

THE HIGH COURT

[2010 No. 5888 P]

BETWEEN

WHITE YOUNG GREEN ENVIRONMENTAL (IRELAND) LIMITED

PLAINTIFF

AND

ANNA GETHINGS

DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 20th day of July, 2015.

1. This is an application brought by the plaintiff pursuant to order 22, rule 1(1) of the Rules of the Superior Courts seeking leave of the Court to make an offer of tender of payment to the defendant in relation to her counterclaim herein.

2. The chronology of events leading to this application is as follows:-

(a) On 12th November, 2008, the plaintiff issued proceedings against the defendant seeking recovery of professional fees in respect of services rendered by the plaintiff to the defendant. These proceedings were issued in the Circuit Court and the total claimed by the plaintiff is in the sum of €33,985.37.

(b) On 7th July, 2009, a defence and counterclaim was delivered on behalf of the defendant. In the counter claim, the defendant alleged negligence on the part of the plaintiff who provided services to the defendant in relation to a proposed residential development to be undertaken by the defendant at Ballyduff, Kilcomb, Camolin, Co. Wexford and in particular, in relation to the requirements of the planning authority, Wexford County Council, concerning the need to obtain a discharge licence for the development under the Water Pollution Acts, 1977 to 1990. The value of the counterclaim as pleaded in the civil bill was €260,393.00 of which €210,666.18 comprised interest which was alleged to be continuing.

(c) The plaintiff raised a detailed notice for particulars in relation to the counterclaim on 20th November, 2009.

(d) On 18th June, 2010 the proceedings were adopted in the High Court.

(e) On 20th July, 2010 the defendant delivered replies to the notice for particulars of the plaintiff together with vouching documentation.

(f) On 8th April, 2011, the plaintiff delivered a detailed and considered reply to the defence and counterclaim of the defendant.

(g) The defendant served a notice of intention to proceed on 24th October, 2013.

(h) On 15th May, 2014, the defendant delivered updated particulars of special damages. The amount now claimed by way of counter claim was increased very significantly to in excess of €1.5 million of which €594,459.67 related to interest, which was stated to be continuing.

(i) The defendant served notice of trial on 28th May, 2014.

(j) On 5th June, 2014, the solicitors for the plaintiff informed the defendant that the plaintiff company had been placed in liquidation in August 2012. The solicitors for the plaintiff informed the defendant's solicitors that, as a result, the proceedings could not be progressed until such time as the defendant obtained an order pursuant to section 222 of the Companies Act, 1963, giving the defendant liberty to proceed with her counterclaim against the company in liquidation. The defendant duly issued a notice of motion dated 8th July, 2014 seeking an order of the court pursuant to section 222 of the Companies Act, 1963. That application was heard and granted by the Court on 13th October, 2014.

(k) The plaintiff made a request for discovery of documents arising out of the counterclaim of the defendant on 12th November, 2014.

(l) The defendant's solicitors delivered an affidavit of discovery on the 22nd January, 2015 followed by delivery of documents of discovery on 2nd February, 2015.

(m) The defendant delivered further updated particulars of special damages on 8th April, 2015. The principal difference between this and the particulars delivered by the defendant in May 2014 related to interest claimed.

(n) The matter had been set down for trial on 14th April, 2015. The trial commenced on that day but, upon the urging of the Court, on the second day of the trial the parties applied to adjourn the proceedings to facilitate a mediation of the dispute and the proceedings were stayed to facilitate the mediation. The mediation was unsuccessful and a new trial date of 19th January, 2016 was fixed by the Court. It is estimated that the trial of the proceedings will take two weeks.

3. In advancing this application, counsel for the defendant submitted that the defendant would not be prejudiced in the event that the Court grants this application. He submits that nothing was said or revealed during the mediation process that could be regarded as being prejudicial to the case of the plaintiff, although he acknowledged that the granting of the application would result in a litigation disadvantage to the plaintiff. He pointed out that if granted, the offer of tender of payment would of course only be effective from the date on which it is made, and could not have any impact upon costs already incurred to date by the parties.

Counsel further submits that it was only following upon the delivery of discovery by the defendant in early February of this year, and the subsequent delivery of updated particulars as special damages in April of this year, less than one week before the trial date, that the plaintiff was in a position to assess the appropriate amount of a lodgement.

4. Counsel on behalf of the defendant accepted that no specific prejudice would be occasioned to the defendant if the application is granted. However, he did submit that it would be unfair to grant the application because in the course of the mediation the plaintiff would have gained an insight into the defendant's thinking in relation to the proceedings. Furthermore, the defendant had made its expert witness reports available to the plaintiff during the course of the mediation. He also pointed out that sufficiently detailed particulars of special damages had in fact been furnished by the defendant in May of 2014 and that the only difference between the particulars furnished in May 2014 and April 2015 related to interest.

5. The application on behalf of the plaintiff was grounded on the affidavit of its solicitor, Lasairphiona Ní Laighin. A replying affidavit opposing the application was filed by the solicitor acting on behalf of the defendant, Mr. John McCarthy to which in turn Ms. Ní Laighin filed a further affidavit in reply on 13th July, 2015. In this latter affidavit, Ms. Ní Laighin avers that the plaintiff could not have made an offer of tender of payment in satisfaction of the counterclaim of the defendant before the Court had granted an order under section 222 of the Companies Act, 1963 and also until the defendant had delivered discovery documentation. She also avers that the plaintiff encountered a difficulty following the death of its own expert witness and that it was not possible to calculate an appropriate lodgement until after a new expert witness had been instructed and a report obtained, all of which followed the delivery of discovery documents in February 2015.

