THE COURT OF APPEAL

Finlay Geoghegan J.
Hogan J.
Mahon J.

2014/741

[Article 64 Transfer]

BETWEEN

CYRIL REANEY AND ITA O'REGAN AND TRAVALON LIMITED

PLAINTIFFS/RESPONDENTS

AND

INTERLINK IRELAND LIMITED (T/A D.P.D.)

DEFENDANT/APPELLANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of July 2016

1. This appeal highlights uncertainties in O. 22 of the Rules of the Superior Courts concerning the making of lodgements and what constitutes an award for the purposes of O.22 r. 6. It also concerns the principles to be applied in awarding interest pursuant to s. 22 of the Courts Act 1981.

Background
2. The defendant/appellant ("DPD") is a subsidiary of La Poste. It operates a network of franchises throughout Ireland involving courier activities. The first and second named plaintiffs from 1986 onwards purchased franchises for areas principally in Cork and sold certain of these. From 2005 they retained the franchise area relating to depot 28. It operated that franchise pursuant to an agreement of the 22nd December, 1995 ("the Franchise Agreement") between the first and second named plaintiffs and the defendant. Judgment was given in favour of the plaintiffs. The notice of appeal raises an issue in relation to the position of the third plaintiff which was not a party to the Franchise Agreement. Nothing turns on this and for simplicity in this judgment I propose referring simply to the plaintiffs which may properly in certain places only refer to the first and second named plaintiffs.

3. Disputes appear to have arisen prior to 2008. On the 17th July, 2008, the plaintiffs issued a plenary summons against the defendant seeking damages for breach of contract and certain declarations in relation to amendments relating to the Franchise Agreement and its performance. No steps appear to have been taken to progress those proceedings prior to 2010. On the 29th September, 2009, DPD gave six months notice of termination to the plaintiffs, pursuant to s. 13 of the Franchise Agreement to expire on the 31st March, 2010. The franchise terminated and on the 8th July, 2010, the plaintiffs issued a further plenary summons against DPD seeking inter alia, payment of monies allegedly due to them pursuant to clause 13 of the Franchise Agreement and an injunction preventing DPD from enforcing a restraint of trade clause in the Franchise Agreement. They also sought and were refused interlocutory relief by order of the High Court (Hanna J.) on the 29th July, 2010. An order, on consent was made by the High Court (Laffoy J.) on the 9th December, 2010, consolidating the 2008 and 2010 proceedings and directing that they proceed as one action. By this point in time statements of claim in each had been delivered.

4. By first notice of lodgement of the 6th January, 2011, DPD lodged a sum of €253,075 in court and the notice specified that "the sum is enough to satisfy all of the plaintiffs' claims in these consolidated proceedings, and liability is denied in respect of the said claims". A defence had been delivered in the 2010 proceedings in October 2010 and on the 6th January DPD also delivered a defence in the 2008 proceedings. The defences did not, as then required by the Rules of the Superior Courts, plead the fact of the lodgement. This was pointed out by the solicitors for the plaintiffs and an amended defence so pleading was delivered in each proceeding on the 25th January, 2011.

On the 4th October, 2011, DPD lodged an additional sum of €109,168.23 making a total sum lodged of €362,243.23 and the notice of additional lodgement specified "that the sum is enough to satisfy all of the plaintiffs' claims in these consolidated proceedings, and liability is denied in respect of the said claims".

High Court Judgments
5. The action came on for hearing before Gilligan J. in June 2012, and he delivered a written judgment on the substantive claims on the 31st July, 2012. Save in respect of his refusal to award interest, there is no appeal against the decisions in that judgment, but they are relevant to the issues on appeal.

6. The trial judge identified the principal issue arising in the proceedings as being "to determine the effect of clause 13 and further commentary to determine the appropriate sum of money pursuant to clause 13 to compensate the plaintiffs in respect of the termination of the defendants' franchise area relating to depot 28".

7. Clause 13 of the franchise agreement provides:-

> If notice is given by the owner under Clause 2 hereof, then the owner shall purchase or produce a purchaser of the business from the operator at a sum equal to the purchase price set out in the Schedule 3 hereto plus such further sum as is agreed between the parties which sum is to fairly reflect the turnover of the business carried on by the operator as of the date of the notice."

