Cayman Insurance Litigation Q3 2016 Review

Welcome to the Q3 2016 Stuarts insurance litigation review. In this edition, we address Payments into Court. Stuarts acts for a number of leading Cayman Islands Insurance Companies and specifically advises and acts for Insurers in defending a range of personal injury, medical negligence and property claims.

Offers of Settlement and Payment into Court - GCR Order 22

O22, r.1 (1) of the GCR provides that:-

"In any action for a debt or damages any defendant may at any time pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined in the action, a sum or sums of money in satisfaction of any or all of those causes of action" .

The Defendant must give notice of the payment in to the Plaintiff and every other Defendant. The Plaintiff must send to the Defendant a written acknowledgment of receipt **(O22, r.1 (2))**.

Whilst a Defendant may, without leave of the Court, give notice of an increase of the payment in, leave of the Court is required to withdraw or amend **(r.1 (3))**. However, to justify permission to withdraw, there must be a change in circumstance which results from facts coming to light, not simply a change in one's view of already known facts which was so in the Cayman Islands case of *Manku v Seehra*[1] where the Defendant made a payment into Court based on one expert report, then two days later received a second expert's report indicating the payment in was too high. Leave to withdraw was refused because the second expert had simply "re-evaluated" the claim based on existing information.

Where two or more causes of action are joined, the notice of payment must state that the money is paid in respect of all or specify which cause(s) it is made in respect of and where there are separate payments, in respect of any two or more causes of action, he must specify the sum paid in respect of that or those causes **(r.1 (4) (a) and (b))**.

A cause of action in respect of debt or damages will be construed as including interest in the Judgment **(r.1 (7))**.

The Plaintiff may accept a payment in within 21 days after receipt of the notice of payment or amendment/increase to an existing payment in but, in any event, before the start of the trial **(r.3(1))**. This is subject to **r.3 (2)** which states that where a payment in is made *after* the the start of the trial, it may be accepted within 2 days of receipt of the notice of the payment in, provided that the Judge has not started summing up or handing down judgment.

The fact that money has been paid into court and the amount paid in shall not be communicated to the Court until the issues of liability and of the amount of debt or damages has been determined **(r.7 (1))**. However, where an issue as to costs of a liability trial arises, but the amount of the debt or damages remaining to be tried separately, any party may bring to the attention of the Court the fact that a payment into Court has or has not been made and the date, but not the amount **(r.7(2))**.

By virtue of r.14 a party may opt to make a written offer *"without prejudice save as to costs"*, similarly the Court cannot be made aware of the offer until the issue of costs falls to be decided, however *"the Court shall not take such offer into account, if at the time it is made, the party making it could have protected his position as to costs by means of a payment into Court"* **(r.14 (2))**.

1 [1985] CILR 224

Key Contacts

Richard Annette
Head of Litigation
Tel: (345) 814-7920
richard.annette@stuartslaw.com

Comment

Whilst the primary purpose of Order 22 is to encourage parties to take active steps towards settlement, the practical effect, from a Defendant's perspective is one of trying to obtain costs protection and at the same time exposing the Plaintiff to a risk of paying the Defendant's costs from the date of the payment in to the date of judgment, should they fail to beat the amount paid in at trial. It is important to note that this is not an automatic entitlement. However, the payment into court is a matter that is **expressly** to be taken into account by the court when exercising its *discretion* as to costs under **O.62 r.10 (b)**.

In practice, where the payment in exceeds the amount of damages including interest that is awarded to the Plaintiff, the Defendant will be entitled to their costs incurred *after* the time for acceptance of the payment in has expired. This is also the case if the payment in equals the judgment award[2].

R.14(2) has the effect of limiting the circumstances in which a written offer can be used instead of a payment in to court, as it removes the advantageous costs implications for a Defendant if, at the time the offer was made, a payment into court was feasible.

Practical and Tactical Guidance for Defendants' Payments In

- In cases where liability is not in issue, it is sensible to make a payment in as soon as possible so as to maximise the incentive to the Plaintiff to settle. The sooner the payment is made the sooner the clock starts to run against fees which are incurred which if the matter leads up to a quantum trial, could be significant. Furthermore, it is open to Defendants to increase the payment in to increase the pressure as the matter progresses towards a trial.
- The purpose is to exert pressure on the Plaintiff. As such, the payment in should be pitched somewhere between the minimum and the maximum the Plaintiff can expect to receive at trial ("the valuation bracket"). It may be that an initial payment is at the bottom of this bracket.
- Even where liability is in issue, where it seems apparent that the Defendant will ultimately pay something to the Plaintiff, it is often sensible to make a payment in, again to exert some pressure on the Plaintiff to settle. It may be that from a tactical perspective, this is best placed when the Defence is filed, which, for example, denies liability and pleads contributory negligence. This gives the Plaintiff an indication of the case they have to meet and should make them consider litigation risk, in terms of their exposure to costs, by balancing the strengths and weaknesses of their pleaded case against the merits of the Defence raised.
- A reduction from the bottom end of the valuation bracket can be made to reflect the risk of a successful Defence in full or in part. For example, where it is felt the Plaintiff is 30% contributory negligent, the payment in at the bottom end of the valuation bracket can be reduced by 30% to reflect the pleaded case.
- Other tactical points in the litigation timetable to pay in or increase payments into Court are when key evidence is exchanged, such as expert or lay witness evidence, which highlights risks or weakness within the Plaintiff's case and or strengths in the Defendant's case.
- The Plaintiff cannot accept a payment in during the course of the trial, that was paid in before the start of the trial, without the judge's permission, which will usually also require the consent of the Defendant[3].

Conclusion

It is clear that Order 22 is a useful tool for Defendants; the purpose being to promote resolution and thereby reduce costs. It places a burden on the Plaintiff by both (1) presenting a risk to the recovery of all of the Plaintiff's costs; **and** (2) exposing the Plaintiff to potential liability in respect of part of the Defendant's costs should the payment in not be accepted and where the Plaintiff does not beat the amount paid in at trial. It is a mechanism which should routinely be carefully considered and reviewed on an on-going basis as the case develops.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact Richard Annette at Stuarts Humphries.

2 Wagmam v Vare Motors Limited [1959] 1 WLR 853
3 Gaskin v British Aluminium Co Ltd [1976] QB 524 CA

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Richard Annette
Head of Litigation
Tel: (345) 814-7920
richard.annette@stuartslaw.com