

Calderbank offers

The Hon Justice M J Beazley AO

Introduction

- 1 This paper was born out of a great deal of judicial frustration (not only mine) in dealing with applications for indemnity costs based on *Calderbank* offers and the seeming lack of understanding of the now substantial jurisprudence in New South Wales relating to those offers.

- 2 The paper is only about *Calderbank* offers. I do not propose to deal with the law that relates to offers made under Pt 20 r 20.26 of the Uniform Civil Procedure Rules 2005 (the UCPR), and the consequences of non-acceptance of such an offer: Pt 42, r 42.14. However, I would be remiss in a paper dealing with offers of compromise, if I did not draw your attention to the regime which is provided under the UCPR. Accordingly, there is annexed to this paper copies of both rules. I do not propose, at this stage, to say anything more about the costs rules. I will return to them later, when I wish to raise for your consideration the question of your professional obligations in advising your clients as to the making of offers of compromise.

- 3 Let me then return to *Calderbank* offers. The genesis of *Calderbank* offers is the English decision of *Calderbank v Calderbank*.¹ The issue in *Calderbank v Calderbank* was whether a party could in a 'without prejudice' communication in which an offer of settlement had been made, reserve that party's right to waive the confidential (that is, the 'without prejudice') nature of the offer in order to rely upon it for the purposes of making an application for indemnity costs. Cairns LJ held that that was permissible.

¹ [1975] 3 All ER 333; [1975] 3 WLR 586

- 4 In the years following the decision in *Calderbank*, there remained a question whether the procedure was available in jurisdictions other than matrimonial causes. This was finally resolved in *Computer Machinery Co Ltd v Drescher*.² Sir Robert Megarry VC examined the history of ‘without prejudice’ offers of compromise, noting that it had been settled law that if such letters did not result in a settlement, they could not be considered by the court on the question of costs unless the parties consented: see *Walker v Wilsher* (1889) 23 QBD 335; *Stotesbury v Turner* [1943] KB 370. This of course provided no incentive to a party to settle. The position could be overcome if a money claim was involved by the payment into court of the proposed settlement sum.
- 5 However, if relief other than a money sum was sought, for example, relief by way of a declaration, there was no means by which a party seeking to resolve a matter could do so in circumstances that would entitle that party to a costs benefit. Megarry VC commented that some such procedure was needed and endorsed the approach taken by Cairns LJ in *Calderbank* as providing an appropriate means of doing so. Megarry VC also considered that notwithstanding the authorities to the contrary, the procedure was one of general application and was not confined to matrimonial cases.
- 6 That part of the *Calderbank* jurisprudence is now undisputed and does not need to be revisited. Such offers are commonplace and there is never an argument about whether the ‘without prejudice’ nature of the offer precludes reliance upon it for the purposes of costs.
- 7 There are now numerous cases in the Court of Appeal in which the jurisprudence surrounding *Calderbank* offers has been developed. I propose to deal with those authorities, not in chronological order, but in a sequence that I consider appropriately brings to the forefront the matters

² [1983] 3 All ER 153; [1983] 1 WLR 1379

that you should have in mind when advising a client in respect of making an offer of compromise by this method.

- 8 Each of the principles that are discussed in this paper is based on the premise that, in the case of a plaintiff, the result of the court's adjudication is as favourable or more favourable to the offeror than the offer of compromise, or in the case of a defendant, the court's adjudication is less favourable to the plaintiff than the offer. A reference to a *Calderbank* offer will be used in that context.

Basic rule as to costs

- 9 The starting point in respect of the costs of proceedings is that costs follow the event: see UCPR r 42.1. That general rule is subject to the court determining that some other order should be made as to the whole or in any part of the costs: UCPR r 42.1. Costs ordered to be paid are assessed on the ordinary basis (replacing the language of "*party/party*" costs) unless the court otherwise orders: UCPR r 42.2. The making of a *Calderbank* offer is one circumstance in which the court might exercise its discretion under r 42.1.³

Public policy and purpose underlying *Calderbank* offers

- 10 There is both a public policy and a private interest in encouraging offers of compromise so as to settle legal proceedings (see *Computer Machinery Co Ltd v Drescher*,⁴ *Cutts v Head*,⁵ *South Eastern Sydney Area Health Service v King*.⁶ In *South Eastern Sydney Area Health Service v King* (a case dealing with an offer of compromise under the rules of court), Hunt AJA (Mason P and McColl JA agreeing) stated the purpose of the rules of court as being:

³ cf r 42.14, r 42.15

⁴ [1983] 3 All ER 153; [1983] 1 WLR 1379

⁵ [1984] 1 All ER 597; [1984] 2 WLR 349; [1984] Ch 290 at 311

“... to encourage the proper compromise of litigation, in the private interests of the litigants and in the public interest of the prompt and economical disposal of litigation.”⁷

- 11 See also *Macquarie Radio Network Pty Ltd v Arthur Dent (No 2)*.⁸ The same policy and purpose underlie offers of compromise made in the form of *Calderbank* offers: see *Leichhardt Municipal Council v Green*;⁹ *Elite Protective Personnel Pty Ltd v Salmon*.¹⁰ In *Leichhardt Municipal Council v Green*, Santow JA said:

“... the practice of *Calderbank* letters is allowed because it is thought to facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants.”¹¹

- 12 The nature of the private interest (which itself underpins the public policy) was articulated by Fox LJ in *Cutts v Head* in these terms:¹²

“If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.”

- 13 The public policy in encouraging settlement also finds statutory encouragement: first, in the *Evidence Act* 1995, s 131 and now in the *Civil Procedure Act* 2005, s 56.

“131 Exclusion of evidence of settlement negotiations

- (1) Evidence is not to be adduced of:

⁶ [2006] NSWCA 2

⁷ *Ibid* at [83]

⁸ [2007] NSWCA 339 per Beazley JA at [15] (Mason P and Basten JA agreeing)

⁹ [2004] NSWCA 341

¹⁰ [2007] NSWCA 322

¹¹ [2004] NSWCA 341 at [14]

¹² [1984] Ch 290 at 315; [1984] 1 All ER 597 at 612

- (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.

(2) Subsection (1) does not apply if:

...

- (h) the communication or document is relevant to determining liability for costs ...”** (Emphasis added)

14 Section 56 of the CPA relevantly provides:

“56(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the **just, quick and cheap** resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule ...” (Emphasis added)

15 Underlying the continuing acceptability of a *Calderbank* offer as a means of settling claims, is their flexibility.¹³

***Calderbank* offers and orders for indemnity costs**

16 The discussion which surrounds *Calderbank* offers is customarily couched in terms of indemnity costs. The party making the ‘successful’ *Calderbank* offer, whether plaintiff or defendant, usually makes an application for indemnity costs. However, the correct principle is that a *Calderbank* offer may entitle a party to a different costs order, other than that costs follow the event. To that extent, the order made will be advantageous costs order. In the case of a successful plaintiff who has also made a

Calderbank offer, the advantageous order will be an order for indemnity costs, usually from the date the offer was made. That is because the successful plaintiff will be entitled, in the usual case, to an order for costs in accordance with UCPR r 42.1.

- 17 However, in the case of a defendant, the advantageous costs order is not necessarily an order for indemnity costs. Where a defendant makes a *Calderbank* offer in terms which are more favourable than the court's order, an advantageous costs order in favour of the defendant is one to which it would not otherwise be entitled. The court might, therefore, order that the successful plaintiff pay the defendant's costs on the ordinary (party/party) basis. It might order that each party pay their own costs. The court might also order that the defendant have an order for costs on an indemnity basis: *Commonwealth of Australia v Gretton*.¹⁴ I will return to the question of whether an order for indemnity costs should be made later.
- 18 It is important to recognise that a *Calderbank* offer does not automatically result in the court making a favourable costs order: *SMEC Testing Services Pty Ltd v Campbelltown City Council*.¹⁵ Rather, the question that the court has to determine in deciding whether to do so is

“... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure ...”¹⁶

SMEC was upheld by the Court of Appeal in *Jones v Bradley (No 2)*.¹⁷

¹³ See *Leichhardt Municipal Council v Green* [2004] NSWCA 341; *The Anderson Group v Tynan Motors Pty Ltd (No 2)* [2006] NSWCA 120 at [10]; *Elite v Salmon* [2007] NSWCA 322 at [135]

