IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Henley Estate (Re)*, 2024 NLCA 45
Date: December 30, 2024
Docket Number: 202301H0020

BETWEEN:

JOHN J. HENLEY AND
CHRISTOPHER M. HENLEY — APPELLANTS

AND:

BRIAN A. HENLEY — FIRST RESPONDENT

AND:

JANET M. HENLEY K.C. — SECOND RESPONDENT

Coram: F.P. O'Brien, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 201301E12144 (2023 NLSC 48)
Appeal Heard:	January 24, 2024
Judgment Rendered:	December 30, 2024
Reasons for Judgment by:	F.P. O'Brien J.A.
Concurred in by:	F.J. Knickle and K.J. O'Brien JJ.A.
Counsel for the Appellants:	Geoffrey Budden K.C. and Allison Conway
Counsel for the First Respondent:	Douglas Wright
Counsel for the Second Respondent:	Janet Henley K.C. (Self-Represented)

Authorities Cited:

CASES CITED: *Henley Estate (Re)*, 2022 NLSC 103; *Henley Estate (Re)*, 2023 NLSC 48; *Dawe v. Morgan*, 2023 NLCA 11; *Henley v. Henley*, 2021 NLCA 46; *Mega Roofing and Waterproofing Ltd. v. Dobbin (N.D.) Ltd. et al*., 1996 CanLII 7290 (NLSC); *Steele v. Rendell*, 2017 NLCA 36; *Finn v. St. John's (City)*, 2007 NLCA 46; *Winter v. Newfoundland and Labrador Health Care Association*, 2005 NLCA 66; *Cluney (Guardian ad litem of) v. Kennedy Estate*, 2002 NFCA 39; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191; *Rooney (Litigation Guardian of) v. Graham*, 2001 CanLII 24064 (ONCA); *Lawson v. Viersen*, 2012 ONCA 25.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 20A; *Court of Appeal Rules*, NLR 38/16, rule 58.

F.P. O'Brien J.A.:

OVERVIEW

[1] This appeal concerns Rule 20A of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, and the potential costs consequences flowing from an offer to settle made under this Rule.

[2] The parties to this appeal are siblings. They have been engaged in protracted litigation regarding the distribution of the estate of their late father, Mr. Alec G. Henley.

[3] An application (hereafter the application, or the original application) was brought in the Supreme Court of Newfoundland and Labrador to resolve certain issues respecting the estate's distribution. A Supreme Court Judge heard the application and decided the issues.

[4] The Judge also decided that no costs would be awarded on the application. Rather, all parties were ordered to bear their own costs (*Henley Estate (Re)*, 2022 NLSC 103, hereafter the Decision, at paras. 83-86).

[5] There was no appeal of the Judge's determination of the issues. There was also no appeal of the Judge's Decision to award no costs and have all parties bear their own costs.

[6] After the Judge's Decision was made, an application was brought in the Supreme Court (hereafter the Rule 20A application). The Rule 20A application indicated that an offer to settle had been made pursuant to Rule 20A.

[7] The offer to settle had been made by the first respondent in this appeal, Mr. Brian A. Henley, and the second respondent in this appeal, Ms. Janet M. Henley, K.C., respectively (hereafter the offerors). The offer was received by the appellants in this appeal, Mr. John J. Henley and Mr. Christopher M. Henley, respectively (hereafter the offerees). The offer was not accepted, nor was it revoked.

[8] In the Rule 20A application, the offerors argued that the offer to settle was more favourable to the offerees than the result the offerees obtained in the Decision.

[9] The offerors stated that, in these circumstances (where the offer to settle was not accepted by the offerees and the offer was more favourable than the result obtained by the offerees in the Judge's Decision), Rule 20A applied. Accordingly, the offerors argued that they should be awarded enhanced costs pursuant to the Rule.

[10] After hearing the Rule 20A application, the Judge set aside the part of the original Decision that related to costs (i.e. that no costs be awarded and all parties bear their own costs) and ordered that the offerees pay enhanced costs to the offerors (*Henley Estate (Re)*, 2023 NLSC 48, hereafter the Rule 20A Decision, at para. 38).

[11] In the Rule 20A Decision, the Judge did not consider: (i) all terms of the offer to settle made by the offerors; or (ii) a separate settlement proposal that had been made by the offerees.

[12] There was a specific term in the Rule 20A offer to settle relating to costs. It stated that the offerees had to pay the offerors' costs of the original application. In the Rule 20A Decision, the Judge disregarded this term of the offer to settle stating that it would be "inappropriate" to consider it.

[13] The Judge also refused to consider a separate settlement proposal that had been made by the offerees. The Judge considered only the offerors' offer to settle, which was made pursuant to Rule 20A.

[14] The appellants (i.e. the offerees) argued on appeal that the Judge erred in two respects: first, by failing to consider all terms of the offerors' offer to settle; and second, by failing to consider the offerees' separate settlement proposal.

[15] The respondents (i.e. the offerors) argued on appeal that the Judge made no error in the Rule 20A Decision and properly concluded that the offerors were entitled to enhanced costs.

