# OFFERS OF COMPROMISE
# UNDER RULE 20.26 OF THE *UNIFORM CIVIL PROCEDURE RULES* - HOW TO MAKE THEM BITE

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## Introduction and objectives of this paper

1. This Paper considers key aspects of making valid and enforceable offers of compromise pursuant to rule 20.26 of the *Uniform Civil Procedure Rules* 2005 ("UCPR"), as amended, which took effect on 7 June 2013. The Paper also outlines when offers that are otherwise invalid under the UCPR may be relied upon pursuant to the principles of *Calderbank v Calderbank* [1975] 3 WLR 586 ("*Calderbank*").

2. The emphasis on early resolution of matters and the principles of case management in ss.56-60 of the *Civil Procedure Act 2005* (NSW) ("the CPA") means that an understanding of rule 20.26 is essential for civil litigators. Pursuant to s.4 and Schedule 1 of the CPA, Part 3-9 of the CPA and the UCPR apply to civil proceedings in the Local, District and Supreme Courts of NSW, the Dust Diseases Tribunal, the Industrial Relations Tribunal and to Class 1-4 proceedings in the Land and Environment Court. It is fair to say the CPA and the UCPR have been a revolutionary force in civil litigation in NSW with their emphasis on the "just, cheap and quick resolution of the real issues in the proceedings" as per s.56 of the CPA.

3. The primary objective of this Paper is that practitioners have an understanding of the operative components of a valid offer of compromise under rule 20.26 of the UCPR. This is important in civil proceedings. An offer that is invalid cannot be relied on for an indemnity costs order under Division 3 of Part 42 of the UCPR. A secondary objective is to clarify the main differences between an offer of compromise under the UCPR and an offer made in accordance with *Calderbank*. The third and final

objective is to review the important cases from the Supreme Court considering offers of compromise made since 7 June 2013.

**The importance of an effective offer of compromise – costs orders are here to stay (usually)**

4. Rule 20.26 of the UCPR is designed to encourage early settlement through the use of offers of compromise and costs penalties that may apply under Division 3 of Part 42 of the UCPR. An understanding of the mechanics of making of an offer in accordance with the UCPR or the *Calderbank* principles is important because costs orders are invariably final. These sections and rules are to be read as part of and guiding the discretionary power of the court to make orders as to costs (including against third parties) under s.98 of the *Civil Procedure Act.*

5. An order as to costs by the Supreme Court may only be appealed from with the leave of the Court of Appeal: s.101(2)(c) of the *Supreme Court Act 1970* (NSW). Leave to appeal is also required where the amount in issue is below the threshold amount of $100,000: s.101(2)(r) of that Act. Most costs orders should (hopefully) involve less than $100,000. An appeal from the District Court to the Supreme Court of a judgment or order as to costs requires leave pursuant to s.127(2)(b) of the *District Court Act 1973* (NSW). Appeals from the District Court are assigned to the Court of Appeal pursuant to s.48(2)(f) of the *Supreme Court Act*. An appeal from the General Division of the Local Court to the Supreme Court in respect of a costs order requires leave of the Supreme Court pursuant to s.40(2)(c) of the *Local Court Act 2007* (NSW).

6. In summary, whether the appeal is from the Local Court to the Supreme Court; the District Court to the Supreme Court; or the Supreme Court to the Court of Appeal, any appeal from a judgment or order as to costs must be the subject of an application for leave. Such applications may be difficult to succeed on where the sum in dispute is small. The principles relevant to leave applications were reviewed in the decision of *Council of the City of Botany Bay v Michos* [2013] NSWCA 244 per Gleeson JA at [28]. It is ordinarily only appropriate to grant leave to appeal in matters that involve issues of principle; questions of general importance; or an injustice which is reasonably clear in the sense of going beyond what is merely arguable: *Council of the*

*City of Botany Bay v Michos* (*supra*); see also *McDonald v Price* [2011] NSWSC 70 per Davies J at [45] in which his Honour stated that an applicant for leave must demonstrate something more than that the trial judge is arguably wrong in the conclusion arrived at and the orders are open to reconsideration.

7. There must be proportionality between what is at stake on the leave application and the resources to be allocated to the appeal. A leave application involving a relatively small amount would be disproportionate to the costs of the appeal and therefore leave would be refused: *McDonald v Price* (*supra*) at [45] citing Lord Hoffmann in *Piglowski v. Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360 at 1373. Unless exceptional circumstances apply, ordinarily any costs order would be a final decision.

**Division 4 of Part 20 of the UCPR – making, accepting and enforcing an offer of compromise under rule 20.26 of the UCPR**

8. Rule 20.26 of the UCPR is contained within Part 20 of the UCPR which is headed "Resolution of Proceedings Without Hearing". The application of rule 20.26 of the UCPR must be seen within the rubric of the legislative intent to resolve civil proceedings without the costs of a trial by using other mechanisms within Part 20. Those other mechanisms are mediation in Division 1, arbitration in Division 2, references to referees in Division 3 and compromise under Division 4 within Part 20. Rule 20.26 has been substantially amended by the *Uniform Civil Procedure Rules (Amendment No 59) 2013* which took effect on 7 June 2013. Offers of compromise made before 7 June 2013 are subject to the previous version of the rule: Part 1 of Schedule 12, UCPR.

9. Since 7 June 2013, rule 20.26 of the UCPR reads as follows (with emphasis for purposes of this paper):

> "(1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
>
> (2) An offer under this rule:
>
> (a) must identify:

(i) the claim or part of the claim to which it relates, and

(ii) the proposed orders for disposal of the claim or part of the claim, including, if a monetary judgment is proposed, the amount of that monetary judgment, and

(b) if the offer relates only to part of a claim in the proceedings, must include a statement:

(i) in the case of an offer by the plaintiff, as to whether the balance of the proceedings is to be abandoned or pursued, or

(ii) in the case of an offer by a defendant, as to whether the balance of the proceedings will be defended or conceded, and

(c) must ***not include an amount for costs and must not be expressed to be inclusive of costs***, and

(d) ***must bear a statement to the effect that the offer is made in accordance with these rules***, and

(e) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to that interim payment, and

(f) must specify the period of time within which the offer is open for acceptance.

(3) An offer under this rule may propose:

(a) a judgment in favour of the defendant:

(i) ***with no order as to costs***, or

(ii) despite subrule (2)(c), with a term of the offer that ***the defendant will pay to the plaintiff a specified sum in respect of the plaintiff's costs***, or

(b) that the ***costs as agreed or assessed up to the time the offer was made will be paid by the offeror***, or

(c) that the ***costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of a specified estate, notional estate or fund*** identified in the offer.