8. Schedule 3 set out €95,000 but there was a dispute as to how the "further sum" was to be determined. It was not in dispute that it related to the value of the business as at 29th September, 2009. The trial judge ultimately concluded at para. 42 of his judgment:-

> "I take the view in construing Clause 13 that the plaintiffs are to be repaid a sum not less than the original purchase

price, which in this case is sum of €95,000.00 and further, are to be paid a sum which fairly reflects the turnover and its effect on the value of the business which is to be paid by the defendants as owner having regard to the fact that it was not possible to procure a purchaser of the business."

9. Thereafter having considered the evidence in relation to valuation and additions and deductions to be made, he ultimately concluded at para. 46 of his judgment:-

> "Applying the five times multiplier it appears that the appropriate value of the plaintiff's franchise as of the date of the notice of termination was €255,307.00. This figure is nett of any liability to VAT which would have to be paid in addition thereto at the appropriate rate."

10. The trial judge identified four additional monetary claims being made by the plaintiffs at para. 9 of his judgment:-

> A. A claim by the plaintiffs in respect of lost commission due to under-weighing of parcels known as "Parceline consignments". A figure in the sum of €31,900 had been agreed subject to liability. The trial judge decided that DPD was liable to the plaintiffs pursuant to the Franchise Agreement for this amount. The claim related to a period from May 2007 to termination of the agreement in March 2010.
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> B. A claim for loss by the plaintiffs in what was described as "1L4 account". This claim was dismissed by the trial judge.
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> C. A claim for a loss arising out of what was known as the "Pulsar account". The claim related to payments allegedly wrongly deducted and due between April 2008 and March 2009. The trial judge awarded €8,680 in respect of the claim on the Pulsar account.
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> D. A claim for interest "on such amount if any as the court finds is properly due and owing to the plaintiffs". This claim was rejected by the trial judge and I will return to the reasons given.

11. Following delivery of the judgment of the 31st July, 2012, an issue arose as to the entitlement of the plaintiffs to the payment of VAT on the three sums awarded to them pursuant to that judgment. Issues also arose in relation to costs in part by reason of the lodgements made. A further hearing was held and a written ruling delivered by the trial judge on the 30th November 2012.

12. In that ruling he determined that the plaintiffs were entitled to be paid VAT on the sum of €31,900 awarded in respect of the Parceline account and on the sum of €255,307 being the value of the franchise as terminated. He determined that they were not entitled to VAT on the amount in respect of the Pulsar account as the agreed figure had included VAT. Whilst there was an appeal against those VAT decisions, counsel on behalf of DPD indicated in the course of the hearing of the appeal, wisely, that that matter was not being pressed. As appears from the judgment of the 31st July, 2012, the trial judge had already indicated in relation to the valuation of the franchise that this was an amount plus VAT payable. It appears it was not in dispute that the agreed Parceline figure was VAT exclusive.

13. The total amounts payable to the plaintiffs by DPD pursuant to the two judgments then aggregated €356,200 (€38,599.50 + €308,921+ €8,680). However, the total amount lodged following the additional lodgement on the 4th October, 2011, was €362,243.23. Those facts gave rise to an application under O. 22, r. 6 and a consideration of the validity of the notices of lodgement which the trial judge also determined in his written ruling of the 30th November, 2012.

Cross appeal for interest

14. The plaintiffs in both the 2008 and 2010 proceedings had included claims for "interest pursuant to Statute". It does not appear to have been in dispute that the statute in question was s. 22 of the Courts Act 1981. This provides:-

