THE HIGH COURT

[2003 No. 13234P]

BETWEEN

BRIAN COUGHLAN AND COATES ENTERTAINMENT LIMITED TRADING AS CITY LIMITs COMEDY AND NIGHT CLUB AND SKY BAR

PLAINTIFFS

AND

AMANDA STOKES AND MICHAEL WHELTON AND BY ORDER OF THE HIGH COURT

CON O'LEARY AND ELAINE O'LEARY

DEFENDANTS

AND ALSO BY ORDER OF THE HIGH COURT CONSOLIDATING PROCEEDINGS RECORD NO. 2006 No. 5956P ENTITLED

BRIAN COUGHLAN AND COATES ENTERTAINMENT LIMITED TRADING AS CITY LIMITS COMEDY AND NIGHT CLUB AND SKY BAR

PLAINTIFFS

AND

JOHN DONEGAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 20th day of April, 2009.

The application
This is an application, on foot of a notice of motion dated 27th March, 2009, on behalf of all of the defendants in this consolidated action seeking an order pursuant to Order 22, rule 1 of the Rules of the Superior Courts allowing the payment into Court of a sum in satisfaction of the plaintiffs' claim in these proceedings, such payment being for and on behalf of all of the defendants in the consolidated proceedings and for any necessary ancillary orders. It has been made clear by the defendants that, if leave is granted, the lodgment will be without admission of liability, so that liability will remain in issue.

The proceedings
The consolidated proceedings have a long and complicated history. However, it is only necessary to allude to the aspects thereof which are pertinent to the issues which the Court has to determine on this application.

Broadly speaking, the plaintiffs' claims against all of the defendants in the consolidated proceedings are claims for damages for loss which the plaintiffs allege they incurred as a result of damage to their nightclub premises in Cork as a result of negligence, breach of duty and/or breach of the rule in *Rylands v. Fletcher* on the part of the defendants, being owners of premises adjoining the nightclub. Essentially there are four defendant interests in the consolidated action, namely:

> (1) the first defendant in the first action, who has been a defendant since the first action was initiated in November 2003;
>
> (2) the second defendant, who has also been a defendant in the first action since November 2003;
>
> (3) the third and fourth defendants in the first action, who were joined as defendants in the first action by order of the Court made in May 2007; and
>
> (4) the defendant in the second action, which commenced in December 2006.

The order consolidating the two actions was made on 10th December, 2007.

The proceedings were case managed in the Chancery List and, being ready for hearing, were listed for hearing in Cork on 10th November, 2008. However, due to the estimated duration of the hearing, the defendants applied to have the proceedings transferred back to Dublin. The proceedings were listed for hearing in Dublin on 19th March, 2009 but, unfortunately, there was no Judge available to hear the case. The proceedings have now been listed for hearing on 5th May, 2009 and the estimated duration of the hearing is two weeks.

One of the reasons advanced on behalf of the defendants for seeking leave to make a lodgment at such a late stage in the process, after the consolidated proceedings were twice listed for hearing, is that is was only as recently as 26th March, 2009 that it was decided by all of the defendants that they would have a single legal representation, one firm of solicitors and one team of senior counsel and junior counsel, acting on behalf of all of the defendants, so that a co-ordinated approach could be adopted to the defence of the proceedings. The other reason advanced was that it only became possible after 29th October, 2008 for the defendants to properly consider making a lodgment. While, in their reply dated 6th November, 2004 to a notice for particulars raised in the first action, the plaintiffs particularised special damages as including a sum of €1,278,938 in respect of loss of profit up to August 2002, those particulars were only updated on 29th October, 2008, following the directions of the Court on 24th October, 2008, to show a claim for loss of profit to the end of August 2007 in the amount of €2,720,678.

The relevant rules
The consolidated proceedings do not involve any claim for personal injuries and, accordingly, they are governed by sub-rule (1) of rule (1) of Order 22 which, insofar as is relevant, provides as follows:

> "In any action for a debt or damages ... the defendant may at any time after he has entered an appearance in the action and before it is set down for trial, or at any later time by leave of the Court, upon notice to the plaintiff, pay into Court a sum of money in satisfaction of the claim ...."

Where money is paid into Court the consequences in terms of where liability for the costs of the proceedings lies is determined in accordance with rule 4 or rule 6 of Order 22.

> Rule 4(3), insofar as is relevant for present purposes, provides:
>
> "If the plaintiff accepts money paid into Court in satisfaction of his claim, ... he may after four days from payment out, unless the Court otherwise orders, tax his costs incurred to the date of giving notice to the defendant, in accordance with the provisions of sub-rule (1) hereof and forty-eight hours after taxation may sign judgment for his taxed costs."

