Neutral Citation: [2013] IEHC 569

THE HIGH COURT

COMMERCIAL

[2011 No. 2925 P.]

[2011 No. 74 COM]

BETWEEN

MCCAMBRIDGE LIMITED

PLAINTIFF

AND

JOSEPH BRENNAN BAKERIES

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 12th day of December, 2013

Issue

1. Is a defendant who is being sued for an account of profits entitled to pay a sum into Court pursuant to O. 22, r.1 of the Rules of the Superior Courts in respect of that claim? If so, should the defendant in the present case be permitted to do so?

2. These are the issues which fall for determination in this judgment.

The Proceedings

3. On 30th March, 2011, the plaintiff commenced proceedings against the defendant alleging an infringement of the plaintiff's copyright in bread packaging utilised on whole wheat bread. The plaintiff claimed injunctive relief in respect of that infringement and also in respect of the alleged passing off of the defendant's bread as that of the plaintiff.

4. The plaintiff also claimed damages (including aggravated and/or exemplary damages) or at the plaintiff's option an account of profits in respect of both the copyright infringement and the passing off.

5. The litigation was subsequently transferred into the Commercial List and on 16th May, 2011, I gave pre-trial directions and fixed the trial to commence on 21st July, 2011. At the hearing, on 16th May, the parties agreed that the trial would deal only with the question of liability. If the question of damages were to arise it would be addressed on a later occasion.

6. I directed that any discovery which was to be made in anticipation of the trial on 21st July, 2011, would be limited to liability questions and would exclude any issue of damages.

7. The trial of the action took place between 21st and 27th July, 2011, before Peart J. On 25th November, 2011, he delivered his reserved judgment and found in favour of the plaintiff.

8. The order of Peart J. restrained the defendant from passing off its bread as bread manufactured and/or placed on the market in the State by or with the authority of the plaintiff. He also enjoined advertising, marketing and promoting the sale of bread by means of packaging confusingly similar to that utilised by the plaintiff.

9. The defendant appealed to the Supreme Court. By its order of 31st July, 2012 that court dismissed the appeal and affirmed the order of Peart J. It granted injunctions similar to those granted in the High Court.

Post-Judgment Events

10. Following the decision of the Supreme Court, there was an exchange of correspondence between the parties on the question of whether the plaintiff would elect for damages or an account of profits.

11. On 19th November, 2012, a request was made by the plaintiff's solicitors that they be furnished with precise figures and appropriate supporting documentation *"in order to get some sense of the starting point from which the Brennan sales went after the offending packaging was adopted"*. This information was sought with a view to informing the plaintiff as to whether it should elect between damages or an account of profits. On 20th December, 2012, that information was supplied.

12. On 21st February, 2013, the plaintiff's solicitors wrote that it appeared to them, on foot of the information supplied, that the defendant made a profit of €608,481, arising from the sale of whole wheat products in the offending packaging. In that letter the plaintiff elected for an account of profits. The letter requested the appropriate supporting documentation to vouch that profit figure and other information.

13. On 8th April, 2013, the defendant's solicitors wrote indicating a willingness to provide a sworn affidavit of the financial director of the defendant verifying the figures provided in the letter of 20th December, 2012 and if necessary, a sworn affidavit from the

defendant's auditors to the same effect. In addition, an officer of the defendant offered to make himself available to meet with Mr. Michael McCambridge of the plaintiff and the respective financial directors to address any further queries in respect of the information and documentation provided. Such a meeting apparently did take place but on a without prejudice basis.

14. On 29th July, 2013, the plaintiff's solicitors wrote an open letter to the defendant pointing out, *inter alia*, the surprise of the plaintiff to discover for the first time that the infringing product was not, in fact, manufactured by the defendant at all. Rather, it was manufactured by a company called Doyle's Quality Products (Doyle's) and delivered fully packaged to the defendant. A request was made to clarify the relationship between the defendant and Doyle's and it was alleged that that entity was a joint tortfeasor.

15. A lengthy letter of 26th September, 2013, from the defendant's solicitors dealt with that and other issues and confirmed that the defendant would account for any profits earned by Doyle's in relation to the product without the necessity of joining Doyle's in the proceedings. The letter also confirmed that Doyle's manufactured and packaged the product.