> "22.(1) Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment.
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> (2) Nothing in subsection (1) of this section –
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> (a) shall authorise the giving of interest on interest, or
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> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise, or
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> (c) shall affect any damages recoverable for the dishonour of a bill of exchange, or
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> (d) shall authorise the giving of interest in respect of a period before the passing of this Act, or
>
> (e) shall authorise the giving of interest on damages for personal injuries, or in respect of a person's death, in so far as the damages are in respect of –
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> (i) any loss occurring after the date of the judgment for the damages, or
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> (ii) any loss (not being pecuniary loss) occurring between the date when the cause of action to which the damages relate accrued and the date of the said judgment.
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> (3) In this section –
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> "damages for personal injuries" includes damages for personal injuries arising out of a contract;
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> "pecuniary loss" means loss in money or money's worth, whether by parting with what one has or by not getting what one might get;

> "personal injuries" includes any disease and any impairment of a person's physical or mental condition;
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> "proceedings" includes proceedings to which the State or a State authority (within the meaning of the Act of 1961) is a party."

15. It is not in dispute that the plaintiffs pursued a claim for interest; evidence was led in relation to differing rates of interest and in the written submissions lodged at the end of the High Court trial included the following paragraphs by way of submission:-

> "The plaintiff should also be entitled to interest on the sums due. It is submitted that interest is due on the sum due under Clause 13, from the date of Notice of Termination or, at the latest, from the date of termination, being the 31st March, 2010. Interest should be due on the sum in respect of the under-weighed Parceline consignments from the 29th May, 2008, being the date when the defendant changed the Parceline system.
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> Mr. Grant has provided a Table to the Court which should be of some assistance in relation to the question of interest. A rate of 8% could be applied by the Court. Alternatively, a rate of 6% was suggested by Mr. Gant as being the relevant cost of the money to the Plaintiffs.

16. 8% is the rate applied by s. 22 of the Courts Act 1981. Whilst there was some dispute on appeal as to whether the plaintiffs in the High Court had pursued the claim for interest pursuant to s. 22 of the 1981Act, I am satisfied they did although perhaps it might have been more clearly addressed to assist the trial judge.

17. In his judgment of the 31st July, the trial judge rejected the claim for interest by stating:-

> "60. The plaintiffs contend for interest to date on such sum as may be found to be due and owing to them. However, the franchise agreement and in particular Clause 13 thereof, does not contain any proviso in respect of the payment of interest and in the absence of any such stipulation, I take the view that interest is not payable to date but the judgment herein will attract Courts Act interest in normal course."

18. The plaintiffs, on appeal submitted that the trial judge failed to consider whether or not he should exercise the discretionary jurisdiction given him by s. 22 of the 1981 Act and the mere fact that there is no express contractual agreement for the payment of interest on the sums claimed is not of itself a reason to reject a claim for interest under s. 22 of the 1981 Act.

19. DPD does not dispute the jurisdiction of the court to grant interest on the sums awarded to the plaintiffs pursuant to s. 22 of the 1981 Act, but submits that the trial judge was correct in the exercise of his discretion in refusing to award interest.

20. Both parties were agreed that in the event that the plaintiffs succeeded on this cross appeal that this Court should decide on the interest to be awarded to the plaintiffs pursuant to s. 22 of the 1981 Act. It is agreed that this Court has jurisdiction to do so.

21. I have concluded that the plaintiffs' cross appeal against the dismissal of the claim for interest including pursuant to s. 22 of the 1981 Act, for the reason stated in the judgment of 31 July 2012 must succeed. The fact that the Franchise Agreement does not provide for the payment of interest and in particular clause 13 does not provide for the payment of interest on the sum payable thereunder does not preclude the court having jurisdiction under s. 22 to order interest to be paid on the sums awarded. It may be a factor to be taken into account but it must be recalled that s. 22(2)(b) precludes the court making an order under s.22 where there is a contractual right to interest on the debt concerned. The trial judge was in error in failing to consider whether or not on the particular facts pertaining to each of the sums awarded he should or should not exercise his discretion under s. 22 of the 1981 Act to order payment of interest thereon for some period.

22. What then are the principles according to which the Court should exercise its discretion under s.22 of the 1981 Act? There is a paucity of written judgments of the Superior Courts in relation to matters which the court should take into account in the exercise of its discretion. There are a number of decisions which refer to the discretionary nature of the jurisdiction. Once the court orders the payment by any person of a sum of money (including damages) the judge concerned, "may, if he thinks fit", also order the payment by the person of interest "on the whole or on the part of the sum in respect of the whole or any part of the period between when the cause of action accrued and the date of the judgment".

