

THE HIGH COURT**[2003 No. 3104 P]****BETWEEN****BRYAN CARPENTER AND ANNE CARPENTER****PLAINTIFFS****AND****STONEAVON HOLDINGS LIMITED****DEFENDANT****AND COUNTERCLAIM****STONEAVON HOLDINGS LIMITED****PLAINTIFF TO COUNTERCLAIM****AND****BRYAN CARPENTER, ANNE CARPENTER AND DELOITTE AND TOUCHE IRELAND A FIRM****DEFENDANTS TO COUNTERCLAIM****JUDGMENT of Mr. Justice Paul Gilligan on the 12th day of May, 2016.**

1. This is an application on behalf of the third named defendant to the counterclaim Deloitte & Touche Ireland for an order pursuant to O. 22 r. 1 and 14 of the Rules of the Superior Courts giving leave to their indemnifiers to make an offer of payment to the defendant and counterclaimant in lieu of lodging money in court and for such further or other orders and/or directions as this Honourable Court may see fit.
2. The proceedings herein date back quite some time having been commenced by plenary summons as dated 7th March, 2003. The pleadings closed with replies to particulars on the 3rd July, 2009 and there was then voluminous discovery and eventually a notice of trial was issued on the 13th July, 2015. On the 17th July, 2015 an application was made for a hearing date and the matter was listed for hearing on the 1st June, 2016, in the Chancery List with an estimated duration of 4 weeks. At that moment in time the parties agreed Deloitte & Touche should be permitted to make an offer of a late payment in lieu of lodgement to be made up to and including the 1st December, 2015, and the matter was listed for mention before the Court on the 17th December, 2015.
3. References to the applications to the Court in July and December 2015 are of some relevance in that it had to be expressed or at least it was implied that the action was ready for hearing and the application was made to the Court on the 17th July, 2015, and a hearing date was granted. The reason the matter was listed for mention on the 17th December, 2015, was so that the court could be assured that the case was ready and was proceeding ahead on its designated date for hearing on the 1st June, 2016.
4. In or about July, 2015, it appears that there was some discussion between the parties as regards the possibility of the dispute between them being referred to mediation. In this regard, it is indicated to the court that for a variety of different reasons which are not specified it was not possible to hold the mediation prior to late January, 2016, and it is indicated on behalf of Deloitte & Touche that unfortunately this was outside the date permitted by this Honourable Court for the making of a late payment in lieu of a lodgement.
5. The mediation was not successful and that apparently came to light on the day of the mediation so that at that point in time there was still four months to go to the trial date.
6. It is in my view of significance that the view was expressed on behalf of Deloitte & Touche that they did not wish to jeopardise the mediation process in any way and in those circumstances no offer of payment in lieu of lodging money into Court was made before the initial deadline of the 17th December, 2015, which was the date agreed between the parties for the making of a tender in lieu of lodging money in court.
7. It appears from the correspondence as exhibited to the affidavit as sworn on behalf of Deloitte & Touche that the first indication of their intention to issue an application to give their indemnifiers leave to make an offer of payment in lieu of lodging money into Court was on the 24th March, 2016.
8. Some correspondence followed particularly with regard to a request on behalf of Stoneavon Holdings Ltd. as to how much money it was intended to offer but this correspondence effectively got nowhere.
9. On behalf of Stoneavon Holdings Ltd. as averred to by Mr. Eoghan O'Mahony solicitor there was no agreement that the proposed mediation could be followed by a lodgement as a matter of course. It is averred that there is no provision or practice for the making of lodgement or offers in lieu after a mediation has taken place and that if Deloitte & Touche wished to extend the time for the making of a lodgement until after the mediation they could have raised this point at any stage prior to the mediation or indeed when the matter was listed for mention before this Court on the 17th December, 2015.
10. Mr. O'Mahony contends that the procedure requested herein would in fact subvert the purpose of mediation if lodgements or offers in lieu were allowed after the event of the mediation and this is because parties to mediation are encouraged to adopt an open strengths and weaknesses approach to mediation. He contends as a matter of policy that if there is a concern that an opponent might use the information obtained through mediation in order to make a precisely measured lodgement then the approach to the mediation would inevitably be more guarded and the prospect for its success would be reduced.