¹⁴ [2008] NSWCA 117. See especially the discussion by Hodgson JA at [117] ff

¹⁵ [2000] NSWCA 323

¹⁶ *Ibid* per Giles JA at [37], referring to *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, where Lindgren J at 239 stated that the manner of the exercise of the discretion “depends on all relevant circumstances of the case”

¹⁷ [2003] NSWCA 258 at [8]-[9]. This principle has also been applied in the Supreme Court decisions of *Nobrega v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133 at [10]; *Cummings v Sands* [2001] NSWSC 706 at [4]; *Skalkos v Assaf (No 2)* [2002] NSWCA 236 at [13] to [16]; *Enron Australia Finance Pty Ltd (in liquidation) v Integral Energy Australia* [2002] NSWSC 819 at [10]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA

- 19 *SMEC v Campbelltown City Council* and *Jones v Bradley (No 2)* displaced an earlier line of authority to the effect that, prima facie, a successful *Calderbank* offer should result in an order for costs on an indemnity basis in favour of the offeror.¹⁸
- 20 It is not necessary to lead evidence explaining why the procedure provided for under the rules for the making of an offer of compromise was not availed of: see *Jones v Bradley* at [12].¹⁹

Fundamental principles governing *Calderbank* offers

- 21 In *Commonwealth v Gretton* Hodgson JA observed, at [121], that the underlying rule in relation to costs was one of fairness. His Honour said:

“In my opinion, underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant’s responsibility because the plaintiff was caused to incur costs by the defendant’s failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the

74 at [113] – [119]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [46]-[47]; *Russel v Edwards (No 2)* [2006] NSWCA 52 at [6]-[7].

See also the Federal Court decisions of *John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd* (1994) 52 FCR 201; *The Sanko Steamship Co Ltd v Sumitomo Australia Ltd* (unreported, Federal Court, Sheppard J, 7 February 1996); *Black v Tomislav Lipovac BHNF Maria Lipovac* (1998) 217 ALR 386 at 432; [1998] FCA 699; *Alpine Hardwoods (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* [2002] FCA 224; (2002) 190 ALR 121 at 126; *Natural Waters of Viti Limited v Dayals (Fiji) Artesian Waters Limited (No 2)* [2007] FCA 555 at [14]; *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* [2008] FCA 42 at [7]-[11].

¹⁸ *Multicon Engineering Pty Ltd v Federal Airports Corp* (1996) 138 ALR 425 at 451 held there was a “prima facie presumption of indemnity” in the event of a *Calderbank* offer not being accepted and the recipient of the offer not receiving a more favourable result than the offer (followed in *Naomi Marble & Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518, and *Brittain v Commonwealth of Australia* [2003] NSWSC 270).

¹⁹ Meagher, Beazley and Santow JJA stated that the weight of authority did not support the proposition that evidence needs to be led to explain the choice of a *Calderbank* offer, referring to *Messiter v Hutchinson* (1987) 10 NSWLR 525 at 528; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1998) 13 NSWLR 486; *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 114 ALR 568; *Wollong Pty Ltd v Shoalhaven City Council* (2002) 122 LGERA 331; and *Australian Competition and Consumer Commission v Black on White* [2002] FCA 1605.

plaintiff was not entitled: cf *Ohn v Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ. Departures from the general rule that costs follow the event are broadly based on a similar approach.”

- 22 In the same case, I expressed my agreement with Hodgson JA, at [85], in these terms:

“I agree with Hodgson JA that the exercise of the discretion must be based on fairness and that underlying that concept itself involves a consideration of the responsibility of parties in incurring the costs.”

- 23 The relevance of the party responsible for costs of the proceedings being incurred had earlier been considered by me in *Monie v Commonwealth of Australia (No 2)*.²⁰ That case is considered below on another point. However, on this question, in *Monie*, at [29], I said (Mason P agreeing):

“... there is both a private interest and a public policy in the encouragement of settlements. One of the reasons these proceedings have not been finalised and are now to be the subject of at least a sixth judicial determination, is because [the defendant] did not accede to an offer which has been exceeded by the Court’s determination of damages in respect of two of the appellants.”