23. The plaintiffs sought to rely on an observation, which was purely obiter of McCracken J. in *Concord Engineering Company Limited v. Bus Ath Cliath* [1995] 3 I.R. 212, where he said that there is "authority that in what I might call a purely commercial case interest should as a general rule be awarded . . .". The issue in that case was whether or not an application for interest under s.22 would be permitted after the making of the final order. McCracken J. did not permit the application. I am not aware of the authorities which he had in mind for the general rule to which he referred and would respectfully suggest that he may have overstated the position.

24. Neither party referred the court to any Irish authority which analyses the purpose of the discretionary jurisdiction given to the court. However, the plaintiffs did refer us to, amongst others, a recent English Court of Appeal decision on the analogous, but not identical statutory provision in England and Wales *West and Anor. v. Ian Finlay & Associates (affirm)* [2014] EWCA Civ 316 in which Voss L.J. at para. 75 stated that the applicable legal principles in that jurisdiction (which were not in dispute) include that , "The purpose of an award of interest is fairly to compensate the recipient for being deprived of the money that he should have received". In England the rate of interest is at the discretion of the court and there were, therefore, other principles referred to.

25. I am in agreement that a primary purpose of an award of interest under s. 22 of the 1981 Act is fairly to compensate a recipient for being deprived of the awarded money that he should have received at an earlier date and which the court by making the order for payment has determined that he should have received. To put it another way: it is intended to compensate a person for being out of the money awarded from the time he ought to have received it to the date of judgment, provided, however, other facts make it just between the parties to make such an award.

26. Whilst I did not articulate the purpose of s.22 in that manner it appears to me that such was the principle I applied in the High Court in a decision on a counterclaim in *ESL Consulting Services Limited v. Virizon* (Ireland) [2010] 2 I.R. 426 at 453. In those proceedings the plaintiff claimed damages in excess of €4 million for alleged breaches of contract. The defendants denied the claim and counterclaimed for monies allegedly due for services provided to the plaintiff. The amount of the counterclaim was agreed at €252,000. I found the defendants to be in breach of contract and awarded a sum of €25,000 to the plaintiff. This reduced the amount recoverable on the counterclaim to €227,000. The defendants sought interest on that amount pursuant to s. 22 of the 1981 Act from the date of commencement of the proceedings. I awarded interest from that date (10th January, 2007) and gave as my reason that from the evidence given I had concluded that the plaintiff was aware from January 2007 that it owed the defendants a sum which it

computed to be approximately €221,000, but denied its liability to pay by reason of the claim for damages. I also stated that I was satisfied that the defendants did not delay in their dealing with the proceedings and therefore awarded interest from the date of commencement by the plaintiffs of the proceedings to the date of judgment.

27. As appears from the foregoing, in addition to considering the purpose of an award of interest under s. 22 as being intended to compensate a person who has been wrongly out of his money it is also necessary in considering the period for which interest will be awarded to consider the facts pertaining to when the claim was made and how it was pursued. I do not accept the submissions made that the court should disregard the manner in which the proceedings were conducted. A plaintiff who delays in commencing or pursuing his proceedings may not be entitled to interest for the entire period from the cause of action or the commencement of the proceedings. It does not appear to me that would be a just exercise of the discretion. Such an approach is consistent with the judgment of Kelly J. in the High Court in *Bank of Ireland Trust Services v. Revenue Commissioners (No. 2)* [2003] 3 I.R. 398. The judgment concerned a claim for payment of interest on VAT which had been overpaid to the Revenue since March 1982. Kelly J. having determined that he would make the award pursuant to s. 22 of the 1981 Act then considered the relevant period. He found that whilst the money had been overpaid on the basis of a then existing practice since 1982, the plaintiff had not given written notice of a claim for repayment of tax until the 22nd March, 1991. On those facts, Kelly J. concluded that "a just result is achieved if the plaintiff is permitted interest from the time when it first gave notice of a claim for repayment of such tax".

