THE HIGH COURT

[2010 No. 6640 P]

BETWEEN

EMERALD ISLE INSURANCE AND INVESTMENTS LIMITED,

TIMOTHY MAVERLEY AND

JAMES MOREY

PLAINTIFFS

AND

PATRICK DORGAN, SYLYESTER DUANE,

EUGENE GLENDON, GILLIAN CANN, SHANE MOLONEY,

EILEEN NAGLE, KEVIN O'KEEFEE AND NICHOLAS O'KEEFFE

PRACTISING UNDER THE STYLE AND TITLE OF

COAKLEY, MOLONEY SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 3rd day of April, 2018

Background

1. These proceedings commenced by way of plenary summons issued on 13th July, 2010 and were set down for trial on 7th July, 2011. On 14th November, 2011 the court granted the defendants liberty to make a late lodgement. Subsequently, the action came on for hearing before Kearns P. in the High Court in December 2011. The action was heard over a period of twelve days between 6th December, 2011 and 18th January, 2012. In an *ex tempore* judgment delivered on 18th January, 2012 the plaintiffs' claim was dismissed and the monies lodged into court were released back to the defendants.

2. Following an appeal by the plaintiffs, the Court of Appeal reversed the decision of Kearns P. and made a finding of liability against the defendants in favour of the first named plaintiff (*Emerald Isle Assurances and Investments Ltd v Dorgan* [2016] IECA 12). The Court of Appeal remitted the proceedings to the High Court for an assessment of damages (if any) suffered by the first named plaintiff as a result of the defendants' negligent breach of duty, taking into account any question of contributory negligence.

3. On 11th July, 2016 there was an unsuccessful attempt to resolve the action by mediation.

4. On 4th November, 2016 the defendants paid into court a sum of money (the lodgement) in satisfaction of the first named plaintiff's claim. The action was again set down for trial on 11th May, 2017 and it was assigned a new list number.

5. By letter dated 18th January, 2018 the first and third named plaintiffs challenged the validity of the lodgement made on 4th November, 2016 claiming that such lodgement could only be made with the leave of the court.

Issue

6. The issue which this Court has to determine is whether the lodgement made on 4th November, 2016 was a valid lodgement or whether the leave of the court was required, on notice to the plaintiffs, to make such lodgement.

Rules of the Superior Courts (RSC)

7. The issue is governed by O. 22 of the Rules of the Superior Courts ("RSC"). Order 22, r. 1(1), as amended provides:

> "1. (1) In any action for a debt or damages (other than an action to which Section 1(1) of the Court Acts, 1988 applies) or in an admiralty action the defendant may -
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> (a) at any time after he has entered an appearance in the action and
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> (i) before it is set down for trial, or
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> (ii) in the case of proceedings subject to case management under Part II of Order 63C, within four weeks of the fixing of a trial date or
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> (b) at any later time by leave of the Court, upon notice to the plaintiff,
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> pay into Court a sum of money in satisfaction of the amount recoverable by the plaintiff from the defendant in the claim or (where several causes of action are joined in one action) in satisfaction of the amount recoverable by the plaintiff from the defendant in one or more of the causes of action."

8. Order 22, r. 1(10) provides:-

> "Notwithstanding subrule 7 (which applies to personal injuries actions), in any case in which a period in excess of eighteen months has elapsed since the date of the notice of trial, a Defendant may, without leave, make a payment into Court within twenty one days, upon notice to the Plaintiff, provided that the said payment, if not accepted by the Plaintiff, shall not take effect until the expiry of two months from the date upon which it was made or increased, as the case may be".

Submissions of the Parties
9. The principal submission by Mr. Senan Allen S.C., on behalf of the defendants, was that the lodgement of 4th November, 2016 was made after an appearance was entered but before the action was set down for trial on 11th May, 2017. This, it was submitted, is in accordance with the provisions of O. 22, r. 1(1)(a) and therefore it follows that the leave of the court was not required.

10. If the defendants are not entitled to rely on O. 22, r. 1(1)(a) then, it was submitted, they are entitled to rely upon O. 22, r. 1(10) which also enables a lodgement to be made without the leave of the court.

11. Counsel for the defendants submitted that the wording of O. 22, r. 1(1)(a) is clear and unambiguous. However, in cases where the court has to interpret the rule, it should do so in the context of public policy in favour of encouraging parties to try to resolve actions without having a court hearing, as is clearly set out in the following passage from Delaney & McGrath, *Civil Procedure in the Superior Courts* 3rd Ed., (Dublin, 2012) at para. 18–01:-

> *"There is a strong public policy argument in favour of encouraging and facilitating parties to settle proceedings rather than litigating them to conclusion. As Peart J commented in Kearney v. Barrett "it is desirable that all efforts to resolve disputes without incurring the high cost of a court hearing should be explored before the trial.""*

12. The defendants rejected the submission of the first named plaintiff that the making of a lodgement in November 2016, without the leave of the court, was unfair in circumstances where the defendants had gained an improper advantage by reason of the hearing of the action before the High Court, the subsequent appeal before the Court of Appeal and the mediation held in July 2016.

