

Amendments to Order 24 A - Offers of Compromise (effective 18 September 2015)

Order 24 A of the Supreme Court Rules 1971 (WA) is a well-known and often used provision that deals with formalised offers of compromise. These offers are often utilised by parties on the basis that they provide stronger protection against costs than a *Calderbank* offer would. This is because a costs order (from the day the offer was made) is relatively automatic if a party achieves a result equal to or better than the offer. A successful *Calderbank* offer, on the other hand, represents no more than a discretionary consideration of the court.

The Supreme Court has recently amended Order 24A. The new provision reads as follows:

“If the Court is satisfied that the failure by the plaintiff to accept the offer made by the defendant was unreasonable, the defendant’s costs are to be taxed on an indemnity basis, unless the interests of justice require otherwise”.

Essentially, the costs consequences have been adjusted in cases where a party has **unreasonably** failed to accept an offer. In such circumstances, the new provisions provide that this party will be liable to pay the other party’s costs on an **indemnity** basis (not just on a party and party basis) from the date on which the offer is made. Order 24 A has also been amended to allow for offers of compromise to be put forward in counterclaims and third party notices.

As can be observed from the above wording, the new provision is subject to the following two conditions:

- The party making the offer must satisfy the Court that it was at all material times willing and able to comply with the terms of the offer; and
- The Court retains the discretion not to allow costs on an indemnity basis if “the interests of justice require otherwise”.

Our observations

The Court still retains an ultimate discretion not to award costs on an indemnity basis. However, it is evident that the new provisions will ensure that parties attain even stronger protection against costs. The amendments can therefore be seen as a welcome change particularly when being utilised in the context of unmeritorious litigation.

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