AN CHÚIRT UACHTARACH
THE SUPREME COURT

Woulfe J.
Hogan J.
Murray J.
Collins J.
Donnelly J.

S:AP:IE:2025:0000076

[2026] IESC 34

Between/

JOSEPH HOWLEY

Plaintiff/Respondent

AND

PAUL HOWARD

Defendant/Appellant

AND

ATTORNEY GENERAL AND LAW SOCIETY OF IRELAND

Amici Curiae

-and-

S:AP:IE:2025:0000075

Between/

JOSEPH HOWLEY

Plaintiff/Respondent

AND

ÚNA McCLEAN

Defendant/Appellant

AND

ATTORNEY GENERAL AND LAW SOCIETY OF IRELAND

Amici Curiae

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 17th day of June 2026

Part I - Introduction

Background

1. The prevalence of "no foal, no fee" payment agreements is so widespread – even ubiquitous – throughout the legal profession that it might seem surprising that the very legality of the practice would be open to serious challenge. Yet this is the issue which now arises in this appeal.

2. The appellants to this appeal (Mr. Paul Howard and Ms. Una McClean)("the taxpayers") maintain that certain contractual arrangements between the respondent Collector General (Mr. Joseph Howley) and a panel of nominated solicitors in respect of the recovery of legal costs have champertous features such as to render those agreements unenforceable. Specifically, they object to two separate aspects of these agreements. First, they object to the fact that the respondent has agreed a fee structure whereby the nominated solicitors recover an enhanced percentage fee depending on the sums actually recovered from defaulting taxpayers. Second, they contend that the agreement contains a "no foal, no fee" element which they say is champertous and unlawful.

3. To explain all of this it is first necessary to set out the background to the proceedings. The respondent claims the sum of some €2.4m (including interest) from Mr. Howard in respect of unpaid taxes. In the companion (and substantially identical) case of Ms. McClean the sum in question which is claimed is approximately €625,000 (including interest). These sums were affirmed by the Tax Appeals Commissioner, so that these sums are now final and conclusive: see s. 949(3) of the Taxes Consolidation Act 1997. There is, as I have already indicated, but one single issue raised in both cases, namely, whether certain arrangements between the respondent and a panel of nominated solicitors in respect of legal costs have champertous features such as to render these agreements unenforceable.

4. The respondent commenced these proceedings in 2021. The High Court originally granted summary judgment, but the case was remitted to plenary hearing by the Court of Appeal. As we shall now see, both the High Court and the Court of Appeal subsequently entered judgment in favour of the respondent, rejecting arguments based on champerty.

5. This Court thereafter granted the taxpayers leave to appeal in respect of the champerty issue. Given, however, that the case seemed to have implications for the interaction of the law of champerty and common fee arrangements within the legal profession, we considered that both the Attorney General and the Law Society of Ireland should be invited to participate in this appeal as *amici curiae*. Both the Attorney General and the Law Society accepted the Court's invitation, and their submissions have been extremely helpful.

Part II -The terms of the Revenue Commissioners' contract with the nominated solicitors

6. Before proceeding further, however, it is next necessary to set out the relevant provisions of what I shall term the Revenue Commissioners' contract ("the contract")("Revenue") with the individual solicitors' firms included on its panel. The relevant provisions of the contract are contained in Clause 5.1, Clause 5.2 and Clause 5.3 of the contract:

> "5.1 The major portion of the renumeration under this contract will be in form of commission expressed as a percentage of amounts collected. Legal costs shall be recovered from the debtor to the greatest extent possible. Revenue acknowledges that in the nature of the work, there will be some cases where costs will be incurred but no recovery is possible.
>
> 5.2 [In the earlier judgments both Quinn J. in the High Court and Binchy J. in the Court of Appeal broke this clause down into its individual sentences for ease of reference, and I will adopt the same format]:

i In cases where an Order for Judgment in the relevant Court is obtained, Revenue may also seek an order of the Court for costs to be taxed in default of agreement.

ii. The Firm shall, *in such cases*, be entitled to charge for its services and outlay incurred.

iii. For the purposes of taxation of such costs Revenue shall be entitled to claim costs on the basis of work done, time spent, and other factors found in O.99 r.37(22) of the Rules of the Superior Courts ordinarily addressed in the taxation of such costs.

iv. On completion of taxation of costs, the Firm shall be entitled to render an account and invoice to Revenue calculated on the basis set out in this paragraph, but the Firm shall take into account such sums as have already been billed and paid by the Collector-General pursuant to the provisions of Clause 5.3 below.

v. The amount due on the invoice will become payable by Revenue to the Firm *in so far as Revenue is successful in recovering those costs* from the defaulting taxpayer pursuant to the order for costs or pursuant to the agreement for payment of costs by the defaulting taxpayer.

vi. For the avoidance of doubt if Revenue is not successful in recovering costs as taxed or as agreed from the defaulting taxpayer then the remuneration of the Firm will be limited to those payments set out in Clause 5.3 below.

vii. Any excess *due to the Firm* over and above this will be waived by the Firm." (emphasis supplied)

7. The following table sets out details of the remuneration payable under Clause 5.3 of the contract.

Action stage	**Fee payable**	**Commission excluding VAT at 23% payable if collection is completed after the action stage shown and before further action**.

Issue of a demand.	€27 plus VAT.	2% of the first €4,000 and 0.5% of the balance of tax and interest collected.
Issue of Proceedings.	€145 plus VAT plus outlay, less fees and outlay already paid in respect of this referral.	4% of the first €4,000 and 2% of the balance of tax and interest collected.
Judgment obtained (including registration of a judgment, where required).	€210 plus VAT plus outlay less fees and outlay already paid in respect of this referral.	
For enforcement of judgment *where collection is achieved*.	€270 plus VAT plus outlay less fees and outlay already paid in respect of this referral.	7% of the tax and interest collected.
For enforcement of judgment where enforcement is completed (case withdrawn from solicitor) *without collection*; or where enforcement is terminated by Revenue before completion and *before collection is achieved*	2.75% of the first €4,000 and 2% of the balance, to a maximum fee of €5,000, plus VAT plus outlay, less commission, and outlay already paid in respect of this referral (or revised referral if appropriate).	Withdrawal Fee can only be claimed where the Firm has brought the case to enforcement stage and advised Revenue of same. All withdrawal applications must be claimed the month following the withdrawal.
For complex work where input to cases at Senior/Partner level is necessary.	€210 plus VAT per hour.	€210 plus VAT per hour where interpretation of the law requires Senior/Partner input.