(4) If the offeror makes an offer before the offeree has been given such particulars of the offeror's claim, and copies or originals of such

documents available to the offeror, as are necessary to enable the offeree to fully consider the offer, the offeree may, within 14 days of receiving the offer, give notice to the offeror that:

(a) the offeree is unable to assess the reasonableness of the offer because of the lack of particulars or documents, and

(b) in the event that rule 42.14 applies to the proceedings, the offeree will seek an order of the court under rule 42.14(2).

(5) The closing date for acceptance of an offer:

(a) in the case of an offer made two months or more before the date set down for commencement of the trial - is to be no less than 28 days after the date on which the offer is made, and

(b) in any other case – is to be such date as is reasonable in the circumstances.

(8) Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.

(9) An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.

(10) A party may make more than one offer in relation to the same claim.

(11) Unless the court orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.

(12) ***A notice of offer that purports to exclude, modify or restrict the operation of rule 42.14 or 42.15 is of no effect for the purposes of this Division***." (emphasis added)

10. Practitioners should note that the definitions in rule 20.25 of the UCPR and which apply to rule 20.26 state that "**judgment in favour of the defendant** includes a dismissal of a summons or a statement of claim." As such, an offer of compromise may include a dismissal. The difficulty with making such an offer, if it is accepted, is that subject to the terms of the order a mere dismissal does not usually preclude the plaintiff from revisiting the cause of action: s.91(1) of the CPA. This is distinct from a judgment which disposes of the cause of action. The nature of a judgment shall be discussed later in this paper.

11. Where an offer of compromise under rule 20.26 of the UCPR has been made, pursuant to rule 20.27(1) of the UCPR it may be accepted "by serving written notice of acceptance on the offeror at any time" during the period for acceptance. Applying this sub-rule, oral acceptance is insufficient. Pursuant to rule 20.27(2) of the UCPR an offer may be accepted even if a further offer is made during the period of acceptance for the first offer. Where an offer is accepted under rule 20.27(1) of the UCPR, any party to the compromise may apply for judgment to be entered accordingly under rule 20.27(3) of the UCPR. That entitlement to a judgment is extant even where an obligation under an accepted offer is discharged by the offeror by payment of the sum of money equivalent to the offer. The rationale behind rule 20.27(3) of the UCPR is that it permits any party to the compromise to obtain a judgment that brings finality to the proceedings: *Charlotte Dawson v ACP Publishing Pty Ltd* [2007] NSWSC 542 per Nicholas J at [17] – [18].

12. Where a party wishes to withdraw acceptance of an offer of compromise, a written notice of this wish must be served under rule 20.28(1) of the UCPR but only in the following circumstances:

    a. pursuant to rule 20.28(1)(a) if the offer provides for payment of money, or the doing of any other act, and the sum is not paid to the offeree or into court or the act is not done within 28 days after acceptance of the offer or in such other time as the offer provides; or

    b. pursuant to rule 20.28(1)(b) if the court grants leave to withdraw the acceptance. The court is unlikely to grant leave unless there is good reason for a party to retract acceptance as it is an agreement. An applicant would need to establish a basis such as duress, fraud, *non est factum* or mistake (whether unilateral or bilateral) such that the free will to form the agreement is overborne or otherwise vitiated.

13. Where a party has accepted an offer and the other party to the offer fails to comply with that offer, the defendant as innocent party may apply to the court for judgment or order as is appropriate to give effect to the terms of the accepted offer or for an order the proceedings be dismissed and judgment entered accordingly pursuant to rule

20.29(1)(a) or (b) of the UCPR. The plaintiff as an innocent party to such an offer may apply to the court for a judgment or order as is appropriate to give effect to the terms of the accepted offer or for an order the defence be struck out and judgment entered accordingly pursuant to rule 20.29(2)(a) or (b) of the UCPR.

14. Where proceedings are the subject of an appeal to the NSW Court of Appeal, Division 8 of Part 51 of the UCPR makes provision for offers of compromise. Rule 51.47(1) permits a party to an appeal to make an offer of compromise while rule 51.47(2) provides that the provisions of Division 4 of Part 20 as to compromise apply to any such offer subject to references to such things as court, proceeding, plaintiff and defendant are to be taken to the necessary equivalent titles in the appeal proceedings. Rule 51.48 similarly modifies the operation of Division 3 of Part 42 as to costs flowing from offers of compromise to apply to the appeal proceedings. Any offer of compromise made in the court below may be regarded by the Court of Appeal pursuant to rule 51.49 of the UCPR in the exercise of the discretion as to costs.

**Controversies involving the former rule 20.26(2) of the UCPR and *Whitney v Dream Developments Pty Ltd* (2013) 84 NSWLR 311**

15. The most significant difference in the offer of compromise that existed before 7 June 2013 was the former sub-rule 20.26(2) of the UCPR, which stated as follows: "An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs." Two immediate problems arose with the former sub-rule 20.26(2) of the UCPR. The first was that the use of the word "verdict" for the defendant was erroneous. A verdict is the finding of a jury as to a question of fact put to them for deliberation and determination in civil or criminal law. The determination of the rights of the parties by a court gives rise to a "judgment" or orders, which are determinative of the dispute. Section 90(1) of the CPA provides that at, or after trial, a court is to give "such judgment or make such order as the nature of the case requires". This section is supported by rule 36.1 of the UCPR that permits a court at any stage of the proceedings to give such judgment or make such orders as the nature of the case requires. Similarly, s.81 of the *District Court Act* states that a "judgment in an action shall" be "final and conclusive between the parties to the action". As such, the offer that should have been identified in the

former sub-rule 20.26(2) of the former UCPR was "judgment" for the defendant, not a "verdict".

16. Parenthetically, the status of a "judgment" as determinative of a dispute means that a judgment operates as an estoppel on the parties and is a bar to the original cause of action in any other court: *Berkeley v Elderkin* (1853) 118 ER 638; *Rosenfeld v Newman* [1953] 2 All ER 885; *Razelos v Razelos (No 2)* [1970] 1 All ER 386. This means, arguably, that there should not be a "without admission of liability" consent judgment under rule 36.1A of the UCPR as some litigants insist upon. A judgment is meant to be determinative of all issues and should estopp the parties from litigating the cause of action elsewhere. It would be anathema to the nature of a judgment for the parties to in effect reserve their position for the future by making a judgment "without admission of liability". Either a party is liable under a judgment that is determinative of the cause of action or it is not. Given the propensity of some litigants to try to insert "without admission of liability" in consent judgments, this issue may be the subject of another paper!