- 24 There are now a multitude of cases where the Court has sought to work out the circumstances in which an “*offeree’s failure to accept the offer*” warrants departure from the ordinary rule that costs follow the event.²¹

- 25 The offeror bears the persuasive burden of satisfying the court to exercise the costs directions in the offeror’s favour. In *Evans Shire Council v Richardson* the Court used the language of onus, stating that there was **an onus on the claimant** to establish it was unreasonable for the offeree to refuse the offer.²² In this case, the opponent had not put on any submissions to the contrary. Nonetheless, the offeror still bore the ‘onus’

²⁰ [2008] NSWCA 15

²¹ *SMEC v Campbelltown City Council* per Giles JA at [37]; *Jones v Bradley (No 2)* [2000] NSWCA 323 per Meagher, Beazley and Santow JJA at [8]

²² [2006] NSWCA 61 per Giles, Ipp and Tobias JJA at [26]

of establishing that it was unreasonable for the offeree not to accept the offer.

26 In order to discharge that onus, a party may be required to disclose to the Court the quantum of any costs order that it has in its favour and which is not included in the *Calderbank* offer.²³

- **genuine compromise**

27 An offer of compromise must be a “*genuine offer of compromise*”²⁴ and the offeree must be provided with an appropriate opportunity to consider and deal with the offer.²⁵

28 Whether a particular offer is a genuine offer of compromise involves an evaluative judgement upon which judicial minds might differ. The Court has held that a relatively small disproportion between the offer and the award may represent a genuine offer of compromise.

29 In *Maitland Hospital v Fisher (No 2)*, the Court of Appeal held that a differential of 2.5 per cent between the appellant’s offer and the judgment sum (a judgment of \$206,090 compared to an offer of \$200,000) was a real, not a trivial or contemptuous offer.²⁶ In coming to that decision, the Court considered it relevant that the appellant was a kitchen maid, to whom the sum of \$6,090 would have been a significant amount.

²³ *Commonwealth v Gretton* at [99]

²⁴ See *Leichhardt Municipal Council v Green*, at [21]-[24], [36] per Santow JA (Stein JA agreeing) and *Herning v GWS Machinery Pty Ltd (No 2)* [2005] NSWCA 375 at [4]-[5] per Handley, Beazley and Basten JJA

²⁵ See *Elite Protective Personnel v Salmon* [2007] NSWCA at [99], referring to *Donnelly v Edelsten* (1994) 49 FCR 384 at 396 (Full Court of the Federal Court, Neaves, Ryan and Lee JJ)

²⁶ (1992) 27 NSWLR 721

- 30 In *Forbes Services Memorial Club Ltd v Hodge* a differential of \$129.24 (judgment of \$30,129.24 compared to an offer of \$30,000) was held to constitute a genuine offer of compromise.²⁷
- 31 In *Manly Council v Byrne (No 2)*, the respondent made an offer of compromise on the appeal in which she sought payment of the damages award she had received a trial, but waived interest on that sum.²⁸ The waiver of interest meant forgoing interest for 79 days at 9 per cent, which amounted to approximately \$8,000. This was held to be a genuine offer of compromise. In that case, the Court reaffirmed that the means of the plaintiff was a relevant matter to take into account in deciding whether the compromise was a real one.²⁹ Likewise, the prospect of success on the appeal was also a relevant consideration.
- 32 There are cases which have held that a “walk-away” offer, for example, that the party withdraw from the appeal and each party pay their own costs, did not constitute a genuine compromise: *Townsend v Townsend (No 2)*,³⁰ *Herning v GWS Machinery Pty Ltd (No 2)*.³¹
- 33 However, it all depends upon the circumstances. *Leichhardt Municipal Council v Green* concluded that no error of legal principle exists in holding that a “walk-away” offer can, in a particular case, be a “genuine offer of compromise”.³² It is the task of the court to consider “whether the particular offer in the circumstances represented a genuine attempt to

²⁷ (Unreported, NSWCA, Kirby P, Priestly and Cole JJA, 8 March 1995). See Kirby P at [14], who stated, “the amount of a ‘compromise’ that will be relevant to a particular case will depend upon the prospects of a party’s succeeding or failing in the appeal ... it would appear that the principle contemplates that so long as some actual offer of compromise, short of the full amount payable under the order under appeal [is made], the rule will apply”.