ISSUES

[16] There are two issues to be considered on appeal:

1. Did the Judge err by failing to consider all terms of the offerors' Rule 20A offer to settle?

2. Did the Judge err by failing to consider the offerees' separate settlement proposal?

[17] On the first issue, I would conclude that the Judge erred in principle by failing to consider all terms of the offer to settle. This error impacted the Judge's Rule 20A analysis and the conclusion that enhanced costs be ordered. I would allow the appeal on this basis.

[18] On the second issue, I would conclude that the Judge made no error by not considering the offerees' separate settlement proposal. I would dismiss this ground of appeal.

STANDARD OF REVIEW

[19] The standard of review to be applied in assessing an order for costs was recently considered by this Court in *Dawe v. Morgan*, 2023 NLCA 11:

> [14] The standard of review respecting cost awards is settled law. Cost awards are discretionary. However, such discretion must be exercised judicially and according to principle. Costs awards should only be set aside on appeal if they result from error in principle or if they are plainly wrong (*Steele v. Rendell*, 2017 NLCA 36, 1 C.A.N.L.R. 790, at para. 10, relying on *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 247). See also *Hiscott v. Hall*, 2015 NLCA 1, 361 Nfld. & P.E.I.R. 141, at paras. 6-13.

[20] In the present case, as in *Dawe*, this Court must assess whether the Judge exercised discretion judicially and according to principle. This Court may intervene if the award resulted from an error in principle or was plainly wrong. The Court must consider the Judge's interpretation and application of the provisions of Rule 20A, which provided the context for the costs award.

BACKGROUND

The Original Application

[21] The offer to settle was made during the original application. The parties could not agree on certain issues relating to the distribution of the estate's assets, and the original application was brought in the Supreme Court to resolve these issues.

[22] The first issue was whether agreements made among the siblings, in a meeting held on December 4, 2016, were binding. The second and related issue concerned the interpretation of language in two codicils to the late Mr. Alec G. Henley's Last Will and Testament, and how certain of the assets of the estate should be distributed.

[23] The Judge determined that "the agreements made during [a meeting of the siblings] of December 4, 2016 are binding on all of the parties", and that the codicils "do not convey an interest in shareholder's loans to the three siblings named therein" (Decision, at para. 86).

The Judge awarded no costs on the Original Application

[24] Having determined the issues on the original application, the Judge specifically considered the issue of costs and explained why costs should not be awarded to any party.

[25] The Judge found that all four siblings were acting in good faith in holding their positions in the litigation. The Judge stated that all parties were "credible and provided evidence in a straightforward manner", that they "answered the questions put to them directly", and that they were not "engaged in any kind of obfuscation".

[26] Rather, the Judge observed that, while the siblings all had "strongly held opinions that are difficult to dislodge", and while they "differed in their interpretation of various matters", ultimately, they were all acting in good faith and

were all "attempting, in their own way, to ensure that the wishes of their late father, Alec G. Henley, were carried out" (Decision, at paras. 2-5).

[27] The Judge noted that "costs can be regarded as a punitive remedy awarded in an adversarial context". The present litigation involved an ongoing acrimonious dispute among family members, which the Judge described as "a family disagreement that has spiraled out of control" and stated that the awarding of costs would "only exacerbate the already strained relationships in this family". The Judge further observed that the siblings "have sufficient means and need not be compensating one another because they have sought to express views that they strongly hold" (Decision, at paras. 83-84).

[28] In the result, the Judge decided to "exercise my discretion to refrain from awarding any costs in this matter" and ordered that the "parties shall each bear their own costs of this application" (Decision, at paras. 85-86).

[29] As noted above, there was no appeal of the Decision not to award costs on the original application.

The Rule 20A Application

[30] After the Judge's Decision, the offerors brought the Rule 20A application.

[31] The offerors argued that, despite the Judge's determination on the original application that all parties bear their own costs, they were entitled to recover enhanced costs pursuant to Rule 20A.

[32] The offerors' claim for Rule 20A enhanced costs was premised on their submission that the offer to settle was more favourable than the result achieved by the offerees in the Decision.

[33] Rule 20A.01 states that "[a] party may serve upon an adverse party an offer to settle (Form 20A(A)) any claim between them in the proceeding … on the terms therein specified". The offerors served the offer to settle on the offerees in the prescribed form, using Form 20A(A). Therefore, the provisions of Rule 20A were engaged.

[34] The Judge first became aware of the offer to settle when the offerors filed the Rule 20A application requesting enhanced costs. Rule 20A.08(3)(b) directs that the

application for enhanced costs be brought after a decision is made on the original application.

[35] Two sections of Rule 20A permit an award of enhanced costs. These are Rule 20A.08 and 20A.10. In the offerors' Rule 20A application, the offerors applied for relief under both sections, and the Judge considered both.

Rule 20A.08

[36] Rule 20A.08 states, in part:

> (1) Unless ordered otherwise, when
>
> (a) an offer to settle was made by a plaintiff [in this case the plaintiff is the offerors]
>
> (i) at least 7 days before commencement of the trial or hearing of the proceeding, and
>
> (ii) was not revoked or accepted prior to commencement of the trial or hearing,
>
> and
>
> (b) where that plaintiff [the offerors] obtains a judgment as favourable or more favourable than the terms of the offer to settle,
>
> that plaintiff [the offerors] shall be entitled to party and party costs plus taxed disbursements to the date of service of the offer to settle and thereafter to double party and party costs plus taxed disbursements.

