LO v Northern Territory of Australia, JA v Northern Territory of Australia, KT v Northern Territory of Australia, LB v Northern Territory of Australia (Costs of Settlement Conference)

[2017] NTSC 24

PARTIES:	LO v NORTHERN TERRITORY OF AUSTRALIA And JA (Litigation Guardian for EA) v NORTHERN TERRITORY OF AUSTRALIA And KT (Litigation Guardian for KW) v NORTHERN TERRITORY OF AUSTRALIA And LB (Litigation Guardian for JB) v NORTHERN TERRITORY OF AUSTRALIA

FILE NO:	14 of 2015 (21508784); 15 of 2015 (21508785); 19 of 2015 (21510204); 26 of 2015 (21513348).
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
DELIVERED:	30 March 2017
HEARING DATES:	Written Submissions
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

PRACTICE AND PROCEDURE – Costs – Costs in respect of a settlement conference held pursuant to Rule 48.12 – Usual position is that costs are costs of the proceedings – Circumstances by which a party may be liable for costs of a settlement conference – Requirement to establish that a party refused to participate in the settlement conference – Meaning of refusing to participate.

EVIDENCE – Evidence of communications in the course of settlement negotiations – Extent that evidence of such communications may be led – General rule at common law, under the Supreme Court Rules and the Evidence (National Uniform Legislation) Act is that such evidence may not be adduced – Exceptions to the general rule – Exception in the Supreme Court Rules and the Evidence (National Uniform Legislation) Act – Inconsistency between the Evidence (National Uniform Legislation) Act and Supreme Court Rules.

STATUTORY INTERPRETATION – Repugnancy of delegated legislation – Inconsistency between rules of Court and subsequently enacted statute – Whether rules invalid to the extent of the inconsistency – Test to be applied to determine inconsistency – Whether statute intended to be a complete statement of law – whether rules invalid to the extent of the inconsistency.

Evidence (National Uniform Legislation) Act (NT), s 131(1), (2)
Supreme Court Act (NT), s 86(2)
Supreme Court Rules, rr 48.12(1), (8), (9), (11), (12); 48.14
Evidence Act 1995 (Cth), s 131
Evidence Act 1995 (NSW), s 131
Evidence Act 2008 (Vic), s 131
Civil Procedure Act 2005 (NSW), s 30(4)
Federal Court Act 1976 (Cth), s 53B
Supreme Court Act 1986 (Vic), s 24A

Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd (2007) 71 NSWLR 140;
The Silver Fox Co Pty Ltd v Lenard's Pty Ltd (No 3) (2004) 214 ALR 621;
Pinot Nominees Pty Ltd v Commissioner of Taxation (2009) 181 FCR 392;
Forsyth v Sinclair (No 2) (2010) 28 VR 635;
Powell v May [1946] KB 330;
Stevens v Perrett (1935) 53 CLR 449;
South Australia v Tanner (1989) 83 ALR 631;
Keen Bros Pty Ltd v Young (1982) 44 ALR 519;
Victoria v Commonwealth (1937) 58 CLR 618;
Harrington v Lowe (1996) 190 CLR 311;

Pearce D and Argument S, *Delegated Legislation in Australia*, 3rd ed, LexisNexis Butterworths.

REPRESENTATION:

Counsel:

Plaintiffs:	Mr Baran
Defendant:	Mr Moses

Solicitors:

Plaintiffs:	North Australian Aboriginal Justice Agency
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

LO v Northern Territory of Australia, JA v Northern Territory of Australia, KT v Northern Territory of Australia, LB v Northern Territory of Australia (Costs of Settlement Conference) [2017] NTSC 24

BETWEEN:

LO
Plaintiff

v

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND

JA (Litigation Guardian for EA)
Plaintiff

v

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND

KT (Litigation Guardian for KW)
Plaintiff

v

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND

LB (Litigation Guardian for JB)
Plaintiff

v

NORTHERN TERRITORY OF AUSTRALIA
Defendant

No. 14 of 2015 (21508784); No. 15 of 2015 (21508785); No. 19 of 2015 (21510204); No. 26 of 2015 (21513348).