²⁸ [2004] NSWCA 227

²⁹ *Ibid* at [17]-[22]

³⁰ [2001] NSWCA 145

³¹ [2005] NSWCA 375

³² [2004] NSWCA 341 at [36], applying *GIO General Ltd v ABB Installation and Service Pty Ltd* [2000] NSWCA 118 and rejecting the non-discretionary approach of Dunford J in *McKerlie v State of New South Wales (No.2)* [2000] NSWSC 1159.

reach a negotiated settlement, rather than merely to trigger any costs sanctions”.³³

- **rejection of offer must be unreasonable**

34 Factors that are relevant to the question whether a rejection is unreasonable include:

- Whether there was sufficient time to consider the offer;
- Whether the offeree had adequate information to enable it to consider the offer; and
- Whether any conditions are attached and if so, whether those conditions are reasonable.

35 The question whether the rejection of an offer was unreasonable is usually determined without adducing further evidence. Indeed, in *Elite v Salmon*, Basten JA stated at [147] that the question must be determined on a summary basis. His Honour said:

“Greater sympathy may be accorded a defendant who receives an offer early in proceedings where there has been no reasonable opportunity for it to assess its questions of liability or its likely exposure in damages. Such matters must be assessed on a case by case basis. Usually litigation will not be the first that the defendant hears of the claim. However, a defendant which receives an offer of settlement in circumstances where it reasonably requires more time to consider its position would no doubt be advised to respond to that effect and, if necessary, make a counter-offer in due course.”³⁴

36 His Honour’s comments need to be understood in context. Take the example where the offer of compromise is made in circumstances where the party making the offer has not obtained or has obtained but not served all of the party’s expert evidence, medical or otherwise. If such evidence contains material that would have been relevant to the assessment of the

³³ [2004] NSWCA 341 at [39] per Santow JA.

offer and it is not served until after the offer expires, the offeree may be able to establish that it was not unreasonable not to have accepted the offer. In that case, some material will have to be before the court to establish those circumstances. That is usually done by the tender of the documents, with the covering letter that establishes the date of service. It may be done by an agreed statement from the Bar table.

37 Such a situation arose in *South Eastern Sydney Area Health Service v King*. In that case, Hunt AJA (Mason P and McColl JA agreeing), stated:

“...However, the fact that the plaintiff’s case had changed significantly between the date of the plaintiff’s offer and the trial in which the judgment obtained is higher than the amount of the offer does provide a sufficient basis for an order denying the plaintiff’s entitlement to indemnity costs: *Maitland Hospital v Fisher [No 2]* (at 725). The very nature of the situation itself demonstrates that it would be unfair to a defendant to make an order for indemnity costs when the evidence at the trial is different from that known to the defendant at the time of the offer. Whether or not this is an “exceptional” situation does not matter.”³⁵

38 In *Vale v Eggins (No 2)*, I said, in relation to a rules offer:

“... the respondent, at the time that he made the offer of compromise, had not served all the medical reports which he already had in his possession. In those circumstances, when the respondent already had material in his possession which he did not serve, and which was relevant to an assessment of the offer made, he ought not to be entitled to the favourable costs provisions under the Rules. It is not an answer, as submitted by the respondent, that the appellant could have himself made an offer of compromise once all the evidence was in his possession.”³⁶

39 If there are developments in a case after the offer is made, the rejection of an offer may be found to be reasonable: see also *Rolls Royce Industrial Power (Pacific) Ltd v James Hardie and Co Pty Ltd*.³⁷

³⁴ [2007] NSWCA 322 at [147]

³⁵ [2006] NSWCA 2 at [85]

³⁶ [2007] NSWCA 12 at [22]

³⁷ [2001] NSWCA 461; (2001) 53 NSWLR 626 at [95]-[99]. Here, a cross claim was made after the relevant offer. Stein JA (with whom Davies AJA agreed), stated at [95], “The cross-claim produced a

