

LOCAL COURTS (CIVIL CLAIMS) ACT 1970—RULE

NEW SOUTH WALES



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1. This rule is made by the Rule Committee on 11 April 1994, and has effect on and from 22 April 1994.

2. The Local Courts (Civil Claims) Rules 1988 are amended by inserting after Part 17 the following Part:

PART 17A

OFFER OF COMPROMISE

Application of Part

1. (1) This Part applies to actions in a court's General Division but not to actions in a court's Small Claims Division.

(2) Subrule (1) does not prevent a court from making any order or giving any direction.

Mode of making offer

2. (1) An offer of compromise is made to a party under this Part by serving a notice of the offer on the party.

(2) A notice of offer shall:

(a) be prepared in accordance with Part 36 rules 2–6; and

(b) bear a statement to the effect that the offer is made in accordance with this Part.

(3) The notice of an offer to a party who acts other than by a solicitor shall contain the words "You should seek advice from a solicitor or a Chamber Magistrate as to the possible consequences in costs of this document", or words to a like effect.

Application

3. (1) Subject to this rule, in any action each of the plaintiff and the defendant may make to the other an offer to compromise any claim in the action on the terms specified in the offer.

(2) A plaintiff may not make an offer under subrule (1) unless the plaintiff has supplied to the defendant such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer.

(3) Unless the court otherwise orders, where a plaintiff makes an offer under subrule (1), no order shall be made in favour of the defendant on the ground that the plaintiff has not supplied, or has not supplied sufficient, particulars or documents as required by subrule (2) unless the defendant has informed the plaintiff in writing of that ground within 14 days after receipt of the offer.

Offer with further offer as to costs

4. (1) An offer of an amount expressed to be inclusive of costs is not an offer for the purposes of this Part.

(2) A party may make an offer under rule 3 (1) (a "principal offer") to compromise any claim in an action and, at the same or a subsequent time, an offer (a "costs offer") to compromise any claim of the plaintiff for costs incurred in the action up to the date of any acceptance of the principal offer by paying or accepting an amount specified in the costs offer.

(3) Where a principal offer and a costs offer are made under subrule (2) and the offeree accepts the principal offer, the offeree may accept or fail to accept the costs offer.

(4) A costs offer is of no effect for the purposes of this rule if the principal offer is not accepted.

(5) Where:

- (a) a plaintiff accepts a principal offer and fails to accept a costs offer; and
- (b) the plaintiff applies to the court for an order for costs of the action; and
- (c) the court is of opinion 'that the costs offer was in an amount not less than the costs reasonably incurred (on a party and party basis) by the plaintiff up to and including the day when the principal offer was accepted,

the court may in its discretion award the costs of the application to the defendant.

Time for making or accepting offer

5. (1) An offer may be made at any time before judgment in respect of the claim to which it relates.

(2) A party may make more than one offer.

(3) An offer may be expressed to be limited ~~as~~ to the time it is open to be accepted but the time expressed shall not be less than 28 days after the offer is made.

(4) An offeree may accept the offer by serving notice of acceptance on the offeror before:

(a) the expiration of the time specified in accordance with subrule (3) or, if no time is specified, the expiration of 28 days after the offer is made; or

(b) in the case of an action referred for determination under section 21H of the Act, the commencement of the hearing of the action before the arbitrator; or

(c) judgment in respect of the claim to which the offer relates, whichever event is the soonest.

(5) An offer shall not be withdrawn during the time it is open to be accepted, unless the court otherwise orders.

(6) An offer is open to be accepted within the period referred to in subrule (4) notwithstanding that during that period the party to whom the offer (the “first offer”) is made makes an offer (the “second offer”) to the party who made the first offer whether or not the second offer is made in accordance with this Part.

(7) Where an offer is accepted under this rule, any party to the compromise may apply to the court to enter judgment accordingly.

Time for compliance

6. An offer providing for the payment of a sum of money, or for the doing of any other act, shall, unless the notice of offer otherwise provides, be taken to provide for the payment of that sum or the doing of that act within 28 days after acceptance of the offer.

Withdrawal of acceptance

7. (1) A party who accepts an offer may, by serving a notice of withdrawal on the offeror, withdraw the acceptance:

(a) where the offer provides for payment of a sum of money or the doing of any other act and the sum is not paid to the offeree or into court or the act is not done within 28 days after acceptance of the offer or within such other time ~~as~~ the offer provides; or

(b) where the court gives leave so to do.

(2) On withdrawal of an acceptance all steps in the action taken in consequence of the acceptance shall have such effect only as the court may direct.

(3) On withdrawal of an acceptance or on the motion for leave to withdraw an acceptance, the court may:

- (a) give directions under subrule (2);
- (b) give directions for restoring the parties as nearly as may be to their positions at the time of the acceptance; and
- (c) give directions for the further conduct of the action.

Offer without prejudice

8. An offer made in accordance with this Part shall be taken to have been made without prejudice, unless the notice of offer otherwise provides.

Disclosure of offer to court

9. (1) No statement of the fact that an offer has been made shall be contained in any document filed in the action.