8. It will be seen from this table that the fee structure first provides in some instances for an enhanced fee which is dependent on the sums actually recovered. This type of success fee was described by Stephens J. in *Baranowski v. Rice* [2014] NIQB 122 (at para. 18 of his judgment) as a "conditional uplift" fee. For consistency and convenience, I propose to adopt the same terminology. One might indeed go further and argue that Clause 5.3 actually provides for a contingency fee in that it contemplates that the solicitors are to be paid out of the sums actually recovered by Revenue. As we shall see, however, this type

of conditional uplift fee has been expressly sanctioned by statute in debt collection and liquidated damages claims.

9. The second aspect of the table is that it provides for a form of "no foal, no fee" payment structure in that the fee payable is made dependent on whether Revenue actually recover sums against the taxpayer: see, e.g., Clause 5.2(vi). If those sums are not recovered, then the Revenue are confined to the fee structure provided in Clause 5.3. I propose to consider each of these matters separately. It is first necessary, however, to summarise the judgments in the High Court and the Court of Appeal and then to consider the arguments advanced by the parties.

Part III – The judgments of the High Court and the Court of Appeal

The High Court judgment

10. In a judgment delivered on 16th January 2024, Quinn J. granted judgment for the amount of taxes, surcharges and interest claimed in the summons, together with interest: see *Howley v. Howard* [2024] IEHC 15. Quinn J. did not accept the contention that the respondent's fee arrangement with a panel of solicitors was champertous. Quinn J., having considered the contract between the respondent and his panel of solicitors dated 29th January 2020, in particular Clauses 5.1, 5.2 and 5.3, headed "Remuneration Structure", held that the contract was not champertous. Quinn J. determined that there was nothing unlawful or extraordinary about the arrangement between the solicitors and the respondent.

11. These contractual provisions – on one view – appeared to provide for a form of incentive type remuneration structure. Thus, for example, in addition to a fee of €270 plus VAT plus outlay, the solicitors' firm in question was entitled to receive 7% of the tax and interest charged as commission in respect of the "enforcement of judgment where collection is achieved." Quinn J. rejected the contention that in a case where judgment was granted and a costs order made against a defendant, that the "fruits" of the litigation were both the tax

debt and the costs. He also did not accept that the effect of Clause 5.2 was to confer on the solicitor a right to be paid a share of those "fruits" of the litigation.

12. Quinn J. rejected the argument that Clause 5.2 of the contract operated to confer a "contingent bonus" upon the respondent's solicitors wherein the solicitors would be entitled to require payment of a sum in excess of that to which the respondent would otherwise be entitled to recover under Clause 5.3. Quinn J. also rejected that the amendment to the contract dated 14th February 2023, in which Clause 5.2 was deleted, rendered the proceedings moot.

13. Quinn J. also rejected the claim that the contract was contrary to public policy by reason that it perpetuated fraud on a taxpayer. Quinn J. held that this proposition forwarded by the taxpayers was based on an assumption that at an adjudication the respondent would withhold or conceal the existence of the terms of engagement with his solicitors, and refused to determine the case on the basis of such an assumption.

14. Quinn J. further held that even if he was incorrect in finding that the contract was not champertous, it did not follow that the tort of champerty could be relied upon as a defence to the proceedings. Quinn J. held that while champerty is a tort and an offence in the State, the rule cannot be invoked as a bar to the pursuit of an otherwise sustainable or stateable action. Quinn J. held rather that if a defendant succeeded in their defence and established that the action had been maintained in a champertous manner, then he or she may have a remedy against the party who has provided the offending assistance; however such did not arise in the present case.

15. The taxpayers duly appealed the decision to the Court of Appeal, principally on the ground that the High Court had erred in finding that the contract was not champertous, and that champerty was not in any case a defence to the proceedings.

The Court of Appeal judgment

16. The Court of Appeal (Whelan, Binchy, O'Moore JJ.) upheld the decision of the High Court and dismissed the appeal on all grounds: see *Howley v. Howard* [2025] IECA 77.

17. In the principal judgment of the Court, Binchy J. noted that the burden was on the appellant taxpayers to prove champerty on the balance of probabilities. He held that it would be difficult to conclude that the effect of Clause 5.2 of the contract could be said to amount to a form of maintenance or champerty. In circumstances where the respondent has a statutory obligation to pursue those who fail to pay taxes due, Binchy J. held the proceedings would be brought irrespective of the fee arrangements entered into between the respondent and his legal advisors.

18. Binchy J. further concluded that there was no authority for the proposition that *Wallersteiner v. Moir (No. 2)* [1975] QB 373 (on which the taxpayers placed much reliance) reflected the law in this jurisdiction and he considered that to accept that proposition would be to extend the law of champerty as it now stands. Binchy J. held that to do so would be inconsistent with the decision of the Court in *O'Keeffe v. Scales* [1998] 1 IR 290 in which Lynch J. expressly stated (at 295) that the law of champerty should "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."

19. Binchy J. also rejected the argument that costs should be treated as the fruits of litigation in the same way as a monetary award would. The judge held that litigants do not issue proceedings to recover costs, but to recover losses or damages, and that it is those losses or damages, if recovered, that are correctly described as the fruits of the litigation. Binchy J. held that costs, however, are claimed in order to make whole the plaintiff so as to ensure the plaintiff is not at a loss as a result of the defendant's conduct which necessitated the litigation.