28. Applying those principles to the facts as found by the trial judge in his judgment of the 31st July, 2012, I have concluded as follows. First, interest should be awarded on the sums awarded in the judgment of the 31st July, 2012, i.e., in the case of the clause 13 and Parceline awards it should be the VAT exclusive figure. There is no evidence that VAT in the amount subsequently added by the later ruling had been paid over to the Revenue Commissioners at any date prior to the aware of these amounts. I would allow it on the full €8,860 relating to the Pulsar account which had been wrongly deducted.

29. Second, in respect of the sum of €31,900 on the Parceline under-weighing claim and the sum of €8,680 on the Pulsar account interest should only be awarded from the 8th July, 2010, i.e., the date of commencement of the 2010 proceedings for the following reasons. On the finding made by the trial judge those are sums which ought to have been, in the case of Parceline paid and in the case of the Pulsar account not deducted during the currency of the Franchise Agreement commencing in 2007 or 2008 and ending in March 2010. However, whilst a plenary summons was issued in 2008 which might be considered to include claims for these amounts, those proceedings were not pursued and it was only when the 2010 proceedings were commenced that those claims were shortly thereafter pursued and included in a statement of claim delivered in October, 2010 in the 2008 proceedings. Thus, whilst the plaintiffs may have been out of those sums prior to September 2009, they did not really pursue those claims until the commencement of the 2010 proceedings and in those circumstances the commencement of the 2010 proceedings appears the date from which it is just to award interest.

30. Third, in respect of the amount awarded pursuant to clause 13 of the Franchise Agreement the position is more complicated. As appears the amount to be paid was determined by the trial judge to be the purchase price paid by the plaintiff set out in Schedule 3 to the Franchise Agreement which was €95,000 and "such further sum as is agreed between the parties" which was "to fairly reflect the turnover of the business carried on by the operator as of the date of the notice".

31. There should never have been any dispute about the liability of DPD to pay €95,000 to the plaintiffs. Clause 13 does not specify the date of payment. However, as found by the trial judge (at para. 31) termination by the defendants of a Franchise Agreement was extremely rare and in all but one previous incident what had occurred was that franchisees sold on the franchise to a purchaser who was acceptable to the defendants and the purchase monies was paid via the defendant by the new franchisee to the retiring franchisee. If that had occurred, then the total sum payable pursuant to clause 13 would have been paid on the sale of the franchise presumably on or shortly after the termination of the franchise in March 2010.

32. DPD in its submissions referred to a number of attempts they had made to offer to the plaintiff's different ways in which the additional sum over the €95,000 would be determined short of the necessity of High Court proceedings. I have taken those steps into account in the conclusion I have reached. Notwithstanding these steps, I have concluded that interest should be payable on the entire awarded sum (excluding VAT) of €255,307 from the date of commencement of the 2010 proceedings. First, DPD was always obliged to pay a minimum of €95,000. The purpose of the payment pursuant to clause 13 is to compensate the plaintiff for the loss of the franchise. It ought to have been paid to the plaintiff upon termination of the franchise or shortly thereafter. Whilst offers were made in 2010 to make a payment of €96,769.00 it was in full and final settlement or conditional upon the plaintiff agreeing to certain other matters including the manner in which the additional sum might be resolved. When the plaintiff sought an interlocutory order that this amount be paid it was objected to. In my judgment it follows that the plaintiffs were wrongfully deprived of the amount due under clause 13 since shortly after the termination of the franchise in March 2010 and pursued its claim by the commencement of the proceedings in July 2010.

33. In reaching this conclusion I have considered carefully DPD's submission that until such time as the court determined the total amount payable under clause 13 it was not under an obligation to make a payment to the plaintiffs and therefore the plaintiff should not be considered to have been out of any money to which it was entitled prior to the date of the judgment. That submission cannot on the facts apply to the €95,000. Further, it was not submitted to this Court that there was any evidence adduced before the High Court, to which the trial judge could have had regard in reaching his judgment delivered on the 31st July, 2012, that DPD had offered to pay to the plaintiffs (either on account or otherwise a sum in the order of the €255,307 awarded by the trial judge in respect of its liability to them pursuant to clause 13. On termination of the franchise in March 2010 without a sale to a new purchaser DPD became the owner of the franchise and the clause 13 payment was intended to compensate the plaintiffs for its loss at that time.