16. In anticipation of the next stage of the action the defendant now wishes to lodge a sum of money in court in satisfaction of the plaintiff's claim.

This Application
17. The defendant seeks an order pursuant to O. 22, r. 1 of the Rules of the Superior Courts granting it leave to pay into court a sum in satisfaction of the plaintiff's claim. The application is resisted.

The Rule
18. Order 22, rule 1 confers a right on a defendant who is sued for a debt or damages or in an admiralty action at any time after he has entered an appearance in the action and before it is set down for trial, upon notice to the plaintiff, to pay into court a sum of money in satisfaction of the claim. Even if the action is set down for trial, a lodgment may be made in such a case with leave of the court. Clearly, leave of the court is required in the instant case since the action is long set down for trial.

19. Two lines of argument are propounded by the plaintiff in objecting to this application. First, it says that on the plain wording of the rule the entitlement to make a lodgment is limited to an action for a debt or damages or an admiralty action. A claim for an account of profits is not a claim for a debt or damages.

20. Second, the plaintiff argues that the concept of a lodgment is premised on the assumption that a claimant should have a reasonable idea as to the true extent of its loss and thus be able to make a decision as to whether it will continue to pursue a claim for damages when faced with a proffered sum chosen by the defendant. The lodgment procedure is wholly unsuited for use where the remedy of an account of profits, which is concerned with what the defendant gained from its unlawful activity as opposed to what the plaintiff lost, is claimed. The taking of the account seeks to identify the sum which the defendant is obliged to disgorge. In advance of that process concluding and that sum being identified, it is said that it would be unjust to pressurise the wronged party, whilst still unaware of the true financial position, into abandoning its claim for fear that the account might ultimately yield less than the figure lodged.

Interpretation of the Rule
21. On the meaning of the rule, the plaintiff cites a number of judicial *dicta* in support of its contention that a lodgment is not permitted.

22. The oldest of these authorities is *Nichols v. Evens*, a case decided in 1883 (22 Ch. D 611). In that case, Fry J. had to deal with the provisions of Order XXX, rule 1 of the then Rules of Court which provided:-

> *"Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the court or a judge at any later time, pay into court a sum of money by way of satisfaction or amends."*

23. There that judge said at p. 613:

> *"In their statement of defence the defendants say that the money is paid into court to cover the plaintiff's particular demands in respect of her share of the capital money and in respect of her share of the £200. They do not say that they have paid it into court in satisfaction of her entire demand, nor could they do so, for the plaintiff was asking an account on the footing of wilful default, and it was not possible to satisfy this demand by any specific payment. I am of opinion that Order XXX does not apply to this case. In my judgment that order applies, as is shewn by rule 1, only to a case in which the case is strictly speaking to recover a debt or damages, where the whole demand applies to money. If the plaintiff seeks an account it is impossible to satisfy that demand by any specific payment of monies."* (My emphasis)

24. A more recent decision cited by the plaintiff is that of Blayney J. in *O'Neill v. Ryanair Limited* [1992] 1 I.R. 160. That is a case in which the court was asked to consolidate two sets of proceedings. One was a petition brought under s. 205 of the Companies Act and the other an action instituted by the same petitioner by way of plenary summons claiming damages.

25. The judge took the view that consolidation of the two actions was not possible because the proceedings did not lend themselves to be converted into a single proceeding. As part of the application, the defendant sought to meet both proceedings with a single lodgment. That was also refused with Blayney J. saying:-

> *"Once the proceedings remain separate, there clearly cannot be a single lodgment in respect of both. Apart from this, while I accept Mr. Kelly's submission that the company proceedings come within the definition in the rules of an action, I do not agree that they constitute an action for damages within O.22, r.1 so as to make it possible for a respondent to make a lodgment. While there appears to be an indirect claim for damages in the petition, such damages could not be damages at common law and in my opinion it is to such damages that the rule refers."* (My emphasis)

26. The third and most recent case relied upon by the plaintiff is the decision of Geoghegan J. in *Larkin v. Whitony Limited* (Unreported, Supreme Court, 19th June, 2002). There Geoghegan J. said of O. 22, r. 1:-

> *"But that rule which has also existed for a great number of years only applies to an action for debt or damages. It does not apply to a specific performance suit. It is true that there was an alternative claim for damages but it is quite clear that the intended payment into court in this case does not in any way relate to the alternative claim for damages. It*

relates to the balance of the payment which would allegedly have the effect of rescinding the contract being sued upon."

