

CJRS 13/2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

**Procedure under New Order 22 –
Offers to Settle and Payments into Court**

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the procedure under the new Order 22 – Offers to Settle and Payments into Court in the latest draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”). It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

New Order 22

2. The new Order 22 introduces a system of “sanctioned offers” and “sanctioned payments” governing the making of settlement offers by the plaintiff or the defendant and the consequences thereof. It is adopted and modified from “Part 36 offers and payments” of the Civil Procedure Rules which have achieved considerable success in England and Wales.

3. Under the new Order 22, offers to settle any type of dispute (not just money ones as under the present O.22) may be made, thereby bringing the whole action or a part of it, to an end. Moreover, the settlement offers by parties can relate to (i) the whole claim, (ii) a part of the claim(s) and (iii) even an issue arising from a claim(s). The new Order 22 substantially alters the existing system of payments into court and would considerably widen the ambit of offers to settle cases. As distinct from the existing Order 22, which provides only the mechanism for payment into court by the defendant, the new Order 22 allows also the plaintiff to make settlement offers. If an offer is not bettered when judgment is obtained, the offeree has to bear the

consequences of enhanced interest and costs. It is a procedure which aims to encourage the parties to take possible settlement seriously and to provide an incentive for parties to settle disputes at an earlier stage than at present.

4. It should be noted that if a party makes a settlement offer not in accordance with the new Order 22, it will not attract the consequences specified thereunder, unless the Court so orders (O.22, r.2(4)).

Sanctioned Offer and Sanctioned Payment

5. “Sanctioned payment” means an offer made by way of a payment into court in accordance with this Order. “Sanctioned offer” means an offer made (otherwise than by way of a payment into court) in accordance with this Order (O.22, r.1). The terms “plaintiff” and “defendant” apply interchangeably depending on whether the context is a claim or counterclaim.

6. The plaintiff can only make a settlement offer by way of a sanctioned offer. The plaintiff need not do so by making a sanctioned payment. The defendant can, depending on the circumstances, make it by both ways.

7. Where an offer by a defendant involves a payment of money to the plaintiff, the offer must be made by way of a sanctioned payment (O.22, r.3(2)). Where the offer does not consist of a payment of money, it will have to be made by way of sanctioned offer.

8. There is no prescribed form to be used in relation to a sanctioned offer. For sanctioned payment, **Form 23** (notice of payment) and **Form 24** (notice of acceptance) are to be used.

9. There are restrictions on disclosure of sanctioned offer and sanctioned payment. A sanctioned offer is treated as “without prejudice save as to costs” (O.22, r.21(1)). The fact that a sanctioned payment has been made must not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided (O.22, r.21(2)).

Making a Sanctioned Offer

10. A sanctioned offer must be in writing (O.22, r.5(1)) and must state, among other things, whether it relates to the whole claim or to part of it or to any issue arising from it and if so, to which part or issue (O.22, r.5(3)). The offeror shall serve the sanctioned offer to the offeree (O.22, r.5(6)).

11. The plaintiff or defendant can serve the sanctioned offer at any time after the commencement of the action (O.22, r.6(1)) but if it is served less than 28 days before the commencement of trial, the offer can only be accepted with the court's leave unless parties agree on the liability for costs (O.22, rr.5(8), 11(2), 12(2)).

12. A sanctioned offer may not be withdrawn or diminished before the expiry of 28 days from the date the sanctioned offer is made unless the court grants leave to do so (O.22, r.5(7)(a)).

13. A sanctioned offer is made when it is served on the offeree (O.22, r.9(1)).

Making a Sanctioned Payment

14. A sanctioned payment may only be made after the proceedings have commenced (O.22, r.3).

15. A defendant who makes a sanctioned payment shall file with the court a notice in **Form 23**. It must state, among other things, the amount of payment and whether the payment relates to the whole claim or to part of it or to any issue arising from it and if so, to which part or issue (O.22, r.7(2)).

Form 23

16. The defendant shall serve the Form 23 on the plaintiff and file with the court a certificate of service (O.22, r.7(3)).

17. A sanctioned payment may not be withdrawn or diminished before the expiry of 28 days from the date the sanctioned payment is made unless the court grants leave to do so (O.22, r.7(4)).

