

# LAWS2371 FINAL FINAL NOTES

**CASE** | **STATUTE** - [read facts 3x 1st]

OVERVIEW
<b>Part 1: Pre-commencement considerations</b> <ol style="list-style-type: none"> <li>1. Is the claim barred by a limitation period, res judicata and/or Anshun estoppel?</li> <li>2. Does the claim have 'reasonable prospects of success'?</li> <li>3. Are there alternatives to litigation?</li> <li>4. Who are the proper parties? – Causes of action and parties, joinder, consolidation, standing, representative proceedings (class actions) and funding litigation</li> <li>5. Which court has jurisdiction over the claim?</li> <li>6. Will litigation fulfil the overriding purpose of civil procedure?</li> </ol>
<b>Part 1A: Alternatives to litigation (can take place at any time)</b> <ol style="list-style-type: none"> <li>1. Negotiation</li> <li>2. Mediation</li> <li>3. Court-annexed mediation</li> <li>4. Arbitration</li> <li>5. Enforceability of ADR clause</li> <li>6. Settlement negotiations privilege</li> </ol>
<b>Part 2: Pre-commencement or early orders</b> <ol style="list-style-type: none"> <li>1. Interim preservation orders               <ol style="list-style-type: none"> <li>a. Freezing orders/Mareva injunctions/Mareva orders</li> <li>b. Search orders/Anton Piller orders</li> </ol> </li> </ol>
<b>Part 2A: Case management</b> <ol style="list-style-type: none"> <li>1. Legal technology,</li> <li>2. Technology in discovery</li> </ol>
<b>Part 3: Pleadings</b> <ol style="list-style-type: none"> <li>1. Originating process               <ol style="list-style-type: none"> <li>a. Statement of claim</li> <li>b. Summons</li> </ol> </li> <li>2. Defence/ Reply</li> <li>3. Particulars</li> <li>4. Striking out pleadings</li> </ol>
<b>Part 4: Service</b> <ol style="list-style-type: none"> <li>1. Is service required?</li> <li>2. Is there an affidavit of service?</li> <li>3. Personal Service</li> <li>4. Substituted Service</li> </ol>
<b>Part 5: Evidence</b> <ol style="list-style-type: none"> <li>1. Client legal privilege               <ol style="list-style-type: none"> <li>a. Loss of client legal privilege</li> </ol> </li> <li>2. Discovery               <ol style="list-style-type: none"> <li>a. Implied undertaking</li> </ol> </li> <li>3. Notices to produce</li> <li>4. Subpoenas</li> <li>5. Witness preparation</li> <li>6. Affidavits</li> </ol>
<b>Part 6: Judgment</b> <ol style="list-style-type: none"> <li>1. Costs and cost orders</li> <li>2. Security for costs</li> <li>3. Offers of compromise</li> </ol>
<b>Part 7: Summary disposal</b> <ol style="list-style-type: none"> <li>1. Default judgment</li> <li>2. Summary judgment</li> <li>3. Summary dismissal</li> <li>4. Want of prosecution</li> </ol>
<b>Part 8: Appeal</b>
<b>Part 9: Enforcement and execution of judgment</b>

**WHAT COURT IS THE QUESTION IN?**

- **Supreme court?** Highest State court in NSW (inherent power)
  - Operates under Supreme Court Act 1970 (NSW) + Civil Procedure Act 2005 (NSW)
  - Unlimited civil jurisdiction
  - Divided into ComLaw Division (civil, criminal, administrative law) + Equity Division (commercial, corporations law, equity, trusts, probate, family provisions)

- Order made for \$100,000.00 security on basis of further security in tranches, rather than all at once and liberty for W to apply at a later date for more.
  - KEY CONSIDERATIONS:
    - the quantum of risk that a costs order would go unsatisfied;
    - whether an order security would be oppressive;
    - whether any impecuniosity of the applicant arises out of the conduct complained of; prospects of success; public interest considerations; and delay

## COST OFFERS

**\*\*note, offers of compromise are statute and calderbank are general law, you pursue offers of compromise and say in the alternative you rely on Calderbank**