- 40 In *Blagojevch v Australian Industrial Relations Commission*, the Court found that rejection of a settlement offer, after the offeree had been warned of a challenge to the truthfulness of his evidence (and the evidence was subsequently found to be false), may be held to be unreasonable.³⁸
- 41 These cases demonstrate that the ‘prospects of success’ is a relevant consideration to the costs determination.
- 42 Where the offer is subject to a non-monetary condition, such as requirements for an apology or release, proper exercise of the discretion will involve the court considering the reasonableness of the condition, and whether or not the judgment result was, in substance, more favourable than the offer: *Magenta Nominees Pty Ltd v Richard Ellis (WA) Pty Ltd*,³⁹ *Timms v Clift*,⁴⁰ *Assaf v Skalkos*,⁴¹ and *Skalkos v Assaf (No 2)*.⁴² The rejection of an offer that is conditional upon the release of unrelated proceedings may be considered reasonable: *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd*.⁴³
- 43 In *Commonwealth of Australia v Gretton* the Court was concerned with a *Calderbank* offer made by a defendant. The trial judge had held that notwithstanding the jury verdict in favour of the plaintiff was substantially lower than the Commonwealth’s offer, it was not unreasonable for the plaintiff to have rejected the offer. Accordingly, the Court rejected the

change of circumstance which, if in existence as at [time that the relevant offer was made], would have been likely to have produced a different complexion to the litigation so far as [the offeree] was concerned.”³⁸ (2000) 98 FCR 45. Marshall and Lehane JJ (with whom Moore J substantially agreed) stated at [35], “the more confident an employer is of its ability to defeat a claim for compensation on the basis of evidence which it knows to be false, the more reasonable its conduct in rejecting an offer of settlement”. This was not a *Calderbank* offer, but the same principle applies.

³⁹ (FCA, Full Court, WAG66/94, 29 August 1995, unreported, BC9506519). Here the offer included a requirement for release and an undertaking as to confidentiality. The offer was found in all the circumstances to be reasonable and an order for special costs orders made.

⁴⁰ [1998] 2 Qd R 100

⁴¹ [2000] NSWSC 935 at [82]

⁴² [2002] NSWCA 236

Commonwealth's application for indemnity costs or another advantageous costs order.

- 44 The Commonwealth appealed, seeking an order for indemnity costs, or alternatively, costs on the ordinary basis. The Commonwealth's appeal was disallowed. Relevantly, in respect of the question whether the rejection of the offer was unreasonable, Hodgson JA stated:

"... where the question is whether, by reason of refusal of a *Calderbank* offer, a party should have to pay costs on an indemnity basis rather than party and party basis, it is generally necessary that the party seeking assessment on an indemnity basis satisfy the court that the other party was acting unreasonably in refusing the offer."⁴⁴

- 45 His Honour referred to *Rosniak v GIO*, where Mason P had stated in relation to the requirement of unreasonableness for indemnity costs, in contra-distinction to party/party costs:

"Later cases have emphasised that the discretion to depart from the usual 'party and party' basis for costs is not confined to the situation of what Gummow J described as the 'ethically or morally delinquent party' ... Nevertheless the court requires some evidence of unreasonable conduct, albeit that it need not rise as high as vexation. This is because party and party costs remain the norm, although it is common knowledge that they provide an inadequate indemnity."⁴⁵

- 46 Hodgson JA had noted earlier that cases such as *Hillier v Sheather* and *Leichhardt Municipal Council v Green* were decided at a time when the rules relating to a defendant's offer of compromise were different from the current rules.⁴⁶ Previously, under the Supreme Court Rules and the District Court Rules, a defendant who had made a successful offer was only entitled to costs on a party/party basis. In *Leichhardt Council v Green* the defendant had been successful in the action and was thus entitled to

⁴³ [2006] NSWSC 583 at [73]-[74]

⁴⁴ *Commonwealth v Gretton* at [117]

⁴⁵ (1997) 41 NSWLR 608 at 616

⁴⁶ *Commonwealth v Gretton* at [113]

party/party costs, but was seeking indemnity costs on the basis of a *Calderbank* offer. As Hodgson JA points out, the advantageous costs order in such a case had to be an order for indemnity costs.⁴⁷

Usual form of a *Calderbank* offer

- 47 What then constitutes a *Calderbank* offer, and what are the circumstances in which it may be, or is best, made?
- 48 The usual form of a *Calderbank* offer derives directly from *Calderbank v Calderbank* itself: namely, a ‘without prejudice’ offer in a money sum plus costs, with an exception that the offer may be used in relation to costs. However, the use of a particular form of words is not necessary.⁴⁸ A *Calderbank* offer does not have to be in any particular form or use any particular formula. As I said in *Elite v Salmon*, the Court should consider such a *Calderbank* offer:

“... according to its terms and to determine whether, in all the circumstances, the Court should exercise its discretion to award indemnity costs.”⁴⁹

Types of offers that may be made

- offers inclusive of costs: *Elite v Salmon*

- 49 The question whether an offer made inclusive of costs could be properly considered as a *Calderbank* offer was decided recently in *Elite v Salmon*. By majority, it was decided that such an offer was a *Calderbank* offer and could be taken into account in determining the appropriate costs order. However, as I said, “*there may be difficulties in the path of a party who*

⁴⁷ *Commonwealth v Gretton* at [115]

⁴⁸ *Elite Protective Personnel v Salmon* [2007] NSWCA 322 per Basten JA at [137]. See also *Trustee for the Salvation Army (NSW) Property Trust v Becker (No 2)* [2007] NSWCA 194 at [25]-[29] per Ipp JA (Mason P and Basten JA agreeing)

⁴⁹ *Ibid* at [7]

seeks indemnity costs when the application is based upon an offer inclusive of costs".⁵⁰

- 50 Basten JA also held that an offer inclusive of costs could constitute a *Calderbank* offer. His Honour also recognised that there may be difficulties in a party making such an offer. I refer to his Honour's analysis of these problems below. Support for the majority view is to be found in *Trustee for the Salvation Army v Becker (No 2)*.⁵¹
- 51 McColl JA, in a strongly-argued dissent on this point, disagreed that an offer inclusive of costs is a 'valid' *Calderbank* offer.⁵²
- 52 There are two underlying principles which support the principle that an offer inclusive of costs may be receivable as a *Calderbank* offer. The first principle recognises the degree of flexibility which the Court of Appeal has said attaches to *Calderbank* offers. Secondly, as I stated in *Elite v Salmon*, an award of indemnity costs based on a *Calderbank* offer involves the exercise of a discretion. A general or overarching 'rule' or 'principle' that only offers exclusive of costs could ground a favourable exercise of the court's discretion would operate as a fetter on that discretion and would introduce a rigidity to the making of so called *Calderbank* offers which has no basis in principle.⁵³
- 53 The danger in making an offer inclusive of costs is that the court may not be able to determine whether or not it was unreasonable for the offeree to

⁵⁰ *Ibid* at [7]

⁵¹ *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 194

⁵² McColl JA accorded the *Smallacombe* line of authority greater weight, the premise of which is that an offeree, "cannot be said to have acted unreasonably in not accepting an offer expressed to be inclusive of costs, because of the offeree does not have an adequate opportunity to consider the offer and because of the difficulties posed when a court comes to consider the reasonableness of the offeree's conduct in rejecting/not accepting it. In other words such an offer presents practical difficulties" at [111]. These include "party and party costs to date on taxation or assessment" at [114]. However, her Honour found that *Smallacombe* was not a "definitive rule" that an "all-in" *Calderbank* offer can never be considered on the question of indemnity costs, but affords guidance as to the exercise of discretion and informs the question of "reasonableness" at [115].

⁵³ [2007] NSWCA 322 at [5]

accept the offer. More particularly, it may be difficult for the court to assess whether the offer was equal to or better than the result received on the verdict.

- 54 If a plaintiff made an offer inclusive of costs and subsequently received an award of damages in excess of that amount then, on any view, the plaintiff had bettered the offer and should have that taken into account in relation to the question of costs. The matter is not quite so straightforward when the award of damages is less than the offer. In that case, it may not be an easy matter to determine, without an assessment of those costs, whether the award for the plaintiff is at least as favourable or more favourable than the offer.⁵⁴
- 55 The real disadvantage of a costs-inclusive offer occurs when a defendant makes such an offer, but the matter proceeds to judgment. Basten JA explained this in *Elite v Salmon*:

“Where the judgment is equal to or above the inclusive figure, the defendant will have failed to better its own offer. However, if the judgment is below the offer there may be uncertainty because the offer included an unquantified element for costs incurred up to the time when it lapsed or was rejected. No doubt the figure for costs incurred to that time by the plaintiff could be resolved by some form of assessment, but if the calculation of the damages component is not clearly seen to provide a figure above the judgment, then the interests of justice will usually not be served by incurring further expense in assessing the costs element of an offer and the plaintiff would be entitled to his or her costs ...”⁵⁵