CORAM: MASTER LUPPINO

REASONS

(Delivered 30 March 2017)

[1] Pursuant to Rule 48.12(1) of the *Supreme Court Rules* ("the SCR"), on 11 August 2015 I directed the parties in these proceedings to attend a settlement conference. That rule enables me to set a settlement conference to explore the possibility of settlement if I am of the view that a proceeding is capable of settlement or ought to be settled. Clearly that can be ordered even if the parties have a different view of the prospects of settlement. Although I cannot specifically recall the circumstances leading to the setting of a settlement conference in these matters, I usually invite comments from the parties before making such an order. Relevantly in this respect, at the time there were no objections to that course. As is also usually the case, orders

for the provision of a précis by each party case were made.[1] All parties sufficiently complied with that order.

[2] Although the current matters comprise four separate proceedings, they have a common factual matrix and hence it was decided to conduct a joint settlement conference.[2] The settlement conference was held on 16 November 2015.

[3] According to the material before me at the settlement conference, the facts on which the case is based, at least in respect of the claims as pleaded as at the date of the settlement conference,[3] is that on 21 August 2014 the four Plaintiffs were held in detention in the Behavioural Management Unit ("BMU") of Don Dale Youth Detention Centre ("DD"). They were held in the BMU as they had escaped from DD on 2 August 2014 and as they had made threats of assault to members of staff at DD and had also made ongoing threats of further escape.

[4] Jake Roper ("Roper"), another detainee in the BMU at that time, escaped from the BMU into a less secure section of DD and while in that less secure area he made ongoing threats, caused extensive property damage and behaved aggressively. Contemporaneously, property damage was caused by some of the Plaintiffs and some of the Plaintiffs also directed abuse and threats to DD staff.

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1 Per SCR r 48.12(11).

2 The trial of the four proceedings was also conducted as a joint hearing.

3 The pleadings were substantially amended after the settlement conference and further allegations of separate assaults and batteries, in addition to those in the pleadings as they then stood, were added.

[5] The staff at DD called for assistance from Corrections officers from the nearby adult prison. A dog handler with a Corrections dog and three Corrections officers attired in riot gear attended at DD in response. Despite that intervention, the situation could not be controlled and the Commissioner for Correctional Services authorised the use of CS gas, commonly known as tear gas. Roper was able to be stabilised shortly after the deployment of the CS gas. Although the CS gas was directed only at Roper, the Plaintiffs were affected due to their proximity. They also saw the involvement of the Corrections officers in riot gear and the dog and saw all relevant actions by them.

[6] It is against this background that the Plaintiffs claimed damages for assault and battery. The pleadings, as they stood at the time of the settlement conference, allege that the marshalling of the Corrections officers in riot gear and the use of dogs[4] and the deployment of CS gas caused the Plaintiffs to fear imminent harm. The pleaded battery is the actual administration of force by the deployment of the CS gas. The Defendant disputed liability on the basis that the actions of the Corrections officers were justified and permitted.

[7] The parts of Rule 48.12 relevant to these reasons are now set out.

> **48.12 Settlement conference**
>
> (1) If a Judge or the Master is of the opinion that a proceeding is capable of settlement or ought to be settled, the Judge or

[4] At trial Kelly J found that there was one Corrections dog.

Master may direct that the matter be set down for a settlement conference for the purpose of exploring the possibility of settlement.

(2)-(7) Omitted

(8) Except to prove that a settlement was reached between the parties and the terms of the settlement, evidence of things said or admissions made at a settlement conference is not admissible in either the proceeding or a court without the consent of those parties.

(9) If a party (***the party at fault***):

(a) fails to attend a settlement conference after having been notified of the conference under subrule (3); or

(b) having attended a settlement conference:

(i) refuses to participate in the settlement conference;

or

(ii) applies (other than with the consent of the other parties) to adjourn or further adjourn the settlement conference and the adjournment is granted by the Master,

the party at fault must pay the costs of the other parties thrown away as a result, which costs may (despite rule 63.04(3)) be taxed immediately by the Taxing Master.

(10) Omitted

(11) A Judge or the Master may order each party to prepare a précis of the party's case to be given to the Master at the settlement conference.