(2) Where an offer has not been accepted, then, except as provided by rule 11 (g), no communication with respect to the offer shall be made to the court at the hearing or, as the case may require, to the arbitrator, until after all questions of liability and the relief to be granted have been determined.

(3) Subrules (1) and (2) shall not apply where a notice of offer provides that the offer is not made without prejudice.

Failure to comply with accepted offer

10. (1) Where a party to an accepted offer fails to comply with the terms of the offer, then, unless for special cause the court otherwise orders, the other party shall be entitled, as he may elect, to:

- (a) such judgment or order as is appropriate to give effect to the terms of the accepted offer; or
- (b) where the party in default is the plaintiff, an order that the action be dismissed, and, where the party in default is the defendant, an order that the defence be struck out, and in either case to judgment accordingly.

(2) Where a party to an accepted offer fails to comply with the terms of the offer, and a defendant in the action has brought a cross-claim, or filed a third party notice, which is not the subject of the accepted offer, the court may make such order or give such judgment under subrule (1) and make such order that the action, cross-claim, or claim on the third party notice be continued as it thinks fit.

Costs

11. (1) Subject to subrule (2), upon the acceptance of an offer of compromise in accordance with rule 5 (4), unless the court otherwise orders, the defendant shall pay the costs of the plaintiff in respect of the action up to and including the day the offer was accepted, on a party and party basis, and the plaintiff shall be entitled to apply to the court to determine the amount of those costs.

(2) On application by the defendant, the court may if it thinks fit order that the costs payable under subrule (1) shall be the costs of the plaintiff in respect of the action up to and including the day the offer was made, or any day between that day and the day the offer was accepted.

(3) If a notice of offer contains a term which purports to negative or limit the operation of subrule (1), that term shall be of no effect for any purpose under this Part.

(4) Subrules (5)–(7) apply to an offer which has not been accepted at the time prescribed by rule 5 (4).

(5) Where an offer is made by a plaintiff and not accepted by the defendant, and the plaintiff obtains an order or a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer, then, unless the court otherwise orders, the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim from the date on which the offer was made, determined on an indemnity basis, in addition to the plaintiff's costs in respect of the claim incurred before that date, determined on a party and party basis.

(6) Where an offer is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains an order or a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the court otherwise orders, the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was made, determined on a party and party basis, and, unless the court otherwise orders, the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter, determined on a party and party basis.

(7) For the purpose of subrule (6), where the offer was made on the first or a later day of the hearing of the action, then, unless the court otherwise orders, the plaintiff shall be entitled to the plaintiff's costs in respect of the claim up to 11 am. on the day following the day on which the offer was made, determined on a party and party basis, and the defendant shall be entitled to the defendant's costs in respect of the claim thereafter, determined on a party and party basis.

(8) Where a plaintiff obtains judgment for an amount which includes interest, then, for the purpose of determining the consequences as to costs referred to in subrules (5) and (6), the court shall disregard so much of the interest as relates to the period after the day on which the offer was made.

(9) For the purpose only of subrule (8), the court may be informed of the fact that the offer was made, and of the date on which it was made, but shall not be informed of its terms.

(10) Subrules (5) and (6) shall not apply if the court is satisfied that the party making the offer was not at a material time willing and able to carry out what the party offered.

(11) Unless the court otherwise orders, any application for an order for costs under subrule (5) or (6) must be made immediately after the order or judgment giving rise to the entitlement to the order for costs is made or given, and the court shall, immediately it makes such an order for costs, proceed to determine the amount of costs payable under the order.

(12) On a determination on a party and party basis, the court shall have regard to the amount it would have determined under Part 31 rule 7 if the action had proceeded to a hearing and judgment.

(13) On a determination on an indemnity basis, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

Multiple defendants

12. Where 2 or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a debt or damages and rights of contribution or indemnity appear to exist between the defendants, rule 11 shall not apply to an offer unless:

- (a) in the case of an offer made by the plaintiff—the offer is made to all defendants, and is an offer to compromise the claim against all of them;
- (b) in the case of an offer made to the plaintiff
 - (i) the offer is to compromise the claim against all defendants; and
 - (ii) where the offer is made by 2 or more defendants—by the terms of the offer the defendants who made the offer are jointly or jointly and severally liable to the plaintiff for the whole amount of the offer.

Offer to contribute

13. (1) Where in any action a third or subsequent party notice is filed, any third or subsequent party may serve on any other party an offer to contribute toward a compromise of the claim made by the plaintiff on the terms specified in the offer.

(2) The court may take an offer to contribute into account in determining whether it should order that the offeree should pay the whole or part of:

- (a) the costs of the offeror, or
- (b) any costs which the offeror is liable to pay to the plaintiff.

(3) Rules 8 and 9 shall apply to an offer to contribute as if it were an offer of compromise.

EXPLANATORY NOTE

The purpose of the amendments is to make available in the Local Courts the system of offer of compromise, supported by costs sanctions against unreasonable refusal to accept an offer, which operates in the Supreme Court and District Court.

E. J. O'Grady
Secretary to the Rule Committee
