

(A) Introduction to “Offer to Settle”

An offer to settle (OTS), as the name implies, is an offer by one party to settle any ongoing lawsuit it may have with another party. When accepted by the other party, the ongoing suit is to be discontinued, and parties need not incur further legal costs. Parties can thus save on potentially substantial litigation costs.

In addition to it being a means of dispute resolution, it may also be utilised for a tactical advantage in the ongoing suit. The advantage of offering to settle is that it has costs consequence should the ongoing suit continue to its natural conclusion (i.e. when the Judge makes a decision), without prejudicing the offeror’s interests or liabilities (in the ongoing suit). This means, depending on the results of the suit, the existence of an OTS may lead to one party recovering a higher amount of costs from the opposing party.

A major requirement for a valid OTS is that it must be a genuine and serious offer.

Procedure and Form

Order 22A of the Rules of Court sets out the procedure to make an OTS and the consequences of accepting or rejecting an OTS, as well as the procedure by which to enforce further settlement agreement (which is to be entered into after an OTS has been accepted by the parties in the suit).

An offer to settle must be served in the prescribed form (Form 33 of the Rules of Court), and may be made at any point in time before the Court makes a full and final decision in respect of the suit.

An offer to settle is a confidential document/correspondence that cannot be disclosed in any court document or revealed to the Court until after the suit has been finally decided upon, and when the Court is deciding on the costs amount each party is to bear. An offer to settle can contain a variety of terms, such as terms as to allocation of costs, and the substantial settlement terms themselves.

(B) Making an offer to settle

- An OTS can be made by either a plaintiff or a defendant to the proceedings.
- The offer must be served in the prescribed form as in Form 33 of the Rules of Court.
- The offer can either specify a time for acceptance, or not. Any time specified for acceptance must be for a period not less than 14 days after the OTS is served on the opposing party.
- Where there is no specified time for acceptance, the offer can be accepted at any time before the Court

makes a full and final decision in respect of the suit or before the offer is withdrawn by the offeror.

(C) Withdrawing an offer to settle

Withdrawal of an OTS can be due to a number of reasons, such as the offeror’s wish to modify the terms of the offer or if the offeror has obtained new evidence improving its chances of winning the ongoing suit.

- If an OTS has not specified a time for acceptance, an offer may be withdrawn at any time only after the expiry of 14 days from the date of service of the offer. However, at least one day’s prior notice of the intention to withdraw must be given to the opposing party.
- If an OTS has specified a time for acceptance, permission must be obtained from the Court to withdraw the offer before the stated expiry date of the offer and 14 days must have passed from the date of service of the offer.

(D) Accepting an offer to settle

- The acceptance of offer must be made in the prescribed form in Form 35 on the party who made the offer (O. 22A r. 6(1)).
- If the offer specifies a time for acceptance, notice of acceptance must be served by then. Otherwise, the offer will be deemed to have been withdrawn when the time expires.
- If the offer does not specify a time for acceptance, the offer can be accepted before the Court makes a full and final decision in respect of the suit.
- An offer that has been withdrawn or has expired cannot be accepted.

(E) Rejecting an offer to settle

- The party to whom the offer is made can either reject the offer, or respond with a counter-offer.
- If the counter-offer is not accepted, the offeree can still choose to accept the original offer, unless it has been withdrawn, or the Court has issued a full and final judgment in respect of the suit for which the OTS was made.

(F) What are the cost consequences of rejecting an offer to settle?

- Before costs consequences can be determined, the offer must be deemed to be valid. It must not have been withdrawn, or expired before the disposal of the claim for which the offer is made. The offer must

also be a genuine and serious offer with a view to settle the dispute.

To better understand how costs may be allocated, two concepts are useful to keep in mind:

1. Costs on a standard basis – O 59 r 27(2)

The Registrar shall allow a reasonable amount in respect of all costs reasonably incurred. Any doubts which the Registrar may have about whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

2. Costs on an indemnity basis – O 59 r 27(3)

All costs shall be allowed except where they are of an unreasonable amount, or have been unreasonably incurred. Any doubts which the Registrar may have about whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

Where the offer has been accepted but does not provide for costs O.22Ar.9(2)(a):

- The plaintiff will be entitled to his costs assessed to the date that the notice of acceptance was served. This is to encourage the defendant to accept the offer as soon as possible, to avoid excessive delay.