17. The second problem with the former rule 20.26(2) of the UCPR was the use of the words "must be exclusive of costs". These words gave rise to a great deal of confusion amongst practitioners of both the Bar and the solicitors' branch of the profession as well as conflicting judgments as to validity of offers. This confusion was not resolved until the NSW Court of Appeal comprised of five Justices delivered the decision of *Whitney v Dream Developments Pty Ltd* (2013) 84 NSWLR 311 ("*Whitney*"). The Court consisting of Bathurst CJ, Beazley P, McColl JA, Barrett JA and Emmett JA held, *inter alia*, that an offer of compromise for the payment of a particular sum which included a statement "the defendant to pay the plaintiff's costs as agreed or assessed" invalidated the offer of compromise. The reasons of Bathurst CJ at [25] and Barrett JA at [52] were, in summary, that the contentious statement had the effect of fettering the discretion under Division 3 of Part 42 of the UCPR, thereby not abiding by the costs regime of that Division. Beazley P and McColl JA agreed with reasons of Bathurst CJ and Barrett JA.

18. In a separate judgment by Emmett JA that was not the subject of agreement by the plurality, it was noted at [75] that the making of an offer under which the defendant

was to pay the plaintiff's costs as agreed or assessed "would involve departure from the scheme contemplated under rule 42, since it would the oust the residual power of the court…".

19. The *ratio decidendi* of the Court in *Whitney*, although slightly differently expressed by each Justice, was that any offer of compromise that added an agreement as to costs would be invalid as it was seeking to create a binding agreement that excluded the jurisdiction of the courts to deal with costs under Division 3 of Part 42 of the UCPR.

**Division 3 of Part 42 of the UCPR: the costs regime to be applied following the making of an offer of compromise**

20. Division 3 of Part 42 of the UCPR contains the costs rules to be applied in respect of offers of compromise that are accepted or rejected. This Division was amended on 7 June 2013 by Amendment Number 59. As with the former rule 20.26 of the UCPR, the former Division 3 of Part 42 Rules apply to offers made before 7 June 2013: see UCPR Sch 12, Pt 1.

21. In summary the rules dealing with offers of compromise under rule 20.26 of the UCPR are as follows (with emphasis for ease of reference):

    a. Rule 42.13A: *Where an offer of compromise with no provision as to costs is accepted*, if the offer proposed a judgment in the plaintiff's favour the plaintiff is entitled to a costs order against the defendant assessed on the ordinary basis up to the time when the offer is made. If the offer proposed a judgment for the defendant (including a dismissal), the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim assessed on the ordinary basis up to the time when the offer was made. This rule is automatic and is not subject to a discretion.

    b. Rule 42.14: *Where an offer of compromise is made by the plaintiff but is not accepted and the order or judgment on the claim is no less favourable to the plaintiff*, pursuant to rule 42.14(2)(a) "[U]nless the court orders otherwise" the plaintiff is entitled to an order against the defendant for the plaintiff's costs in

respect of the claim on the ordinary basis to a point in time at which the order is then on the indemnity basis. When the indemnity basis commences depends on when the day on which the offer was made. Pursuant to rule 42.14(2)(b)(i) if the offer was made before the first day of the trial, the indemnity basis is from the beginning of the day following the day on which the offer was made. Pursuant to rule 42.14(2)(b)(ii) if the offer was made on or after the first day of the trial, the indemnity basis is from 11.00am on the day following the day on which the offer was made. [Note: consistent with *Whitney* the broad discretion of the court under s.98 of the *Civil Procedure Act* is not displaced by the rule given the introductory words of rule 42.14(2) "Unless the court orders otherwise…"].

c. Rule 42.15 – *Where an offer of compromise is made by the defendant but not accepted by the plaintiff and the plaintiff obtains an order or judgment no more favourable to the plaintiff than the terms of the offer,* pursuant to rule 42.15(2)(a) "[U]nless the court orders otherwise" the plaintiff is entitled to an order against the defendant for costs on an ordinary basis up to the time the defendant becomes entitled to costs on an indemnity basis. Pursuant to rule 42.15(2)(b)(i) where the offer was made before the first day of the trial the defendant is entitled to costs on an indemnity basis from the beginning of the day following the day on which the offer was made. Pursuant to rule 42.15(2)(b)(ii) where the offer was made on or after the first day of the trial the defendant is entitled to indemnity costs from 11.00am on the day following the day on which the offer was made. [Note again the broad discretion of the court is not displaced given the introductory words "Unless the court orders otherwise…"].

d. Rule 42.15A – *Where an offer of compromise is made by the defendant but is not accepted and the defendant obtains an order or judgment no less favourable to the defendant than the offer,* pursuant to rule 42.15A(2)(a) "[U]nless the court orders otherwise" the defendant is entitled to an order against the plaintiff for the defendant's costs on an ordinary basis up to the time which the defendant becomes entitled to indemnity costs. Pursuant to rule 42.15A(2)(b)(i) where the offer was made before the first day of the trial, the

> indemnity is from the beginning of the day following the day on which the offer was made. Pursuant to rule 42.15A(2)(b)(ii) where the offer was made on or after the first day of the trial, the indemnity is from 11.00am on the day following the day on which the offer was made. [Note the discretion of the court is not displaced given the introductory words "Unless the court orders otherwise…"].

22. Rule 42.15A of the UCPR may be relied on where a defendant makes an offer of compromise of a judgment for the defendant under rule 20.26 of the UCPR with or without a sum for costs and that offer is not accepted but the defendant obtains a judgment and an ordinary costs order in its favour. In the decision of *JJES Pty Ltd v Sayan (No 2)* [2014] NSWSC 975 (4 July 2014) per Campbell J, the defendant had made an offer on 2 February 2012 under the former rule 20.26(2) of the UCPR of a judgment for the defendant with each party to pay its own costs and disbursements. At the date of the offer the defendant had incurred costs and disbursements of $30,000. The plaintiff did not accept the offer and judgment was entered for the defendant on 8 May 2014. The proceedings concerned a franchise for a 7-Eleven convenience store. The plaintiff corporation was a "man of straw" incorporated solely for the franchise, was without assets and had a sole director and shareholder, a Mrs Navaei. Mrs Navaei was the main witness on liability and damages and her evidence was rejected. Campbell J found the defendant was *prima facie* entitled to the benefit of rule 42.15A of the UCPR and receive the benefit of costs paid on the ordinary basis to 2 February 2012 and thereafter on the indemnity basis. Further as the plaintiff was a man of straw and Mrs Navaei had directed and had an interest in the litigation an order was made under s.98(1) of the *Civil Procedure Act* that Mrs Navaei pay the defendant's costs in substitution for the plaintiff corporation. In making a third party costs order, Campbell J relied on and referred to the *ratio decidendi* of the *High Court in Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-3 per Mason CJ and Deane J (Gaudron J agreeing) as to the category of cases where such orders may be made as follows:

> "That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting, or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the

circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

23. By use of the word "entitled", rules 42.14-42.15A of the UCPR create in effect a right to a special costs order in favour of the successful offeror by way of the indemnity from the day after the offer was made: *Hillier v Sheather* (1995) 36 NSWLR 414. However, the right to the indemnity contained in rules 42.14-42.15A is qualified by the words "Unless the court orders otherwise". The question that arises in the exercise of the discretion to order "otherwise" is whether the offeree has any basis for denying the successful offeror's entitlement under the rules to an indemnity costs order: *Marsland v Andjelic (No 2)* (1993) 32 NSWLR 649. That question is approached on the basis that sufficient circumstances will generally be required to justify a departure from the rule: *Morgan v Johnson* (1998) 48 NSWLR 578 at 581-582 per Mason J. This is an impressionistic exercise and will depend on all the facts of the matter as well as the conduct of the successful offeror in the course of the proceedings. Factors justifying the refusal of an indemnity under rules 42.14-42.15A of the UCPR include the following:

a. Where an offeror betters an offer but significantly changed the case after the date of the offer. An example is where a plaintiff succeeded at trial on a new point only advanced in final submissions: *Nominal Defendant v Hawkins* (2011) 58 MVR 362.

b. Where the costs incurred are wholly disproportionate to the judgment amount and the proceedings were pursued for an extraneous purpose: *Jones v Sutton (No 2)* [2005] NSWCA 203.

c. Where the costs are attributable to the offeror's own unreasonable conduct. As an example costs may be refused on the indemnity basis where an offeror unreasonably contested an issue on which the offeror did not succeed: *EDPI Pty Ltd v Rapdocks Pty Ltd* [2007] NSWSC 195.

24. The general discretion of the court contained within rules 42.14-42.15A of the UCPR is also subject to the overriding principle in s.60 of the *Civil Procedure Act* that in any

proceedings, the practice and the procedure of the court should be implemented with the object of resolving the issues between the parties in a way that the costs to the parties are proportionate to the importance and complexity of the subject matter in dispute. As such, a significant disproportion between the judgment amount and the cost of the proceedings may justify depriving an otherwise successful offeror of the usual costs order, including an award of indemnity costs that would otherwise flow from an accepted offer of compromise: *Jones v Sutton (No 2)* (*supra*). Lastly, despite the entitlement to the indemnity under rules 42.14-42.15A of the UCPR it is to be recalled that these rules are subordinate legislation. The UCPR are always subordinate to the provisions of the *Civil Procedure Act* including the discretion as to costs in s.98 of that Act. As stated by Davies J in *McDonald v Price* (*supra*) at [18]:

> "[I]t is a well known principle that a power provided by the Rules cannot exceed the power given in an Act under which those Rules are made, and if the Rule and the Act are irreconcilable then the Rule must give way to the Statute - see Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, Sydney, Butterworths (2001) at 3.38 and the cases cited therein."

25. On the basis of the use of the words "Unless the court otherwise orders", the NSW Court of Appeal in *Whitney* found that the requirement that an offer be "exclusive of costs" in the former rule 20.26(2) was to ensure that offers did not remove the residual discretion of a court under Division 3 of Part 42 of the UCPR, in particular to depart from the entitlement to an indemnity order. It was held by Barrett JA at [52] in *Whitney* that it was an essential characteristic of any offer of compromise that it must abide by the regime with respect to costs under Division 3 of Part 42 and that the words "exclusive of costs" were part of this essential characteristic. As stated by Barrett JA, that essential characteristic had to be left "untrammelled by any apparent contractual qualification, supplement or contradiction." The words "costs as agreed or assessed" were an offer to enter a binding agreement to pay costs, such agreement precluding the discretion the court may otherwise have to disallow costs or make orders contrary to the agreement.

**Application of the amended rule 20.26(3) of the UCPR – an offer that includes costs can be made by a defendant only**

26. The difficulty with the former rule 20.26(2) as identified in *Whitney* was that a reference to costs invalidated the offer of compromise. This difficulty was overcome in part by the new rule 20.26(3)(b) operative from 7 June 2013. I say "in part" as my analysis of this sub-rule shows that it arguably only applies to an offer of compromise made by a defendant to a plaintiff. A plaintiff still cannot make an offer that contains a reference to costs or the offer may be invalid.

27. Rule 20.26(3)(b) of the UCPR provides that an offer may propose that the costs as agreed or assessed up to the time the offer was made will be paid by the offeror. An offer of costs as agreed or assessed under rule 20.26(3)(b) of the UCPR should only flow from a defendant to a plaintiff. A plaintiff cannot (or hopefully will not) make an offer that costs as agreed or assessed will be paid "by the offeror" under rule 20.26(3)(b) of the UCPR. If accepted, this would leave the plaintiff liable to pay the defendant's costs. Rule 20.26(3)(b) does mean, however, that arguably an offer by a defendant to pay a sum or to enter orders for part or all of a plaintiff's claim may also include an offer to pay the plaintiff's costs as agreed or assessed up until the time the offer was made. Similarly, rule 20.26(3)(c) of the UCPR arguably permits a defendant trustee to make an offer to pay costs as agreed or assessed on the ordinary or indemnity basis from a specified estate, notional estate or fund for example as part of an offer to settle part or all of a plaintiff's claim under Chapter 3 of the *Succession Act* 2006 (NSW).

28. As I read the amended rule 20.26(2) and (3) of the UCPR, a plaintiff can only make an offer of compromise that does not include costs and is not expressed to be inclusive of costs. Costs of the plaintiff as offeror are to be dealt with under rules 42.13A, 42.14 or 42.15 of the UCPR. If a plaintiff makes an offer that includes a provision for costs this would still be invalid under *Whitney* as the offer would fetter the discretion of the court under Division 3 of Part 42 of the UCPR and is not authorised by rule 20.26(2) or 20.26(3)(b) or (3)(c).

29. As I read the UCPR, rule 20.26(3)(b) does not permit an offer of compromise to be made by a defendant of a payment of a sum for part or all of a claim plus a specified sum for costs. Likewise, rule 20.26(3)(b) does not permit a defendant to make an offer of payment of a sum for part or all of a claim with such sum to be inclusive of costs. An offer by a defendant of a payment of a "specified sum in respect of the plaintiff's costs" can only be made as part of an offer of compromise of a judgment for the defendant plus a specified sum for costs pursuant to rule 20.26(3)(a)(ii) of the UCPR. If offers are made by a defendant to a plaintiff of payment of a sum plus a specified sum for costs or else a sum inclusive of costs, both are arguably invalid offers as they offend rule 20.26(2)(c) of the UCPR and are not authorised by rule 20.26(3)(a)(ii).