### OFFERS OF COMPROMISE

#### Limb 1:

Making an offer →  
procedural  
requirements **r20.26**

- 1. must be in writing (**r20.26(1) UCPR**)
- 2. must identify the part of the claim it relates to (**r20.26(2)(a)(i) UCPR**)
- 3. must identify the proposed orders for settlement, including amount for monetary judgment (**r20.26(2)(a)(ii) UCPR**)
- 4. must NOT include an amount of costs and must not be expressed to be inclusive of costs (**r20.26(2)(c) UCPR**)
  - Offer CANNOT affect operation of 42.14-15A, which deals w/ cost consequences of an offer not being accepted
  - The offer CAN include a reference to the payment of costs by the offeror as 'agreed or assessed' (**r20.26(3) UCPR**).
- 5. Offer must bear a statement that the offer is in accordance w/ UCPR (**r20.26(2)(d) UCPR**)
- 6. The offer must state period of time the offer is open for acceptance.
- 7. Offer cannot be withdrawn during acceptance period (**r20.26(11) UCPR**)
- 8. Must give sufficient particulars + documentation to enable offeree to fully consider offer (**r20.26(4) UCPR**)
- 9. (if related to part of a claim) must note whether:
  - plaintiff has (abandoned / pursued) the balance of the proceedings OR
  - defendant has (defended / conceded) the balance of the proceedings
- 10. you may make more than one offer re same clause (**r20.26(10) UCPR**)

#### Limb 2:

acceptance of an offer  
– procedural  
requirements:

- The offer must be accepted within the period of acceptance specified in **r 20.26(5) UCPR**
  - Offer made two months or more before trial?
    - it must be accepted within 28 days (**r 20.26(5)(a) UCPR**).
  - Offer made less than two months before trial?
    - acceptance will be as is reasonable at court's discretion (**r 20.26(5)(b) UCPR**).
- Offer must be accepted by written notice during period of acceptance (**r 20.27(1) UCPR**).
- Offer may be accepted even if a further offer is made during the period of acceptance for the first offer (**r20.27(2) UCPR**).

#### Limb 3:

withdrawal of  
acceptance of an offer  
– procedural  
requirements:  
**r 20.28 UCPR**

- **first:** must occur via written notice (**r20.28(1) UCPR**)
- **second:** withdrawal of acceptance occurred in circumstances where (apply below)
  - (*payment / other act*) was not performed within 28 days after acceptance of offer
  - the Court granted leave – a valid circumstance to withdraw acceptance of an offer (**r 20.28(1)(b) UCPR**).
- Since acceptance of the offer has validly been withdrawn, the Court will restore the parties as nearly as may be to their positions at the time of acceptance and provide for the further conduct of the proceedings (**r 20.28(2) UCPR**).

#### Limb 4:

Post offer – procedural  
requirements:

- Offeree must (*pay money / do the act*) within 28 days of acceptance (**UCPR r 20.26(8)**) **\*\*unless offer specified otherwise**
- FAILURE
  - Either plaintiff/defendant has failed to comply with the accepted offer, as evidenced when (*non-compliant conduct*)
  - **if plaintiff failed:**
    - a) Since plaintiff failed to comply with the terms of the offer, defendant is entitled to a judgment to give effect to the terms of the accepted offer and an order that the proceedings be dismissed (**UCPR r 20.29(1)**).
  - **if defendant failed**

