

Group Briefing

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Reject a genuine settlement offer and risk paying the price

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Can a party who successfully sues another party, having rejected a settlement offer, be liable for some of the other party's costs? Potentially yes.

THE USUAL RULE

The usual rule in litigation is that costs follow the event, i.e. the losing party pays the winning party's costs. However, the courts can depart from this rule in certain circumstances. For example, in cases where it is not possible to make a lodgement/tender, the court can, where it considers it fair to do so, have regard to the terms of any settlement offer made by the losing party (whether made on an open basis or without prejudice save as to costs). If the settlement offer would, if accepted, have resolved the dispute and avoided the need for a court hearing, the court may take the view that the losing party should be allowed to recover at least some of its costs from the winning party.

This was seen in a recent High Court decision: [O'Reilly v Neville](#).

DISPUTE BETWEEN THE PARTIES

In this case, a husband and wife successfully sued the developers from whom they purchased their house for specific performance. The couple rejected a total of six open offers to settle the dispute.

THE FIRST SETTLEMENT OFFER

The Court, in its judgment, focused on two offers in particular.

The first offer was, the Court said, "commendable", but acknowledged that it would not have resolved the central issue in dispute. However, the Court criticised the couple for not responding to it in any meaningful way.

THE FINAL SETTLEMENT OFFER

The final offer was much more comprehensive and thought-out. Indeed, the Court described it as an "exemplary" offer and said that it should have been accepted. The Court noted that it addressed all of the shortcomings in the previous offers. It acknowledged responsibility for the defects, and set out a step-by-step procedure for remedying these. It also provided for the intervention of an independent expert to resolve any dispute between the parties.

Indeed the couple's own engineer confirmed that he could see no reason why this offer was not accepted.

IMPACT ON COSTS

Court rules provide that when a court

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

is considering the awarding of costs in any action (except in cases where a lodgement or tender could have been made), it can have regard to the terms of any settlement offer (whether made on an open basis or without prejudice save as to costs) sent by one party to the other party.

The Court awarded all costs from the date of the final settlement offer to the developers. The couple, though successful in the litigation, recovered the costs of only one day of the eleven-day High Court hearing, which related to a matter not dealt with by the offer.

The Court observed that the couple's failure to accept this offer caused almost all of the costs that followed. It noted that the developer had, throughout the dispute, showed a willingness to engage with the couple to resolve matters, but this willingness was not reciprocated by the couple. The Court stated that while the developers' original workmanship could be criticised, one could not criticise the way in which they had addressed the couple's complaints, and had dealt with the legal proceedings.

- » The courts want to encourage parties to put forward settlement proposals which might lead to an early resolution of litigation and lead to significant savings of costs and court time.
- » The courts will not allow a party to disregard a genuine attempt to settle a dispute with impunity. A party who does so can expect to be penalised in costs, even if ultimately successful in the litigation.
- » The courts expect a party who is rejecting a settlement offer to respond in a meaningful way to the offer.

Open settlement offers, offers without prejudice save as to costs and lodgements/tenders can shift the cost burden of litigation, if used correctly and should be borne in mind at all times by defendants. Similarly they should be carefully considered from this perspective by plaintiffs.

KEY TAKEAWAYS

- » The courts look favorably on parties who actively and genuinely engage with the other side in an attempt to resolve the matters in dispute.

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