September 2012

Calderbank Letter

The high level of costs is a constant bugbear and a legitimate business concern for any organisation involved in litigation. In a jurisdiction like Ireland where the unsuccessful party has to pay the costs of the victor as well as its own, defendants have an incentive to bring litigation to a speedy conclusion by settlement and avoid the expense of a trial. What can a defendant do to get a reluctant or un-cooperative plaintiff to sit up and take notice of entreaties to settle.

The Lodgment

The Rules of the Superior Courts ("RSC") lay down procedures to help defendants focus the minds of plaintiffs. Order 22 of the RSC permits payments into court. This allows a defendant to pay into court a sum of money in satisfaction of a claim and is more commonly known as a lodgment. The lodgment has to be made at specific points in the legal proceedings and outside of those particular timelines the permission of the court must be sought.

In non personal injuries actions the procedure involves the actual lodgment of money into the courts office. Personal injuries cases differ since the introduction of *S.I. 328 of 2000*: *Rules of the Superior Courts (No. 5) (Offer of payment in lieu of lodgment) 2000,* which allows certain qualified parties (including indemnifiers authorised in the State as an insurance undertaking) to make a tender offer in lieu of a lodgment. In other words a qualifying party does not have to make an actual payment into court.

The advantage of making a Lodgment

Once a lodgment is accepted, other than completing some minor procedural issues, the litigation is usually at an end. It is only when a lodgment is not accepted, the matter proceeds to trial and the plaintiff fails to achieve a sum in excess of the lodgment that the penal costs' provisions

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in the RSC are applied. Under Order 22 Rule 6, the plaintiff is entitled to the costs of the action up until the time the lodgment was made, but crucially the defendant is entitled to the costs of the action from the time the lodgment is made. As the latter period will include the trial of the action, the plaintiff becomes liable for the defendant's solicitors costs, barristers fees and experts' fees. Consequently the costs can amount to a significant sum.

The making of a lodgment by a defendant is a useful tactical tool as Order 22 Rule 6 (3) clearly states that *"…the defendant shall be entitled to the costs of the action …"* (except in cases of minors). While the advantage of a lodgment is that the court has no discretion if the award to the plaintiff is not greater than the lodgment, the procedure does have one downside. The lodgment must be made at specific times under the RSC and outside those time limits the permission of the court must be sought. The courts have little appetite in giving that permission and would need very strong and cogent reasons for doing so.

The problem for a defendant is that at the times it is required procedurally to make the lodgment it might not have the requisite information available to decide what sum to lodge. This might be because a plaintiff has given insufficient information or needs to amplify certain aspects of their claim. Additionally, as a case proceeds to trial, or indeed at trial, evidence might emerge which shows that a once strong defence is now less so. With timelines for making a lodgment lapsed, and a reluctance by the courts to give permission to make a lodgment, does a defendant have any tactical options to restrict its costs? The answer is yes – the Calderbank letter.

The Calderbank Letter

As stated at the outset the general rule that applies in Ireland is that *"costs follow the event",* meaning costs are awarded to the successful party. This right to costs is enshrined in Order 99 Rule 4 (1) of the RSC which states:-

> *"the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event"*

While the court can exercise discretion, as a general rule the successful party is awarded costs. As discussed above, this discretion is fettered by Order 22, Rule 6 when a plaintiff does not accept a lodgment which was made into Court and proceeds with the action and is not awarded more than the lodgment.

This position has however been changed to a degree by *S.I. No. 12 of 2008, Rules of the Superior Courts (Costs) 2008,* which amends Order 99 in relation to the courts consideration of costs. Order 99 1A (1) states that the Supreme Court and High Court:-

> *"… in considering the awarding of the costs of any appeal or any application in respect of an appeal, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy*

> *the whole or part of that other party's (or those other parties') claim or counterclaim the subject of the appeal, or application."*

Order 99 1 (A) does not apply to an action in respect of a claim or counterclaim concerning which a lodgment or tender offer in lieu of lodgment may be made in accordance with Order 22. This amendment to Order 99 enables the courts to consider the terms of any offer in writing sent by one party to another. An *"offer in writing"* is stated as including *"any offer in writing made without prejudice as to the issue of costs."*

The purpose of this amendment to Order 99 is to allow the courts to have a more formal approach to what are known as Calderbank letters or offers and to provide a statutory footing for this practice. This type of offer derives its name from the English Court of Appeal decision in *Calderbank .v. Calderbank [1976] Fam Law*. 93 where an offer to settle was expressed in a communication which was *"without prejudice except (or save) as to costs"*. The intention was that the offer would have all the features of a normal *"without prejudice"* offer, but allowed reference to be made to it in Court on the issue of costs, if the offer was not accepted.

For a period of time there remained a question whether this procedure was available in areas other than family law cases. However, over the years the Calderbank letter gained a more general application and has been used in many commercial cases. The existence of the Calderbank letter was recognised judicially in Ireland in *O'Neill .v. Ryanair (No. 3) [1992] 1 I.R. 166* and was given consideration in *Murnaghan .v. Markland Holdings Limited and Anor [2004] IEHC 406* and more recently in the case of *Geraghty and Gilmore .v. Galway County Council & Ors [2011] IEHC 447*. In the latter case Mr. Justice Murphy said in referring to the amended Order 99 1A (1) that:-

> *"the purpose of such a Calderbank letter or offer, as it is commonly known, is to promote the settlement because of the party's consciousness of a potential costs penalty if a reasonable offer is refused. The Calderbank letter also brings to the court's attention any unreasonable behaviour of parties and recognises the offerers willingness to reach a settlement. The rule does not require any necessary formality nor, indeed, separate Calderbank letters to be sent to the parties."*

The Calderbank letter needs no formality in structure or timing. Order 99 1A (1) allows the courts consider *"the terms of any offer in writing".* Under the Order an *"offer in writing"* includes *"an offer in writing made without prejudice save as to the issue of costs"* - in essence a Calderbank letter. Interestingly Order 99 also allows the court to have regard to the parties behaviour and willingness to settle, issues normally cloaked by privilege. It can be said to also have public policy element in providing an incentive for the plaintiffs to end their litigation as soon as possible as well as discouraging wasteful and unreasonable behaviour by litigants.

When to serve "Calderbank" Letter?

The time by which a Calderbank letter should be served is open and it will be for the courts to decide its effectiveness. Anecdotally one hears of Calderbank letters being served just prior to trial

or even during the trial. The cases of *Murnaghan* and *Geraghty & Anor* show two very different approaches. In *Murnaghan* the Calderbank letter was served on the day the trial was to begin and Laffoy J refused to consider the letter. She said that *"metaphorically it came way beyond 'the eleventh hour'".* In *Geraghty and Anor* Murphy J. gave effect to a Calderbank letter that was served ten weeks after the commencement of the hearing of the action.

Conclusion

Offers to compromise are important litigation tools. The use of the lodgment is a more foolproof method in increasing the pressure on a Plaintiff, as the court has no discretion when it comes to penalising a plaintiff who fails to be awarded more than the lodgment. The Calderbank letter allows the court to have discretionary consideration to its terms as to costs and a defendant is heavily reliant on the courts discretion to depart from the general rule that the successful party is entitled to its costs. The Calderbank letter is therefore a useful costs saving tactic and as the *Geraghty & Anor* case shows it might never be too late to serve it.

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