These cases show, it is submitted, that the rule, as judicially interpreted, does not permit of a lodgment, save in an action for debt or common law damages. It does not permit a lodgment in a claim for an account of profits, it is said.

Nature of Relief
27. Apart from those three cases, the plaintiff also says that the concept of a lodgment is alien to a claim for an account of profits because of the very nature of such relief.

28. In *House of Spring Gardens v. Point Blank Limited & Ors* [1984] I.R. 611, Costello J. in this court described the remedy sought here in the following way:-

> *"An order for an account of profits and their payment is an equitable remedy, given in lieu of an order for the payment of damages…. an order for the payment of profits [can] be made against all persons who have been involved in the same tortious act of copyright infringement."*

29. The nature of the remedy was also considered in *Hollister Incorporated & Anor v. Medik Ostomy Supplies Limited* [2013] IP&T 577 where Kitchin L.J. said at p. 598:-

> *"…an account of profits does not compensate the trade mark owner for the losses he has suffered. It simply deprives the infringer of the profits he has made from an activity in which he should never have engaged. It therefore ensures the infringer does not benefit from his wrong, but it contains no element of punishment. Moreover, as an equitable remedy, it may be refused if for any reason it would produce an unjust result…. As for effectiveness, an account is an effective deterrent because an infringer knows he will not retain any profits derived from his infringement."*

30. In *House of Spring Gardens* on appeal, Griffin J. considered the question of damages as contrasted with an account of profits and the nature of the latter. He said at 706:-

> *"The defendants claim that the sum of approximately £630,000 payable to the plaintiffs under the royalty agreement would be adequate compensation for the headstart the defendants obtained. The plaintiffs, however, claim that such sum would be totally inadequate, as the defendants had more information than was available in the public domain, and that where profit is made by pirating the art of another, the person making the profit should not be allowed to keep his ill-gotten gains. They claimed that the plaintiffs are entitled at their option to damages or to an account of profits in lieu of damages. That this is so is clear from the authorities. In Peter Pan Manufacturing v. Corsets Silhouette Ltd. 23 [1964] 1 W.L.R. 96. [1964] 1 W.L.R. 96, Pennycuick J. said at p. 106:-*
>
> > *'. . . it follows as a matter of right that the plaintiffs are entitled at their option to claim damages in respect of such invasion of their rights as has already taken place, or alternatively, an account of the profits made by manufacture and sale of [the goods] in invasion of their rights.'*
>
> *And at p. 108 he said:-*
>
> > *'. . . what the plaintiff who elects in favour of an account of profits is entitled to, is simply an account of profits in the sense which I have indicated, that is: What has the plaintiff expended on manufacturing his goods? What is the price which he has received on their sale? and the difference is profit.'*
>
> *The basis on which such an account of profits should be ordered is that there should not be unjust enrichment on the part of the wrongdoer. In My Kinda Town Ltd. v. Soll 36 [1983] R.P.C. 15. [1983] R.P.C. 15, Slade J. said at p. 49:—*
>
> > *'As I understand the relevant principles, the object of ordering an account in cases such as the present is to deprive the Defendants of the profits which they have improperly made by wrongful acts committed in breach of the Plaintiffs' rights and to transfer such profits to the Plaintiffs.'*
>
> *And at p. 54 he said:—*
>
> > *'Thus, in my judgment, the six authorities relied on by the plaintiffs afford authority for the proposition that, in ordering an account of profits in a passing-off case or a case involving breach of confidence, the Court will ordinarily direct the account in a form wide enough to include all profits made by the defendant from his tortious acts of breaches of confidence.'*
>
> *And at p. 55:—*
>
> > *'The purpose of ordering an account of profits in favour of a successful plaintiff in a passing-off case is not to inflict punishment on the defendant. It is to prevent an unjust enrichment of the defendant by compelling him to surrender those profits, or those parts of the profits, actually made by him which were improperly made and nothing beyond this.'"*

31. In these circumstances, it is said that the very nature of a claim for an account of profits is one which does not lend itself to the possibility of a lodgment. The account will require the defendant to disgorge all profits made from the wrongful activity.