11. Mr. O'Mahony contends that the conduct of the mediation in these proceedings has given Deloitte & Touche the advantage of an insight into Stoneavon's thinking in relation to the proceedings and that because of the mediation each party now has a significantly better understanding of the attitude to the proceedings of the other party and this places Deloitte & Touche in a stronger position now to make an offer by way of tender.
12. Both parties to the application contend that each will either suffer a significant and obvious litigation disadvantage or advantage depending on their perspective.
13. It is contended on behalf of Stoneavon that it is a matter of concern that Deloitte & Touche refused to confirm what the level of the tender offer will be.
14. At a minimum Mr. O'Mahony contends that Deloitte & Touche have had four months in advance of the trial to consider the making of the proposed offer of tender and more importantly could have made the offer prior to mediation. At this point in time Mr. O'Mahony contends on behalf of Stoneavon that it would be fundamentally unfair that they should now be faced with the litigation disadvantage of the proposed tender at this very late stage so close to what will be a long and complex trial and in this regard it is agreed between the parties that the case will last for four weeks and involves a claim of approximately €4 million.
15. A further issue arises in that in addition to this late application on behalf of Deloitte & Touche, Mr. O'Mahony on behalf of Stoneavon by way of letter of the 4th December, 2015, served a notice pursuant to O. 32 r. 3 of the Rules of the Superior Courts for Deloitte & Touche to admit documents and the attachments to his letter amount quite obviously to a very substantial amount of work and to date there has not even been a reply to his letter of the 14th December, 2015.
16. This application has to turn necessarily on its own facts and surrounding circumstances. There are two intertwined important principles the first involving the mediation process which is increasingly becoming an important aspect of the resolution of disputes before the courts bringing about in cases an agreed and mediated resolution of the dispute between the parties and a significant saving not only in legal costs but also in respect of the Court's resources.
17. The second aspect is the now generally maintained view of the Courts that the public interest is best served by allowing defendants to proffer to the plaintiff utilising the facility of the Courts a sum that the defendant considers adequately meets the plaintiff's claim. Again the underlying rationale for this view is for the bringing about of a reasonable resolution of the proceedings and a potential reduction in respect of legal costs that will necessarily be incurred if matters have to proceed to a full and potentially lengthy trial allied to the necessity of the courts to efficiently use the resources available to them for the efficient disposal of litigation.
18. I take the view that there cannot be a bar to defendants in an action making an offer of tender or a lodgement or any payment into Court in accordance with the Rules of the Superior Courts after the parties have engaged in a mediation process and this Court is acutely aware that where disputes in relation to matters pending or under active litigation go to an unsuccessful mediation the pleadings will continue in the normal manner, and payments into Court and offers of tender in accordance with the Rules of the Superior Courts will be made in the normal course and applications for late payments and lodgements will also be made.
19. I come to the conclusion on the basis of the affidavit evidence that there was nothing special or untoward about the events which took place in the mediation as between the parties herein as held on the 26th January, 2016, and which unfortunately was unsuccessful. I do not accept the proposition that simply because the mediation took place in January, 2016, and was unsuccessful that the fact of the mediation having taken place should bring about a situation whereby this Court ought to refuse the relief as sought on behalf of Deloitte & Touche herein.
20. In my view the public interest is best served by allowing the indemnifiers of Deloitte & Touche even at the eleventh hour to make an offer by way of tender for a sum that they say adequately meets the claim of Stoneavon, but subject always to the maintenance of a fair and just procedure which does not allow for one party to gain an unfair litigation advantage by its own action or inaction.
21. There is in my view in the particular circumstances of this application a risk of unfairness to Stoneavon, particularly as there is now only nineteen days to the trial of the action. The risk of unfairness can be overcome by the exercise by this Court of its inherent discretion in providing for, as a condition for the granting of the relief as sought, an order to the effect that if the offer by way of tender by the indemnifiers of Deloitte & Touche is accepted Stoneavon is to be entitled to its costs to be taxed in default of agreement to include all costs incurred in going to the hearing as scheduled for the 1st day of June, 2016, such as but not limited to the solicitor's professional fee, the expenses of witnesses, counsels' brief fees and any other costs and expenses which necessarily will arise having been incurred for the trial of the action.
22. Accordingly, I will hear the submissions of counsel as to the form of the order to be drawn up.