(12) Despite subrule (8), if an offer of settlement is made before the Master at a settlement conference:

(a) the Master must record the offer and place that record in a sealed envelope on the Court file; and

(b) the offer may be taken into consideration by the Court in exercising its discretion to award costs once final judgment in the proceeding is given.

[8] To put these reasons into context, now follows a summary of events as they occurred during the course of the settlement conference albeit that there may have been a variation in the precise sequence of events. After the opening of the settlement conference there was a general discussion of the facts of the case and of the matters in dispute. At the outset I questioned each of the parties as to various matters raised by them in their précis and to clarify the nature and extent of the dispute relevant to the possible settlement of the proceedings. The parties then in turn spoke to their précis and made general comments regarding their own case as well as the case of their opponent.

[9] Mr Baran, for the Plaintiffs concluded his comments by putting an offer of settlement on behalf of each of the Plaintiffs in the sum of $95,000 plus costs. I was told that the offers were the same offers as had been submitted on behalf of the Plaintiffs four months earlier in July 2015. I was also told that the Defendant had not responded to those offers and the Defendant did not challenge that.

[10] Mr Moses, counsel for the Defendant, then asked for an opportunity to obtain instructions for a response to the offers. He indicated that he expected that only a nominal offer might be made. He also made a suggestion of a possible set off for damage caused at DD by some of the Plaintiffs. The Defendant had not made a counterclaim nor pleaded a set off at that time. As Mr Moses was not able to produce evidence as to precisely

which of the Plaintiffs caused the alleged damage, after further discussion he elected not to pursue that avenue at that time.[5]

[11] I allowed Mr Moses the time over the lunch adjournment to obtain instructions and on resumption he indicated that the Defendant rejected the Plaintiffs' offers and was not prepared to make a counter offer.

[12] The conference ended a short time later and once it was clear to me that a settlement could not be arrived at. The Plaintiffs then made an application for costs against the Defendant pursuant to Rule 48.12(9) of the SCR. The Defendant opposed the application.

[13] As the proceedings were then to proceed to trial, I made orders for submissions regarding costs with the intention of publishing a decision at a later date. In practical terms I was prevented from publishing my reasons before the finalisation of these four matters as it would otherwise involve disclosure of the events at the settlement conference and of the offers by the Plaintiffs and clearly that must be avoided for obvious reasons. Rule 48.12(8) of the SCR also contains a prohibition on the disclosure of matters discussed at a settlement conference. The effect of Rule 48.12(8) is that evidence of things said or admissions made at a settlement conference is not admissible in either the proceeding or a court without the consent of the parties.

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5 Subsequently the Defendant did counterclaim in some of the proceedings, and in separate actions against other persons, who allegedly caused the damage.

[14] After receiving the submissions and after considering the matter, I notified the parties that my decision was to dismiss the Plaintiffs' application for costs and that I would publish my reasons after a decision in the substantive proceedings was delivered.

[15] The trial of these matters was heard before Kelly J over 9 days between September and October 2016 and her Honour's decision was published on 21 March 2017. Although the Statement of Claim of each Plaintiff was amended after the settlement conference to allege further instances of assault and battery, in respect of the assault and battery as pleaded at the time of the settlement conference, her Honour found that the deployment of CS gas and the involvement of Corrections officers attired in riot gear and the use of a Corrections dog was reasonable and necessary. Her Honour dismissed each of the Plaintiffs' claims in respect of the cause pleaded as at the time of the settlement conference and found for the Defendant in each case. In respect of the numerous additional claims added by the Plaintiffs after the settlement conference, her Honour mostly found for the Defendant. In respect of the one claim where the Plaintiffs were successful, her Honour awarded modest damages of between $12,000 and $17,000. That result, largely in favour of the Defendant, may help to put the position adopted by the Defendant into context.

[16] The Defendant's submissions argued that Rule 48.12(8) prevented me from having regard to what was said or admissions made during the settlement conference, without the consent of all parties, for any purpose including for

the purposes of determining costs. Mr Moses indicated that the Defendant did not consent for that purpose. The Plaintiffs submitted that the attendance of a party at a settlement conference with knowledge of Rule 48.12(8) would amount to a waiver.[6] That however was little more than a bare unsupported submission and I am not convinced that it is correct.