20. Binchy J. held that champerty is not a defence to the proceedings. Binchy J. concluded that Lynch J. made it clear in *O'Keeffe* that champerty should not be deployed to deprive people of their constitutional right of access to the courts to litigate reasonable claims. Binchy J. rejected the contention that the observations of Lynch J. were *obiter* and was satisfied that such decision represents the current state of the law on the issue. Binchy J. concluded that champerty cannot be deployed as a defence, but a successful defendant who can establish that an action was maintained by champerty has their remedy in tort against the tortfeasor.

21. In a separate judgment, O'Moore J. strongly rejected the claims of fraud advanced by the taxpayers, holding that this claim was unstateable. O'Moore J. held that it was impossible to make out fraud, deceit or fraudulent misrepresentation in the circumstances of the case and held that the point should not have been made at all where it was forwarded on a hypothetical basis and not maintained on the basis of the facts arising in the circumstances. O'Moore J. further criticised that the point was maintained on appeal and was not abandoned. Binchy J. in his judgment agreed with the observations of O'Moore J. and the conclusions of the High Court, and held that there were no errors in the conclusions of that Court.

Part IV – The application for leave and the submissions of the parties

The application for leave

22. The taxpayer, Mr. Howard, thereafter applied for leave to appeal to this Court pursuant to Article 34.5.3º of the Constitution on the 16th June 2025 seeking to set aside the judgments and orders of the High Court and Court of Appeal. The application for leave to appeal made by Mr. Howard was expressed in identical terms to the separate application made by Ms. McClean ([2025] IESECDET 114). By a determination dated 19th September 2025 ([2025] IESCDET 115) this Court granted leave to appeal in both cases, noting (at para. 25 of the Determination in Mr. Howard's case) that aspects of the law of champerty were

"somewhat unclear", particularly questions "regarding the legality of what appears to be a form of conditional uplift fee which is success dependent and which is based on the amount of unpaid taxes and interest recovered as against the defaulting taxpayer."

The arguments of the appellant taxpayers

23. The taxpayers contend that the Court of Appeal erred in concluding that the principles in *Wallersteiner (No.2)* were not and were never part of Irish law. They also submit that the Court of Appeal judgment has created uncertainty as to the extent of a solicitor's security under s. 3 of the Legal Practitioners (Ireland) Act 1876 in determining that costs are not the fruits of litigation, as Laffoy J. held costs were part of the proceeds of litigation in *Lett v. Wexford Borough Council* [2016] 1 IR 418. They further contend that the Court of Appeal had erred in considering the observations of Lynch J. in *O'Keeffe* as the *ratio* of that case where they were instead *obiter.*

The arguments of the respondent

24. The respondent maintains that success fee arrangements are a common feature of Irish litigation and are not champertous. Furthermore, the respondent contends that the taxpayers are incorrect in their characterisation of the observations of Laffoy J. and Lynch J. and it says that the Court of Appeal correctly considered and applied the earlier decisions in *Lett* and *O'Keeffe.*

The issue before the Court

25. The sole issue before the Court is whether the respondent's fee arrangement with a panel of its solicitors is champertous. As I have already observed, Clauses 5.1, 5.2 and 5.3 of the contract (which are set out above) appear to contemplate that the solicitor may in some instances obtain a conditional uplift fee based on the sums actually recovered from the taxpayer. Following the commencement of these proceedings the Revenue sought to amend and delete Clause 5.2 of the contract. The taxpayers, Mr. Howard and Ms. McClean,

maintain that this amendment was ineffective, noting that the High Court refused to dismiss the defence on the ground that the champerty issue was now moot. In fact, both the High Court (*Howley v. Howard* [2024] IEHC 15) and the Court of Appeal ([2025] IECA 77) addressed the merits of the defence and ruled that the arrangements were not champertous.

26. I propose to take a similar approach. If the contracts for professional services contained provisions which were originally champertous or amounted to a form of illegal maintenance, then the taxpayers were entitled to object to them on the grounds that these arrangements were void: see generally, Snell's *Equity* (Sweet & Maxwell, 35th ed., 2025) at para. 3-046. Accordingly, contrary to the suggestions made in the judgments in the High Court and the Court of Appeal, the existence of a champertous agreement is a defence to those proceedings. Any other conclusion would effectively undermine the rules on champerty and maintenance since it would mean that a defendant would be obliged to defend champertous proceedings (or proceedings which had been improperly maintained) with the only remedy being a separate action in tort for damages. Leaving aside the fact that the basis on which damages could be recovered in such a case would be quite uncertain, the essential rationale of the rules on champerty and maintenance is to maintain the integrity of the administration of justice. It could hardly be suggested that litigants – or, for that matter, a court – should be obliged to stand back, effectively powerless to act in the event that the agreement was indeed champertous and await the outcome of a separate tort action brought by the defendants in the original proceedings.

27. If, moreover, that were indeed the law, then this Court could never, for example, have decided *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2017] IESC 27, [2022] 2 IR 417 in the way in which it did.

28. To that extent, therefore, I think that counsel for the taxpayers is correct in saying that we have to consider the validity of these clauses as they existed at the time of the commencement of the proceedings and not otherwise.

Part V – The Legality of the Conditional Uplift Fee

The legality of the conditional uplift fee

29. If we turn to the first issue, namely, the legality of the conditional uplift fee, one might first observe that the fee arrangements contained in Clause 5.3 would clearly have been champertous at common law, not least because the solicitors in question obtained a success fee which was contingent on the sums actually recovered by Revenue against the defaulting taxpayer. So, for example, in *Re A Solicitor* [1912] 1 KB 302 at 313 Darling J. held that a solicitor who charged fees of this nature had engaged in unprofessional and champertous conduct. This was because the respondent solicitor was found to have "a distinct interest in the amount which he would recover. His commission for bringing an action was to be governed, the percentage being fixed, by the amount recovered". This, said Darling J. (at 312) amounted to a division of the spoils ("campi partitio" in Latin)(literally, a division of the field) "between the solicitor and the person who claimed it". In *Wallersteiner (No.2)* [1975] QB 373 Lord Denning MR observed ([1975] QB 373 at 393) that "payment of a commission on a sum proportioned to the amount recovered – only if he won – ….was also regarded as champerty".

