation ought be pursued to ascertain the extent to which that was so. The court held that it would be impractical if illegal maintenance were to be imputed to those members who had no relevant interests because it would then be necessary to pursue the investigation a step further and see what proportion, if any, of the funds applied to aiding the prosecution of the action was attributable to the contributions or donations of those members, for only that proportion of the funds could be said to have been illegally applied. The court said guilt or innocence of the crime of maintenance should not be made to depend upon such impracticable counting of heads, investigation of individual interests and dissection of funds. The relevant question was whether the association could be fairly described as being in substance a body of persons individually possessed of legal rights as riparian owners or owners of fishing rights, or having other relevant interests, to the extent that the ACA was acting in defence of the collective interests of its members on the principle of mutual protection.

**Analysis**

42. The application to strike out by the JR applicants was issued only weeks after Atlas's plenary summons was served. Since the issue of the motion to strike out on 1st December, 2021, Atlas has not delivered a statement of claim. In the course of the hearing before this court, Atlas tentatively argued that this was reasonable in the light of the desirability of avoiding unnecessary expenditure of resources or legal costs in the preparation of a statement of claim prior to the court's determination of the strike out motion. This may be perfectly sensible. However, the fact remains that almost six months after the commencement of the proceedings, no statement of claim has been delivered.

43. In general, the court would be very reluctant to strike out proceedings prior to delivery of a statement of claim as the contours of the plaintiff's case may not yet have been fully developed. However, it must be recalled that in the present case, simultaneously with issuing and serving the plenary summons, Atlas issued and served a motion seeking interlocutory relief restraining the JR applicants from taking any steps, including the making of applications to court, pending the determination of the present proceedings and further seeking mandatory orders directing the JR applicants to identify the parties providing funding and other associated directions. This motion was issued at a time before Holland J. had heard the *ex parte* application for leave to apply for judicial review in December 2021. As the moving party in that application for an interlocutory injunction, Atlas bore the onus of demonstrating an arguable case. It is not unreasonable to expect that the affidavits grounding Atlas's application for this interlocutory injunction (together

of course with the affidavits responding to the application to strike out the proceedings) would contain sufficient material to demonstrate that an arguable case had been made out. The fact that Atlas withdrew this application for interlocutory relief on the same date that the JR applicants opened their application before me to strike out the present proceedings does little to impact upon this expectation. Indeed, Atlas's grounding affidavit in its interlocutory application avers to the fact that the proofs required for interlocutory relief are "*well known*" and refers to the test in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] IR 88.

44. In all the circumstances, I am fully satisfied that I have a sufficient appreciation of the nature of Atlas's case to enable me to ascertain whether, in accordance with the jurisprudence of the court, same is bound to fail.

45. There are two essential bases for Atlas's assertion that the JR applicants have committed the tort of maintenance and champerty. Reliance is placed first on the fact of the flyer; and second upon what Atlas maintains is an unreasonable failure on the part of the solicitor acting for the JR applicants to respond to its correspondence seeking detailed information in relation to the parties funding the litigation. Atlas maintains that the "*only inference"* to be drawn from the solicitor's failure to clarify that the proceedings are not being illegally funded and to identify the relevant third-party funders is that the judicial review proceedings are in breach of the rules on maintenance and champerty.

46. All that Atlas needs to do is put forward a credible basis for suggesting that it may be possible at trial to establish the facts which are asserted, and which are necessary for success in the proceedings. Has this been done?

47. The flyer constitutes sufficient uncontradicted evidence, for the purposes of the present application, that funds have been solicited by the local residents' association to fund the judicial review; that a group comprised of representatives of the residents' association and residents representing the Watsons area decided to lodge an application for judicial review and that members of the group made this application for judicial review. For the purposes of the present application, it also seems reasonable to assume that some or all of the JR applicants are members of this group. Certainly Mr. and Ms. Dalton are either members of the group or in connection with the group as campaign flyers were to be delivered to their address. It is also reasonable to assume that some or all of the JR applicants were aware that the residents' association was producing, publishing and distributing the flyer and that the purpose of the flyer was to raise funds for judicial review proceedings. It is also reasonable to assume that Mr. and Ms. Dalton intended to assist in the collection of funds received in response to the flyer. The flyer states that some funds to support the judicial review had already been raised from a number of locals before its publication. For the sake of argument therefore, and taking Atlas's case at its highest, I will also assume that further funds were raised on foot of the flyer to support the judicial review and that some or all of the JR applicants assisted in this task or were aware of it. However, it is also reasonable to assume that, insofar as any such further funds were raised on foot of the flyer, they were raised from the persons to whom

the flyer was addressed or to whom it was distributed, namely members of the local community.