13. As regards the hearing of the action and the subsequent appeal, Mr. Allen argued that both parties were now aware of the strengths and weaknesses of the each others case so that no advantage, improper or otherwise, could be gained by either side. As for the mediation, reliance was placed on a letter sent by the defendants prior to the mediation dated 1st July, 2016. I will return to the terms of this letter later.

14. Finally, Mr. Allen referred the court to the Supreme Court decision in *Cyril Reaney, Ita O'Regan and Travelon Limited v. Interlink Ireland Limited (T/A as DPD)* [2018] IESC 13. This case considered the consequences of failing to beat a lodgement. The majority decision was delivered by O'Donnell J. In his judgment, O'Donnell J. referred to O. 22, r. 6.

15. O.22, r.6 provides that where a plaintiff 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:

> (1) …
>
> (2) …
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> (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."

16. In interpreting this rule, O'Donnell J. emphasised that a trial judge has a degree of discretion in making a costs order where the amount awarded to the plaintiff falls narrowly on either side of the lodgement. The traditional view was that a failure to beat the lodgement by even a small margin resulted in the plaintiff having to pay the defendants costs from the date of the lodgement.

17. Mr. John Finlay S.C., on behalf of the first named plaintiff, submitted that the reference to "before it is set down for trial" in O. 22, r. 1(1)(a) refers to 7th July, 2011, which was the date of the setting down for trial of the action that was subsequently appealed to the Court of Appeal. Thus, any lodgement thereafter could only be made by leave of the court pursuant to O. 22, r. 1(1)(b). The first named plaintiff rejected the defendants' submission that they were entitled to make a lodgement, without application to the court, before the remitted action was set down for hearing. It was submitted that were this to be the case, a defendant could revive an entitlement to make a lodgement without the leave of the court by simply having the notice of trial struck out.

18. Counsel for the first named plaintiff submitted that the defendants were not entitled to rely upon the provisions of O. 21, r. 1(10) as this was only referable to personal injury actions.

19. Finally, the first named plaintiff accepted that there was a policy in favour of encouraging and facilitating parties to settle proceedings without a court hearing. However, it was argued that such a policy could not be followed at the expense of fairness. At this stage, the defendant has had the advantage of having heard the plaintiffs' case both in the High Court and, on appeal, in the Court of Appeal. To this has to be added the fact that a failed mediation also took place. Thus, it is submitted, that permitting the defendants to make a lodgement without application to the court would be unfair and give an improper advantage to the defendants.

20. In the course of their submissions, the parties referred the court to a number of authorities, which I will deal with in the following paragraphs.

Consideration of Submissions
21. The first matter which has to be considered is how "before it is set down for trial" in O. 22 r. 1(1)(a) is to be interpreted where the action in question has been remitted following an appeal.

22. An action that has been remitted requires a new notice of trial to be served and the action be set down for trial again. This is so because the action that has been remitted is, in effect, a different action to that which was heard the first time. In this case, liability (save for possible contributory negligence) is no longer in issue and it is now an assessment of damages. Both the plaintiffs and the defendants may call different witnesses, in particular different independent experts, and neither party is confined to the legal submissions it made at the first hearing. Thus, when an action is remitted for rehearing I do not think that it is at all unreasonable that a defendant should have the same opportunities to make a lodgement as it had when the action was first set down for trial.

23. In the course of submissions, the court was referred to the Supreme Court decision of *Ely (an infant) v. Dargan* [1967] IR 89. In this case, the plaintiff claimed damages in the High Court for personal injuries which he alleged were caused by the negligence of the defendant. The defendant had paid into court a sum of money with his defence. At the trial of the action, before a judge and jury, the plaintiff was awarded a sum in excess of the lodgement. The defendant appealed the decision and the Supreme Court set aside the award as being excessive and directed a new trial. Subsequently, a settlement of the plaintiffs' claim was reached subject to the

approval of the High Court, which approval was not forthcoming. The defendant then applied for liberty to increase the amount of money lodged in court, such liberty was refused except on terms which were unacceptable to the defendant. The defendant appealed this to the Supreme Court. The then wording of the O. 22, r. 1(1) provided:-

> "In any action for a debt or damages or in an admiralty action, the defendant may before or at the time of the delivering his defence.. or at any later time by leave of the court, upon notice to the plaintiff, pay into court a sum of money in satisfaction of the claim.."