The effect of that sub-rule is that if, say, the defendants' application is acceded to and the defendants make a lodgment on, say, 27th April next and the plaintiffs give notice of acceptance of the sum paid into Court on, say, 1st May next, the plaintiffs will be entitled to their costs of the proceedings up to 1st May next.

Rule 6 deals with the situation where the plaintiff does not accept, in satisfaction of the claim, the sum paid into Court but proceeds with the action and is not awarded more than the amount paid into Court. In that situation "unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct", *inter alia*, the following provisions apply:

> "(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.
>
> (3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid."

Sub-rule (4) provides for set-off of the costs mentioned in sub-rules (2) and (3) against each other. If this application is acceded to and the defendants make a lodgment on, say, 27th April, 2009, but the plaintiffs do not accept the lodgment but proceed with the action and ultimately fail to "beat" the lodgment the effect of sub- rules (2) and (3) is that, subject to such order to the contrary as the trial Judge may make for special cause, the plaintiffs would be entitled to the costs up to 27th April, 2009 and the defendants would be entitled to the costs thereafter.

The position adopted by the plaintiffs on the application
Counsel for the plaintiffs submitted, in reliance on the decision of this Court (Barr J.) in *Brennan v. Iarnroid Eireann* [1992] 2 I.R. 167, that where, as here, the defendants had known of a large claim for a long time and a lodgment had not been made within the permitted time but leave was sought after unsuccessful "without prejudice" negotiations, the Court has a discretion to refuse the application outright. It is admitted by the defendants that there were "without prejudice" negotiations on 19th March, 2009, which came to nought. The alternative proposition put by counsel for the plaintiffs was that, as a matter of law, and in particular, having regard to the decision of the Supreme Court in *Ely v. Dargan* [1967] I.R. 89, the application could only be allowed on the basis that the defendants pay all of the plaintiffs' costs to date in the proceedings.

Conclusion
Referring to rule 1(1) of Order 22, in *Ely v. Dargan*, Ó Dálaigh C.J. stated (at p. 94) that the rule is "in the widest terms", indicating that an application for leave may be brought before a re-trial, as well as before a trial. Later (at p. 95) he stated:

> "The defendant was right to urge that the public interest is served by allowing a defendant, even at the eleventh hour, to proffer to the plaintiff under the lodgment machinery of the Courts a sum that the defendant considers adequately meets the plaintiffs claim. But the principle of public interest does not require that a defendant, who by leave of the Court is allowed to avail of the lodgment machinery, should do so on any more favourable conditions than he would have done if he had used the machinery in the ordinary way without the Court's leave."

In *Brennan v. Iarnroid Eireann* the plaintiff's claim was for damages for personal injuries and was governed by rule 1(7), not by rule 1(1). There the defendants had sought to be allowed make a lodgment out of time, having initially filed defences denying liability and having been involved in two attempts to settle the claim, in the course of which the plaintiff had made available all medical reports relating to her injuries, out of which no settlement emerged. Barr J. refused the application holding that, in the absence of special circumstances, a defendant should not be allowed to use information obtained in unsuccessful settlement negotiations as a measure for calculating what was intended to be a "tight" lodgment. Moreover, he held that the fact that all three defendants were, at the time of the application, being represented by the same solicitor and that they no longer disputed liability, where it was not contended that any of the defendants ever thought that they had a good defence, did not amount to special circumstances.

The decision in *Brennan v. Iarnroid Eireann* was distinguished recently in this Court by Peart J. in *Kearney v. Barrett* [2004] 1 I.R. 1, which was also a personal injury action which was governed by rule 1(7). It was distinguished on the basis that the former had been decided "before the climate change brought about by the Rules of the Superior Courts (No.6) (Disclosure of Reports and Statements) 1998". In that case, Peart J. refused the plaintiff's application seeking an order striking out a notice of tender offer, which had been made in time, but after unsuccessful negotiations between the parties. Apart from noting the climate change brought about by the disclosure requirements, Peart J. considered the rationale underlying the lodgment rules, stating as follows (at p. 10):

> "When the court, as in this case, is examining the situation that has arisen and is considering whether a tender offer which has been made should be allowed to remain in being or whether it should be struck out on the basis that it ought not to have been put in after unsuccessful 'without prejudice' negotiations, the court cannot look at the situation in the same way as the plaintiff who naturally feels that he has made some concessions during those negotiations which he would not have made had he known the defendant was going to make the tender offer. The court must consider the matter from the point of view of justice and from the point of view of the purpose of the lodgment and tender mechanism, including the public interest identified by Ó Dálaigh C.J. in *Ely v. Dargan* ....
>
> Can it seriously be suggested that from the court's perspective as opposed to the plaintiffs' that it is wrong or unjust or unfair that a defendant should be permitted to make, within the time permitted by the Rules ..., a lodgment or tender offer in the light of the true facts of the case, including the weakness in his opponent's case? I think not. The purpose of the lodgment procedure is to facilitate an earlier settlement of a case, as well as reducing the costs of the action and helping to ensure that as far as possible cases do not get heard by a court which need not be heard."