Decision

6. In general terms, the Court will accede to applications to lodge money in Court or to make an offer of tender of payment after the time ordinarily permitted by the rules, unless by doing so a prejudice is caused to the plaintiff (or, in cases such as this, to the counter claimant) or unless it is unfair to grant the application. This willingness of the Court to facilitate such applications is based upon the public policy of enabling parties to take such steps as are likely to bring litigation to as swift and economic a conclusion as is possible.

7. Cases in which such applications are advanced following upon settlement to discussions require greater scrutiny. This follows upon the decision of Barr J. in the case of *Brennan v. Iarnród Éireann* [1992] 2 I.R. 167 in which the application was refused on the grounds that in the absence of special circumstances, a defendant should not be allowed to use information obtained in unsuccessful settlement negotiations as a means of calculating the amount of a lodgement. Barr J. went on to say that:

"if such negotiations are unfruitful, the defendant ought not to be allowed to capitalise on the plaintiff's full disclosure of his or her case as to personal injuries and/or on liability, and to use the information obtained in such negotiations as a measure for calculating what is intended to be a tight lodgement."

Importantly however, this decision, which involved an application made in the context of a claim for damages in respect of personal injuries suffered by the plaintiff, preceded the introduction of the mandatory exchange of expert witness reports pursuant to S.I. 391/1998.

8. In the case of *Kearney v. Barrett* [2004] 1 I.R. 1, also a claim for compensation for personal injuries, but one to which the disclosure requirement of SI 391/98 applied, Peart J. refused an application to strike out a notice of lodgement (made after settlement discussions) on the grounds that court had to consider the matter "from the point of view of justice, and from the point of view of the purpose of the lodgement and tender mechanism." Peart J. went on to say:

"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 lodgement or tender offer in the light of the true facts of the case, including weakness in his opponent's case? I think not. ... In the present case, even if some advantage had been gained during negotiations by way of concession, I can hardly imagine that those concessions were made too easily or against the factual reality of the plaintiffs' case as known by the plaintiffs' own advisers. While there may be some tactical advantage lost to the plaintiffs, the court must take a wider view and see whether any injustice can flow from the revelation of perhaps the real quality of the plaintiffs' case."

9. Since in this case it is not contended that the defendant will suffer any specific prejudice if the application is granted, the question that falls to be answered is whether or not it would be unfair to the defendant to grant the plaintiff leave to make an offer of tender of payment to the defendant at this stage in the proceedings, after one day of hearing, the delivery of expert witness reports by the defendant to the plaintiff and an unsuccessful mediation. I consider that it would be unfair to allow this application for two reasons:-

(1) Firstly, I agree with the submission made by counsel for the defendant that the conduct of a mediation will inevitably have given the plaintiff the advantage of an insight into the defendant's thinking in relation to the proceedings. A meaningful mediation involves an exploration of three key issues: legal issues, personal issues and financial issues. It seems very likely that following upon mediation, each party will have a significantly better understanding of the attitude to the proceedings of the other party; which better positions a defendant to make an offer of tender of payment.

(2) Secondly, while it is undoubtedly a sound public policy to permit lodgements or offers of tender of payment either later than permitted by the rules or after settlement discussions (or both) where there is no prejudice or unfairness to the claimant, there is also a public policy in encouraging parties to try to resolve disputes by means of alternative dispute resolution, even very late in the day, if it helps to avoid lengthy trials and the attendant costs of the same. This public policy is underpinned by s. 15 of the Civil Liability and Courts Act 2004 which permits the Court, upon the application of a party to proceedings, to direct the parties to discuss an attempt to settle the action at a mediation conference. This express public policy of the Oireachtas would in my view be undermined if, by engaging in such a mediation conference, a party to an action subsequently finds himself or herself at a litigation disadvantage. This could of course be avoided if the parties considered the possibility of a lodgement or offer of tender of payment in the event that the mediation is unsuccessful and agreed whether or not such a course could be taken in that event, but no such agreement was reached in this instance. In this case, the defendant arrived to Court and the trial of action commenced on 14th April 2015. At that point the defendant was not suffering from the litigation disadvantage of an offer of tender of payment. She was not obliged to participate in mediation and could have elected to continue the trial if she had wished to do so, but instead decided to accede to the request to refer the dispute to mediation in the hope that a two week trial might yet be avoided. While it was argued on behalf of the plaintiff that it could not have made an offer of tender of payment before the Court Order under s. 222 of the Companies Act, 1963 on 13th October 2014, and thereafter until delivery of discovery documentation on 2nd February 2015, it seems to me that at a minimum the plaintiff had two months in advance of trial

to consider the making of an offer of tender of payment and could have done so at any time up to commencement of the trial. Against that background, it would seem to me to be fundamentally unfair to the defendant that she should now be faced with the litigation disadvantage of an offer of tender of payment.