[37] Rule 20A.08(1) requires that a comparison be made between the outcome reached in the Decision in the original application, and the outcome that would have been reached had the offer to settle been accepted.

[38] If the offerors had obtained "a judgment [in the Decision] as favourable or more favourable than the terms of the offer to settle", then the offerors would be entitled to an award of costs on an enhanced basis.

[39] Specifically, Rule 20A.08(1) states that "unless ordered otherwise", the offerors would be entitled to "party and party costs plus taxed disbursements to the

date of service of the offer to settle and thereafter to double party and party costs plus taxed disbursements".

[40] There are several requirements that must be met before the enhanced costs consequences of Rule 20A.08(1) are triggered.

[41] First, there must be an offer to settle made pursuant to Rule 20A. If not, the Rule is not engaged. In this case, this requirement was satisfied because the offerors made the offer to settle in accordance with the Rule, and in the prescribed form using Form 20A(A).

[42] Second, the offer to settle must not have been revoked or accepted before the court decision was obtained. In this case it was neither revoked nor accepted before the Decision was made in the original application.

[43] Third, the offerors must have obtained a result in the Judge's Decision that was as favourable or more favourable to the offerors than the terms of the offer to settle made to the offerees. In this case, the Judge proceeded on the basis that the result in the Decision on the original application *was* more favourable to the offerors than the offer to settle. However, as discussed below, in doing so the Judge erred by not taking into account all terms of the offer.

[44] Fourth, there is a temporal requirement in Rule 20A.08(1). The offer to settle must be made at least seven days prior to the commencement of the hearing of the application.

[45] This temporal requirement was not met in this case. The original application was heard in two parts. The first part began on October 26, 2020 and continued for five days until October 30, 2020. The application was then paused when an appeal was brought to this Court on a separate issue, unrelated to the issue in the present appeal (*Henley v. Henley*, 2021 NLCA 46). After the appeal proceedings, the second part of the original application resumed on March 21, 2022 and continued for a further five days.

[46] The offer to settle under Rule 20A was made by the offerors on February 9, 2022. Therefore, it did not meet the requirements of Rule 20A.08(1) because it was not made at least seven days prior to the commencement of the hearing, which was October 26, 2020. As such, the Judge did not make an order for enhanced costs under Rule 20A.08(1).

Rule 20A.10

[47] However, the Judge ordered enhanced costs under Rule 20A.10, which can apply where the requirements of Rule 20A.08 are not met.

[48] Rule 20A.10 states:

> Notwithstanding the provisions of this rule, the court, in exercising its discretion as to costs, may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters.

[49] The Judge concluded that Rule 20A.10 applied in this circumstance, where the seven-day requirement of Rule 20A.08 was not met. This conclusion was consistent with the interpretation of Rule 20A.10 in this jurisdiction. For example, as stated in *Mega Roofing and Waterproofing Ltd. v. Dobbin (N.D.) Ltd. et al*., 1996 CanLII 7290 (NLSC), at page 21, Rule 20A.10 "allows the court to take into account an offer to settle which, perhaps for time limit or other reasons, does not come within Rule 20A.08".

[50] The Judge noted that "[w]hile the Offer to Settle was not made more than seven days before the commencement of the hearing in this matter, it was made 45 days prior to the commencement of the second half of the hearing" (Rule 20A Decision, at para. 4) (i.e. the offer was made on February 9, 2022 and the second part of the original application began on March 21, 2022). The Judge observed that the offer to settle, therefore, had been served on the offerees "long before the second half [of the application] commenced" (para. 13).

[51] The Judge concluded that, in these circumstances, an order for enhanced costs could be made under Rule 20A.10:

> [12] I am of the opinion that Rule 20A.10, being a *non obstante* provision, allows me to overlook any deficiency in the service of the Offer to Settle in this matter. …
>
> …
>
> [14] I am inclined to exercise my discretion under Rule 20A.10 and overlook the late filing because the hearing was bifurcated, and the Offer to Settle was made well in advance of the second half of the hearing … .

[52] In the result, the Judge awarded enhanced costs to the offerors under Rule 20A.10. The enhanced costs award made under Rule 20A.10 was the same as the award that could have been made under 20A.08. That is, the offerors were awarded their costs and disbursements for the period up to the date of service of the Rule 20A offer to settle (February 9, 2022), and double costs and disbursements for the period after the service of the offer.

[53] The Judge's interpretation of Rule 20A in this respect, and the Judge's conclusion that Rule 20A.10 could be used to award enhanced costs in this circumstance, was not appealed.

The offer to settle

[54] The offerors' offer to settle had three parts.

[55] The first two parts dealt with the valuation and transfer of shares within the estate and the issue of a shareholder's loan, and the third part dealt with the payment of costs on the original application.

