

I suggest that S.I 12 of 2008 , which amends Order 99 of the Rules of the Superior Courts should be revised. The relevant part is as follows:

“1A. (1) Notwithstanding sub-rules (3) and (4) of rule 1—

(a) The Supreme Court, in considering the awarding of the costs of any appeal or any application in respect of an appeal, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party’s (or those other parties’) claim or counterclaim the subject of the appeal, or application.

(b) The High Court, in considering the awarding of the costs of any action (**other than an action in respect of a claim or counterclaim concerning which a lodgment or tender offer in lieu of lodgment may be made in accordance with Order 22**) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party’s (or those other parties’) claim, counterclaim or application.

(c) The High Court, in considering the awarding of the costs of any appeal from the Circuit Court, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party to the appeal offering to satisfy the whole or part of that other party’s (or those other parties’) claim or counterclaim the subject of the appeal.

(2) In this rule, an “offer in writing” includes any offer in writing made without prejudice save as to the issue of costs. ”;

That part of Rule 1A (b) (the Rule) which I have highlighted in bold, should be omitted. Its existence potentially prevents a Calderbank offer being made in any case where a lodgment or tender can be made. It may be a weak argument to contend that whereas the Rule allows the High Court to consider the position where a lodgment or tender cannot be made, it does not preclude the Court from considering the same position where a lodgment or tender can be made. Thus the Rule discourages settlement by Calderbank offer in cases where a lodgment or tender can be made.

Also, it is illogical to have such a provision in the High Court, whereas it does not apply to appeals from the Circuit Court (Rule 1A (c)) and whereas, under Rule 1A (a), the Supreme Court is not so limited.