[17] In any case I do not agree with the Defendant's submission in respect of the application of the prohibition in Rule 48.12(8). As factual findings are necessary for a determination as to whether the Defendant refused to participate in the settlement conference, taken to its logical conclusion that contention would deny me any factual basis to determine an application for costs pursuant to Rule 48.12(9). That would be anomalous given the rule clearly contemplates the possibility of a costs order in certain circumstances. Applying the prohibition in the way submitted by the Defendant would render Rule 48.12(9) otiose and such an interpretation is to be avoided. In my view I can have regard to the actions and comments of the parties at the settlement conference, once the proceedings are finally determined, and for the limited purpose of determining the liability for costs.

[18] Rule 48.12(12) provides an exception to Rule 48.12(8). On its wording however that is limited to the costs of the substantive proceedings and is only relevant to a cost decision once final judgment has been given.

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6 No authorities were cited for this proposition. It was argued by analogy to determining costs based on a Calderbank offer where a court has regard to what would otherwise be privileged communications for the sole purpose of determining costs.

[19] Notwithstanding the Defendant's submission to the contrary, I consider that the exception contained in section 131(2)(h) of the *Evidence (National Uniform Legislation) Act* ("UEA") applies in the current case. The UEA provides, in section 131(1), for a general prohibition in respect of adducing evidence of communications in the course of settlement negotiations and ordinarily that would equally apply to communications at a settlement conference held pursuant to Rule 48.12. Specifically it provides as follows:-

> (1) Evidence is not to be adduced of:
>
> (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
>
> (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

[20] A number of exceptions to that general rule are then set out in sub-section (2) and relevant to the current matter is the exception in section 131(2)(h) which provides:-

> (2) Subsection (1) does not apply if:
>
> (h) the communication or document is relevant to determining liability for costs;

[21] The basis of the Defendant's contention that section 131(2)(h) did not apply was not specified. The contention was made simply by bare statement in a footnote to a submission regarding Rule 48.12(8) saying that section 131(2)(h) "*…has no application in relation to the determination of costs*". The Plaintiffs made no submissions concerning that despite being given

leave for submissions in reply to those of the Defendant. The Plaintiffs thereafter provided submissions in reply but did not address this aspect.

[22] Absent more specifics of this submission by the Defendant, I assume the Defendant's contention is based on the line of authorities including the decision in *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd*[7] (*Azzi*). The line of authorities commences with *The Silver Fox Co Pty Ltd v Lenard's Pty Ltd (No 3)*[8] ("*Silver Fox*") where, when dealing with the similarly worded corresponding provision in the *Evidence Act 1995* (Cth), Mansfield J said:

> Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations, whether private or by mediation, are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore a resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome of those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of section 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by use of the expression "without prejudice" or by a mediation agreement.[9]

[23] *Silver Fox* dealt with a case where there was a clash between the provision in the *Evidence Act 1995* (Cth) equivalent to section 131(2)(h) of UEA and a term in a mediation agreement. That particular term provided that the evidence of the terms of any settlement offers made during the course of the mediation could not subsequently be led in evidence. Mansfield J ruled that

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7 (2007) 71 NSWLR 140.
8 (2004) 214 ALR 621.
9 (2004) 214 ALR 621 at 624.

the Act prevailed over any terms agreed to by the parties and that is clearly correct.

[24] In *Azzi* the clash was between the New South Wales equivalent of section 131(2)(h) in the *Evidence Act 1995* (NSW) and section 30(4) of the *Civil Procedure Act 2005* (NSW) ("CPA"). For current purposes, section 131(2)(h) of the *Evidence Act 1995* (NSW) is comparable to the corresponding provision in the UEA. Subsection (a) of section 30(4) for of the CPA provided:-

> (a) Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body.

[25] In *Azzi*, Brereton J ruled that the New South Wales equivalent of section 131(1) of UEA made discussions at a mediation inadmissible as the section operated as a bar to admissibility. He then said that the effect of the exception in section 131(2)(h) was to remove the bar to admissibility in section 131(1). He decided that it only removed the bar in section 131(1) and not the bar in section 30(4) of the CPA, which remained in operation and with full effect.