r 20.29 UCPR	<ul style="list-style-type: none"><li>o <b>b)</b> Since defendant failed to comply with the terms of the offer, plaintiff is entitled to a judgment to give effect to the terms of the accepted offer and an order that the defence be struck out (<b>UCPR r 20.29(2)</b>).</li></ul>																																							
	<ul style="list-style-type: none"><li>• <b>(1)</b> If P, being a party to an accepted offer, fails to comply w/ terms of the offer, the D is entitled--<ul style="list-style-type: none"><li>o <b>(a)</b> such judgment or order as appropriate to give effect to terms of the accepted offer, or</li><li>o <b>(b)</b> to an order that the proceedings be dismissed, and to judgment accordingly, as the defendant elects, unless the court orders otherwise.</li></ul></li><li>• <b>(2)</b> If D, being a party to an accepted offer, fails to comply w/ terms of the offer, the P is entitled--<ul style="list-style-type: none"><li>o <b>(a)</b> such judgment or order as appropriate to give effect to the terms of accepted offer, or</li><li>o <b>(b)</b> to an order that the defence be struck out, and to judgment accordingly, as the P elects, unless the court orders otherwise.</li></ul></li><li>• <b>(3)</b> If a party to an accepted offer fails to comply w/ the terms of offer, and a D in the proceedings has made a statement of cross-claim or cross-summons that is not the subject of the accepted offer, the court--<ul style="list-style-type: none"><li>o <b>(a)</b> may make such order or give such judgment under this rule, and</li><li>o <b>(b)</b> may make such order as to the further conduct of proceedings on the statement of cross-claim or cross-summons, as it thinks fit.</li></ul></li></ul>																																							
Rejection → Consequences of rejecting an offer	<ul style="list-style-type: none"><li>• <b>limb 1:</b> identify rule (columns 1-3)</li><li>• <b>limb 2:</b> apply the consequence (columns 4-5)</li><li>• <b>limb 3:</b> determine whether the offer is genuine?<ul style="list-style-type: none"><li>o Offer must involve a “genuine offer of promise” and not merely made to trigger the costs consequences under the rules (<b>Leach</b>)</li><li>o <b>Objective Test:</b> Whether there was a real element of compromise is determined objectively according to circumstances of the particular case at the time the Offer was made (not with benefit of hindsight) (<b>Leach</b>)</li><li>o A "genuine offer" is one where the offeror is giving something away, not just making a tactical offer to trigger cost consequences (<b>Freedom Developments</b>)<ul style="list-style-type: none"><li>■ Wasn't unreasonable in this case as claim wasn't frivolous or vexatious</li></ul></li><li>o If genuine offer rejected; courts not obliged to order indemnity costs (<b>Hart v Boucouis</b>)<ul style="list-style-type: none"><li>■ “unless the court orders otherwise” suggests judicial discretion</li><li>■ <b>s98 CPA:</b> Court has complete and unfettered discretion in relation to making costs orders.</li><li>■ Offer in this case involved only “a minor element of compromise” “it was not an offer of a kind likely to encourage early settlement”</li></ul></li></ul></li></ul>																																							
	<table><tr><th rowspan="2">RULE</th><th rowspan="2">OFFER BY</th><th rowspan="2">REJECTED BY</th><th rowspan="2">TERMS</th><th colspan="2">Plaintiff pays Defendants Costs</th><th colspan="2">Defendant pays Plaintiffs Costs</th><th rowspan="2">COSTS ORDER</th></tr><tr><th>ORDINARY</th><th>INDEMNITY</th><th>ORDINARY</th><th>IDEMNITY</th></tr><tr><td>42.14</td><td>Plaintiff</td><td>Defendant</td><td>Judgement for P <u>no less favourable</u> (receives equal amount as rejected offer)</td><td>x</td><td>x</td><td>✓ <i>up until offer</i></td><td>✓ <i>after offer</i></td><td>D pays P's costs on an ordinary basis until offer &amp; indemnity after</td></tr><tr><td>42.15</td><td>Defendant</td><td>Plaintiff</td><td>Judgement for P <u>no more favourable</u> (receives less or equal amount as rejected offer)</td><td>x</td><td>✓ <i>after offer</i></td><td>✓ <i>up until offer</i></td><td>x</td><td>D pays P's costs on an ordinary basis until offer and P' pays D's costs on indemnity basis after offer</td></tr><tr><td>42.15A</td><td>Defendant</td><td>Plaintiff</td><td>D wins at trial – D makes an offer but rejected by P (D judgment no less favourable</td><td>✓ <i>up until offer</i></td><td>✓ <i>after offer</i></td><td>x</td><td>x</td><td>P pays D costs on an ordinary basis until offer and indemnity after</td></tr></table>	RULE	OFFER BY	REJECTED BY	TERMS	Plaintiff pays Defendants Costs		Defendant pays Plaintiffs Costs		COSTS ORDER	ORDINARY	INDEMNITY	ORDINARY	IDEMNITY	42.14	Plaintiff	Defendant	Judgement for P <u>no less favourable</u> (receives equal amount as rejected offer)	x	x	✓ <i>up until offer</i>	✓ <i>after offer</i>	D pays P's costs on an ordinary basis until offer & indemnity after	42.15	Defendant	Plaintiff	Judgement for P <u>no more favourable</u> (receives less or equal amount as rejected offer)	x	✓ <i>after offer</i>	✓ <i>up until offer</i>	x	D pays P's costs on an ordinary basis until offer and P' pays D's costs on indemnity basis after offer	42.15A	Defendant	Plaintiff	D wins at trial – D makes an offer but rejected by P (D judgment no less favourable	✓ <i>up until offer</i>	✓ <i>after offer</i>	x	x
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CASES	<ul style="list-style-type: none"><li>• <b>Leach:</b> all or nothing determination of liability &gt; this meant that the only room for compromise in the offer was with respect to costs → <b>HELD</b> to be genuine offer of compromise<ul style="list-style-type: none"><li>o procedural technicalities will not invalidate offer of compro if its intent aligns w/ UCPR</li><li>o The language of the offer, though outdated, effectively reflected the rule's intent (i.e., each party bearing their own costs).</li></ul></li></ul>																																							