48. Does the above evidence support Atlas's assertions that the JR applicants have committed the tort of maintenance and champerty or, alternatively, does the above provide a reasonable basis for believing that evidence could become available at the trial to establish the facts which are necessary for success in the proceedings? The answer is plainly in the negative.

49. An essential element of the tort of maintenance and champerty is that the third-party funder has no interest in the proceedings and so is unjustifiably intermeddling therein. It is abundantly clear from the text of the flyer that it is directed towards persons who have a legitimate interest in the proceedings. The flyer was distributed by a body known as "Watson Killiney Residents Association" in relation to planning permission for a development in the local area at Watson Road and Watson Drive. The flyer states that it is circulated as part of the residents' associations' policy on informing "*residents of issues that will impact all of us*". It is clear that the flyer was intended to be circulated to residents of the area to be impacted by the development or to residents who otherwise will be impacted by the development. The flyer then sets out eight separate ways in which it is apprehended that the proposed development will affect "*us all in Watsons*" detailing highly localised concerns such as sewage, traffic, safety of children, pedestrians and cyclists, parking and potential antisocial behaviour. In describing these likely impacts, the flyer refers repeatedly to the local area using language such as "*our small internal estate roads*" "*lengthy delays for all of our residents", "dramatic increase in traffic on all of our small internal estate roads"* and *"antisocial behaviour and loitering throughout our estate".* The flyer seeks *"community wide support"* with funding to protect "*our local amenities".*

50. In these circumstances it is extremely difficult to conceive of any rational basis for contending that the residents' association, the residents whom it represents or the persons in the local area to whom the flyer was addressed, do not have a legitimate interest in the proceedings. The only basis upon which the flyer requests donations, and the only conceivable basis upon which one could anticipate a recipient would donate funds, would be because the donors apprehend that the development would have a significant negative effect upon their local area.

51. There could be no doubt that an association of residents in the locality would meet the threshold of "sufficient interest" in order to bring judicial review proceedings. In *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10 the Supreme Court stated:

> *"On the current state of the jurisprudence in Ireland, and without, for the moment, having regard to the requirements of European law, it seems that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the*

*area potentially impacted by the development in question. Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally..."*

52. This certainly suggests that the residents' association has a legitimate interest in the proceedings. It is also notable that the residents' association made a submission to An Bord Pleanála in its own right.

53. Atlas cited no authority whatsoever for the proposition that members of a local residents' association or individual residents of a particular locality in which a substantial development is proposed could be viewed as a party having no interest in litigation such as this. On the contrary, all judicial commentary from the *Martell* case in 1955 to the present day, recognises that local community and voluntary groups and associated persons with a common interest in a particular area or issue have a legitimate interest in bringing such proceedings. Such groups and the persons who contribute to them are not to be prohibited from raising funds for litigation or contributing funds to ongoing litigation of interest and importance to them.

54. As stated above, the second basis upon which Atlas asserts that the tort of champerty or maintenance has been committed arises from the fact that the JR applicants' solicitor refused to provide it with the information sought in its correspondence of 24th and 27th September, 2021. With respect, these letters can only be described as audacious. Atlas has identified no legal entitlement to request this private information pertaining to the residents' association. The information sought by Atlas is, in many respects, the personal information of the persons to whom it relates, which raises GDPR concerns particularly as the solicitor for the JR applicants does not even represent the residents' association or its membership. In these circumstances it is frankly startling that Atlas would infer, from the solicitor's refusal to furnish the information sought, that a tort has been committed.

55. In the course of the application before me, Atlas argued that the solicitor for the JR applicants had been incorrect in asserting that Atlas had no legal entitlement to the information sought in their solicitor's letters of 24th and 29th September and maintained that it had a right to know the identity of those funding the litigation, in short, a right to "*know their adversary*". This stark statement does not appear to be correct, particularly where there are no reasonable grounds for contending that the litigation is being funded by third parties without an interest in the proceedings.

