

## Irish Procedure - Lodgments and Tenders Stephen Chessher, Beale and Company

### 1 Introduction

- 1.1 This article summarises aspects of the Irish rules of Court on making lodgments and tenders and sets out some of the drawbacks with this procedure as compared to equivalent procedures under the English Civil Procedure Rules.

### 2 Lodgments

- 2.1 Lodgments (payments into court) may be made by defendants in the Irish courts which have broadly similar effect to Part 36 payments/offers under the English Civil Procedure Rules. The procedure is set out in Order 22 Rules of the Superior Courts, and order 15 Circuit Court Rules.

### 3 Tenders

- 3.1 Order 22 allows certain '*qualified parties*' to make a tender offer in lieu of a lodgement. A '*qualified party*' includes a party which is '*an indemnifier of any party and authorised to carry on business in the State as an insurance undertaking*', ie a professional indemnity or other liability insurer. This procedure is available both to Irish insurers and to other EU domiciled insurers.
- 3.2 Tender offers are deemed to be lodgments and have the same costs consequences and same time limits as lodgments. They can only be made without leave of the court before a case is set down for trial. Thereafter leave must be sought from the court.
- 3.3 The obvious advantage of a tender offer over a lodgement is that there is no need to make any payment unless or until the tender offer is accepted.
- 3.4 The difficulties of assessing whether to make a lodgement and if so for how much apply equally to tender offers: in the absence of pre-action protocols or satisfactory pleadings, a defendant is rarely in a position to make a realistic assessment of its position before litigation has reached an advanced stage.

### 4 Tenders between Defendants

- 4.1 Litigation involving multiple defendants tends to be particularly difficult to settle at an early stage. However, since 2005, insurers and other defendants who are '*qualified parties*' (primarily State bodies) have had an additional tactic available to them.
- 4.2 Where any issue of apportionment of liability between defendants arises, insured defendants are able to make tenders to co-defendants (Order 22 Rule 15). This applies only to the Superior Court, there is no equivalent for the Circuit Court. Tenders made to co-defendants have limited costs consequences.
- 4.3 The tender offer is to pay '*a specified amount of the total damages for which the defendant may be liable to the plaintiff*'.
- 4.4 It may be made '*at any time prior to the trial of the issue of apportionment of liability between the offeror and offeree*'.

4.5 If the tender is accepted and judgment is entered against both the offeror and the offeree, '*the offeror shall become liable ... to account to the offeree for the payment to the plaintiff of the specified amount of the total damages...*'

4.6 The offeror's liability is therefore predetermined at the time that the tender is accepted. It should be appreciated that the tender between defendants only affects the positions of the defendants. If the offeree fails to pay the plaintiff its proportion of damages, the offeror will remain liable to the plaintiff for the full sum awarded.

## 5 Costs Consequences of tenders between defendants

5.1 If the tender between defendants is accepted, there are no defined costs consequences, i.e. each defendant may be liable for costs in the normal way

5.2 If the tender between defendants is **not** accepted the costs consequences are:

- a) where judgment is entered against both the offeror and the offeree; and
- b) the offeree has not accepted the tender between defendants; and
- c) the amount of the total damages awarded to the plaintiff which the offeror is liable to pay does not exceed the amount specified in the tender;

then (unless the judge directs otherwise)

- d) the offeree shall be liable to the offeror in respect of the costs of the issue of apportionment incurred after the date of the tender between defendants.

5.3 The ability to make tenders between defendants, although welcome, is of limited use in practice because:

- a) a defendant considering making a tender between defendants must come to a view both on apportionment of liability between defendants and on quantum of the plaintiff's claim and often on the basis of limited information;
- b) unless the tender between defendants is combined with a successful tender offer to the plaintiff, the defendant offeror will still have to incur trial costs;
- c) the costs consequences as between defendants if the plaintiff's claim against one or all of the defendants is discontinued (because the plaintiff has accepted a tender offer or otherwise) are uncertain; and
- d) the costs which the successful defendant offeror is able to recover are only those which relate to the apportionment of liability as between defendants. They do not include the offeror's costs of defending the plaintiff's claim and in practice it is likely to be very difficult to disentangle one from the other.

## 6 Summary

6.1 A tender offer to a plaintiff may be made by an insured defendant in any circumstances in which a lodgement could be made.

6.2 An insured defendant may make a tender offer to a co-defendant at any time up to trial.

6.3 A tender between defendants has limited costs consequences (as between co-defendants).

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