30. But while this was the law in 1922 upon the establishment of the Irish Free State, and was carried over in 1937 by Article 50 of the Constitution, this is no longer the case so far as an action to recover a debt or other liquidated sum is concerned. Section 68 of the Solicitors (Amendment) Act 1994 ("the 1994 Act") had originally so expressly provided by allowing contingent fee recovery in debt collection cases of this kind. While this section was

repealed by Schedule 2 of the Legal Services Regulation Act 2015 ("the 2015 Act"), s. 149(1)(a) replicates the general effect of s. 68 of the 1994 Act.

31. Section 149(1) of the 2015 Act accordingly provides that:

> "(1) A legal practitioner shall not charge any amount in respect of legal costs if –
>
> (a) they are legal costs in connection with contentious business expressed as a specified percentage or proportion of any damages (or other moneys) that may be or become payable to his or her client, *other than in relation to a matter seeking only to recover a debt or liquidated demand*". (emphasis supplied)

32. The effect of this sub-section is two-fold. First, it effectively re-states the general rule as to champerty in statutory form by preventing a solicitor from charging a percentage fee in respect of "damages (or other moneys)" that may be recoverable on behalf of the client. It would not, for example, be lawful for a solicitor acting for a client in a personal injuries action to stipulate that his fee should be expressed as a percentage of the sums recovered in that action.

33. Second, this re-statement of the rule as to champerty does not, however, apply to actions for debt or in respect of other claims seeking only to recover liquidated amounts. As the respondent's proceedings here seek only to recover a debt, they fall within the exception to s. 149(1)(a) of the 2015 Act. It follows, therefore, that the fee structure provided for by Clause 5.3 of the Contract is, by virtue of s. 149(1)(a), a lawful one.

34. Faced with this difficulty, counsel for the taxpayers argued that this statutory exception should be strictly construed, so that one could not have, as it were, a "mixed" fee consisting of a flat commission payment plus a percentage fee in respect of the sums actually recovered. This, of course, is what Clause 5.3 provides. For my part, I cannot accept this construction of s. 149(1)(a). The Oireachtas clearly decided to modify the traditional common law champerty rules by allowing for percentage fees in debt collection and

liquidated damages claims. Given this policy choice by the Oireachtas, it would not be sensible to exclude "mixed" fee arrangements of this kind.

35. In view, therefore, of the provisions of s. 149(1)(a) of the 2015 Act, it was accordingly lawful for the Revenue to provide for a percentage fee arrangement (coupled, if needs be, with a commission payment) which was made dependent on the sums actually recovered. While this type of conditional uplift fee would certainly have been champertous at common law, that common law rule has *in this respect only* been supplanted by the exceptions provided for in s. 149(1)(a), so far as debt collection cases of this kind are concerned.

Part VI – The legality of the "no foal, no fee" cost structures prior to 1922

36. We must now turn to the more difficult second issue, namely, the legality of "no foal, no fee" costs structures, or (as here) a variant thereof as provided for by Clause 5.2 of the contract. The all too complex law in relation to this matter is very helpfully analysed in rigorous detail by Professor Whyte in "The legal status of 'no foal, no fee' arrangements" (2012) 17 *Bar Review* 61.

37. Before proceeding further, one particular complication should be noted. At the hearing of the appeal, counsel for the respondent confirmed that it proposed to claim costs *only* on the basis of Clause 5.3 and *not* by reference to Clause 5.2. What follows, therefore, technically is obiter because the "no foal, no fee" aspects of Clause 5.2 have thereby been rendered academic. I consider, however, that it is in the public interest and very much in line with this Court's role under Article 34.5.3º and Article 34.5.4º of the Constitution that we should provide clarity on this issue, not least given the centrality of its importance to the funding arrangements currently prevalent in the legal system. While the conclusions reached in respect of that clause are therefore strictly obiter, in deference to the arguments advanced in this Court and in view of the wider importance of the issues raised, I have

thought it necessary to consider and explore them: see, by analogy, the comments of O'Donnell C.J. in *Odum v. Minister for Justice* [2023] IESC 3, [2023] 2 ILRM 164.

38. As I have already indicated, the "no foal, no fee" costs arrangements are very widespread throughout the legal system. In its most common form, the solicitor agrees with the client not to charge any fee (other than for outlay) save to the extent that the client obtains an order for costs against another party who is a mark for costs. These fee arrangements are very common in cases involving litigants of modest means who might otherwise be unable to take, say, personal injury cases against an alleged tortfeasor.

39. This, of course, is not true of Revenue who naturally have the resources to maintain proceedings. They are very probably using these fee arrangements for cost management/cost reduction purposes and to incentivise efficiencies on the part of their legal teams. Clause 5.2(v) and (vi) of the contract nevertheless provide for a form of "no foal, no fee" arrangement in that they contemplate a higher fee being paid to the solicitors on their panel in the event that Revenue obtain an order for costs against the taxpayer. This captures the essence of the "no foal, no fee" arrangement. This raises the question of whether these arrangements are actually lawful, despite the fact that they are a very common form of current fee arrangements, particularly for private litigants in areas such as personal injuries, clinical negligence claims and judicial review.

40. In this context it may be useful in the first instance to consider what the law actually was in 1922 and what was carried over, first, by Article 73 of the Constitution of the Irish Free State and subsequently by Article 50 of the Constitution of Ireland in 1937. In saying this, there is no need to re-open the debate found in recent cases such as *McGee v. Governor of Portlaoise Prison* [2023] IESC 14, [2023] 1 ILRM 305 and *The People (Director of Public Prosecutions) v. Noonan* [2025] IESC 22 as to the extent to which the common law can be

"developed" beyond the contours of what existed in 1922 or, for that matter, in 1937. The law as it existed in 1922 is, nevertheless, a starting point for this analysis.