The disclosure requirements introduced in 1998 in relation to personal injuries actions do not apply to these consolidated proceedings. That, in my view, could not be a determinative factor on this application. The fulfilment of the underlying rationale of the lodgment procedure- facilitating settlement of the claim without a full hearing with a view to reducing costs provided the plaintiff is not prejudiced - must be the determinant, irrespective of the level of disclosure required by law.

As I hope to illustrate later, in this case to allow the defendants to make a lodgment at this late stage does not entail any prejudice or disadvantage to the plaintiffs. Given the reliance by counsel for the plaintiffs on the decision of the Supreme Court in *Ely v. Dargan*, I consider it appropriate to demonstrate how that case is distinguishable from this case. The plaintiff in *Ely v. Dargan* was an infant who was claiming damages for personal injuries. The defendant paid the sum of £7,000 into Court with his defence. At the trial of the action, the plaintiff was awarded the sum of £13,000 as damages. The defendant appealed. The Supreme Court set aside the award as being excessive, directed a new trial, and ordered the plaintiff to pay the defendant his costs of the appeal and also ordered that the costs of the trial should abide the result of the new trial. Subsequently, the plaintiff's claim was compromised subject to the approval of the Court, but the approval was not forthcoming. The defendant then applied for leave to increase the lodgment to £10,505. As appears from the judgment of Ó Dálaigh C.J. (at p. 92), in the High Court Murnaghan J. was prepared to grant leave but only on terms that all costs to which the plaintiff had been put from the date of the original defence should be paid. Counsel for the defendant, however, was only prepared to offer to pay the costs of the first trial and of the motion for leave to increase the lodgment. The application was refused and the defendant appealed to the Supreme Court. In his judgment, immediately following the passage which I have quoted earlier, Ó Dálaigh C.J. stated that the defendant, by increasing the amount of his lodgment, was seeking to put himself in a more advantageous position at trial vis-á-vis the plaintiff than he then occupied. The *ratio decidendi* is to be found in the following paragraph, in which Ó Dálaigh C.J. stated (at p. 95):

> "Cases may arise in which there are circumstances that require special consideration; but, short of this, my opinion is that in the ordinary case where a defendant wishes to increase the amount ofhis original lodgment he may properly be required, as a condition of obtaining liberty, to restore the plaintiff to the position in which he would have been if the increased lodgment had been an original lodgment made under the Rules without leave; that is to say, that the defendant should undertake to recoup the plaintiff in respect of all costs already incurred, or ordered to be paid by him, subsequent to the date of the original lodgment."
>
> Liberty was granted to increase the lodgment on the terms stated.

Unlike the situation which arose in *Ely v. Dargan*, this application is not concerned with topping up an existing lodgment, nor are the plaintiffs facing a re-trial in circumstances where there is an existing award of the costs of an appeal against them. In the situation which arises here, the application of rules 4 and 6 of Order 22 do not disadvantage the plaintiffs to any extent beyond which they would have been affected if the lodgment had been made with the first defence, that is to say, the defence of the first defendant which was delivered on 14th July, 2004. If rule 4(3) comes into play, the plaintiffs will be indemnified against costs incurred up to the date of notice of acceptance. If rules 6(2) and 6(3) come into play, they will be indemnified against the costs of the action up to the date of the lodgment and in respect of any issue on which they succeed to the extent that those costs exceed the costs due to the defendant from the date of the lodgment. In other words, the outcome in relation to costs will turn on the decision which the plaintiffs make in relation to the lodgment and will be qualitatively no different to the outcome of the decision they would have been faced with in July 2004 had a lodgment been made at that stage.

I cannot see how fairness or justice requires that the defendants should only be allowed make a lodgment at this juncture, if they pay all of the plaintiffs' costs to date. In reality such a term would undermine the whole rationale of the lodgment process. Such discretion as is reserved to the trial Judge under rule 6 would be ousted and the potential value of the set off mechanism in rule 6 would be negatived, thereby affording the plaintiffs considerable advantages.

Order
There will be an order giving the defendants leave to make a payment into Court in satisfaction of the plaintiffs' claim in the consolidated proceedings. I will hear further submissions in relation to whether a time limit should be imposed in relation to the making of the lodgment and to the delivery of an amended defence. The amendment will only be allowed to the extent necessary to comply with rule 7 of Order 22, which requires that the fact that money has been paid into Court under that Order shall be stated in the defence.