[56] First, the offer stated that the valuation of certain shares would be "in accordance with an agreement reached … at a meeting of December 4, 2016". The Judge confirmed that the valuations were in accordance with an agreement reached on that date. Second, and related to the first part, the offer to settle included a proposal about how certain estate assets would be shared among the siblings. The offer proposed, on a percentage basis, how the assets in question (which related to a shareholder's loan) would be distributed.

[57] The Judge considered the offer and compared it to the result in the original Decision. The Judge concluded that, had the offerees accepted the offer to settle on the percentage basis proposed in the offer, they each would have received $8,522.35 more than they received in the Judge's Decision.

[58] The Judge accepted the affidavit evidence of one of the offerors, Janet M. Henley, K.C., as the basis for this conclusion, stating:

> [15] … The Affidavit of Janet M. Henley, K.C. dated December 18, 2022 contains detailed calculations outlining the precise effect of the Offer to Settle. I accept her calculations as being accurate.

> [16] In accordance with Henley, K.C.'s calculations the [offerees] would each have received $8,522.35 more than the agreement that they reached on December 4, 2016 and which I upheld in my June 23, 2022 decision [i.e. the Decision]. …

[59] This $8,522.35 figure was not appealed. Indeed, as noted by the Judge, it was only slightly higher than the calculation made by one of the offerees, John J. Henley. The Judge stated: "According to John J. Henley's calculations the [offerees] would have received $7,616. 04. The difference is not consequential" (para. 16).

[60] If this were the entirety of the offer to settle, the offer would have been more favourable than the Decision. However, there was also a third part of the offer to settle, which dealt with the payment of costs.

[61] The third part of the offer stated that, to achieve settlement and conclude the matter, the offerees were required to pay the offerors' costs of the original application "on a party and party basis, pursuant to Column III of the Scale of Costs, with a 10 percent reduction".

[62] Affidavit evidence from one of the offerees, John J. Henley, was provided to the Judge on the Rule 20A application. In the affidavit, Mr. Henley estimated that, to satisfy this term of the offer, the offerees would have had to pay "approximately $42,000.00" in costs to the offerors. Ultimately, the offer was not accepted and the Judge, in the original Decision, decided that the offerees were not required to pay any costs.

The Judge did not consider the costs component of the offer to settle

[63] In considering whether the offer was more favourable than the result in the original Decision, the Judge disregarded the fact that the offer to settle required the offerees to pay the offerors' costs.

[64] The Judge concluded that it would be "inappropriate" to take into account the costs component of the offer to settle:

> [18] The Applicants [i.e., the offerors] offered a reduced Column (Column III) on the Scale of Costs less 10%. They would have not considered that I would exercise my discretion to award no costs. It would not be fair to use my award of no costs to the detriment of the Applicants. The Applicants made a *bona fide* attempt at resolving the dispute at an amount significantly less than what a court might ordinarily award. A judge might have easily awarded costs under Column V given the length of time that

> the Rule 20A Application occupied, the issues that needed to be resolved and the array of senior counsel that had been retained to provide service.
>
> [19] … It is my view, therefore, that it would be inappropriate, in calculating whether the Applicants' Offer to Settle offered terms more favourable to the Respondents than they received in my decision, to take into account any amount in respect of costs.

[65] Having disregarded the costs component of the offer, the Judge considered the only other monetary component of the offer. This was the $8,522.35, referenced above, relating to the distribution of the estate's assets.

[66] In considering only the $8,522.35, and disregarding the costs component of the offer, the Judge proceeded on the basis that the offer was more favourable to the offerors than the result in the Decision. On this basis, the Judge set aside the costs portion of the original Decision (that the offerees pay no costs) and replaced it with an order that the offerees pay enhanced costs.

[67] As discussed next, I would conclude that this was an error in principle.

ANALYSIS

ISSUE 1: Did the Judge err by failing to consider all terms of the offerors' Rule 20A offer to settle?

The purpose of Rule 20A

[68] In *Dawe*, this Court considered the purpose of a Rule 20A offer to settle:

> [15] Simply put, rule 20A is designed to foster the settlement of litigation. It encourages litigants to take a hard look at the viability of their positions by making or accepting offers to settle, thereby settling their differences and sending to judicial adjudication only matters which truly require it. Offers to settle made under rule 20A.08 presume that if a litigant does not accept an offer to settle made to them under the rule, they do so knowing that a double party and party costs order will likely be made against them if judicial determination is less favorable than the terms of the offer.

[69] This Court described the objective of Rule 20A in similar terms in *Steele v. Rendell*, 2017 NLCA 36:

> [26] Rule 20A provides that a party who refuses a formal offer to settle, proceeds to trial, and receives a less favourable outcome than the offer, will pay increased costs (double costs unless otherwise ordered) from the date of the offer. …

[70] In both *Dawe* and *Steele*, this Court recognized the importance of having Rule 20A followed with consistency and predictability, so that it can be an effective tool to promote settlement.