41. At one level, s. 11 of the Attorneys' and Solicitors' Act 1870 ("the 1870 Act") might seem to suggest that "no foal, no fee" arrangements of this kind were unlawful. This section provides that:

> "Nothing in this Act…shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interests, of his client in any suit action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit".

42. Section 11 of the 1870 Act was expressly preserved by s. 2(2)(a) and Schedule 1 of the Statute Law Revision Act 2007. The first part of the section addresses the question of contingency style arrangements whereby the solicitor receives a percentage fee based on the sums actually recovered. This, as we have seen, is now dealt with by s. 149(1)(a) of the 2015 Act which must be regarded as having superseded the first part of s. 11 of the 1870 Act.

43. The second part of s. 11 of the 1870 Act deals with "no foal, no fee" arrangements. The language used by the parliamentary draftsman ("Nothing in this Act…shall be construed to give validity…") is decidedly curious. Certainly taken in isolation, it gives the impression that "no foal, no fee" arrangements are unlawful. It seems to imply that such arrangements are in fact already unlawful and that nothing in the section would actually validate them.

44. That, however, is not the way in which the section was actually interpreted prior to 1922. Shortly after the 1870 Act was enacted, the English Court of Common Pleas held in *Jennings v. Johnson* (1872-1873) LR 8 CP 425 that, in the terse words of Bovill C.J. (at

426), "Section 11 was intended to provide against champerty. But a promise not to charge anything for costs is not champerty". It is true that, as Pearson J. subsequently observed in *Re A Solicitor* [1956] 1 QB 155 at 160, *Jennings* was decided "very soon after the [1870] Act was passed, when it may well be that the situation in relation to which and the purpose for which it was passed were well in everybody's mind". This was also the view of Professor Winfield, *The Present Law of Abuse of Legal Procedure* (Cambridge, 1921) where, commenting (at 101) on cases such as *Jennings* he said that s. 11 "does not seem to have made any change in the previous law".

45. I cannot avoid thinking, however, that there is something unconvincing about the line of reasoning found in the judgment of Bovill C.J. in *Jennings*. If the section was designed to protect against champerty, then, one may ask, why did the Parliament use the term "give validity" in the context of "no foal, no fee" arrangements? The language to my eyes seems somewhat convoluted for a statutory provision which was simply designed to preserve the pre-existing common law rule and practice. Why, it might be asked, would Parliament use language which certainly gave the impression that such arrangements were unlawful such that nothing in the section would "give validity" thereto if it really intended to achieve the exact opposite result? If, therefore, the matter had to be determined as if it were *res intergra,* I am not sure that this would be the interpretation of the section which I would personally adopt.

46. The general view is, of course, that "decisions of the House of Lords upon law common to England and Ireland given before the coming into operation of the Constitution of 1922 are of binding force in the Courts until their effect has been altered by our Legislature": see *Minister for Finance and Attorney General v. O'Brien* [1949] IR 91 at 117, per Murnaghan J. These pre-1922 House of Lords decisions (and perhaps English Court of Appeal decisions as well) are part "of the corpus of jurisprudence and law that was taken

over on the foundation of Saorstát Éireann, being the laws in force in Saorstát Éireann at the date of the coming into operation of the Constitution of the Irish Free State": see *Irish Shell Ltd. v. Elm Motors Ltd.* [1984] IR 200 at 226, per McCarthy J.

47. While McCarthy J. also suggested that these pre-1922 House of Lords decisions should no longer be treated as strictly binding in view of our own relaxation of the rules as to *stare decisis* in cases such as *Attorney General v. Ryan's Car Hire Ltd.* [1965] IR 642, it is unnecessary to explore this question so far as the present case is concerned. This is because this Court is not, of course, strictly bound by any pre-1922 English first instance decision such as the Court of Common Pleas decision in *Jennings*.

48. It is not, however, simply a question of precedent, as such. It is rather that, rightly or wrongly, this interpretation of s. 11 of the 1870 Act is the one which has been current for over 150 years. In these circumstances, I think that this Court should not disturb this interpretation of s. 11 of the 1870 Act. As Henchy J. explained in *Mogul of Ireland Ltd v. Tipperary (NR) County Council* [1976] IR 260 at 273:

> "Even if the later Court is clearly of opinion that the earlier decision was wrong, it may decide in the interests of justice not to overrule it if it has become inveterate and if, in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand".

49. I consider that this principle applies here. The practice of "no foal, no fee" arrangements has become inveterate in the Irish legal system and the population as a whole has acted on the basis of the legality of this practice in a "widespread or fundamental way". In this context the Law Reform Commission observed (at p. 67) in its Consultation Paper on *Third-Party Litigation Funding* (CP-69-2023) that "no foal, no fee" arrangements "are an accepted aspect of the Irish legal system and a key instrument for many in accessing

justice." One could also point to the observations of Denham C.J. in *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2017] IESC 27, [2022] 2 IR 417 at 447, where she said that: "There is a long history at the Bar, and amongst solicitors, of taking cases on a 'no foal no fee' basis. Many of the most important cases have been taken in such circumstances". Similar sentiments have been recently expressed in a series of environmental funding cases, including, for example, the comments of Murray J. (at para. 88) in *Friends of the Irish Environment v. Legal Aid Board* [2023] IECA 19 and those of Holland J. (at para. 90) in *Salmon Watch Ireland CLG v. Aquaculture Licences Appeals Board* [2024] IEHC 700.

50. There are besides many contemporary decisions from the general pre-1922 area which attest to the legality of the "no foal, no fee" practice. So, for example, in *Ladd v. London Road Car Co*. (1900) 110 LT Jo. 80, Lord Russell of Killowen LCJ observed that: "justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed."