56. It is helpful to note the consideration of this question in *Thema Intl. Fund v HSBC Inst. Trust Services (Ireland) [*2011] 3 IR 654. In *Thema*, the plaintiff had instituted proceedings against the defendant for losses sustained by the fund in respect of which the defendant was alleged to have been the custodian. During case management of the proceedings, the defendant applied to the court for orders requiring the disclosure of the details of the plaintiff's funding for the purposes of the litigation. The High Court, Clarke J., accepted that it was reasonable to conclude that the plaintiff was in receipt of some form of third-party funding. However, the court was satisfied that the funders had a

legitimate interest in the litigation. The defendants nonetheless argued that the court had jurisdiction to award costs against such third-party funders and ancillary jurisdiction to require, at an early stage, the disclosure of the identity of the third-party funders. Clarke J. refused the relief sought but required the plaintiff to undertake to inform any funders that they could be the subject of a costs order and to maintain proper records identifying the amount and source of the third-party funding. In the course of his judgment, Clarke J. considered an argument similar to that advanced by Atlas in these proceedings. He observed that the proposition that a party needed to know its true adversary may be more applicable to cases dealing with professional third-party funders. Where such a third-party, who has no direct or indirect connection with the litigation, becomes involved by "*buying in*" to the case on the basis of an agreement to fund the action in return for sharing the proceeds, then there is a very real sense in which that person becomes an adversary. However, a third-party funder who is not guilty of champerty (and who has the sort of legitimate interest in the case identified in the champerty jurisprudence) is in a different situation. They are, even if only indirectly, already involved in the litigation. In such circumstances, the court held that getting precise details as to the identity of the funder and the terms of the funding is not necessary or proportionate to allow the defendant to understand who its true adversary is. Clarke J. was not satisfied that the argument as to knowing one's adversary had sufficient weight in this jurisdiction to counterbalance the undoubted litigation advantage that would be caused by requiring disclosure at this stage.

57. The circumstances pertaining in *Thema* were of course different to the present case, notably because the context of the court's refusal to order that the plaintiff identify the third-party funders was its decision that those funders had a legitimate interest in the litigation and that the funding arrangement was therefore not champertous. In the present case, at the time of Atlas's request for information this had yet to be enquired into by the court. This, however, does not suggest that Atlas were entitled to be furnished with the information requested, still less, that a refusal to furnish the information provided a reasonable basis upon which to infer that the tort of maintenance and champerty has been committed. In my view, the solicitor for the JR applicants was perfectly entitled to decline to answer this request for information. For Atlas to infer from the absence of a response that maintenance and champerty must be made out is without credible foundation.

58. Nor was Atlas able to point to any case in which maintenance or champerty had successfully been invoked in the context of judicial review proceedings either by way of establishing the basis for a stay of those proceedings, still less as a basis for establishing liability for a standalone tort of maintenance and champerty. This is likely to be because, in general, judicial review and other public law proceedings do not advance a claim for damages. As champerty presupposes an arrangement to participate in the proceeds of the maintained litigation, it does not arise in this case.

59. On the basis of the above, I am fully satisfied that Atlas has not identified any evidence or any reasonable basis to believe that evidence will become available such as might establish a stateable case of maintenance and champerty.

60. Finally, I observe that there is some irony to the submissions made by Atlas to the effect that the court must exercise restraint in granting this application to strike out lest this infringe its right of access to the courts. The admitted purpose of these proceedings is, in part at least, to restrain the judicial review proceedings. Indeed, this formed the basis for Atlas's argument that the proceedings were not brought for a collateral purpose but rather for the purpose which they plead on their face; being to restrain the proceedings and to obtain damages for maintenance and champerty. It is notable that Atlas has not brought proceedings against the residents' association, which is the party allegedly improperly soliciting funds, still less against the alleged third parties who are said to be illegally maintaining in the proceedings (although I accept that Atlas does not know the identity of the latter). Insofar therefore as it may be argued that this court ought to be reluctant to place an obstacle in the path of Atlas's right to progress its claim, same must be balanced against the right of the JR applicants to bring forward the judicial review proceedings in which leave was granted and in which, moreover, the applicants successfully resisted a lengthy *inter partes* application to have leave set aside.

61. In all the circumstances, I hold that the JR applicants are entitled to an order pursuant to the inherent jurisdiction of the court striking out these proceedings as bound to fail.