	<ul style="list-style-type: none"> <li>○ The omission of acceptance period from the offer itself (instead placing it in a covering letter) did not render the offer invalid.</li> <li>● <b>Hart v Boucousis</b> <ul style="list-style-type: none"> <li>■ First offer</li> <li>○ A "walk-away" offer made just after parties had filed preliminary docs</li> <li>○ NOT a genuine offer of compromise → merely tantamount to inviting [OFFEREE] to surrender their claim when the claim wasn't 'frivolous or vexatious'</li> <li>■ Second offer</li> <li>○ A "walk-away" offer made after both sides had incurred significant legal costs</li> <li>○ walk-away offer contained very significant concessions incurring heavy costs for both parties</li> <li>○ <b>HELD</b> to be genuine offer of compromise → it was unreasonable for offeree to reject it.</li> </ul> </li> </ul>
<b>CALDERBANK LETTERS</b>	
Alternatively, [OFFEROR] may argue that even though the offer of compromise cannot be valid under the UCPR (due to it failing to adhere to the formalities, namely___), it may still be regarded as a common law Calderbank offer & therefore enforceable by the Court.	
<b>NOTE</b>	<ul style="list-style-type: none"> <li>● Calderbank Offers → A "without prejudice" settlement offer, reserving the right to rely on it for costs purposes if refused.</li> <li>● <b>Types of calderbank offers</b> <ul style="list-style-type: none"> <li>○ Inclusive of costs (<b>Elite v Salmon</b>): <ul style="list-style-type: none"> <li>■ Offers can include costs.</li> <li>■ But assessing whether judgment is more favorable becomes harder.</li> </ul> </li> <li>○ Offers limited to liability (<b>Vale v Eggins</b>): <ul style="list-style-type: none"> <li>■ Offer addresses only liability, not quantum.</li> </ul> </li> <li>○ Forgoing interest (<b>Manly Council v Byrne</b>): <ul style="list-style-type: none"> <li>■ Waiving interest is a valid compromise.</li> </ul> </li> </ul> </li> <li>● When to use? (see <b>Whitney</b>) <ul style="list-style-type: none"> <li>○ Use a Calderbank offer when you need flexibility that rules offers don't provide, such as including costs.</li> <li>○ However, there are not many other situations where Calderbank offers would provide additional advantages over rules offers</li> </ul> </li> </ul>
<b>THE TEST/RULE</b> on whether to award indemnity costs	<ul style="list-style-type: none"> <li>● whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs (<b>UCPR r 42.1</b>), and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure: <b>SMEC Testing Services</b></li> <li>● <b>ONUS</b>: on claimant to establish it was unreasonable for the offeree to refuse the offer: <b>Evans Shire Council v Richardson</b></li> </ul>
<b>STEPS</b>	<p><b>Limb 1:</b> Was the offer a 'genuine offer of compromise'?; <b>AND</b></p> <ul style="list-style-type: none"> <li>● should be a reasonable attempt to settle</li> <li>● small disparity b/w offer and judgment can still be considered a genuine offer of compromise <ul style="list-style-type: none"> <li>○ <b>Maitland Hospital</b>: a 2.5% diff b/w the offer and the judgment sum was deemed a real offer, noting the significant amount for the appellant.</li> <li>○ <b>Forbes Services Memorial</b>: a \$129.24 diff b/w the offer and the judgment sum was held to constitute a genuine offer of compromise.</li> <li>○ <b>Manly Council</b>: waiving interest (like \$\$\$ interest – amounted to approx \$8,000) on a damages award was held to be genuine offer of compromise</li> <li>○ <b>Townsend</b>: Offers such as "walk-away" offers, where the parties pay their own costs, may not always constitute a genuine compromise <ul style="list-style-type: none"> <li>■ BUT, court found in <b>Leichhardt Municipal Council</b> that, depending on the circumstances, a "walk-away" offer <i>can</i> be genuine offer if it reflects a genuine attempt to negotiate a settlement rather than merely triggering cost sanctions.</li> </ul> </li> </ul> </li> </ul> <p><b>Limb 2:</b> Was the rejection of the offer unreasonable?</p> <ul style="list-style-type: none"> <li>● [<b>Say this</b>] reasonableness is assessed at the time the offer is made and not with the benefit of hindsight: <b>Freeman Development Group</b></li> <li>● Factors relevant to determining whether rejecting an offer was unreasonable include: <ul style="list-style-type: none"> <li>○ time available to consider the offer,</li> <li>○ whether the offeree had sufficient information to assess the offer, and</li> <li>○ The reasonableness of any attached conditions.</li> </ul> </li> </ul>