[71] Consistency and predictability also underpin the requirement that all terms of an offer to settle are considered. That is, in deciding whether an offer to settle will be accepted or rejected, a party must be able to predictably weigh and assess all "economic parameters of the offer, including the costs consequences of proceeding to trial and judgment" (*Mega Roofing and Waterproofing Ltd.*, at pp. 19-20). The party receiving the offer to settle must make an informed assessment of the "economic parameters of the offer", by assessing all terms of the offer.

[72] In *Dawe*, this Court specifically referenced the importance of predictability and consistency, and the economic assessment that is undertaken when considering whether to accept or reject an offer to settle:

> [34] In *Rendell v. Steele*, 2016 NLTD(G) 44, 380 Nfld. & P.E.I.R. 60, aff'd 2017 NLCA 36, 1 C.A.N.L.R. 790, Burrage J. had also quoted from paragraphs 21-25 of *Mega Roofing* to explain the rationale of Rule 20A. At paragraph 33, he stated:
>
> > Following a review of the policy underlying the costs consequences of the rule respecting offers to settle … Orsborn J. in *Mega Roofing & Waterproofing Ltd.*, stated:
> >
> > > [21] It is clear that, across Canada, the imposition of severe and adverse costs consequences is seen as necessary in order to encourage the making and acceptance of reasonable settlement offers prior to trial.
> > >
> > > [22] The decisions previously referred to confirm that this objective will only be achieved through a consistent and predictable application of the costs rule. Obviously, parties making and considering a settlement offer need to know all the economic parameters of the offer, including the costs consequences of proceeding to trial and judgment. …
> > >
> > > [25] Faced with an offer to settle, a party must objectively assess the economics of proceeding further. … A party may decide to accept the offer or to itself make an offer. If, having assessed the offer, it chooses

> to do nothing, that choice carries with it the implicit determination that the party is satisfied that it will achieve a better result at trial. This is the party's own determination to make — it knows the strengths and weaknesses of its case. But such a determination also indicates that the party is willing to accept the risk of proceeding further. There is a willingness to accept the consequences of being wrong. …
>
> (Emphasis added.)

[73] The objectives and principles of Rule 20A were efficiently summarized in *Dawe*, as follows:

> [38] In summary, rule 20A is designed to foster the settlement of litigation by encouraging litigants to take a hard look at the viability, including the merits and legality of their positions, or their "strengths and weaknesses" and "the economics of proceeding further" (per Orsborn J. in *Mega Roofing*, at para. 25, and Burrage J. in *Rendell*, at para. 35). …

[74] The purposes and objectives of Rule 20A have been similarly considered in other cases. See for example: *Finn v. St. John's (City)*, 2007 NLCA 46; *Winter v. Newfoundland and Labrador Health Care Association.*, 2005 NLCA 66; *Steele*; *Mega Roofing and Waterproofing Ltd.*; *Cluney (Guardian ad litem of) v. Kennedy Estate*, 2002 NFCA 39. Similarly, from the Supreme Court of Canada, see *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at page 227, wherein the Court states that the purpose of an offer to settle rule, such as Rule 20A, "is to induce settlements and avoid trials and to provide predictability with respect to costs".

The Judge erred by disregarding the costs component of the offer to settle

[75] With respect, I would conclude that the Judge erred by failing to take into account all parts of the offer to settle when comparing the terms of the offer with the Decision on the original application. Failing to do so was contrary to the operation and purpose of Rule 20A.

[76] In this regard, I would agree with the conclusion of the Ontario Court of Appeal in *Rooney (Litigation Guardian of) v. Graham*, 2001 CanLII 24064 (ONCA), where it is stated that "all the terms of an offer to settle, including any provision for costs, must be compared with all the terms of the judgment, ordinarily including the disposition of costs" (para. 57). Offers to settle are not assessed on a piecemeal

basis. All parts of an offer to settle must be considered in determining whether the offer to settle is more or less favourable than the outcome of the litigation.

[77] In this case, the offer was received and assessed by the offerees, who had to decide whether to accept it. This requires an evaluation of the entirety of the offer and an assessment of the likely outcome of the litigation in comparison to all terms of the offer. When a provision on costs is included in an offer to settle, this is meant to alert the offerees that the proposal in the offer relating to costs (in this case, that the offerees pay costs on Column III, with a 10 percent discount) will be compared to the ultimate costs result ordered (in this case, that the offerees pay no costs).

[78] This is consistent with the objective of the Rule as described in *Dawe*, which is "to foster the settlement of litigation by encouraging litigants to take a hard look at the viability, including the merits and legality of their positions, or their "strengths and weaknesses" and "the economics of proceeding further"" (*Dawe*, at para. 38).

[79] In this instance, the offerees had to consider all terms of the offer and determine whether they were likely to do better or worse than the offer. It would be unreasonable to later assess the relative favourability of the offer to settle, *vis-à-vis* the outcome of the litigation, without considering all of the offer's terms.

The offerees considered all terms of the offer to settle (including the costs component) before rejecting it

[80] The costs component of the offer to settle was clearly considered by the offerees. As noted above, one of the offerees filed an affidavit with the Supreme Court regarding costs.