30. The words "verdict in favour of the defendant" are no longer valid for the purposes of rule 20.26(3)(a) of the UCPR. The words that must be used are a "judgment in favour of the defendant". If such an offer is made, costs are either dealt with on the basis that there would be no order as to costs under rule 20.26(3)(a)(i) or that the defendant will pay to the plaintiff a specified sum in respect of the plaintiff's costs under rule 20.26(3)(a)(ii). Rule 20.26(3)(a)(ii) is clearly designed to enable an offer of a judgment for the defendant to be more attractive to a plaintiff who has incurred costs. The former offer under rule 20.26(2) of a "verdict for the defendant with each party to bear their own costs" had very little bait on the hook to make it appetising to a plaintiff unless the claim was manifestly hopeless even to the most bellicose litigant.

31. Where an offer is made before particulars of the offeror's claim are available, it is essential that the offeree provide notice within 14 days under rule 20.26(4) of the UCPR that the offer is unable to be assessed due to lack of particulars. It would appear from the rules that there is no general discretion within rule 20.26(4) to extend that time. However, I note that rule 1.2(1) of the UCPR permits the court by order to extend or abridge any time fixed by the rules, including the 14 days in rule 20.26(4). To enable this discretion to be exercised in favour of the offeree, an application would need to be made to the court by motion under rule 18.1 of the UCPR. This would necessarily require details of the offer of compromise to be provided, which in turn may offend both rule 20.26(9) of the UCPR (an offer is without prejudice) and s.131(1) of the *Evidence Act 1995* (NSW) (evidence of settlement is inadmissible).

Any failure to provide notice within 14 days may therefore be irremediable due to the practical difficulties in seeking an extension of time. I submit that the best option where practitioners are presented with an offer that requires particulars to consider it but the 14 days have expired would be to issue the notice in any event and seek particulars of the claim and an extension of the 14 days by consent. If the costs issue arises but the particulars have not been provided or were provided after the offer expired, the offeree may apply to the court to exercise its discretion under rules 42.14-42.15A and not enter an order for indemnity.

32. In summary, the following are arguably valid offers:

a. Pursuant to rule 20.26(2), an offer by a plaintiff to a defendant for the plaintiff to accept a sum or other orders in settlement of all or part of a claim with no provision as to costs in the offer. Costs are then dealt with under rule 42.13A of the UCPR if accepted.

b. Pursuant to rule 20.26(2), an offer by the defendant to pay a sum or other order in settlement of all or part of a claim with no provision as to costs. Costs are then dealt with under rule 42.13A of the UCPR if accepted.

c. Pursuant to rule 20.26(3)(a)(i), an offer of a judgment for the defendant with no order as to costs. If accepted, the consent judgment should have as a note "No order as to costs".

d. Pursuant to rule 20.26(3)(a)(ii), an offer of a judgment for the defendant with a term that the defendant will pay a specified sum for the plaintiff's costs. If accepted, the costs portion of the offer would then be a binding agreement dealing with those costs.

e. Pursuant to rule 20.26(3)(b), an offer of the payment of a sum by the defendant or other orders for part or all of the claim and that costs as agreed or assessed will be paid by the defendant. If accepted, the costs portion of the offer would then be binding agreement dealing with those costs.

f. Pursuant to rule 20.26(3)(c), an offer of the payment of a sum or other orders for part or all of the claim and that costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of an estate, notional estate or fund. If accepted, the costs portion of the offer would then be a binding agreement dealing with those costs.

**What is a compromise and when should a compromise be offered?**

33. The question then becomes: what is a compromise? Under rule 20.26 of the UCPR and the general law, an offer must involve "a real and genuine element of compromise": *Hearning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375. If a plaintiff's offer is in substance merely a demand for payment of the full amount claimed or a formal offer "designed simply to trigger the entitlement to indemnity costs" then wholly exceptional circumstances are required to justify an indemnity costs order: *Tickell v Trifleska Pty Ltd* (1990) 25 NSWLR 353 at 355. Even though the UCPR contemplate an offer of a judgment in favour of the defendant, a defendant's offer to bear its own costs or contribute only a trivial proportion of the claim may lack the element of compromise necessary to comply with rule 20.26: *Leichhardt Municipal Council v Green* [2004] NSWCA 341; *Hearning v GWS Machinery Pty Ltd (No 2)* (*supra*). How this reasoning stands in the face of the entitlement under Division 3 of Part 42 is unclear save for the fact the absence of genuine compromise may be taken into account by a court in its discretion to order "otherwise".

34. Determining what constitutes a genuine compromise requires a factual and impressionistic enquiry taking into account the monetary value of the claim, the facts supporting the claim and any elements of the claim additional to the monetary value: *Shellharbour City Council v Johnson (No 2)* (2006) 67 NSWLR 208 at [20]-[23]. As an example of a genuine compromise, where a claim pursuant to s.151Z(1)(d) of the *Workers Compensation Act 1987* (NSW) is for an indemnity in respect of workers compensation benefits totalling $400,000, the plaintiff employer may make an offer of compromise of a full indemnity of those payments with a reduced notional assessment of damages payable by the defendant to the worker and waive any entitlement to interest under s.100 of the CPA. Interest in such matters may be

significant and be upwards of $50,000 depending on when the cause of action arose. To forego such an interest sum is a genuine compromise. To ensure that the compromise is understood by the offeree, the offer of compromise should state that the notional assessment of damages is reduced and the entitlement to interest has been abandoned.

35. The next question is when the offer should be made. More than one offer of compromise can be made in the course of proceedings. It is advisable to negotiate on the basis of offers of compromise so that, if negotiations fail, a range of offers are available to rely on at a costs argument. An offer can be made at any stage of the proceedings once the proceedings are commenced.

36. An offer of compromise under the UCPR cannot be made prior to proceedings commencing. This is because rule 20.26(1) refers to an offer being made "in any proceedings". Until such time as an originating process is filed, whether by way of a summons or statement of clam, there is no proceeding in which an offer may be made under the UCPR.

37. When an offer of compromise should be made in the course of proceedings is an impressionistic determination. For a plaintiff the best time is after there are sufficient particulars of a claim for the offeree to be able to assess the offer. A plaintiff may have provided extensive evidence of a claim prior to commencing proceedings to enable an offer of compromise to be served contemporaneous with the service of an originating process. In the alternative, the best time may only arise at any one of the following stages: answering of a request for further and better particulars; the service of a filed defence; the exchange of documents pursuant to discovery; the exchange of evidence; or shortly before or even in the midst of a trial. In my respectful view, an offer of compromise should be served by a plaintiff (if possible) prior to the defendant being required to put on evidence as the costs associated with formalising evidence may be a disincentive to settlement.

38. Where a defence raises issues such as competence or jurisdiction such that the claim is plainly unable to succeed, I can see no harm in an offer of compromise of a judgment for the defendant with no order as to costs or a specified sum for costs being

made prior to the exchange of evidence. This is particularly so where, for instance, an application may be forthcoming to dismiss the proceedings under rule 13.4 of the UCPR on the basis, *inter alia*, that no reasonable cause of action is disclosed on the pleadings. If such application is successful, then the offer of compromise may be relied on to seek an indemnity for the costs incurred in the application.

