

Settlement

Statute: Offers of Compromise under UCPR Structure

1. **Definition:** Offers of compromise provide mechanism by which either P or D can offer to resolve the substantive claims in litigation. Resolution is facilitated by coupling costs consequences to rejection of an offer where a party fails to achieve a better result at trial. By facilitating timely resolution of disputes, the procedure supports the overriding purpose and principles of case management in part 6 of CPA.
2. **Purpose:** Encourage proper compromise of litigation, in the private interests of individual litigants and public interest of prompt/economic disposal of litigation; Instils heightened sense of realism during negotiation; obliges offeree to give serious thought about risk of non-acceptance (cost implications).
3. **An offer of compromise can be made under UCPR 20.25**
 - **UCPR 20.26(1): any party** by notice in **writing** may make an offer to any other party to compromise on any claim in the proceedings; **no restrictions on who or when**
4. **There are certain requirements that must be fulfilled**
 - **UCPR 20.26 Making of Offer**
 - **UCPR 20.26(1)&(2)(d):** must in **writing and must state in “accordance with UCPR rules”**
 - UCPR 20.26(2c) **must not include an amount for costs and must not be expressed to be inclusive of**
 - UCPR 20.26(2f) must specify **period of time** within which offer is open for acceptance.
 - **UCPR 20.26(1)(10):** may relate to **some or all claims**, and more than one offer can be made on the same claim
 - **UCPR 20.26(9):** taken to be **made without prejudice**, unless the notice indicates otherwise
 - **UCPR 20.26(2)(c)&(3):** must be **exclusive of costs**, unless the offer proposes a judgement in favour of the defendant (propose costs arrangements)
 - **UCPR 20.26(4): supply sufficient documentation to allow for full consideration of offer;** if not, notice may be given **within 14 days** that offer cannot be fully considered. Rules provide formal notice requirements.
 - **UCPR 20.26(2)(e)&(f):** offer must **specify time that it is open**, which may be limited
 - **UCPR 20.26(11): cannot be withdrawn during the open period** (without court order)
 - **UCPR 20.26(5): The closing date for acceptance of an offer:**
 - (a) in case of an **offer made 2 months/more before trial**, is to **be no less than 28 days** after the date on which offer is made
 - (b) in any other case- is to be such date as is reasonable in the circumstances.
 - **UCPR 20.30:** limitations are placed on disclosure of offers to the court or arbitrator; the circumstances in which the court at time of trial, may become aware of offer of compromise if it is not accepted are restricted
 - **UCPR 20.27 Acceptance of Offer**
 - **UCPR 20.27 (1)** Party may accept an offer by **servicing written notice** of acceptance during period of acceptance
 - **UCPR 20.28 Withdrawal of Acceptance**
 - **UCPR 20.29 Failure to comply with Accepted Offer**
 - If P, being party to accepted offer, fails to comply with terms of offer, D is entitled to
 - (a) to such J or order as is appropriate to give effect to the terms fo the accepted offer, or
 - ...
 - **UCPR 20.30 Disclosure of Offer to court or arbitrator**
5. **UCPR 42:** Offer may propose certain cost arrangements but only under 2 conditions otherwise it is invalid.
 - **R20.26(3)(a)(ii)** If offer is for **judgement in favour of defendant**, offer may propose that **D will pay a specified amount of P’s costs** (only cost that can be included in offer!)
 - **R20.26(3)(b):** Offer can propose **that costs assessed or agreed as of time of making of offer** will be paid **by offeror**
6. **There are cost implications (see table below)**
 - **UCPR 42: Risk of costs order** is placed on a party that rejects a genuine, reasonable and fair offer
 - **CPA s98:** Court has complete/unfettered discretion in relation to making cost orders
 - **If offer is accepted and no provision is made for costs**, costs will follow the event, **assessed on an ordinary basis** (i.e., if accepted offer is for judgment for the plaintiff on a claim, then defendant pays plaintiff’s costs of that claim and vice versa)
 - **Default rules apply: Unsuccessful party pays the successful party**
 - **Ordinary basis:** Professional work reasonable incurred (**Drafting corresponding, writing submissions, preparing documents**) “**party party costs**”
 - If offer is rejected and, upon disposition of the claim, the rejecting party is no better off than they would have been had they accepted the offer, costs are determined partially on an **ordinary basis** and partly on an **indemnity basis**; the party benefiting from such costs order depends on the disposition of claim

- **Indemnity basis:** all the professional legal costs incurred reasonably (less desirable than ordinary costs)

7. **Cite the relevant CL**

- Offer must be **genuine**; in order for an offer of compromise made under the UCPR to attract an indemnity costs order, it must involve a “**genuine offer of promise**” and not merely be made so as to **trigger the costs consequences under the rules**. (*Leach v The Nominal Defendant*)
- **Objective Test:** Whether there was a real element of compromise is **determined objectively according to the circumstances** of the particular case at the **time the Offer was made** rather than with the benefit of hindsight...it is also determined by reference to the rule pursuant to which the offer was made (*Leach v The Nominal Defendant*)
 - Offer was genuine but court exercised its power to order otherwise; it was not unreasonable for Leech to reject the offer, so court ordered otherwise and did not let Leech pay indemnity costs.
- If genuine offer rejected; courts not obliged to order indemnity costs (*Hart Security v Boucouis no 2*)
 - “unless the court orders otherwise” suggests judicial discretion
 - **S98 CPA:** Court has complete and unfettered discretion in relation to making costs orders.
 - Offer in this case involved only “a minor element of compromise” “it was not an offer of a kind likely to encourage early settlement”
- **Onus on offeree to establish exceptional circumstances**
 - As Hart sets out, court may still order otherwise at their discretion even if offer is genuine if the **party meets the onus that indemnity costs not be ordered because it was not unreasonable to reject the offer**.
 - Factors relevant to whether it was reasonable: sufficient time to consider offer, offeree had adequate info to consider, conditions attached were reasonable.
- Offers made expressly under UCPR will not take effect as Calderbank due to noncompliance (*Whitney v Dream Developments*)