24. Although this case involved increasing a lodgement where a retrial had been directed, it is clear that the provisions of O. 22, r. 1(1) have changed considerably. Under the original wording of O. 22, r. 1(1), the lodgement was to be made at a much earlier stage in the proceedings, namely with the defence, rather than when the action is set down for trial, as is the current procedure. There can be a number of significant steps taken in an action between the delivery of a defence and the setting down for trial, for example, discovery. Further, *Ely* was a personal injuries action and O. 22 now provides for a number of opportunities that were not available in 1967 to either make or increase a lodgement without the leave of the court. These changes would seem to be in pursuance of the public policy referred to at para. 11 above and suggest that a less restrictive approach should be adopted in interpreting the rules as to when a lodgement can be made without leave.

25. I do not accept the submission that a defendant could avoid the necessity of obtaining leave of the court to make a lodgement by applying to have a notice of trial struck out. It seems that such a possibility could be dealt with by the provisions of O. 36, r. 20 of the RSC which provides that no notice of trial shall be countermanded "except by consent or by leave of the Court, which leave may be given subject to such terms as to costs, or otherwise, as may be just." A term could be imposed to deprive a defendant of any unfair advantage that could arise.

26. Though not necessary for this decision, I do accept the submission of the first named plaintiff to the effect that the wording of O. 22, r. 1(10) applies only to personal injury actions.

27. The next issue that has to be considered in whether, when a retrial has been directed, a defendant wishing to make a lodgement, without leave, has an unfair advantage. Undoubtedly where there has been a prior trial of an action the defendant will know the strengths and weaknesses of the plaintiff's case. The plaintiff will have an equal advantage in this regard. In the instant case, save for a possible issue on contributory negligence, the first named plaintiff now knows that, in fact, the defendants do not have a defence. Therefore, I cannot see how the defendants have gained any unfair advantage. The lodgement that is now made has to be based on a realistic view of the value of the plaintiff's case so increasing the chances of achieving the public policy aim of facilitating a settlement of litigation without the necessity of a court hearing.

28. In this case, prior to the date of the lodgement, an unsuccessful mediation took place, thereby, it was argued, giving the defendants an unfair advantage. Such a situation was considered in *White Young Green Environmental (Ireland) Limited v. Anna Gething* [2015] IEHC 498. In giving judgment Binhcy J. stated at para. 9:-

> "(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 lodgments 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…"

29. In this case, prior to the holding of the mediation a letter in the following terms was sent by the solicitors for the defendants to the plaintiffs:-

> "Dear Sirs,
>
> We refer to previous correspondence and the mediation to take place on 11th July, 2016.
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> Whilst it is hoped that the dispute can be resolved through mediation, please note, for the avoidance of doubt, that our client is reserving its rights to rely on/or restore the lodgment previously made and/or to make a new lodgment in the event that the dispute is not resolved at mediation."

30. It is evident from the clear wording of this letter that the mediation took place with the plaintiff's full knowledge of the possibility that in the event of the mediation failing a lodgement might be made. Therefore, it is not open to the plaintiffs to claim that the lodgement was unfair or as a result of an improper advantage obtained by the defendants following the failure of the mediation.

31. Finally, regarding the issue of fairness, I refer again to the judgment of the Supreme Court in *Reaney, O'Regan and Travelon Limited*. To summarise the principles that are applicable on the awarding of costs where a lodgement has been made O'Donnell J. stated at para. 41:-

> "(v) Where a plaintiff fails to beat a lodgement, but falls short by a clear margin, and the matter is one of general assessment rather than precise award, a court may consider that a sufficient ground to depart from the presumptive costs order under Order 22 Rule 1(5) in which case a court may reflect the reasonableness of the pursuit of the claim by, if appropriate disallowing some element of the plaintiff's costs, by reference to the Veolia principles where there are distinct issues or more generally;

(vi) Conversely where a plaintiff beats a lodgement but by only a small amount, a court may still consider if it was reasonable to have pursued the case, and may reflect that adjudication in its award of costs either under the *Veolia* principles where there are clearly distinct issues, or by extension of them."

Thus, where an award falls marginally on either side of a lodgement a court has some flexibility on the awarding of costs. Prior to this decision it was generally considered that there was no such flexibility. This is a development of the law which I must take into account in considering the issue the fairness.

Conclusion

32. By reason of the foregoing, in my view the lodgement made on 4th November, 2016 was in accordance with O. 22, r. 1(1)(a)(i) and therefore did not require the leave of the court. Further, such lodgement was not made in circumstances which were either unfair or where the defendant had an improper advantage by reason of the hearing of the action in the High Court in December 2011-January 2012, the Court of Appeal in January 2016 or the mediation in July 2016.