39. Having said all this, as a form of human conflict with all the vagaries it entails, litigation is a moveable feast that requires tactical and strategic planning and a degree of common sense. There is no perfect answer as to when an offer of compromise should be made and it requires balancing the facts of the case and the goals of the client. Practitioners should be prepared to advise clients to make genuine offers of compromise at any stage in the proceedings provided that the time for acceptance accords with the rule 20.26(5)(a) or (b) of the UCPR (being either 28 days where the offer is made more than two months before the trial or for such time as is reasonable in the circumstances).

**Invalid offers of compromise and reliance in the alternative on *Calderbank***

40. The next question is how to rescue an offer of compromise under rule 20.26 of the UCPR that is invalid. Although rule 20.26 has been amended so that since 7 June 2013 reference to be made to the payment of costs by an offeror, offers of compromise may still be invalidated, particularly if they fail to refer to rule 20.26 of the UCPR.

41. The offer may be rescued pursuant to the principles of *Calderbank*. This is not, however, automatic as the circumstances of the offer, or the offer itself, must be such as to clearly invoke an understanding on the part of the offeree that the offer may be relied upon to depart from the usual rule that costs are to be granted in favour of the successful party. This requires an analysis of the entirety of the circumstances of the case to determine whether or not the offer would be applicable for the purposes of *Calderbank*: *Whitney* per Bathurst CJ at [42]-[43] and Barrett JA at [57]. This is based on an evaluation of the nature of the communication and this evaluation is both objective and impressionistic.

42. The best way to enable reliance on *Calderbank* in respect of an invalid offer of compromise is to ensure that any letter serving the offer of compromise under rule 20.26 of UCPR includes a statement that the offer of compromise is relied upon for the purposes of *Calderbank* (with a full citation of that case) in the event that the offer of compromise is invalid for any reason. Further, the letter of service should be marked "without prejudice save as to costs" consistent with *Calderbank*. As a final step, if the practitioner thinks it is warranted, the reasons why it would be unreasonable not to accept the offer should be provided by reference to both law and the evidence served by the parties.

43. If a valid offer of compromise under rule 20.26 of the UCPR is served but not accepted, then the right to an indemnity costs order under rules 42.14-42.15A arises unless the court "orders otherwise". This right is identified by the verb "entitled". This right is substantially different to the position under *Calderbank*. A *Calderbank* offer does not automatically result in a court making a favourable costs order: *SMEC Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323; see also the summary of authorities for this proposition in *Trustee for Salvation Army (NSW) Property Trust & Anor v Becker & Anor (No 2)* [2007] NSWCA 194 per Ipp JA at [7]. A favourable costs order under *Calderbank* will only arise when, in all the circumstances, the court in its discretion under s.98 of the *Civil Procedure Act* finds that there is justification for departure from the ordinary rule as to costs.

44. The NSW Court of Appeal in *Evans Shire Council v Richardson* [2006] NSWCA 61 held that there is an onus on the offeror to establish it was unreasonable for the offeree to refuse the *Calderbank* offer. This has been confirmed in the authorities cited by Ipp JA in *Trustee for Salvation Army (NSW) Property Trust & Anor v Becker & Anor (No 2)* (*ibid*). This statement of the onus is effectively a reversal of the position under Division 3 of Part 42 of the UCPR where the rules govern the entitlement to costs "[U]nless the court orders otherwise". In summary, under *Calderbank* the offeror must establish why the court should exercise the discretion in the offeror's favour for an indemnity costs order whereas under the UCPR the onus is on the offeree to establish why the court should not apply the rules and order indemnity costs. The enquiry required by reliance on a *Calderbank* offer may create a mini trial regarding the circumstances at the time the offer was made and whether it was unreasonable to

reject the offer. The factors to be taken into account include the evidence, the particulars, the pleadings and claims all assessed on an objective basis as to what was "unreasonable". Examples of where rejection of an offer was not unreasonable include the following:

a. Where a party succeeded at trial on a case that significantly changed after the offer was made: *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Coy Pty Ltd* (2001) 53 NSWLR 626.

b. Where the offer was open for a very short period of time of 5 days and was conditional on the provision of a release in of claims in unrelated proceedings: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2006] NSWSC 583 at [73]-[74].

c. Where the offer was ambiguous as to its terms: *Lahoud v Lahoud* [2011] NSWSC 1186.

d. Where no pre-judgment interest was provided in the offer despite the explanatory letter and terms of the offer referring to such interest with the result that the offer thereby implicitly excluded interest: *Coregas Pty Ltd v Penford Australia Pty Ltd (No 2)* [2013] NSWCA 11 at [12] per Hoeben JA, Meagher JA and Bergin CJ in Eq agreeing.

45. There are also questions that arise under *Calderbank* as to whether or not an offer constituted a genuine compromise as with the UCPR. Again, this all depends on the circumstances of the case. In this context, it has been held that an offer by a defendant of each party walk away and pay their own costs may be a "genuine offer of compromise": *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [36]. The test is whether or not the offer has been made in a "genuine attempt to reach a negotiated settlement" rather than an offer made simply to impose cost sanctions: *Leichhardt Municipal Council v Green* (*supra*) at [39].

**Three significant cases considering offers of compromise under rule 20.26 made since 7 June 2013**

46. I shall now provide a brief review of three significant cases on offers of compromise since the Amending Order No 59 came into effect. These are *AAI Limited v Josipovic (No 2)* [2013] NSWSC 1577 (1 November 2013) per Campbell J ("*AAI Limited*"), *Owners Corporation Strata Plan No 74667; 74670 and 74662 v Auburn City Council* [2015] NSWSC 86 (17 February 2015) per Rein J ("*Owners Corporation*") and *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) (No 2)* [2014] NSWCA 391 (14 November 2014) ("*Leach*").

47. In the decision of *AAI Limited*, the substantive proceedings were unusual in that an insurer brought claims in administrative law challenging the validity of a certificate issued under s.94(4) of the *Motor Accidents Compensation Act 1999* (NSW) ("the MACA"). That certificate was by a claims assessor of the Claims Assessment and Resolution Service in respect of damages for personal injury suffered by the first defendant in a motor vehicle accident. The claims assessor's certificate and supporting decision assessed damages at $118,633.60 plus costs and disbursements, which were allowed in the sum of $28,564.08. The total of these figures for damages and costs was $147,197.68. The plaintiff's claims for relief in the Supreme Court were in the nature of an order in the nature of *certiorari* setting aside the claims assessor's certificate and a further order in the nature of *mandamus* remitting the first defendant's application for re-assessment of damages according to law. The complaint of the plaintiff was an error of law in the assessment by the claims assessor of damages, particularly for future care with that head of damages totalling $75,996.60.