32. In a claim for damages, the plaintiff knows the amount of loss sustained by it and thus can make an informed decision as to whether to accept a lodgment or not. But the plaintiff will not know the amount of profit that has been made by the wrongdoing defendant in advance of the taking of the account and so ought not to be put to the hazard by permitting a defendant to make a lodgment in such circumstances. Thus, it is said that O. 22 makes perfect sense in excluding an ability on the part of a defendant to make a lodgment in an account of profits case.

The Defendant's First Argument
33. The defendant's first argument sought to persuade me that a claim for an account of profits was accommodated by the provisions

of O. 22, r. 1 because such a claim could truly be regarded as an action for damages. This argument was largely based upon passages from Chapter 1 of the latest edition of *McGregor on Damages* dealing with the definition of the term damages.

34. At para. 1-001 of the work, the following is to be found:-

> *"A resounding definition of the term damages would make for a fitting opening of a work on the law of damages and in their first sentence earlier editions have done just this. But it has become more and more difficult, as time has moved on, to construct a definition of damages which is satisfactory and which is comprehensive. So many exceptions to, and qualification upon, once solid, clear, unadulterated rules have appeared, perfectly sensibly, that a clear-cut definition is no longer feasible; the arrival of restitutionary damages and of human rights was the last straw. The impossible search for a clear-cut, comprehensive definition is therefore abandoned. Instead the definition from earlier editions, a definition which still represents the norm, is taken but it is qualified to indicate that it applies generally but not invariably, thus:*
>
> > *Damages in the vast majority of cases are the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling."*

35. This passage, it is said, demonstrates that the notion of damages is now much wider than heretofore and certainly much wider than was the case when the current 1986 edition of the Rules of the Superior Courts was promulgated. *A fortiori*, it is a much wider concept than it was in 1883 when Fry J. decided *Nichols v. Evens*.

36. What must be borne in mind, however, is that when *Nichols v. Evens* was decided the equitable remedy of a claim for an account of profits existed. That is clear even from the text of Fry J's judgment.

37. The argument proceeded to para. 1-002 of *McGregor*. There, four recognised types of damages are identified. The only one that is of relevance from the point of view of this case is category No. 4 namely, restitutionary damages. The author says of them:-

> *"Restitutionary damages are new on the scene. They come into play when the defendant's tort or breach of contract has given him a benefit and the claimant has suffered no loss or at least has suffered a loss of smaller proportions than the benefit to the defendant. Such an award is the antithesis of compensation."*

38. Fortification for the argument was said to be found in paras. 1-006 and 1-007 of the same work. They read as follows:-

> *"Actions claiming money and restitution, in earlier days called, confusingly, quasi contract, do not depend upon a wrong done to the claimant. Their very existence indeed is attributable to the fact that no wrong, whether tort or breach of contract, is generally available upon which the claimant may sue. Illustrations are provided by actions for money paid under a mistake of fact, actions for money paid under a contract which is in some way vitiated and actions to recover money paid to a third party for which the defendant is primarily liable. Such claims depend not upon a loss to the claimant but upon a benefit to the defendants; they do not fall within the ambit of a textbook on damages.*
>
> *There are, however, situations in which a restitutionary claim is available where there is tort or breach of contract in addition. In most of such cases this will be because there is a benefit to the defendant wrongdoer as well as an equivalent, or a greater, loss to the claimant. Claims may then be brought by him either for restitution or for damages; they are simply in the alternative. But where the incidence of loss falls below the level of benefit or where there is no loss at all, the modern philosophy is that suit must be brought for restitutionary claims. The thinking is not clear as to whether this is a claim in restitution or in damages. If it is to be restitution, one has a situation where a tort or breach of contract gives rise not to a damages claim but a restitution claim. If it is to be damages, the tort or breach of contract is there but the criterion for recovery is not compensation but benefit."*

39. These paragraphs were cited in an effort to persuade me that an account of profits can be regarded as in some way a claim for restitutionary damages. Even a cursory reading of the passages cited can demonstrate likely defects in that argument. But the argument is torpedoed by the very next passage from the book.