- **Elite v Salmon [2007]**, Basten JA stated that the rejection should be assessed on a summary basis, w/ more sympathy given to Ds who receive offers early in proceedings, especially if they need time to assess liability or damages.
- If an offer is made before all relevant evidence (e.g., expert reports) is served + this evidence becomes available after offer expires, offeree may argue that rejecting offer was not unreasonable
  - **South Eastern Sydney Area**, ruled that D should not be penalised for rejecting an offer when the evidence significantly changed after the offer was made.
- **Vale v Eiggins**, court **held** that a respondent who had not served all relevant medical reports at the time of making an offer was not entitled to favorable cost provisions.
- **Blagojevich**, the rejection of an offer was deemed unreasonable after the offeree was warned that their evidence might be challenged and was later found to be false.
- The "prospects of success" in a case are an important factor in determining the reasonableness of rejecting an offer.
- For offers with non-monetary conditions (e.g., an apology or release), the court must assess the reasonableness of the condition and whether the final judgment was more favorable than the offer: **Magenta Nominees**
  - In **Boulderstone**, it was reasonable to reject an offer conditioned upon the release of unrelated proceedings
- **Freeman**: did not act unreasonably bc offer made at early stage + sum offered inclusive of costs was minor to DREs claim + there was no attempt by appellants to explain

## PROPORTIONATE

### IS THERE AN ISSUE RELATING TO THE PROPORTIONALITY OF COSTS?

Proportionality of costs: **s60 CPA**  
[CHEAP]

- The issue is whether the order to [X] (describe any order) is proportionate. Court practice and procedure should be implemented with the objective of resolving the issues between the parties in a manner that is proportionate to the importance and complexity of the subject matter in dispute (**s60 CPA**).

### CASES

- **Zanella**: D had 25% share in property — wanted to claim his share but couldn't because P had been missing for 20 years
  - The placing of advertisement to find the P in order to resolve an entitlement to property is not proportionate to Ds small monetary claim, and especially when the plaintiff is likely dead.
- **Bleyer v Google**: Court has the power to stay or dismiss an action on the grounds that the resources of the court and parties that will have to be extended to determine the claim are out of all proportion to the interest at stake
  - Disproportionately = type of abuse of process

## LIMITATION PERIOD

The date of filing is decisive for limitation statutes:

- ☐ **Contracts**: 6 years: s14(1)(a)
- ☐ **Torts**: 6 years: s14(1)(b)
- ☐ **Defamation**: 1 year (from date of publication): s14B
- ☐ **Judgment**: 12 years (from date of judgment): s17
- ☐ **Recovery of Land**: 12 years: s27(2)
- ☐ **Breach of Trust**: 12 years: s48
- ☐ **Personal Injury**: 6 years: s18A (before 6 December 2002) or s50C (after 6 December 2002)