[81] In the affidavit, John J. Henley stated: "That in considering the offer of February 9, 2022 which is the subject of the Rule 20A application, I estimated my potential cost exposure to this offer to be approximately $42,000.00", and "I did not believe costs in that amount [approximately $42,000.00] to be reasonable nor likely to be awarded by the court, and this informed my decision not to accept the offer of February 9, 2022". While Mr. Henley's "approximately $42,000.00" estimate has not been assessed or taxed, it represented his estimation of what would have been required to accept the offer to settle and conclude the matter without a judicial determination.

[82] Rule 20A is designed to have litigants undertake the type of assessment of the terms of an offer to settle as was undertaken here. The offerees took a hard look at the offer, assessed the risk of proceeding with the litigation (including the risk of costs) and decided to reject the offer and go on with the litigation.

The offer to settle must be compared to the actual result in the original application, not to possible results that did not occur

[83] The reasons provided by the Judge for ignoring the costs component of the offer to settle evince an error in exercising discretion judicially and according to principle (*Dawe*, at para. 14).

[84] The Judge disregarded the costs component of the offer to settle, stating: "[The offerors] would have not considered that I would exercise my discretion to award no costs"; it "would not be fair to use my award of no costs to the detriment of [the offerors]"; and a "judge might have easily awarded costs under Column V given the length of time that the Rule 20A Application occupied, the issues that needed to be resolved and the array of senior counsel that had been retained to provide service" (Rule 20A Decision, para. 18).

[85] With respect, this misconstrues what is required in a Rule 20A application. A Judge must compare what was decided in the original application (here, it was decided that no costs would be awarded) with what was in the offer to settle (here, the offer to settle required that the offerees pay costs on Column III, less a 10 percent reduction).

[86] On a Rule 20A application, the offer and the litigation result (in this case, the original Decision) are compared to determine whether the result was more favourable, less favourable, or as favourable as the outcome that would have been achieved had the offer been accepted. In this case, the costs result on the Decision was clearly less favourable to the offerors (and more favourable to the offerees) than the terms of the offer.

[87] Rule 20A is not meant to invite speculation about other possible outcomes that did not materialize. It is inappropriate to speculate that costs *might* have been awarded by another judge on Column V in the original application when, in fact, no costs were awarded in this application (on Column V or any column).

[88] Similarly, a Rule 20A award for enhanced costs cannot be made on the basis that the offerors "would have not considered" the possibility that no costs would be awarded in their favour. Various costs outcomes were possible on the original application. For example, if the offerors were unsuccessful on the application, they would have had no costs entitlement. Even if the offerors were successful, there was no guarantee they would be awarded costs because the awarding of costs is discretionary. Additionally, even if costs were awarded to the offerors, there was no guarantee that costs would be awarded on a specific column. Further, in estate litigation it is possible for costs to be ordered payable by the estate, as opposed to a party. In an earlier application in this litigation, costs were in fact awarded to be payable by the estate. It is always possible for a Judge to make no order as to costs against parties, regardless of the outcome, provided discretion is exercised judicially.

[89] Therefore, the Judge's rationale for ignoring the costs portion of the offer to settle (on the basis that the offerors "would have not considered [the Judge] would exercise discretion to award no costs", or because another judge "might have easily awarded costs under Column V") was not a principled basis to displace the proper application of Rule 20A. Such an approach to Rule 20A would undermine the Rule's intended predictability and consistency.

[90] As noted in *Lawson v. Viersen*, 2012 ONCA 25, at paragraph 21, "[c]osts consequences are result oriented. Pursuant to [the Ontario version of Rule 20A], the terms of the offer are measured … against the judgment obtained in order to determine whether such offer is "as favourable as", "more favourable than" or "less favourable than" the judgment".

[91] Rule 20A contemplates an objective analysis, comparing "apples" (the litigation result) with "apples" (the terms of the offer to settle). It is ultimately somewhat of a utilitarian exercise wherein one objectively discerns whether the outcome of the litigation is more or less favourable than the terms of an offer to settle made in Form 20A(A). A Rule 20A analysis is not meant to be a subjective exercise and is not intended to be determined by the parties' subjective expectations about what might occur. It is about what was decided, not what the parties thought or believed would be decided.

[92] The Judge's failure to consider the costs component of the offer to settle resulted in an error in principle in applying Rule 20A to award enhanced costs.

[93] In the result, as in *Dawe*, I would conclude that appellate intervention is warranted because "the Judge's decision does not comport with the rationale of rule 20A" (*Dawe*, at para. 40).

[94] Accordingly, I would allow the appeal on this basis.

It is not necessary to remit the matter to the Supreme Court

[95] In light of the failure to consider all parts of the offer to settle, it would be available to this Court to direct that the matter be remitted to Supreme Court for a further Rule 20A assessment. However, for the reasons that follow, I would not direct a further Rule 20A assessment in the Supreme Court in these circumstances. Rather, I would allow leave to bring a further application for a Rule 20A analysis, should it be necessary to do so, but subject to the limits set out below.

[96] Any further Rule 20A assessment in Supreme Court would need to consider all terms of the offer to settle, including the costs component, to properly discern whether the offer was more favourable than the result in the Decision.

[97] As such, any further assessment would primarily be a mathematical one.

