

**THE HIGH COURT**

[2022] IEHC 9  
[2012/8005 P]

**BETWEEN**

**MARY T. O'MALLEY**

**PLAINTIFF**

**AND**

**ANDREA HERMANN AND GALWAY CLINIC DOUGHISKA LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Paul Coffey delivered on the 12th day of January, 2022**

1. This is an application by the defendants pursuant to O.22 r 1(7) of the Rules of the Superior Courts for leave to make a late lodgement in a medical negligence action in which proceedings were instituted on 13th August 2012 by way of Personal Injury Summons to which the defendants delivered a Defence on 17th September 2018. Notice of trial was issued on 26th July 2019 and the matter is listed for hearing on 16th March next.
2. The plaintiff opposes the application on the ground that it is made against a background of talks having taken place recently between the parties in which it is accepted that the plaintiff "showed her hand" to the defendants. The plaintiff contends that the granting of leave in such circumstances will unfairly cause disadvantage to the plaintiff after the parties had engaged in "considerable without prejudice communication".
3. Order 22 rule 1(7) of the Rules of the Superior Courts provides as follows:

"A Defendant may once without leave and upon notice to the Plaintiff pay into Court a sum of money in satisfaction of any action to which Section 1(1) of the Courts Act 1988 applies, either at the time of the delivery of a Defence or within a period of four months from the date of the Notice of Trial. A Defendant who has not made such payment within the time permitted or who wishes to increase such sum as has been lodged may only do so by leave of the Court and upon such terms and conditions as to the Court seem fit".
4. As can be seen from its wording, the discretion conferred by subrule 7 is unqualified and granted in the widest possible terms. It is nonetheless a discretion which must in the ordinary way be exercised judicially in accordance with settled principles whereby the Court must not only have regard to the public interest in permitting even a very late lodgement to deter unnecessary litigation but also must take account of the issue of fairness to ensure that the granting of leave does not confer undue litigation advantage on the party seeking it having regard to the circumstances of the particular case in which leave is sought.
5. In *Ely v Dargan* [1967] IR 89 O'Dalaigh CJ stated that the public interest is served by allowing a defendant, even "at the eleventh hour", to "proffer" to the plaintiff under the lodgement machinery of the Courts a sum that the defendant considers adequately meets the plaintiff's claim. This must be so because a lodgement can only be disadvantageous to a plaintiff if it is in an amount that exceeds the sum awarded to the plaintiff at trial in

which case there is a strong public interest in permitting even a late lodgement both to provide some measure of protection to a defendant who has offered more than the value of the plaintiff's claim and to avoid the wasting of court time in the hearing of cases that are in effect moot.

6. Whilst there may well be applications for leave that ought to be refused, there is no rule contained in the Rules of the Superior Courts or elsewhere which states that leave to make a late lodgement may not be granted merely because the claim has been the subject of settlement negotiations or a mediation which have failed to resolve the proceedings. Special circumstances warranting a refusal of leave might well arise where there is evidence that the defendant has mala fide engaged in spurious settlement talks solely for the purposes of making a tight lodgement or where, for example, the application is made during the trial but after the failure of a mediation that has been urged on the parties by the Court itself as was the context for a refusal of leave by Binchy J in the case of *White Young Green Environmental (Ireland) Limited v Getthings* (unreported judgment of Binchy J delivered on 20th July, 2015). Absent evidence of such special circumstances, however, an application to make a late lodgement, even where it is made against a background of unsuccessful endeavours at settlement, ought to be granted but only on such terms and conditions that ensure that the granting of leave does not confer undue litigation advantage on the defendant. Thus in *Ely v Dargan* leave was granted prior to a retrial of a personal injury action on the defendants' undertaking to recoup to the plaintiff all costs incurred, including the costs of unsuccessfully defending an appeal against quantum which had been taken by the defendants prior to the proffering of the late lodgement. Similarly, Gilligan J in the case of *Carpenter v Stoneavon Holdings Limited and Ors* [2016] IEHC 304 allowed leave to make an offer of payment in lieu of lodging money in court against a background of an unsuccessful mediation but did so on terms that the amount so tendered included all costs to the first day of trial in order to reflect the fact that the application was made approximately three months prior to trial.
7. Applying the law so stated to the facts of this case, I do not consider the admitted fact that the plaintiff "showed her hand" in the course of recent without prejudice dialogue between the parties to be a sufficient reason in itself to refuse leave. Absent evidence of *mala fides*, manifest unfairness or some other disorienting circumstance, I am of the view that the discretion of this Court ought to be exercised in favour of the granting of leave but only upon such terms and conditions as ensure that undue litigation advantage does not thereby accrue to the defendants having regard to the timing of this application.
8. In this case the application for leave was made three months prior to trial but over three years after the last pleading was exchanged between the parties. In order to mark the fact that this is a very late application for leave in the context of this particular case, I will grant leave to make a late lodgement but will do so on terms that it shall not take effect until the second day of the trial so that, if accepted at any time prior to that date, the plaintiff will be entitled to costs up to and including the first day of the trial, namely, 16th March, 2022.