Some offers to settle may include terms that deal with how costs are to be allocated to each party. Depending on whether the offer contains such terms, and whether these offers are accepted or not, there may be different cost consequences for each party.

(G) Where the OTS is made by the plaintiff

Where the offer has not been accepted, not withdrawn and the plaintiff obtains judgment more favourable than the terms of the offer – O. 22A r. 9(1):

- The plaintiff is entitled to costs on the standard basis up to the date the OTS was served, and costs on the indemnity basis from that date.

Where the offer has been accepted, but does not provide for costs – O 22A r. 9(2)a:

- The plaintiff will be entitled to his costs assessed to the date that the notice of acceptance was served. This is to encourage the defendant to accept the offer as soon as possible, to avoid excessive delay.

(H) When the OTS is made by the defendant

Where the offer has not been accepted, not withdrawn and the plaintiff obtains judgment less favourable than the terms of offer – O.22A r. 9(3):

- The plaintiff is entitled to costs on the standard basis up to the date the offer was served, and the defendant is entitled to costs on the indemnity basis from that date onwards.

Where the offer has been accepted but does not provide for costs – O. 22A r. 9(2)(b):

- The plaintiff is entitled to costs assessed up to the date he was served with the offer, and the defendant is entitled to his costs, which will be assessed starting from the date of service of the offer, up to the date that the notice of acceptance was served.
- This is intended to encourage the defendant to put an offer early, as well as to incentivise the plaintiff to accept the offer promptly, rather than unnecessary delay.

It should be noted that without prejudice to these stipulations in the Rules of Court, the Court still reserves the full power and discretion to determine by whom and to what extent any costs are to be paid – O.22A r.9(5) and O.22A r. 12.

These rules can be better illustrated with the next two examples.

| Example 1: Plaintiff is claiming \$100,000, but makes an O22A OTS for \$50,000 | |
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| Result after trial | Where OTS is not accepted, and is not withdrawn nor has expired |
| Plaintiff awarded \$100,000 (ie more favourable) | The plaintiff is entitled to costs on the standard basis up to the date the offer to settle was served and costs on the indemnity basis from that date. |
| Plaintiff awarded \$40,000 (ie less favourable) | The offer will normally be disregarded and the defendant will pay the Plaintiff's costs on the standard basis, and bear its own costs. |

| Example 2: Plaintiff is claiming \$100,000, but defendant makes an O22A OTS for \$50,000 | |
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| Result after trial | Where OTS is not accepted, and is not withdrawn nor has expired |
| Plaintiff awarded \$100,000 | The offer will normally be disregarded and the defendant will pay the Plaintiff's costs on the standard basis, and bear its own costs. |
| Plaintiff awarded \$40,000 | The plaintiff is entitled to costs on the standard basis to the offer was served and the defendant is entitled to costs on the indemnity basis from that date. |

(I) How is a settlement agreement enforced?

As with any contractual agreement, it is possible that a party may agree to the offer but does not comply with the terms.

According to O 22A r 8(1), where a party has accepted the offer to settle but fails to comply with any of the terms in the accepted offer, the other party to the agreement can rely on one of the following options:

1. Apply to court for an order in terms of the accepted offer, and the court may grant judgment accordingly. Failure to comply with a court order attracts the charge of contempt of court on the violating party;
2. Continue proceedings as if there had been no offer to settle.

(J) Under what circumstances should you consider making or accepting an offer to settle?

- An OTS should never be ruled out completely as the best way to maximise one's interests in terms of costs and interest on costs, lest the matter proceeds to trial.
- If accepted, an OTS can potentially save both parties hefty costs from pre-trial and trial proceedings.
- The making of an OTS can focus an opponent's mind and, may lead to a commercial settlement of the dispute.
- A party who is facing a recalcitrant opposing party may make an OTS to take advantage of the cost consequence of an OTS.

Note: This Summary is intended to highlight the salient issues relating to how an Offer to Settle generally works, and is not intended to be comprehensive nor should it be construed as legal advice. Further, the examples provided herein are only intended to serve as a general guide on the cost consequences relating to an Offer to Settle and do not exhaustively cover all costs scenarios and potential orders at the end of trial. Should you have any queries as to how this may affect you, please do not hesitate to contact us directly.