Originating process will be valid –

**Supreme and Local Courts and Dust Diseases Tribunal**: 6 months: r 6.4(4)(a)

**District Court**: one month r 6.4(4)(b)(ii)

*Liquidated Claims/Debts*: 6 months: r 6.4(4)(b)(i)(A)

*Defendants outside New South Wales*: 6 months: r 6.4(4)(b)(i)(B)



# PLEADINGS

**Purpose:** support P's cause of action with info sufficiently detailed to put the D on his guard as to the case he has to meet and to enable him to prepare for trial (**Goldsmith**)

**NOTE:** A pleading is = a SoC, defence, reply and subsequent pleadings

A pleading is NOT = summons (see r 6.4 for when required) or notice of motion

## STEP 1: ORIGINATING PROCESS

**Limb 1:** determine what process to use

Purpose of the originating process → To state the relief claimed, from whom, notice to Defendant about consequences, commences the proceedings.

- **UCPR r 6.3 - Statement of Claim (SOC):** used for disputes involving facts, starting the pre-trial & trial processes → required for debt, tort, fraud claims, and personal injury or property damage claims
- **UCPR r 6.4 - Summons:** used for legal questions, initiating summary procedures
  - used for proceedings with no defendant, appeals, preliminary discovery, or certain types of injunctions or receiver appointments

**Limb 2** (if relevant): using the wrong originating process

[*PLAINTIFF*] has incorrectly used the wrong originating process. The issue is whether proceedings have been duly commenced and whether the Court can make appropriate orders.

- **Wrongly commenced via SOC?**
  - Since the proceedings in the present case were wrongly commenced by statement of claim, proceedings are nevertheless, and for all purposes, taken to have been duly commenced from the date of filing of the statement of claim and may be
  - continued accordingly (**UCPR 6.5(1)**).
- **Wrongly commenced via summons?**
  - Since the proceedings in the present case were wrongly commenced by summons, proceedings are nevertheless, & for all purposes, taken to have been duly commenced as from the date of filing of the summons & may be continued accordingly (**UCPR 6.6(1)**).

**Limb 3:** Service of originating process

Note: if technicalities not met – court has discretion to set aside proceedings or treat the failure as an irregularity that does not invalidate the proceedings:  
**s 63 CPA**

### SERVICE MUST INCLUDE:

- **r 6.2(3A)** An originating process served in accordance w/ subrule (3) must include following:
  - (a) the seal of the court on the first page (whether an original sealed copy or a photocopy of a sealed copy),
  - (b) the case number or unique identifier,
  - (c) the listing date (if allocated by the court registry).
- **r 6.12(1)** SOC or summons must specifically state the relief claimed by the plaintiff

### TIMEFRAME

- **Supreme Court; Dust Diseases Tribunal; Local Court**
  - The originating process is valid for service for months after the date it was filed. The originating process must be served on each defendant (**UCPR 6.2(3)**).
- **District Court**
  - The originating process is valid for service for month after the date it was filed.
- **Failure to serve in time? can still commence FRESH proceedings**
  - [*PLAINTIFF*]'s failure to serve the originating process on [*DEFENDANT*] within the prescribed time does not prevent [*PLAINTIFF*] from commencing fresh proceedings by filing another originating process (**UCPR r 6.2(5)**)

## STEP 2: APPEARANCE

Once an originating process has been served on the Defendant, the Defendant can then file an appearance or a defence and serve it on the Plaintiff. Don't need to file a notice of appearance if a defence is filed.

- D may file an appearance or a defence and serve it on Ps address for service (**UCPR r 6.9(2)**)
- To be **filed within 28 days** of Statement of Claim being served (**UCPR r 14.3**)
- Filing prevents P from entering a default judgment
- Can be filed by:
  - Solicitor;
  - Defendant; or
  - authorised officer of a corporation (**UCPR r 7.2**)
- If objections to originating process, service or jurisdiction are to be made, they should be done by notice of motion in lieu of appearance (**r 12.11**)