48. The plaintiff was unsuccessful in the Supreme Court and as a consequence the claims assessor's original certificate with supporting decision and assessment of damages and allowance of costs totalling $147,197.68 remained valid and binding on the plaintiff insurer under s.95 of the MACA. Campbell J at first instance made orders dismissing the Supreme Court proceedings and that the plaintiff insurer pay the first defendant's costs of the proceedings as agreed or assessed. Pursuant to rule 42.2 of

the UCPR in the absence of a contrary order this meant the first defendant's costs were to be assessed on the ordinary basis.

49. The first defendant had made an offer of compromise pursuant to rule 20.26 of the UCPR on 20 August 2013 of a judgment entered against the plaintiff in favour of the first defendant in the sum of $125,000 plus costs as agreed or assessed. As the total assessment that had been provided by the claims assessor and the subject of the Supreme Court proceedings was $147,197.68, the offer was a compromise of $22,197.68 ($147,197.68 - $125,000 = $22,197.68). No provision was made in the offer of compromise for orders to set aside or otherwise dispose of the claims assessor's certificate the subject of the proceedings.

50. The first defendant sought an order for costs on the indemnity basis from 21 August 2013 pursuant to rule 42.15A of the UCPR and on the basis that the order or judgment was no less favourable to her than the terms of the offer. The two issues for determination of the application for indemnity costs were:

    a. whether an offer in the terms made in a public law claim in the Supreme Court's supervisory (administrative law) jurisdiction engages rule 20.26 of the UCPR; and

    b. whether the order dismissing the proceeding was an order on the claim no less favourable to the first defendant than the terms of the offer.

51. The plaintiff argued that an offer to accept a discount on the damages and costs awarded by the assessor was not an offer to compromise any claim in the proceedings before the Supreme Court. The plaintiff submitted that the proceedings consisted only of a challenge to the legality of the claims assessor's decision on the basis the decision vitiated by jurisdictional error, or error on the face of the record consisting of legal error, in assessing the allowance for future care. Relying upon the decision of Brennan J in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-6 [17], the plaintiff submitted that the duty and the jurisdiction of the Court in administrative review does not go beyond a declaration and enforcement of the law which determines the limits and governs the exercise of the repository's power. As the offer

of compromise was couched in the terms of a payment of damages, it did not deal with the relief in the proceedings.

52. This submission was rejected by Campbell J in *AAI Limited* at [23] wherein is Honour noted that in *Quin* (*supra*) it was recognised that the judicature is but one of the three co-ordinate branches of government and the Supreme Court was able to determine the dispute which fundamentally required a reduction of the damages awarded by the claims assessor. The basal dispute between the parties was about the amount of damages payable. In this context it was appropriate to bear in mind that the purpose of the rules relating to offers of compromise include the encouragement of "the proper compromise of litigation, in the private interests of individual litigants and the public interest of the prompt and economical disposal of the litigation".

53. As the fundamental dispute was not about the legality of the claims assessor's decision but the amount of damages payable as found by the claims assessor, it was valid that the first defendant should make an offer of compromise for a reduced assessment of damages and notwithstanding the fact that the offer of compromise was made in the context of Supreme Court proceedings for administrative law relief in the Court's supervisory jurisdiction. This conclusion disposed of the first issue.

54. With respect to the second issue, Campbell J held in *AAI Limited* at [32] and [33] that it was necessary for a defendant to a claim by an insurer for administrative review of an assessment of damages to identify not only that the decision the subject of review be set aside, but that a judgment be entered in favour of the plaintiff insurer in a lesser amount. As such, it is valid to make an offer to accept a lesser sum of damages that complies with rule 20.26 of the UCPR but only if the defendant identifies both the order proposed to dispose of the claim for judicial review and the amount of monetary judgment proposed for damages. The basis for this conclusion is that rule 20.26(2)(a)(ii) of the UCPR provides that an offer "must identify ... the proposed orders for disposal of the claim" to which it relates.

55. The subject offer of compromise did not propose orders disposing of the proceedings by way of an order setting aside the claims assessor's certificate. Such an order was necessary because pursuant to s.95(2) of the MACA the amount of damages the

subject of the certificate was binding on the plaintiff as insurer and the plaintiff as insurer was obliged to pay to the claimant the amount of damages specified in the certificate. Unless that certificate was set aside, a binding determination was in place and notwithstanding any acceptance of the offer of compromise.

56. Due to the fact that the offer did not provide for orders disposing of the proceeding that would effectively set aside the certificate, the offer was held by Campbell J to be invalid pursuant to the principles of *Whitney* because, as stated by Bathurst CJ in *Whitney* at [40], an offer will not engage r 42.15A of the UCPR if it is "not one compliant with rule 20.26". Having determined that had the offer been valid would have been able to make an order for indemnity costs, Campbell J declined to make such an order and ordered that each party bear their own costs of the application for indemnity costs, such that the original order for ordinary costs stood.

57. The obvious and salutary lesson of the *AAI Ltd* decision is that whilst offers of compromise may be binding in applications for judicial review, to be valid any such offer must make a proposal with respect to determining the validity of the original decision in dispute, or otherwise disposing of that decision.

58. In *Owners Corporation* Rein J, considered offers of compromise made pursuant to rule 20.26 of the UCPR which did not expressly state them to be for the payment of costs to the time of the offer. The three plaintiff strata corporations brought separate proceedings in respect of what were claimed to be negligent certifications of each of three buildings of which the plaintiffs were the owners corporations. The hearing of all proceedings was listed for 10 days to commence on 3 February 2015. As at 1 February the plaintiffs had by their executive committees accepted offers of compromise made by the defendants on 22 January 2015. The offers of compromise were in identical terms for, *inter alia*, judgment for the plaintiff for $116,000 with the first and second defendants to "pay the costs of the plaintiff as agreed or assessed." Each offers were made contingent upon acceptance by the other owners corporations of the respective other offers. The acceptance of 1 February 2015 was expressed to be subject to confirmation at the general meetings of the owners corporations which had been called for 5 February 2015 (the earliest the general meetings could be held). The general meeting of each owners corporation approved the settlement. On 6 February

2015 the parties agreed that judgment could be entered in favour of each of the plaintiffs for the amounts specified in the orders. There arose a disagreement about the orders, specifically whether the first and second defendants were liable to pay costs until the date of the offers (22 January 2015) as contended by the defendants or the date of acceptance by the executive committees (1 February 2015) as contended by the plaintiffs. It was not in dispute that the offers were made in accordance with rule 20.26 of the UCPR and there was no issue taken that the offers were invalid.