34. Whilst I accept that in the absence of agreement between the plaintiffs and DPD, DPD could not pay a sum in full and final settlement of its liability under clause 13, nevertheless it appears to me that upon the above analysis the plaintiffs were deprived of the total amount payable under clause 13 from a period shortly after the termination of the franchise in March 2010. DPD could at any time have made payment on account of the total sum due under Clause 13. It did not do this. Further, it does not appear to me that the Court in deciding the period for which interest should be payable under s. 22 on this appeal should have regard to the lodgement. If the trial judge had considered how he should exercise his discretion under s. 22 in relation to the claim for interest having regard to the purpose of the section and the facts disclosed by the evidence and decided same in his judgment of the 31st July, he would not have been aware of the amount of the lodgement. As this Court is now determining the amount of interest which ought to have been awarded by the trial judge in his judgment of the 31st July, 2012, it does not appear to me that it can take into account the fact of the lodgement. In any event, as the notice of lodgement did not specify the sum DPD was paying in respect of the claim pursuant to clause 13 of the Franchise Agreement it would be difficult to take into account.

35. The trial judge ought to have awarded the plaintiffs an additional sum for interest at 8% pursuant to s.22 of the 1981 Act on the total amount awarded, €295,887 (€31,900 +€8680+€225,307) from 8th July 2010 to the date of judgment. To the 31st July this sum

was €48,834. However judgment was not granted on that date by reason, inter alia, of outstanding VAT issues.

Order 22

36. Following the further ruling on the 30th November 2012, the High Court decided to grant judgment on that day for a total sum of €356,200 to the plaintiffs plus specified costs. The total amount of the monies lodged in court was €362,243.23. The issue before the trial judge was, therefore, the potential application of O. 22, r. 6 and the invalidity of the notice of lodgement contended for on behalf of the plaintiffs by reason of the failure of the notices of lodgement to comply with O. 22, r. 1(5) by reason of their failure to specify the sum paid in respect of each cause of action.

37. However, it follows from the conclusions reached above in relation to the interest which ought to have been awarded pursuant s. 22 of the 1981 Act that the total amount for which judgment ought to have been granted by the High Court to the plaintiff on 30th November was a sum of €413,525 (€356,200+€57,325) which exceeds the amount of the lodgement. €57,325 is 8% on €295,887 from 8th July 2010 to 30th November 2012(2 years and 145 days). Accordingly the first issue which must be considered is how O. 22, r. 6 applies to the judgment including interest which I have decided the plaintiffs ought to have been granted on 30th November 2012 by the High Court.

38. Order 22, r. 6 provides:-

> "6. If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:
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> (1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.
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> (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.
>
> (4) The costs mentioned at paragraphs (2) and (3) hereof shall be set off against each other; and if the balance shall be in favour of the defendant, the amount thereof shall be satisfied pro tanto out of the money remaining in Court and, in so far as the money remaining in Court is not sufficient to satisfy the same, shall be recoverable from the plaintiff; or if the balance shall be in favour of the plaintiff, the amount thereof shall be recoverable from the defendant.
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> (5) Any money remaining in Court after satisfying the balance (if any) due to the defendant for costs as aforesaid shall be paid out to the plaintiff.
>
> (6) If in any case the Court is of opinion that for the purposes of the preceding paragraphs of this rule it is not necessary to retain in Court the whole of the balance referred to in paragraph (1) it may order the payment out to the plaintiff of so much thereof as it deems proper.
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> (7) The amount awarded to the plaintiff shall be deemed to be satisfied by the application in manner aforesaid of the moneys paid into Court."