18. A sanctioned payment is made when the sanctioned payment notice (Form 23) is served on the offeree (O.22, r.9(2)).

Acceptance

19. The rules governing acceptance of sanctioned offer and sanctioned payment are similar except that there is a prescribed form (**Form 24**) to be used (O.22, r.11(4)) for acceptance of sanctioned payment. After acceptance of a sanctioned payment, the plaintiff may obtain payment out of the sum in court by making a request for payment in **Form 25** (O.22, r.13).

Form 24

Form 25

20. A sanctioned offer or payment can be accepted without leave by service of a written notice of acceptance (for a sanctioned payment, in Form 24) within 28 days after the offer or payment was made, if it was made not less than 28 days before trial (O.22, r.11(1)). Otherwise, leave is required unless parties have agreed on liability for costs (O.22, r.11(2)).

21. If there is subsisting an application to withdraw or diminish a sanctioned offer or payment, it may not be accepted without leave (O.22, r.5(10) & r.7(5)).

22. A sanctioned offer or payment is accepted when its acceptance is served on the offeror (O.22, r.9(5)).

23. There are situations where one or more, but not all, defendants make a sanctioned payment or offer. The procedures governing the acceptance of which are set out under O.22, r.14.

Consequences of Acceptance

24. If a sanctioned offer or sanctioned payment relates to the whole claim is accepted, the claim is stayed (O.22, r.18(1)), but without affecting the court's power to make orders under O.22, r.18(5). For a sanctioned offer, the stay is upon the terms of the offer and either party may apply to enforce those terms without the need to commence new proceedings (O.22, r.18(2)).

25. If a sanctioned offer or payment of a defendant relates only to part of the claim or an issue arising from the claim is accepted, the claim is

stayed as to that part or issue, and in the case of a sanctioned offer, the stay is upon the terms of the offer and either party may apply to enforce those terms without the need to commence new proceedings (O.22, r.18(3)).

26. Where a sanctioned offer has been accepted and a party alleges that the other party has not honoured the terms of the offer, that party may claim against the other party on those terms without having to commence new proceedings (O.22, r.18(6)).

Costs

27. If a sanctioned offer or payment is accepted without requiring leave to settle the whole claim, the offeree gets his costs of the proceedings up to the date of the acceptance (O.22, r.16(1) & r.17(1)).

28. If a sanctioned offer or payment of a defendant relates only to a part of the claim or an issue arising from the claim is accepted, the plaintiff gets his costs of the proceedings up to the date of the acceptance if at the time of serving notice of acceptance he abandons the other parts of the claim or other issues arising from the claim (O.22, r.16(2)). Otherwise, the liability for costs shall be decided by the court (O.22, r.18(3)(c)).

Consequences of Non-acceptance

29. The consequences of non-acceptance of a sanctioned offer or sanctioned payment depend on the outcome of the proceedings.

30. If a plaintiff has made a sanctioned offer which is not accepted, and he obtains a judgment better than the offer, the defendant may have to face the consequences (O.22, r.20).

31. On the other hand, if the defendant has made a sanctioned offer or sanctioned payment which is not accepted, and the plaintiff fails to obtain a judgment better than the offer or payment, the plaintiff may have to face the consequences (O.22, r.19).

32. The consequences of non-acceptance may include the liability to pay -

(a) by the plaintiff -

- (i) costs incurred by defendant after the latest date on which the offer or payment could have been accepted without requiring leave of the court (O.22, r.19(2));
- (ii) costs on indemnity basis from the latest date on which the offer or payment could have been accepted without requiring leave of the court (O.22, r.19(3)(a)); and
- (iii) enhanced interest (up to 10% above judgment rate) on those costs (O.22, r.19(3)(b));

(b) by the defendant -

- (i) costs on indemnity basis from the latest date on which the offer or payment could have been accepted without requiring leave of the court (O.22, r.20(3)(a));
- (ii) enhanced interest (up to 10% above judgment rate) on those costs (O.22, r.20(3)(b)); and
- (iii) enhanced interest (up to 10% above judgment rate) on any sum awarded (excluding interest) to the plaintiff from the latest date on which the offer could have been accepted without requiring leave of the court (O.22, r.20(2)).