[98] As noted above, once the Judge disregarded the costs component of the offer to settle, the only monetary component considered by the Judge in the Rule 20A analysis was the $8,522.35, relating to the distribution of the estate's assets. The Judge found that, if the offerees had accepted the February 9, 2022 offer to settle, the offerees each would have received $8,522.35 more than they received in the Decision. Therefore, the offerees "lost" $8,522.35 on this part of the offer to settle by not accepting the offer.

[99] However, as discussed above, on the costs component of the offer, the offerees "saved" money by not accepting an offer that required them to pay costs, when the Decision ultimately did not require them to pay any costs.

[100] Any further assessment under Rule 20A would be restricted to determining whether the amount that the offerees "lost" by not accepting the offer ($8,522.35) is greater or less than the amount the offerees "saved" by not accepting the offer and paying no costs.

[101] It is not known what amount the offerees would have paid in costs, on Column III less 10 percent, had they accepted the offer to settle. As noted above, one of the offerees, John J. Henley, provided affidavit evidence that "approximately $42,000.00" would have been required to pay these costs. This is an estimate only. The exact amount was not determined in the Rule 20A application because the Judge did not consider the costs component of the offer.

[102] When the offer to settle was made on February 9, 2022, the parties had spent five days in court on the original application and both offerors were represented by experienced counsel during the first five days of the application. This would have been factored into any costs award.

[103] The question then is whether the costs amount that the offerees would have had to pay to accept the offer to settle and bring the matter to an end would have been greater than $8,522.35.

[104] If the costs amount is greater than $8,522.35, there would be *no* basis for a Rule 20A enhanced costs award because the offer would be less favourable to the offerors (and more favourable to the offerees) than the result in the Decision.

[105] If the costs amount is less than $8,522.35, there *would* be a basis for a Rule 20A enhanced costs award. In that instance, the offer would be more favourable to the offerors (and less favourable to the offerees) than the result in the Decision.

[106] This Court cannot assess this question in the absence of an evidentiary basis, which was not provided. Although the estimate of John J. Henley strongly suggests that the costs amount would have greatly exceeded $8,522.35, this estimate is not evidence and this Court cannot consider it as such.

[107] However, this Court would expect that the parties can make an informed determination, without a further application in the Supreme Court, as to whether the costs component of the offer to settle, on Column III less 10 percent, would exceed $8,522.35.

[108] While this Court does not specifically foreclose the need for an application in Supreme Court to make this assessment, it is expected that the parties will take a common-sense approach as to whether this would be required. It is expected that the parties will realistically calculate the costs amount that would have been required to be paid (on Column III, less 10 percent) to accept the offer and settle the matter,

and that this will inform any determination as to whether any further assessment in Supreme Court is necessary on this narrow point.

Conclusion on Issue 1

[109] In the result, the appeal is allowed and the Judge's Rule 20A Decision, in which the Judge ordered that the offerees pay enhanced costs to the offerors, is set aside. The Judge's costs award in the original Decision, namely that there be no order as to costs and that all parties bear their own costs, is reinstated.

[110] Should any party bring a further application to Supreme Court pursuant to Rule 20A in this regard, any such application will be limited to assessing the amount that would have been paid by the offerees to the offerors (under Column III, less 10 percent) if the offer to settle had been accepted, and comparing that amount to the amount of $8,522.35, referenced above, to determine whether the offer to settle was more favourable than the result in the original application.

ISSUE 2: Did the Judge err by failing to consider the offerees' separate settlement proposal?

[111] As noted above, the original application was heard in two parts. The first part began on October 26, 2020 and continued for five days until October 30, 2020. The second part began on March 21, 2022 and continued for five days until March 26, 2022. The offerors' offer to settle was made on February 9, 2022.

[112] The offerees requested that the Judge (when considering the offerors' February 9, 2022 offer to settle), also consider a separate settlement proposal that they had made to the offerors on November 2, 2020.

[113] The offerees argue on appeal that the Judge had authority, under Rule 20A.10, to consider their November 2, 2020 settlement proposal in the context of considering the offerors' February 9, 2022 offer to settle.

[114] The offerees further submit that the language of Rule 20A.10 allowed the Judge to "take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters".

[115] However, the Judge did not consider the offerees' November 2, 2020 settlement proposal and stated that it was "irrelevant" to the task of assessing the offerors' February 9, 2022 offer to settle.

[116] As noted in pages 33-34 of the transcript of the Rule 20A application of February 21, 2023, the Judge stated:

> I came here to hear … an application with respect to the offer to settle that was made under Rule 20A. And that's what I intend to do. So we're not going to rehash what happened and who said what. I don't care whether two parties made an offer in advance of this one. It makes no difference to me. … Basically, what I'm saying is that whether the [offerees] made an offer or not is irrelevant as far as I'm concerned.

[117] The offerees submit on appeal that the Judge erred by failing to consider their November 2, 2020 settlement proposal.

[118] The offerees argue that their settlement proposal was relevant and that it was an attempt to "resolve the matter in an effort to comply with the [Judge's] direction that the parties attempt settlement".