59. The plaintiffs submitted that as the words used in the offer were not qualified, the defendants should have been taken to have adopted the offer to pay the costs (as agreed or assessed) up to the time that the offer was accepted. It was also submitted that as the offer was made pursuant to rule 20.26(3)(b), the default provisions of rule 42.13A did not apply. The defendants' submissions placed primary emphasis on the fact that there was no reference in rules 20.26(3)(b) or 42.13A to an obligation to pay costs up to the date of acceptance of the offer. Indeed the words of both rules refer to an offer or an obligation to pay costs "up to the time" the offer was made.

60. Rein J accepted the defendant's submissions at [14] of the judgment. His Honour expressed the view that for an offer to comply rule 20.26 of the UCPR, the offer to pay costs must be one in terms of rule 20.26(3)(b), that is to pay costs up to the time the offer was made. Since it was agreed that the offer did comply with the provisions of rule 20.26, the consequence that inevitably flowed was that the offer should be taken to be that the costs up to the date (or more precisely the time) of the offer would be paid by the defendants. This was reinforced by the fact that the offer was stated to be in accordance with rule 20.26 of the UCPR. As such, the Court made orders that the defendants were required to pay the plaintiff's costs up to the time of the offer or 22 January 2015 and not beyond that time.

61. The *Owners Corporation* decision reinforces that an offer of compromise pursuant to rule 20.26(3)(b) of the UCPR, if accepted, only creates an entitlement to costs to the date the offer is made. Similarly, the default rule for acceptance under rule 42.13A(2) and (3) of the UCPR limit the obligation to pay costs up to the time the offer was made. If the plaintiff incurs significant costs in considering the offer and complying

with any administrative processes to accept the offer, these will not be recoverable from any defendants liable to pay costs under the terms of the offer and the rules.

62. The decision of *Leach* per McColl JA, (Gleeson J A and Sackville AJA agreeing) is significant as it considered and applied the discretion of a court to "order otherwise" pursuant to rule 42.15A(2) of the UCPR to refuse an application for an indemnity costs order. The costs judgment concerned an offer made in appellate proceedings on 12 November 2013 of a "verdict (sic) for the respondent" with each party to pay their own costs of both the District Court trial and Court of Appeal proceedings. The covering letter serving the offer stated that the offer was "open for acceptance for 28 days only" and drew the offeree's attention to both rules 20.26 and 51.47 of the UCPR, the latter permitting offers of compromise to be made in appellate proceedings in the Court of Appeal. The appellate proceedings were from a decision in the District Court in a personal injury claim in which significant damages were claimed. The appeal involved difficult and novel issues of liability. The offer had been made and then bettered as a result of the appeal being dismissed with costs. The dismissal had the effect that the District Court costs order that favoured the respondent at trial was secured and the respondent's costs were awarded in its favour in the Court of Appeal.

63. On the costs application before the Court of Appeal following the dismissal of the appeal, no issue was taken with the use of the word "verdict" in the offer and the Court held that the offer should be read as proposing a "judgment" in favour of the respondent: *Leach* at [30]. It was also held that the offer that "[e]ach party ... pay their own costs" in respect of the trial and the appeal reflected the former UCPR 20.26(2) rather than the current "no order as to costs" required by rule 20.26(3)(a)(i) did not invalidate the offer: *Leach* at [31]-[32]. This deviation from the sub-rule did not, however, invalidate the offer. Notwithstanding the fact that the Court of Appeal held that the offer was valid, the Court declined to make order for indemnity costs and exercised its discretion as contained in rule 42.15A(2) of the UCPR to orders "otherwise". The Court of Appeal noted that the onus was on the appellant as the recipient of the offer to demonstrate why the Court should depart from the usual consequences of the rejection of the offer: *Leach* at [45]. The Court rejected a submission that "exceptional circumstances" must apply before the Court exercised

the discretion to order otherwise and also noted that it would be impossible to exhaustively state the circumstances in which the Court's discretion to order "otherwise" might be exercised: *Leach* at [47]-[48].

64. The appellant as offeree submitted that whilst the offer may have constituted a genuine and valid offer of compromise, it was reasonable for the appellant not to accept it as it effectively invited capitulation. The Court characterised the offer of a "verdict for the respondent" with each party to bear their own costs as a "walk away" offer and agreed that it was equivalent to a capitulation by the appellant. Following from this characterisation, for such an offer to successfully trigger the indemnity costs mechanisms under the UCPR the "claim or defence would have to approach something of the character of being frivolous or vexatious": *Leach* at [51]-[53]. The Court found the liability issues on appeal were complex and not frivolous or vexatious so as to trigger the indemnity costs mechanisms. The outcome on liability was "far from a foregone conclusion" and the severity of the damage suffered, based on extensive injuries including brain injury, meant that the proceeding was a case for the appellant that was "all or nothing".

65. The offer that was made involved an element of compromise but only as to costs. According to the Court the offer did not "serve the public policy of encouraging settlement" and on this basis it was not unreasonable for the appellant to not accept the offer: *Leach* at [54]-[56]. On this basis the Court exercised its discretion not to enter an order for indemnity costs that would ordinarily be entered under rule 42.15A(2)(b) of the UCPR. The Court also held that if the offer had not been valid under the UCPR, it could have taken effect as a *Calderbank* letter and the same conclusion would have been reached.

66. The decision of *Leach* was applied by the Supreme Court at first instance in *Hart Security Australia Pty Ltd v Boucousis and Others (No 2)* [2014] NSWSC 1815 (18 December 2014) per Darke J. In that matter the Court refused to make an order for indemnity costs despite the defendant bettering the offer. In that matter, the Court has published reasons and judgment ordering an Amended Statement of Claim be dismissed with costs. The defendants as offeror sought an offer for indemnity costs based on an offer that had been made on 6 June 2014 to pay $30,000 to the plaintiff

and pay the plaintiff's costs as agreed or assessed up to the date of the offer. It was noted that *prima facie* the defendants were entitled to indemnity costs after the date of the offer. It was noted by Darke J at [11] that the offer was tantamount to a surrender on the part of the plaintiff in circumstances where the plaintiff was advancing a case that was "by no means hopeless, frivolous or vexatious" and that as a consequence it was "not an offer of a kind likely to encourage early settlement": *Hart Security* (*supra*) at [12].

**Conclusion**

67. Rule 20.26 has been a very contentious rule within the UCPR. Despite the amendments to rule 20.26, offers of compromise may still be invalidated and even when valid, as shown in *Leach*, may not bite with the Court exercising its discretion to order "otherwise". Care needs to be taken in drafting such offers to obtain a costs order that meets the client's interests. An invalid offer of compromise may leave a client with an unsatisfactory costs order and with little chance for leave to appeal being granted in order to rectify it.

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