



Elements and Benefits of the Offer of Compromise

December 7, 2017

Written by JHK Legal Lawyer Dylan Trickey

The Calderbank Offer has long been a handy tool in the litigators tool kit. However, in recent times the Offer of Compromise has provided practitioners with an alternative approach to settlement of proceedings. This article aims to examine the elements of an Offer of Compromise and briefly look at the benefits over a Calderbank Offer in Victoria.



The Offer of Compromise:

After the update to provisions relating to Offers of Compromise under the *Magistrates' Court Civil Procedure Rules 2010* (VIC) ("the Rules") pursuant to the *Magistrates Court General and Civil Procedure (Offers of Compromise Amendments) Rules 2014* (VIC); the rules across Victoria's state Courts relating to Offers of Compromise essentially provide consistent requirements for offers of compromise.

Using the example of the Rules the necessary drafting requirements for an Offer of Compromise under Order 26 are as follows:

1. The offer must in writing and prepared in accordance with Rules 27.02 to 27.04; and contain a statement to the effect that it is served in accordance with this Order¹; and
2. That the offer is inclusive of costs or that costs are to be paid or received in addition to the offer²;

As for the timing, an Offer of Compromise can be made at any time before an order is made by the Court. A party is also able to choose the time limit for acceptance of an offer; however, the compliance period cannot be less than 7 days after service.

¹ *Magistrates' Court General Civil Procedure Rules 2010* (VIC) r. 26.02(3)

² r 26.02(4)

Most notably, the Rules provide very specific consequences should an Offer of Compromise not be accepted. Using the example of a Plaintiff issuing an Offer of Compromise for the recovery of funds, under the Rules, if a Plaintiff makes an Offer of Compromise, the Defendant does not accept, and the Plaintiff obtains an outcome that is not less favourable than the offer, then, unless the Court orders otherwise the Plaintiff is entitled to an additional 25% of costs on top of the fixed scale costs for those costs incurred after 11.00am on the second business day after the offer was served.³

The Rules also provide that acceptance of an offer may be withdrawn in the event any settlement sum is not paid within 30 days after acceptance on the order and the Court gives leave to do so⁴ (28 days pursuant to the *County Court Civil Procedure Rules*⁵ and *Supreme Court (General Civil Procedure) Rules*⁶). In the event that a party is required to seek leave from the Court, at the time of the application they may also seek leave to restore (as nearly as practicable) the parties to their original positions prior to the acceptance and for further conduct of the proceedings.⁷

It is also worth noting that the Offer of Compromise is not restricted to Plaintiffs. Whilst the focus of the above has been based on the example of a Plaintiff making an Offer of Compromise, in the event a Plaintiff fails to accept a Defendant's offer unless the Court orders otherwise, and the Defendant receives an order in its favour or the Plaintiff's claim is dismissed, then they will be entitled to the same 25% increase on its scale costs as referred to above from 11.00am on the second business day after the offer was served.⁸

Benefit of Offer of Compromise over Calderbank Offer:

Whilst based on similar principles as the Calderbank Offer, the Offer of Compromise provides practitioners the luxury of clear formalities and entitlements as to costs. Each of the steps provided for by the Rules (and those contained in the County Court Rules and Supreme Court Rules) provide a clear direction to practitioners as to how parties are to make an Offer of Compromise and the consequence of failure to comply.

In comparison, if a party were to use an effective Calderbank Offer, and that party was successful, it may be difficult for practitioners to give their client a clear indication of the amount of costs the Court may award as reference has to be made to case law. The Victorian Courts however have provided some guidance in the recent decision in *Oliver Hume (Vic) Pty Ltd v Santa Monica (Aust) Pty Ltd (No 2)*⁹

In this matter, His Honour Woodward J awarded the Plaintiff partial indemnity costs and provided practitioners with a reminder as to how a well drafted Calderbank Offer can still be an effective tool in litigation.

³ r 26.08(2)(a) and (b)

⁴ r26.07(1)

⁵ *County Court Civil Procedure Rules 2008* (VIC) r. 26.03.1

⁶ *Supreme Court (General Civil Procedure) Rules 2005* (VIC) r.26.03.1

⁷ *Magistrates' Court General Civil Procedure Rules 2010* (VIC) r. 26.07

⁸ r. 26.08(4)(a) and (b)

⁹ *Oliver Hume (Vic) Pty Ltd v Santa Monica (Aust) Pty Ltd (No 2)* [2017] VCC 1239

His Honour determined the second offer from the Plaintiff represented a genuine compromise of the Plaintiff's claim, and was also satisfied that the offer was expressed in clear terms and unequivocally foreshadowed an application for indemnity costs if the Defendant rejected the offer¹⁰.

His Honour determined that the Defendant acted unreasonably by not accepting the Plaintiff's offer. Despite the Plaintiff's offer being made close to trial, His Honour determined that given the matter turned on a question of fact, and that the Defendant deviated from its initial pleadings at the trial, the Defendant's acted unreasonably in not accepting the offer¹¹.

The decision demonstrates that if a party can comply with the basic principles of a Calderbank Offer, it can still be an effective tool for a practitioner in attempting to claim costs on an indemnity basis.

Conclusion:

Despite a wealth of case law regarding Calderbank Offers, based on the rules of each of the Victorian state jurisdictions, the Offer of Compromise correctly drafted in accordance with the rules of Court offers a party greater surety as to costs in the event an offer goes unaccepted and they obtain a favourable decision.

Our suggestions to clients engaged in litigation (pending what stage a matter is at) is to proceed with issuing an Offer of Compromise on the basis we can provide clients with a clearer indication what their entitlements would be in the event they obtain a better outcome than that proposed by the offer.

That being said, the Calderbank Offer has not been made redundant, and still provides parties with a handy tool pre-trial when deployed properly, particularly when there is not the luxury of the time required under the Rules.

¹⁰ Ibid at para 6

¹¹ Ibid at para 10