51. Likewise in *Rich v. Cook* (1900) 110 LT Jo. 94 Smith MR said that he "entirely agreed" with the judgment of Lord Russell in *Ladd*, adding that "there was no impropriety at all in a solicitor's merely conducting a speculative action, for if it were improper for a solicitor to do so, many poor people would be unable to get their legal rights."

52. The same approach can be seen in *Clare v. Joseph* [1907] 2 KB 369, a case where the English Court of Appeal held that a client could rely on an oral agreement under which the solicitor agreed to take less than the taxed rates. Here again the various judgments of Lord Alverstone C.J., Fletcher Moulton L.J. and Buckley L.J. all point out that the 1870 Act had simply sought to regulate the relationship between solicitor and client, rather than to change the substance of the law. Lord Alverstone stressed (at 372) that prior to the passage

of the 1870 Act the courts always had the power to control solicitors and the payment of fees:

> "The inquiry was always directed to the question whether the agreement was fair and reasonable, *and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair or unreasonable, but was held binding upon him".* (emphasis supplied)

53. It is true that even prior to 1922 different views were expressed on this subject. In *Pittman v. Prudential Deposit Bank Ltd.* (1896) 13 TLR 110, a client had agreed with his solicitor that a debt which he (the client) owed to that solicitor could be deducted by the latter from any award of damages in the event that the client succeeded in his then pending litigation. This was held to be unlawful by the English Court of Appeal, with Lord Esher MR saying (at 111) that a solicitor "could not make an arrangement of any kind with his client during the litigation which he was conducting so as to give him any advantage in respect of the result of that litigation".

54. But while accepting that divergent views were expressed on the topic, I consider that the clear balance of authority prior to 1922 was that "no foal, no fee" arrangements of this kind were lawful and s. 11 of the 1870 Act had already been judicially interpreted to reflect this fact. One way or another, at least prior to this litigation and at least so far as this jurisdiction is concerned, the legality of this practice has never really been doubted in any serious way. No one had ever suggested otherwise. In these circumstances, I take the view that this represented the common law as it existed in this jurisdiction in 1922 and which was carried over in this State, first, by Article 73 of the Constitution of the Irish Free State and then subsequently by Article 50 of the Constitution as part as the "laws in force in Saorstát Éireann" as of 29th December 1937, i.e., the date of the entry into force of the Constitution.

Part VII – Post-1922 Developments in England and Wales

55. It is next necessary to consider certain developments in England and Wales after 1922. There is no doubt but that the majority of this case-law dealing with the legality of "no foal, no fee" style arrangements suggests that such arrangements are unlawful: see, e.g., *Re Trepca Mines Ltd. (No.2)* [1963] Ch. 199; *Wallersteiner v. Moir (No.2)* [1975] QB 373; *Awwad v. Geraghty & Co.* [2001] QB 570; and *R. (Factortame Ltd.) v. Secretary of State for Transport (No. 8)* [2003] QB 381. Thus, in *Wallersteiner (No.2)* Lord Denning MR stated the rule in fairly uncompromising terms ([1975] QB 373 at 393):

> "It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost."

56. While this reflects the predominant English judicial view, it may nonetheless be noted that some of the earlier turn of the 20th century case-law which hold to the contrary does not appear to have been either cited or relied upon. Thus, for example, there is no mention in *Wallersteiner (No.2)* of earlier authorities such as *Ladd* or *Rich* or, for that matter, *Clare.*

57. There is admittedly one significant English authority to the contrary, *Thai Trading Co. v. Taylor* [1998] QB 781, but even that decision was not followed in *Awwad.* In *Sibthorpe v. Southwark LBC* [2011] EWCA Civ. 25, [2011] 1 WLR 2111 where Lord Neuberger said that the judgment of Millett L.J. in *Thai Trading* had been given *per incuriam*.

58. The justification for this general English approach is well summarised by Walters, "Contingency Fee Arrangements at Common Law" (2000) 116 LQR 371 at 372:

> "Two principal justifications for the law's antipathy towards contingency fees can be identified. First, they are said to give rise to a conflict of interest between solicitor and client. The solicitor's direct financial interest in the outcome of the client's case may affect his ability to give genuinely impartial advice: *e.g.* he may be tempted to

encourage a settlement that is not necessarily in the client's interests. Secondly, solicitors may be encouraged to behave in a manner inconsistent with their duty to the court: *e.g.* by pressurising witnesses or withholding evidence unhelpful to the client's case."

59. To this may be added the comments of Mulheron, *The Modern Doctrines of Champerty and Maintenance* (OUP, 2023)(at 142) where she commented that the modern English case-law was based on the "essential notion…that lawyers cannot be disinterested, so as to give impartial and unbiased advice, if they have a financial interest *in success*; the lawyer should be paid the same, win or lose."

60. Quite apart from the fact that the statutory and regulatory regime in England and Wales is now quite different to that which obtains here, I find myself unpersuaded by these justifications. Even without the statutory changes which obtained in the United Kingdom in 1990, I agree with Millett L.J. in *Thai Trading* when he commented ([1998] QB 781 at 790) that the fear that lawyers "may be tempted by having a financial incentive in the outcome of litigation to act improperly is exaggerated", and he also pointed to the fact that "there is a countervailing public policy in making justice readily accessible to persons of modest means".

61. These sentiments are at least as true in this jurisdiction as they are in the United Kingdom. I dare say that there may be instances where lawyers are swayed in the advices that they tender to the client by reason of the fact that they have a financial interest in the outcome (such as advising the client to settle on terms which ensure that they – the lawyers – are paid), but then just about every human rule is liable to abuse. One can merely say that the practical experience of a jurisdiction where the "no foal, no fee" system is pervasive has not shown that this is a serious practical problem. The same is true *a fortiori* in debt

collection cases where the Oireachtas has expressly sanctioned the practice of conditional uplift fee and where such fees have been lawful in such cases since 1994.