39. DPD submitted that the award for the purposes of O.22, r.6 should be the sum awarded exclusive of interest pursuant to s.22 of the 1981 Act. The plaintiffs' submission was that it means the full amount of the judgment. The parties were agreed there is no Irish authority on the point. DPD relied upon the judgment of the English Court of Appeal delivered by Lord Denning MR in *Jefford v. Gee* [1970] Q.B. 130, in which in relation to an analogous but not identical statutory provision for the payment of interest, the Court of Appeal stated that under the then English Superior Court Rules that a defendant could not and should not make a payment into court in respect of interest. Lord Denning stated at p. 149:

> "Payment into court.
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> Seeing that a claim for interest under the 1934 Act need not be pleaded (*Riches v. Westminster Bank* [1943] 2 All E.R. 725) it is plain that it is not itself a cause of action. It is no part of the debt or damages claimed, but something apart on its own. It is more like the award of costs than anything else. It is an added benefit awarded to the plaintiff when he wins the case.
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> Such being the character of interest, we do not think a defendant can, or should, make any payment into Court in respect of it. If it is not claimed by the plaintiff in the pleadings, the defendant cannot be expected to make a payment into Court in respect of it. Even if it is claimed, it is no part of the cause of action. The defendant is only allowed to make a payment into Court 'in satisfaction of the cause of action', see R.S.C. O. 22, rule 1. Interest being no part of the cause of action, he cannot make a payment in respect of it.
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> The defendant should, therefore, in future make his payment into Court in the same way as he always has done, namely, an amount which he says is sufficient to satisfy the cause of action apart from interest. If the plaintiff recovers more (apart from interest) he gets his costs. If he recovers no more (apart from interest) he does not get his costs from the date of the payment in and he will have to pay the defendant's costs. The plaintiff will, of course, in either case, get the appropriate award of interest irrespective of the payment into Court.
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> If the plaintiff takes the money out of Court in satisfaction of the claim, that is the end of the case. He gets no interest because there is no judgment. The 1934 Act only entitles a plaintiff to interest when he gets a judgment.
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> As a matter of practice, however, if the plaintiff is disposed to think that the payment into Court will cover his claim, he will tell the defendant that he is disposed to go to trial in order to collect the interest: but that such a course would be to their mutual disadvantage because the Revenue would extract tax on it: so it would be better for them to split the interest and settle for a sum somewhat higher than the sum in Court."

40. From a reading of the full judgment, the above observations were clearly obiter. The appeal concerned an award of interest on damages in a personal injury action pursuant to s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934, as amended, which imposed a mandatory obligation on a court to grant interest on damages in such actions unless the court was satisfied that there were special reasons not to grant same. The judgment is mainly concerned with the principles to be applied by a court in making such an award. From the facts and submissions recorded in the official reports it does not appear that there was a lodgement in the action nor that any submissions were addressed to the question of the inclusion or non inclusion of the interest element of any potential award when making a lodgement. The comments by Lord Denning appear to be additional guidance. The English Court of Appeal was not deciding the issue now before this Court on this appeal.

41. That question which now arises on this appeal is whether the "amount awarded" in O.22r.6 means the amount for which the plaintiff is granted judgment against a defendant or a lesser amount to exclude any interest awarded pursuant to s.22 of the 1981 Act. My conclusion is that O. 22 and in particular Rule 6 only appear to make sense and be workable if it is given the former meaning notwithstanding some lack of clarity in Order 22.

42. As appears from O. 22, r. 6 set out above, this applies where a plaintiff does not accept the sum lodged "in satisfaction of the claim" and "is not awarded more than the amount paid into court". The award made by the court for the purposes of O. 22, r. 6 must in my view, be considered to be the total amount for which the court gives judgment against the defendant in favour of the plaintiff on its entire claim in the action. The remaining provisions in r. 6, (1) to (7) do not make sense unless that is the meaning of the amount awarded. Under subrule 6(1) if the amount paid into court exceeds the amount awarded to the plaintiff, the excess is to be repaid to the defendant and the balance to be retained in court. A plaintiff has a prima facie entitlement to the full amount of any judgment awarded subject only to the application of sub-rules 6(1) to (7). Under subrule (1) where the amount paid into court exceeds "the amount awarded to the plaintiff" the excess shall be repaid to the defendant and the balance retained in court. A defendant who has lodged in satisfaction of "all claims" as was done here can only have an entitlement to be repaid an excess over the amount of any judgment given against him in favour of a plaintiff.

