

## **RULE 39 – OFFER TO SETTLE**

### **Definitions**

(1) In this rule:

"defendant" includes "respondent";

"double costs" means double the fees allowed under Rule 60(2) and includes the disbursements allowed under Rule 60(4);

"offer to settle" means an offer to settle under subrule (2);

"plaintiff" includes "petitioner";

"trial" includes "hearing".

### **Where available**

(2) A party to a proceeding may deliver to any other party of record a written offer in Form 65 to settle one or more of the claims in the proceeding in the terms specified in the offer.

### **Money settlement**

(3) An offer to settle for a sum of money includes, in that sum, all interest under the *Judicature Act* to the date of the delivery of the offer, but does not include costs.

### **Application**

(4) This rule also applies to a claim for interim or interlocutory relief.

(5) Subrules (24) to (31) do not apply if a judgment is obtained in default of appearance or pleading or if the relief obtained on an application was unopposed.

### **Time for making offer**

(6) An offer to settle may be delivered at any time before the trial commences.

(7) If an offer is delivered less than 7 days before the trial commences, subrules (24) to (31) do not apply but the court may, in exercising its discretion as to costs, consider the offer and the date that it was delivered.

### **Withdrawal of offer**

(8) A party may withdraw an offer to settle before it is accepted by delivering a written notice of withdrawal in Form 66.

**Expiry of offer**

- (9) An offer to settle that specifies a time within which it may be accepted expires if it is not accepted within that time.

**Counter offer**

- (10) An offer to settle does not expire by reason that a counter offer is made.

**No disclosure to court**

- (11) No statement of the fact that an offer to settle has been made shall be disclosed to the court, or jury, or set forth in any document used in the proceeding, until all questions of liability, and of the relief to be granted, other than costs, have been determined.

**Offer not admission**

- (12) An offer to settle is not an admission.

**Acceptance of offer**

- (13) An offer to settle which has not been withdrawn may be accepted at any time before the trial commences.
- (14) An offer may be accepted only by delivering a written notice of acceptance in Form 67.

**Acceptance must be unconditional**

- (15) Except as provided in subrules (17) and (18), an acceptance of an offer to settle must be unconditional.

**Stay of proceedings**

- (16) Except as provided in subrules (20), (21) and (35) on acceptance of an offer to settle a claim, all proceedings relating to that claim, except recovery of costs, and entry of and enforcement of judgment, are stayed.

**Payment into court as condition of offer or acceptance**

- (17) If a plaintiff offers to settle a claim for payment of money by a defendant, the plaintiff may include in the offer a condition that the money be paid into court, or to a named trustee, and, in that case, the defendant may accept the offer only by paying the money in accordance with the offer and by delivering a written notice of acceptance in Form 67.
- (18) If a defendant offers to settle a claim for payment of money to a plaintiff, the plaintiff may accept the offer with the condition that the money be paid into court or to a

named trustee, and, in that case, if the defendant fails to pay the money in accordance with the condition, the plaintiff may proceed under subrule (20).

### **Payment out of court**

- (19) Subject to subrule (34) and the provisions of Rule 61 relating to an infant's money, money paid into court under this rule may be paid out to a person by order or by consent of the interested parties or of their lawyers of record.

### **Failure to comply with conditions**

- (20) If a party fails to comply with the conditions of an accepted offer to settle, the other party may
  - (a) apply for an order in the terms of the accepted offer, or
  - (b) continue the proceeding as if there had been no accepted offer.

### **Order on acceptance**

- (21) If an offer is accepted, the court may incorporate any of its terms in an order.

### **Costs on acceptance**

- (22) Subject to subrule (23), if an offer is accepted,
  - (a) if the offer was made by the plaintiff, the plaintiff is entitled to costs, or
  - (b) if the offer was made by the defendant, the plaintiff is entitled to costs assessed to the date the offer was delivered to the plaintiff, and the defendant to costs assessed from that date.

### **Costs on acceptance of offer in family law proceeding**

- (23) If a party has made an offer to settle a claim in a family law proceeding and the offer is accepted,
  - (a) unless the court orders otherwise, neither party is entitled to any costs to the date the offer was delivered, and
  - (b) the party making the offer is entitled to costs from the date the offer was delivered.