62. Besides, the reality is that all – or, at least, nearly all – solicitor and client relationships have a commercial aspect. One could say that in virtually every case a solicitor can be said to have an interest in the outcome, even if only on the basis that a successful client is more likely to discharge their fees promptly and generously. To that extent, I consider that the reasoning in *Thai Trading* is, with respect, more convincing and more realistic than any of the other contemporary UK authorities.

63. One must, in any event, balance against any concerns of possible abuse the fact that the legal aid system in civil cases cannot possibly meet the full range of unmet demand. One can fairly say that if the "no foal, no fee" system were held to be unlawful it would immediately present the legal system with a serious crisis.

64. There are, in any event, clear indicators from a series of Irish cases and regulatory measures that the "no foal, no fee system" is not in itself regarded as unlawful. In *McHugh v. Keane,* High Court, 16 December 1994, Barron J. referred to the fact the solicitor had agreed with the client that "he would be remunerated out of monies recovered in the action or not at all." Barron J. held that in these circumstances there was "an implied term to that effect not to withdraw those instructions until the conclusion of the proceedings". There was admittedly no discussion in the judgment of the potential issue as to champerty, but what is striking is that Barron J. saw no reason whatsoever to dispute the legality of the "no foal, no fee" arrangement. It is also worth noting that this approach was followed by Laffoy J. in *Synott v. Adekoya* [2010] IEHC 26 where she quoted with approval from *McHugh* and the judgment addresses itself to the issue of implied terms following the termination of the retainer.

65. It is also of interest that the practice has been regulated by the Legal Services Regulatory Authority ("the Authority"). Article 6(b) of the Legal Services Regulation Act 2015 (Advertising) Regulations 2020 (S.I. No. 644 of 2020)("the 2020 Advertising Regulations") provides that:

> "…an advertisement published or caused to be published by a legal practitioner with a reference to 'personal injuries' to the extent permitted by these Regulations shall not include words or phrases such as 'no win no fee', 'no foal no fee', 'free first consultation', or other words or phrases of a similar nature which could be construed as meaning that legal services in connection with claims for personal injuries would be provided by the legal practitioner at no cost to the client."

66. The Authority has accordingly regulated the advertising of "no foal, no fee" arrangements. While the Authority has no power to make the practice lawful if it were otherwise unlawful, the very fact that it has regulated the practice in this way is another example of the ubiquity of "no foal, no fee" arrangements in this jurisdiction and how – at least up to this point – their legality has never been seriously questioned.

67. There is yet a further consideration. Article 34 of the Constitution vests the administration of justice in the courts and there is, moreover, a multitude of cases which attest to the proposition that Article 34, read in conjunction with Article 40.3.1º, guarantees a constitutional right of access to the courts. If that right is to be made effective, then an existing practice whereby persons of modest means can obtain access to justice should not lightly be held to be unlawful. As Lynch J. stated in *O'Keeffe v. Scales* [1998] 1 IR 290 at 295:

> "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".

68. To this I would point to what I said in the High Court in *Greenclean Waste Management Ltd. v. Maurice Leahy & Co. (No.2)* [2014] IEHC 314 where I observed (at para. 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."

69. All of this means that the common law rules as to maintenance and champerty should not be extended such as to render the "no foal, no fee" system unlawful if this can be avoided. The practice is, as I have noted, deeply embedded in our legal system and it is one method of ensuring access to justice for many: see, *e.g.*, Capper, "Litigation Funding in Ireland" (2021) 14 *Erasmus Law Review* 211; Corbett, "Third-party litigation funding – time for a rethink?" (2023) 69 *Irish Jurist* 12 and Lynch Shally, "Third-party litigation funding: Irish reform, regulatory tensions and European influence" (2025) 73 *Irish Jurist* 125. The concerns in respect of any possible abuse in terms of disinterested legal advice voiced by English judges in cases such as *Wallersteiner (No.2)* have not materialised. The advertising of the practice is regulated by the Authority. One must also note that the Oireachtas has not seen fit to prohibit "no foal, no fee" arrangements even though it has had plenty of

opportunities to regulate issues in relation to costs and lawyers' fee arrangements in legislation such as the Solicitors (Amendment) Act 1994 and the 2015 Act.

Part VIII – The application of these principles to the facts of the present case

70. If, therefore, we can conclude that "no foal, no fee" arrangements are in principle not unlawful at common law, we can then proceed to consider the application of these principles to the present case. Quite independently of the "no foal, no fee" system as such, counsel for the taxpayers emphasised that the indemnity principle was at the heart of the costs regime. He contended that as a solicitor could only furnish a bill of costs in respect of an actual obligation to pay costs, this necessarily meant that a conditional uplift fee of the kind contemplated at Clause 5.2 was invalid because it did not reflect the indemnity principle.

71. The indemnity principle was set out by Walsh J. in *Attorney General (McGarry) v. Sligo County Council (No.2)* [1991] 1 IR 99 at 119:

> "The basis of party and party costs is one of indemnity…What can be recovered in party and party taxation is the money paid out or, perhaps in tune with more modern practice, the monies which the successful party had already undertaken with his solicitor and counsel and other persons to pay, such as witnesses *etc.*, even though not yet paid. Nothing can be recovered in party and party taxation unless three conditions are fulfilled namely, (a) that the court has made an order for costs in favour of the party, (b) that the matters claimed had been properly incurred, and (c) that the party in question is under legal liability to pay them."

72. Counsel for the taxpayers naturally focussed on the third criterion. Here the argument was that there could be no legal liability to pay the costs if the client had in fact agreed to a "no foal, no fee" arrangement. It was said that in these circumstances a solicitor could not honestly present a bill of costs where the fee charged was different depending on the

outcome of the case. This is really another way of saying – albeit somewhat indirectly – that the "no foal, no fee" system is unlawful.