40. In para. 1-008, one finds:-

> *"Actions claiming money in equity under equity's exclusive jurisdiction are not actions for damages. The principal tool in equity for awarding money is the action for an account which is clearly not for damages, but even actions which do not involve the handing over of profits gained by the defendant are not strictly actions for damages; they are claims for equitable compensation."*

41. Thus, I have no difficulty in concluding that a claim for an account of profits is not an action for damages and cannot be so regarded for the purposes of Order 22, rule 1.

The Defendant's Second Argument

42. The next line of argument was by reference to a number of judicial dicta, the majority of which were made in the context of applications seeking extensions of time in respect of lodgments.

43. The first of these was *Ely v. Dargan* [1967] I.R. 89. This was a case on its facts very far from the present. The plaintiff claimed damages for personal injuries. £7,000 was paid into court by the defendant with his defence. The plaintiff was awarded £13,000 damages. The Supreme Court set aside the award as being excessive and directed a new trial. It 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 infant plaintiff's claim was compromised subject to the approval of the High Court. That approval was not forthcoming. The defendant then applied to the High Court for liberty to increase the amount of money that had been paid into court. That approval was refused except on terms which were not acceptable to the defendant, who appealed to the Supreme Court against the refusal. The decision of the High Court was affirmed. In the course of his judgment, Ó Dálaigh C.J. said of O. 22, r. 1, as follows:-

> *"The rule is in the widest terms, and it clearly allows of an application being made to the Court before a retrial as well as before a trial. The only question, in the former case, is what conditions the Court may properly impose in granting leave. The general principle underlying the lodgment machinery of the Courts is that a plaintiff, who accepts within the required time a lodgment in satisfaction of his claim, is entitled to have the costs he has incurred to the date of lodgment taxed and paid by the defendant: r. 4 (3) of Order 22. The plaintiff can suffer no disadvantage unless he chooses to go to trial*

and fails to obtain an award of more than the amount lodged: r. 6 of Order 22. The disadvantages for a plaintiff in the latter circumstances are those enumerated in r. 6, and those disadvantages are the correlatives of the considerable advantages which the defendant reaps….

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 plaintiff's claim."

44. The next case cited was a decision of Peart J. in *Window & Roofing Concepts Limited v. Tolmac Construction Limited* [2004] ILRM 554. The issue in that case was not a late lodgment but rather a late acceptance of a lodgment already made. The extension of time had been refused by the Master of this Court and Peart J. dealt with the appeal from that decision. In the course of his judgment, he said:-

"In considering whether the court should exercise its discretion by granting an extension of time for the acceptance of a lodgment in this case, the court must look beyond the commercial interests of the parties, and consider the wider purpose of the lodgment procedure. A public interest is served by allowing a defendant to lodge a sum of money in Court which he believes is sufficient to satisfy a plaintiffs claim. That public interest was referred to by O'Dalaigh C.J. in Ely v. Dargan (1967) I.R. 89 at 95, albeit in the context of an application by a defendant for liberty to make a late lodgment, rather than in the context of an application for an extension of time to accept a lodgment. But the principle remains the same in my view."

45. Later the judge said:-

"This concept of the public interest has been regarded, in subsequent cases, as important in relation to applications to the court for leave to make a late lodgment. It is of equal importance in the present application since the same interest is at stake, namely the interest of avoiding unnecessary costs, and ensuring that as far as possible valuable court time is not wasted by hearing cases which do not need to be heard."

46. Finally, at p. 559 he said:-

"The public interest is an important consideration in the lodgment procedure. I have always believed that the Rules of the Superior Courts should, as far as possible, be construed so as to enable things to be done, rather than to prevent things from being done. They are a framework within which litigation is to be conducted, and they are an enabling set of rules rather than a disabling set of rules."

