

The Importance of making a lodgement

Case study.

THE HIGH Court

[2012 No. 3367 P.]

BETWEEN

MARGARET BROWNE

PLAINTIFF

AND

**PETER VAN GEENE AND MOUNT CARMEL MEDICAL GROUP (KILKENNY) LIMITED
TRADING AS AUT EVEN HOSPITAL**

DEFENDANTS

Introduction

The plaintiff in these proceedings claimed damages in respect of personal injuries suffered by her due to the alleged negligence of the first and second named defendants, in and about the medical care given to her.

Prior to the trial of the action, the defendants conceded liability and the action proceeded as an assessment of damages only. After a hearing, which lasted some eleven days, judgment was reserved and the plaintiff was awarded damages against the defendants in the sum of €260,111.25.

An application for costs made on behalf of the defendants on the following basis: having regard to the fact that on 27th September, 2016, the defendants had made a lodgement in the sum of €280,000, which had subsequently been increased pursuant to Order of the High Court on 23rd January, 2017, to €450,000, neither of which had been accepted by the plaintiff, it was submitted on behalf of the defendants that the plaintiff was entitled to her costs up to 27th September, 2016, but that as she had not beaten the amount initially lodged by the defendants, they were entitled to their costs from that date onwards.

The plaintiff resisted that application on a number of grounds

Firstly, it was submitted that the awarding of costs was always within the discretion of the court. It was submitted that in this case, the defendants had initially agreed to submit the matter to mediation, but had subsequently refused to attend at the scheduled mediation meeting and had refused to nominate any alternative date for the mediation. In these circumstances, the court was entitled to have regard to the refusal of the defendants to engage in mediation when considering the issue of costs. It was submitted that having regard to their refusal to engage in mediation, the defendants should not be awarded any of their costs.

Secondly, the plaintiff submitted that because the defendants had been given liberty to increase their lodgement by virtue of the Order of Cross J. dated 20th January, 2017, it was a pre-condition of being given liberty to do so, that the defendants should pay to the plaintiff all her costs up to the date of the increased lodgement.

Thirdly, it was submitted that as a number of scheduled hearing dates for the trial of the action had to be vacated, due to the fact that the defendants were not in a position to proceed for one reason or another, the plaintiff should be awarded her costs in respect of the dates which had to be vacated.

Fourthly it was submitted that O. 22, r. 6 provided that even where a plaintiff did not beat a lodgement, he or she was still entitled to the costs of any issue on which they were successful at the trial of the action.

Fifthly, at the conclusion of the hearing the defendants had made an application that the entire of the plaintiff's claim should be dismissed pursuant to s. 26 of the Civil Liability and Courts Act 2004.

Sixthly, it was submitted that in view of the fact that the lodgement and offers, which had been made subsequent thereto by the defendants, were no longer "on the table" for acceptance by the plaintiff during the trial, the defendants had effectively withdrawn the lodgement. In such circumstances they should not be allowed to rely on the lodgement as a means of denying the plaintiff her costs.

Court conclusions

Mediation:

In the circumstances, it cannot be said that the defendants had refused or failed to go to mediation “without good reason”. The ill health of the first named defendant was a good and sufficient reason why they could not proceed to a mediation at that time. Accordingly, this submission on behalf of the plaintiff is not well founded.

The defendants had increased the lodgement:

In this case, the plaintiff consented to the High Court giving the defendants liberty to increase their lodgement. This re-opened the door for the plaintiff to accept the increased sum on offer and carried with it the agreement of the defendants to discharge all the plaintiff’s costs up to the date of the increased lodgement. That is the usual consequence of increasing a lodgement. In the absence of any specific provision in the Order of the High Court giving the defendants liberty to increase their lodgement, it is not reasonable to hold that by merely making an increased lodgement, which was refused by the plaintiff, and which she did not beat at the trial, that the defendants should therefore be held to be only entitled to their costs subsequent to the date of the increased lodgement.

The third submission:

That because a number of previous hearing dates had to be vacated on the application of the defendants, that the plaintiff should be awarded the costs in respect of those dates on which the action did not proceed. The Court declined to make any such order for costs against the defendants on this ground.

The plaintiff’s fourth submission was to the effect that O. 22, r. 6:

The plaintiff’s fourth submission was to the effect that O. 22, r. 6 :specifically provides that where a plaintiff fails to beat a lodgement, 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.

The Court ruled that the plaintiff bears the burden of proving that the injuries of which he complains, where caused by the wrongful act of the defendant and that the issue of causation in relation to injuries, is part of the issue of quantum and is not part of the issue of liability.

There are dicta from the Court of Appeal to the effect that spurious applications under s. 26 of the 2004 Act should be frowned upon and discouraged, that was a long way from supporting the proposition that where a defendant makes an unsuccessful application pursuant to s. 26, that they should be thereby disentitled from relying on the benefits of a lodgement made earlier in the case.

Finally, the plaintiff submitted that because the defendants had made offers subsequent to the date of the increased lodgement, they had effectively withdrawn the lodgement and therefore could not rely on it as a basis for seeking their costs.

The Court saw no basis in law for that submission. A defendant was always entitled to use the procedures provided under the rules to protect their position.

The decision of the Supreme Court in Grant v. Roche Products, does not support the proposition that because a plaintiff exercises her constitutional right to pursue her action to a trial, the defendants should not be entitled to rely on a lodgement properly made pursuant to the rules of court. That proposition was simply untenable.

Accordingly, the court made the following orders in relation to costs:-

(a) The plaintiff is entitled to her costs up to 27th September, 2016. Such costs to be taxed in default of agreement.

(b) The defendants are entitled to their costs from 28th September, 2016 to date. Such costs to be taxed in default of agreement.

(c) The sum of €260,111.25 is to be retained in court. The balance of the lodgement, together with any interest thereon, is to be returned to the defendants.

(d) When the plaintiff's costs and the defendants' costs have been ascertained, either by agreement or following taxation, they are to be set off one against the other and if there is a balance due in favour of the defendant, that can be satisfied out of the balance remaining in court, with the remainder thereof being paid out to the plaintiff.

(e) In the event that the plaintiff's costs exceed those of the defendants, the amount of such excess is to be paid by the defendants to the plaintiff and the sum of money remaining in court can be paid out to the plaintiff.