73. There is, admittedly, English case-law which supports this approach. In *British Waterways Board v. Norman* (1994) 26 HLR 232, a firm of solicitors advised a client of little means to take a private prosecution against a public body in the expectation that they would only be paid if she obtained an order for costs. A Divisional High Court appears to have held that this arrangement was unlawful, unless the arrangement to waive costs had been agreed *only after* the outcome of the proceedings had become known. This reasoning was criticised by Millett L.J. in *Thai Trading* (itself admittedly overruled by later cases) on the basis ([1998] QB 781 at 789) that it "invites solicitors to produce documents evidencing an agreement which both parties know would not be enforced".

74. In the other case, *Aratra Potato Co. Ltd. v. Taylor Joynson Garrett* [1995] 4 All ER 695, solicitors were engaged on a retainer which provided for a 20% reduction in any cases which happened to be lost. Garland J. held that an agreement to charge different fees dependent on the outcome of litigation was champertous and contrary to public policy. In effect, this is but another variant of the fee structure provided for in Clause 5.2 in the present case.

75. Both of these decisions were criticised by Millett L.J. in *Thai Trading* as "unsound". As he pointed out ([1998] QB 781 at 789), a rule of this kind effectively invites solicitors and their clients to engage in subterfuge "in order to recover their costs in the event of a successful outcome to the litigation shows that the underlying reasoning is unsound." Even allowing for the fact that *Thai Trading* has itself been subsequently disapproved in later English cases, there is, I think, much force in this reasoning. A rule which effectively precluded differential fee structures in all non-debt recovery cases would be exceptionally

difficult to police and it would be at odds with modern real-world practices, at least so far as this jurisdiction is concerned.

76. At the same time, it would have to be recognised that the differential fee structures envisaged in Clause 5.2 cannot easily be fitted within the strictures of the indemnity principle identified by Walsh J. in *McGarry (No.2).* Yet if this argument were to be upheld, it would amount to the invalidation of the "no foal, no fee" system by the backdoor, a step I would candidly be most reluctant to take for all the reasons identified elsewhere in this judgment.

77. There are, I think, in any event two answers to this. First, by analogy with the reasoning of Barron J. in *McHugh,* one can say that the average "no foal, no fee" agreement carries with it certain implied terms. If – as Barron J. held – there was an implied term that the client would continue to retain the solicitor until the conclusion of the case and that otherwise he would be liable to discharge the solicitor's fee, one could equally say that if the client did obtain an order for costs against the other party, there was at that point an implied obligation to discharge the solicitor's fees assuming always that the fees are actually recovered from the other party. If the solicitor then furnishes a bill of costs, that will at that point reflect the indemnity principle because the client was then – at least in theory – under an implied obligation to pay.

78. Second, it must be observed that in making the comments which he did in *McGarry (No.2)*, Walsh J. was not speaking with the special features of the "no foal, no fee" system in mind. While the indemnity principle is a key principle upon which the system of costs is based, it does not have the status of an inviolate rule which admits of no exceptions or qualifications. If we have to choose between preserving the "no foal, no fee" system on the one hand or upholding the fundamental character of the indemnity principle on the

other, I consider that it is the latter principle which, again, for all the reasons set out elsewhere in this judgment, must suffer some dilution or qualification.

79. In summary, therefore, while acknowledging the force of the objections raised by counsel for the taxpayers by reference to the indemnity principle, I consider that that principle must yield, if necessary, to the practical operation of the "no foal, no fee" system.

Part IX - Conclusions

80. Summing up, therefore, I would accordingly conclude as follows.

81. First, the fee arrangements provided for by Clause 5.3 of the contract whereby remuneration is in part dependent on the sums recovered, would have been champertous at common law. In the light, however, of s. 149(1)(a) of 2015 Act (reflecting the changes made earlier by the 1994 Act), such arrangements are lawful in proceedings which seek only to recover a debt or other liquidated demand. The present proceedings fall squarely within that statutory exception. It follows that the conditional uplift fee contemplated by Clause 5.3 is not unlawful.

82. Second, insofar as the contract provides for a form of "no foal, no fee" arrangement, I consider that the balance of the authorities demonstrate that such arrangements were not regarded as unlawful at common law as it stood prior to 1922 and, accordingly, form part of the law carried forward into this jurisdiction by Article 73 of the Constitution of the Irish Free State in 1922 and later by Article 50 of the Constitution of Ireland in 1937. Whatever doubts may arise from the language of s. 11 of the 1870 Act, the consistent judicial understanding of that provision, coupled with long-standing professional practice, supports the conclusion that such arrangements are not in themselves champertous or otherwise unlawful.

83. Third, while the modern English authorities such as *Wallersteiner (No.2)* and *Awaad* have tended to adopt a stricter view, I do not consider that those developments reflect the law

of this jurisdiction. In Ireland, the law relating to maintenance and champerty must be applied having regard to constitutional principles, including, in particular, the right of access to the courts. In that context, a practice which has become embedded in the administration of justice, and which operates to facilitate such access, should not be declared unlawful save on compelling grounds.

84. Fourth, although "no foal, no fee" arrangements do not sit easily with the traditional articulation of the indemnity principle, that principle cannot be regarded as absolute. To insist upon its unqualified application in this context would, in effect, undermine a system of legal practice which is both longstanding and of practical importance. In these circumstances, the indemnity principle must yield, to the extent necessary, to accommodate such arrangements.

85. It follows that the contractual provisions in question, including both Clauses 5.2 and 5.3, are not champertous or otherwise unlawful. In light of the position adopted by the respondent during the course of argument in this Court, it is unnecessary for the purposes of the disposition of this appeal to rely upon Clause 5.2. The conclusions reached in respect of that clause are therefore strictly obiter, although in deference to the arguments advanced in this Court and in view of the wider importance of the issues raised, I have thought it necessary to consider and explore them: see, by analogy, the comments of O'Donnell C.J. in *Odum v. Minister for Justice* [2023] IESC 3, [2023] 2 ILRM 164.

86. In those circumstances, I would dismiss the appeal and affirm the order of the Court of Appeal, albeit for somewhat different reasons.