47. Peart J. returned to this topic four days later when he decided *Kearney & Anor v. Barrett & Ors* [2004] 1 I.R. 1. There he said:-

"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 of the Superior Courts 1986, a lodgement 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."

48. These cases were cited with a view to demonstrating that a broad interpretation should be given to the relevant rule of court and that in the public interest it should be interpreted so as to facilitate the making of a lodgment even in a case which clearly is not encompassed in the rule.

49. Alternatively, if the interpretation of the rule cannot be so stretched, then the Court, under its inherent jurisdiction, should permit of such a lodgment.

50. In support of this approach, heavy reliance was placed upon the observations of Geoghegan J. in *Dome Telecom v. Eircom Ltd*. [2008] 2 I.R. 726.

51. In that case, he rejected any idea that the right to discovery of documents should be exclusively based on an interpretation (literal or otherwise) of the relevant rule of court. He went on to say:

"In modern times, courts are not necessarily hide bound by interpretation of a particular rule of court. More general concepts of ensuring fair procedures and efficient case management are frequently overriding considerations. The rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure, and even if there was a rule applicable, the court is not necessarily hide bound by it."

52. Reliance was also placed upon my own judgment in *P.J. Carroll & Co. Ltd. v. Minister for Health (No. 2)* [2005] 3 I.R. 457, where I said:

"There is a jurisdiction inherent in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process. It is a residual source of power which the court may draw upon as necessary wherever it is just or equitable to do so."

53. There is no doubt but that there is a jurisdiction inherent in the court such as was described by Geoghegan J. and myself in the passages just cited. It is said that a lodgment should be permitted in this case because *pace* Peart J. it is in the public interest that such be allowed so as to facilitate settlement in the case as well as reducing the costs of the action.

54. It is also said that in a case which is being dealt with in the Commercial List, which has as its object the just but expeditious and cost effective trial of a case, it is all the more necessary that such a procedure be permitted.

55. The court is master of its procedures and is, as Geoghegan J. observed, not necessarily hide bound by the interpretation of a particular rule of court. Indeed if, as he says, there is no rule in existence precisely covering a given situation the court has an inherent power to fashion its own procedure. Even if there is a rule applicable the court is not necessarily bound by it. It is, however,

important to draw attention to the fact that, as is clear from the quotation from his judgment, such an approach by the court is only permissible if there is an obvious problem of fair procedures or efficient case management.

56. I have no difficulty in accepting the general approach outlined by Peart J. on the question of construction of the Rules of the Superior Courts. It is permissible to regard the rules as a framework within which litigation is to be conducted and to construe them as an enabling set of rules rather than the opposite.

57. In my view, however, those approaches are of no assistance to the defendant in the present case. I am fully in favour of the use of procedures which may bring about an early, expeditious and cost effective resolution of litigation. But such procedures must not put justice to the hazard.

58. I do not perceive anything unfair in not permitting a defendant to pay money into court whether under O. 22, r. 1 or any analogous court devised procedure in a case such as this.

59. On the contrary, I take the view that the observations of Fry J. in 1883 are as apposite now as they were then. He said:-

"If the plaintiff seeks an account it is impossible to satisfy that demand by any specific payment of monies"

60. As is clear from the various quotations to which I have referred in the course of this judgment, the taking of an account of profits is not to be equated with a claim for damages. The account is taken in circumstances where the defendant is going to be required to disgorge profits made by it in the course of unlawful activity. The claimant in such a case is not to be treated as somebody suing for damages who knows the extent of their damage and so can make an informed decision on whether or not to accept a lodgment. A claimant in an account of profits is in an entirely different position. It would not be just to put such a person to the hazard by permitting a defendant to make a lodgment with the consequences in costs should the account yield a lesser sum than that lodged.

Conclusions

61. I conclude that a lodgment is not permitted under O. 22, r. 1 regardless of how wide an interpretation is given to the rule. Neither is this a case where the interests of justice require the court to devise a procedure analogous to that prescribed in Order 22, rule 1. On the contrary it would be unjust to create such a hazard for the plaintiff. In these circumstances, I answer the first question posed at para. 1 of this judgment in the negative. The second question does not arise.

62. The application is refused.