### **Consequences of failure to accept plaintiff's offer to settle a monetary claim**

- (24) If the plaintiff has made an offer to settle a claim for payment of money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the

plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

#### **Consequences of failure to accept defendant's offer for monetary relief**

- (25) If the defendant has made an offer to settle a claim for money and the offer has not expired or been withdrawn or been accepted,
- (a) if the plaintiff obtains judgment for the amount of money specified in the offer or a lesser amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
- (b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

#### **Consequences of failure to accept plaintiff's offer for non-monetary relief**

- (26) If the plaintiff has made an offer to settle a claim for non-monetary relief, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment as favourable as, or more favourable than, the terms of the offer to settle, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

#### **Consequences of failure to accept defendant's offer for non-monetary relief**

- (27) If the defendant has made an offer to settle a claim for non-monetary relief and the offer has not expired or been withdrawn or been accepted,
- (a) if the plaintiff obtains a judgment as favourable as, or less favourable than, the terms of the offer to settle, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
- (b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

#### **Consequences of failure to accept offer in family law proceeding**

- (28) Despite subrules (24) to (27), if a party has made an offer to settle a claim in a family law proceeding, and the offer has not expired, been withdrawn or been accepted, and if the party making the offer obtains a judgment as favourable as, or more favourable than, the terms of the offer to settle, the party making the offer is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

#### **Exception**

- (29) Notwithstanding subrules (24) to (27), the court may award costs, or double costs, up to, or from, a time later than the date of delivery of the offer to settle, if it is

satisfied that the offer could reasonably have been accepted only at a time later than the date of delivery.

### **Interpretation**

- (30) For the purposes of subrules (26) and (27),
- (a) a judgment shall be presumed to be as favourable as, or more favourable than, the terms of an offer to settle made by a plaintiff if the judgment includes the relief specified in the offer, and
- (b) a judgment shall be presumed to be as favourable as, or less favourable than, the terms of an offer to settle made by a defendant if the relief granted in the judgment is included in the relief specified in the offer.

### **Burden of proof**

- (31) Notwithstanding subrule (30), the burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of the subrule.

### **Multiple plaintiffs**

- (32) If there is more than one plaintiff, a separate offer to settle may be made by or to a plaintiff and if that plaintiff becomes entitled to have costs assessed, the clerk shall apportion costs that have been jointly incurred by that plaintiff and other plaintiffs in the proceeding.

### **Multiple defendants**

- (33) Other than in an action for defamation, if several defendants are sued jointly, a plaintiff may not make an offer to settle except jointly to all defendants, and a defendant may not make an offer to settle except jointly with all other defendants.

### **Counter claims and third party claims**

- (34) This rule applies to counter claims and to third party claims, but, if an offer to settle, made between a third party and a defendant, has been accepted, no money shall be paid by the third party to a defendant other than into court and no money paid into court by the third party shall be taken out of court without leave of the court on notice to the plaintiff or without the consent of all parties of record or their lawyers.

### **Parties under disability**

- (35) A party under disability may make, withdraw or accept an offer to settle, but the acceptance of an offer made by or to such a party is subject to approval by the court under Rule 6(15).

### **Fatal Accidents Act**

- (36) A defendant in an action under the *Fatal Accidents Act* may offer to pay one sum as compensation to all persons entitled to recover damages in the action, without specifying the shares into which or the parties among which it is to be divided. If the offer is not accepted this rule applies as if all persons represented by the plaintiff were a single plaintiff.

### **Defamation actions**

- (37) If, in an action for defamation against several defendants sued jointly, the plaintiff accepts an offer to settle made by one defendant, the action may proceed against other defendants, but the sum recoverable on judgment against them shall be reduced by the amount already accepted by the plaintiff.
- (38) A plaintiff in an action for defamation who accepts an offer to settle, or takes money out of court under Rule 21(16), may apply to court for leave to make in open court a statement in terms approved by the court.

### **Costs in cases within small claims jurisdiction**

- (39) Despite subrule (22), the plaintiff is not entitled to costs other than disbursements if
- (a) an offer is accepted for a sum within the jurisdiction of the Territorial Court under the *Small Claims Court Act*, and
  - (b) the proceeding in which the offer was made could appropriately have been brought in the Territorial Court.
- (40) Notwithstanding subrules (24) to (31), if the plaintiff obtains a judgment for a sum within the jurisdiction of the Territorial Court under the *Small Claims Court Act*, the plaintiff is not entitled to costs or to double costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

### **Settlement offer may be delivered**

- (41) In any circumstance to which subrules (1) through (40) do not apply, a party to a proceeding may deliver a written settlement offer, in any form, of one or more of the claims in the proceeding if that settlement offer includes a statement that the party delivering the settlement offer reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.
- (42) If a written settlement offer has been delivered under subrule (41) and brought to the attention of the court, the court may

(a) award costs to the offering party in an amount not greater than the costs to which the party would have been entitled had the offer been made under subrules (1) through (40), or

(b) deprive the party to whom the offer was made of costs to an extent not greater than that which the court could have ordered had the offer been made under subrules (1) through (40).

**Application of subrules (10) to (12)**

(43) Subrules (10) to (12) apply to a written settlement offer made under subrule (41).