[119] The offerees note that their November 2, 2020 settlement proposal was made long before the offerors' offer to settle was made on February 9, 2022. They argue that the February 9, 2022 offer to settle was just "one of several offers that went back and forth between the parties" and that focusing only on this offer to settle, while not taking into account their November 2, 2020 settlement proposal, would not be an appropriate basis for awarding enhanced costs.

[120] I would conclude that the Judge made no error in failing to consider the offerees' November 2, 2020 settlement proposal when assessing the potential costs consequences of the offerors' February 9, 2022 offer to settle under Rule 20A.

[121] The November 2, 2020 settlement proposal was not an offer to settle made under Rule 20A. As such, it did not engage the enhanced cost consequences of Rule 20A.

[122] The November 2, 2020 proposal was not meant to invoke the formal costs consequences of Rule 20A. It was not intended to put the other parties on notice that the terms of the settlement proposal would, if not accepted, be compared to the result obtained in a court decision, and that enhanced costs might be sought. As such, it was not made in the prescribed format of a Rule 20A offer to settle, namely Form

20A(A). It was not designed to "foster the settlement of litigation by encouraging litigants to take a hard look at the viability, including the merits and legality of their positions, or their "strengths and weaknesses" and "the economics of proceeding further", in a context where clear costs consequences under Rule 20A could follow from the decision to accept or reject the offer (*Dawe*, at para. 38).

[123] Unlike the offerors' February 9, 2022 offer to settle, the offerees' November 2, 2020 settlement proposal (and, for that matter, any other settlement proposal, or discussion, or offer that may have been made among the parties) was not an offer to settle made pursuant to Rule 20A.

[124] The February 9, 2022 offer to settle was the only offer to settle made under Rule 20A in this matter. If the February 9, 2022 offer to settle had never been made, the November 2, 2020 settlement proposal would not, in and of itself, have triggered a Rule 20A analysis.

[125] The present circumstances are like those in *Steele*. In *Steele*, it was argued that a settlement offer, which was not made pursuant to Rule 20A, could nonetheless be considered when considering an offer to settle that had been made pursuant to Rule 20A.

[126] This argument was rejected by the trial court in that instance, and by this Court on appeal:

> [27] Ms. Rendell made a formal offer to settle, thereby engaging the prospect of double costs under Rule 20A. But the trial judge retained a discretion not to order double costs. Mr. Steele says double costs were inappropriate because he had also made offers to settle, including one that was essentially an offer to capitulate in exchange for Ms. Rendell waiving damages and costs. He says that if Ms. Rendell had accepted that offer, the trial would have been unnecessary.
>
> [28] As the trial judge observed in the oral hearing, Mr. Steele's offer was not a formal offer to settle under the requirement of Rule 20A.01 and did not engage the Rule. …

[127] The offerees are making the same argument as was advanced and rejected in *Steele*. Rule 20A should not be interpreted to permit, in an analysis of an offer to settle made pursuant to the Rule, evidence of other settlement discussions or negotiations that were not made under the Rule. Allowing such evidence to be

considered in the context of a Rule 20A analysis would erode the consistency and predictability that Rule 20A seeks to promote.

[128] If the consequences of Rule 20A are to be predictable and consistent, parties should know that a Rule 20A offer to settle will be judged against the outcome of the litigation only. It will not be measured or assessed in comparison to the terms of a "non-Rule 20A" proposal. Otherwise, the objective of Rule 20A, which is to promote settlement by permitting parties, with clarity, to assess the "strengths and weaknesses" of their position and consider "the economics of proceeding further" will be undermined (*Dawe*, at para. 38). Parties understand that offers can be made with or without engaging the costs consequences of Rule 20A. If a settlement proposal or offer is made without reference to Rule 20A, there should be no presumption that it will be considered in a Rule 20A context.

[129] A party facing costs consequences because it rejected a Rule 20A offer to settle should not, as a matter of course, be able to present evidence of other settlement negotiations and proposals to lessen or avoid the predictable consequences of the Rule. Such an attempt to bootstrap a "non-Rule 20A" settlement proposal to a Rule 20A offer, and have a Judge consider one or more "non-Rule 20A" offers when assessing costs consequences of a rejected Rule 20A offer to settle, obscures the clarity that is otherwise present in the Rule.

Conclusion on Issue 2

[130] As the November 2, 2020 settlement proposal was not an offer to settle made pursuant to Rule 20A, I would agree with the Judge's characterization that it was irrelevant in terms of the Judge's analysis of the February 9, 2022 offer to settle. I would dismiss this ground of appeal.

CONCLUSION AND DISPOSITION

[131] In conclusion, the appeal is allowed. The costs order of the Supreme Court arising from the Rule 20A Decision, that the offerees pay enhanced costs to the offerors, is set aside. The costs award in the original Decision, namely that there be no order as to costs and that all parties bear their own costs, is reinstated.

[132] As the appeal is allowed, the appellants (i.e. the offerees) are awarded costs of the appeal on Column III, pursuant to Rule 58 of the *Court of Appeal Rules*, NLR 38/16.

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F.P. O'Brien J.A.

I concur: _____

F.J. Knickle J.A.

I concur**:** _____

K.J. O'Brien J.A.