[26] In *Pinot Nominees Pty Ltd v Commissioner of Taxation*[10] ("*Pinot*"), Siopsis J dealt with a similar clash, this time between section 53B of the *Federal Court Act 1976* (Cth) ("FCA") and the corresponding provision to section 131 of UEA in the *Evidence Act 1995* (Cth). For current purposes section 53B of the FCA is sufficiently similar to section 30(4) of the CPA. Siopsis J

[10] (2009) 181 FCR 392.

reconciled the provisions on the basis that section 131(2)(h) only applied to communications at Court appointed mediations and effectively followed Brereton J in *Azzi*.

[27] In *Forsyth v Sinclair (No 2)*[11] the Victorian Court of Appeal dealt with the same issue. The clash in that case was between section 24A of the *Supreme Court Act 1986* (Vic) and the section of the *Evidence Act 2008* (Vic) corresponding to section 131 of the UEA. The Court noted in that case that the comparative provisions were sufficiently similar to both those in the FCA and the various Evidence Acts for purposes of the application of the principle. The Victorian Court of Appeal took the same approach as in *Pinot*.

[28] Therefore, other than in *Silver Fox*, all other cases dealt with a clash between the equivalent of UEA sections 131(1) and 131(2)(h) and another statutory provision. The clash in the current case however is between a statutory provision and the SCR. Rules of Court are a form of delegated legislation for this purpose.

[29] Therefore, unlike in the authorities discussed above, the principle of repugnancy has application in the present case. Repugnancy arises where delegated legislation is inconsistent with a statutory provision. The inconsistency may be with the empowering Act itself, or it may be another separate Act or it may be inconsistency with the general law.

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11 (2010) 28 VR 635.

[30] The effect of the principle is that repugnancy renders the delegated legislation invalid to the extent of the inconsistency.[12] There is one exception, namely where it can be said that the delegated legislation and the statutory provision can both be complied with.[13] A finding to this effect will be facilitated where the empowering Act does not specifically limit the power to make delegated legislation to delegated legislation that is not inconsistent with the empowering Act or any other Act or law.[14] The provision empowering the making of rules in the *Supreme Court Act (NT)* does not have that limitation. That provision, (section 86(2)) provides as follows:

> (2) Without limiting subsection (1), Rules of Court may be made:
>
> (a) to regulate the practice and procedure to be followed in the Court and in the offices of the Court; and
>
> (b) for matters incidental to or relating to any practice and procedure or necessary or convenient for the conduct of any business of Court in exercising its jurisdiction.

[31] What this provision also demonstrates is that the power is limited to procedural matters and is not intended to empower rules altering the substantive law.

[32] The test to determine inconsistency is similar to the covering the field test used to determine inconsistency between Commonwealth and State laws

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12 *Powell v May* [1946] KB 330; *Stevens v Perrett* (1935 53 CLR 449 and see generally Pearce D and Argument S, *Delegated Legislation in Australia*, 3rd ed, LexisNexis Butterworths, at p 231.

13 *South Australia v Tanner* (1989) 83 ALR 631.

14 *Keen Bros Pty Ltd v Young* (1982) 44 ALR 519.

pursuant to section 109 of the Australian Constitution.[15] The test, per Dixon J in *Victoria v Commonwealth*,[16] adapted to the principle of repugnancy, is whether the subordinate legislation would, if valid, alter or impair or detract from the operation of a statutory provision. If so, then it is invalid to that extent. Further, that authority provides that if the Act is meant to be a complete statement of the law on the topic, to the extent that the delegated legislation detracts from that, it is inconsistent in any event and invalid to that extent.

[33] Rules of Court are treated as any other form of delegated legislation for this purpose, see *Harrington v Lowe*.[17] In that case it was also said that Rules of Court are meant to be procedural only and are not intended to change the substantive law. I am satisfied that Rule 48.12(8) is procedural but in any case, I think it is clear that the UEA is meant to be a complete statement of the law, albeit that it is not a Code, and on the principle in *Victoria v Commonwealth*,[18] inconsistency between Rule 48.12(8) and section 131(2)(h) of UEA is sufficient to render the former invalid. In any case the limited exception given in Rule 48.12(9), which restricts the wider exception given in section 131(2)(h), clearly demonstrates that the two are inconsistent and to that extent the former is again invalid.