43. Accordingly on the facts of these proceedings the plaintiffs, with the addition of the interest which this Court is determining they ought to have received, the position is that the amount awarded to the plaintiffs is more than the amount paid into court by the defendant. Accordingly O. 22, r. 6 does not apply.

44. As DPD relied upon the reasoning of Lord Denning in *Jefford*, I have also considered whether Order 22, r. 1(1) should be construed as not permitting a defendant to lodge an amount which includes interest which may be awarded pursuant to s.22 of the 1981 Act. Whilst I accept that Order 22 is not entirely clear I do not consider it should be so construed. Order 22, r. 1(1) permits a defendant to "pay into Court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action". Whilst as submitted by counsel for DPD and observed by Lord Denning a claim for interest pursuant to s.22 of 1981 Act (or English equivalent) is not in itself a cause of action. Nevertheless it forms part of the monetary relief which may be claimed and that a plaintiff may be granted by a court if he succeeds in his cause of action and obtains an order for the payment of a debt or damages or other sum found to be due by the court. It becomes part of the sum a defendant is obliged to pay to a successful plaintiff who obtains judgment in satisfaction of his claim and therefor the sum lodged should include such a potential award. Further, for the reasons already stated O. 22 r. 6, does not appear to be workable if O. 22 is construed to as to preclude a lodgement to take account of Statutory interest. It was accepted in submission a lodgement may always include contractual interest.

45. In those circumstances it is not necessary for this Court to consider the further issues which arise in relation to the validity or otherwise of the notice of lodgement in this case by reasons of its failure to comply with O. 22, r. 1(5). I would simply wish to make the following observation having regard to the ruling of the High Court on the 30th November, 2012. There is a lack of clarity, as was submitted by counsel for DPD, as to what is required or permitted by O.22, r.1 (1) and r.1(5). The question also arises as to how r.6 is intended to work where a defendant lodges differing amounts for different causes of action and a plaintiff beats the amount on some but fails on others. Is the reference to "claim" in O.22, r.1 (1) intended to refer to a proceeding with one cause of action only (as suggested by counsel for DPD) with sub-rule 1(5) applying to all lodgements? Alternatively, does O. 22, r. 1(1) permit a defendant in proceedings to which that sub-rule applies to lodge a single sum in satisfaction of the entire claim (including several causes of action) and in such circumstances . . . does not apply and all that a plaintiff must do is specify in the notice (in the form set out in Appendix C Form No. 4 or 5), that the lodgement is in satisfaction of the entire claim? If it is the latter, then is O.22, r.1 (1) intended to also permit, in proceedings comprising several causes of action, lodgements in respect of one or more causes of action but not all when r.1(5) clearly applies.

46. Similarly, it is not necessary to consider the decision of the trial judge as to the consequences of the failure by DPD (if it was a failure) to comply with O. 22, r. 1(5) but, again, it may be desirable that O. 22 should provide greater clarity as to the consequences and the time at which a judge may permit a single lodgement in satisfaction of all claims.

47. As these issues do not now arise on the facts of this appeal, I do not wish to express a definitive view save to indicate that it may be desirable that Order 22 is reviewed by the Superior Courts Rules Committee in the context of the issues raised by these proceedings.

Costs

48. The final issues on the appeal related to the orders for costs. DPD appealed from the failure of the trial judge to take into account the lodgement, albeit that he decided did not comply with O. 22, r. 1(5) in circumstances where it exceeded the amount awarded to the plaintiffs. That no longer applies. Second it appealed against the costs order made in respect of the interlocutory hearing (no order). Both parties had sought the costs. The decision was one within the discretion of the trial judge on the facts pertaining to the interlocutory reliefs sought and refused and the final outcome of the proceedings in the High Court. I do not consider there is any reason for which this court should interfere on appeal with that costs order.

Conclusion

49. I propose that the order of this Court be to dismiss the appeal; allow the cross appeal and make an order varying the order of the High Court of the 11th December, 2012, so as to provide that the amount for which judgment was granted on 30th November 2012 was the sum of €413,525.