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15 See the cases discussed in Pearce and Argument, *Delegated Legislation in Australia*, LexisNexis Butterworths, 3rd Ed at p 235.
16 (1937) 58 CLR 618.
17 (1996) 190 CLR 311.
18 (1937) 58 CLR 618

[34] For the foregoing reasons, in my view section 131(2)(h) of UEA applies. Whether repugnancy renders the whole of 48.12(8) invalid or whether the effect is simply to remove the bar to admissibility contained in Rule 48.12(8) in respect only of, and for the purposes only of, determining a liability for costs, is not material. Either way, Rule 48.12(9) applies unrestrained by the bar to admissibility set out in Rule 48.12(8).

[35] On that basis I now consider the application of Rule 48.12(9)(b) divorced from the bar to admissibility in Rule 48.12(8). Although costs are generally in the discretion of the Court[19] the circumstances set out in Rule 48.12(9) of the SCR restricts that discretion in that it mandates a liability for costs on the finding of any of the various specified factors. The wording of the rule is very specific. It is based on participation at the settlement conference. There is no reference to making concessions or offers as a basis for determining liability for costs. Although concessions and offers are an aspect of participation at a settlement conference, participation overall is distinct and I think it has to be assessed against all the circumstances of a particular case.

[36] The Plaintiffs argue that the following circumstances amount to the Defendant refusing to participate in the conference namely and firstly, the Defendant's conduct in failing to respond to an offer in writing before the settlement conference. Secondly, in agreeing to the matter being referred to a settlement conference. Thirdly, in attending a settlement conference

[19] Rule 63.03 of the SCR

without instructions.[20] Fourthly, in indicating that a monetary sum would be offered but then declining to make any offers. Fifthly, in failing to engage in the true spirit and intention of a settlement conference namely, to negotiate a monetary sum to bring about a resolution of the proceedings. Finally, in failing to make any offer at the settlement conference, which overlaps considerably with the fourth circumstance.

[37] On my reading of Rule 48.12(9)(b)(i), only events occurring in the course of the settlement conference can be taken into account. Although some matters in the lead up to a settlement conference may be able to be used in a limited way for this purpose in that they may put other pertinent facts in context, (for example, if a party fails to submit a précis as ordered) that would be the limit of the use which could be made of background events. In my view the wording of Rule 48.12(9)(b) confines the enlivening features to the conduct or comments made during the settlement conference. As that rule overrides the Court's usual discretion in respect of costs orders by mandatorily requiring an order for costs to be made once the enlivening features are made out, it should be strictly interpreted.

[38] On that basis, put succinctly, the position of the Plaintiffs is confined largely to a submission that, as the Defendant was not prepared to make any counter offer in response to the Plaintiffs' offer, that amounts to a refusal to participate in the settlement conference.

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[20] There was no evidence to support this and presumably the Plaintiffs alleged this given that the Defendant's counsel sought an adjournment for instructions but that does not necessarily follow and such an implication would not be valid.

[39] I should add that the Plaintiffs also submitted that the conduct of the Defendant in this matter runs counter to its obligation to act as a model litigant, specifically in that it has, without any justification, failed to respond to the Plaintiffs' initial offer and then, despite indicating that an offer would be made, declined to make any offer whatsoever. Leaving aside for the moment considerations as to whether the Defendant acted consistently with the requirements of being a model litigant, I do not consider this to be a relevant consideration given the strict confines of Rule 48.12(9).

[40] In answer, the Defendant submitted that the expression "refuses to participate" in Rule 48.12(9)(b)(i) does not invite speculation as to whether the party did everything in its commercial interest to settle the matter or whether its participation was satisfactory. Further, the Defendant argued that the term "refuses to participate" can only refer to a wilful decision not to take part in the settlement conference in any respect. According to the submissions of the Defendant, the types of conduct which would enliven the rule are, for example, a party remaining mute during the conference, or engaging in obstructive behaviour, or refusing to listen to anything said by the other parties, or attending and then immediately leaving, or requesting the conference to be terminated.

[41] Specifically the Defendant submitted that a refusal to make an offer cannot amount to a refusal to participate. The Defendant argued that its participation in the settlement conference was demonstrated by the

discussions overall and that those discussions had the effect of requiring the parties to outline and defend their trial positions at an early stage. This it was submitted, possibly helped to narrow the issues in dispute as each party was more aware of the other party's case and of the other party's response to the argument proposed to be run at trial.

[42] The Defendant correctly pointed out that absent an order pursuant to Rule 48.12(9), the costs of and incidental to attending a settlement conference are costs in the proceeding[21]. Any order for costs made at the conclusion of the proceedings is entirely in the Court's discretion and the Court would be permitted to take into account the extent of offers made (or the failure to make an offer) in arriving at that decision. In principle that is correct and in my view, the requirement to record offers stipulated in Rule 48.12(12) is, intended to facilitate that process.

[43] In my view the Defendant did participate in the settlement conference within the meaning of Rule 48.12(9)(b)(i) in that it submitted its précis as ordered, responded to my queries regarding its position, raised matters which were a relevant consideration for the Defendant (notwithstanding they could not be maintained on the pleadings as they then stood), and addressed the arguments made on behalf of the Plaintiffs while nonetheless maintaining a denial of liability as then pleaded in its Defence. Agreeing to seek instructions in respect of the Plaintiffs' offers is indicative that the

[21] Rule 48.14 of the SCR.

Defendant did not have any pre-determined intention to refuse to make an offer, and therefore is also an indicator of participation.

[44] Although the Defendant simply rejected the Plaintiffs' offers without making a counter offer, there was no evidence to demonstrate that proper regard to all the relevant considerations was not had for the purpose of that decision. Indeed considerable time was taken by the Defendant's legal representatives to obtain those instructions and that is indicative of a full discussion of pertinent issues between the legal representatives and the instructor.

[45] The decision as to whether or not a party will make an offer, whether at a settlement conference or otherwise, is entirely a decision for the relevant party and is not something that the Court can, or should generally look behind. In my view the measure of whether a party participates in a settlement conference is not whether it is prepared to make an offer. Otherwise a party with a very strong defence,[22] such as the Defendant in the current matters, might nonetheless face a costs risk if it refused to make an offer to a party with poor prospects of success. Although the process of without prejudice negotiations is designed to attempt to facilitate a settlement and to encourage genuine negotiations, it cannot compel a party to make an offer. Where that party regards the opponent's position as unlikely to succeed or having little merit, it cannot be inappropriate to

[22] I was satisfied at the time that the Defendant had a strong Defence justifying the Defendant's approach at the settlement conference.

refuse to make an offer, a decision of the Defendant at the time which was totally vindicated by the ultimate result.

[46] It can be said that even if the Defendant had a preconceived view of the merits of the Plaintiffs' claims, i.e., because the Defendant considered the Plaintiffs' cases to be weak, or of the assessment of any likely award of damages, it can nonetheless be said that there has been participation in the settlement conference if the Defendant attends to better ascertain the nature of the Plaintiffs' claim and its merits and to attempt to demonstrate the strength of its own case. A robust approach to negotiations and an unyielding resistance to putting offers could reinforce that in appropriate circumstances. If, as occurred in the current matters, a Plaintiff fails to persuade a Defendant that it has a worthy claim, that can justify a refusal to make an offer. Rule 48.12(9) cannot be interpreted in such a way that it absolutely requires a response to an offer with a counter offer. Had that been intended then I would have expected that to be clearly expressed. Instead the Legislature has chosen to set the enlivening condition by reference to participation in the conference process and that therefore means something other than making offers.

[47] A wider interpretation is not warranted for the reasons outlined and in any case a too liberal interpretation may have the effect of encouraging spurious claims in the belief that a Defendant is likely to pay something to simply end the proceedings for practical reasons, notwithstanding that a claim has no merit. That approach should not be encouraged.

[48] In my view therefore notwithstanding that the Defendant refused to make a counter offer to the Plaintiffs' offer, it cannot be said that thereby the Defendant has refused to participate in the settlement conference.

[49] Therefore, for these reasons, I dismissed the Plaintiffs' application for costs. I was not prepared to make any order for costs and the effect of that is therefore that all of the costs of and incidental to the settlement conference, including in respect of the submissions to determine the Plaintiffs' claim for costs, are costs of the proceedings pursuant to Rule 48.14.