- **non-conforming rule offers**

- 56 An attempt to make an offer of compromise under the UCPR which fails for non-compliance may be relied upon as a *Calderbank* offer. Whether it can be considered as a *Calderbank* offer will “*depend upon the intention of the offeror as revealed by the terms of the offer*”. As Ipp JA (Mason P and

⁵⁴ Ibid per Basten JA at [141]

⁵⁵ Ibid per Basten JA at [144]

McColl JA agreeing) said in *Trustee for the Salvation Army v Becker (No 2)*:

“The offer may disclose an intention that it should take effect only if it complies with the Uniform Civil Procedure Rules. On the other hand, it may disclose a general intent to make an offer, irrespective of whether it takes effect under the Uniform Civil Procedure Rules or not.”⁵⁶

57 For myself, I would caution the exercise of care in assuming that an offer that fails under the rules will be treated by the courts as constituting a *Calderbank* offer. The rules themselves state that the offer must state that it is an offer made in accordance with the rules: Pt 20 r 26.3(a). If there is non-compliance with the rules there will be an argument as to whether it is a rules offer. If it purports to be an offer made under the rules, but for some reason fails as a rules offer, there may be a real question as to whether it will be accepted as disclosing a general intention to make an offer of compromise. The short message is that it is better to ensure that if you make a rules offer, the offer conforms in all respects. If you do not intend to make a rules offer, that should also be apparent on the face of the written offer.

- **offer of compromise limited to liability**

58 An offer may be made limited to liability: *Vale v Eggins (No 2)*⁵⁷.

- **offers may be made in the alternative**

59 In *Vale v Eggins (No 2)*, the plaintiff in face made two offers. One was in the terms just stated. The other was of a money sum plus costs.

- **offers taking into account contributory negligence**

⁵⁶ *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 194 at [27]

60 In *Coombes v Roads and Traffic Authority (No 2)* the plaintiff's offer was for there to be a verdict for the plaintiff and damages to be assessed subject to a 25 per cent reduction for contributory negligence.⁵⁸ The result (on appeal) was that there was a verdict for the plaintiff and no reduction for contributory negligence. Costs on a solicitor/client basis were ordered in the plaintiff's favour (an award of solicitor/client was made as the offer was made under the rules).

61 In *Vale v Eggins (No 2)*, the offer was that the defendant was to be held 70 per cent liable for the accident and the plaintiff 30 per cent. (Unfortunately for the plaintiff, a finding of 75 per cent contributory negligence was made!)

- **a combined offer made on behalf of a number of plaintiffs**

62 In *Monie v Commonwealth of Australia (No 2)*, an offer of compromise was made in terms:

- “1. Verdict for the Plaintiffs in the sum of \$250,000 plus costs to be agreed or assessed.
2. Such costs to include the costs of the retrial, the first trial and the extension application which Master Malpass as he then was, ordered should be costs in the trial.

This offer is made pursuant to the principles of ***Calderbank v Calderbank*** and is open to acceptance up to and until 10:00 am on Monday 6th February 2006.”

63 On the appeal, the Court entered verdicts for two of three plaintiffs and ordered that there be a retrial of the third plaintiff's claim. In the result in the Court of Appeal, the total judgment sum for the two plaintiffs who had been favoured with a verdict was in excess of the offer made for the three. The defendant (the Commonwealth) argued that a combined mode of offer on behalf of all plaintiffs could not properly be considered a *Calderbank*

⁵⁷ [2007] NSWCA 12

offer. The Court rejected that argument. In summary, the court's reasoning was that the effect of the offer was to propose to the Commonwealth, in circumstances where three claims were being prosecuted together, that they had a combined worth of \$250,000. An offer of compromise in those terms was also a statement to the Commonwealth that the Commonwealth did not have to concern itself with how the plaintiffs viewed their individual claims, or how the plaintiffs would distribute the moneys amongst themselves.⁵⁹

- **offer foregoing interest**

64 An offer of compromise which involves a waiver of interest that would otherwise be payable on the judgment sum may constitute an appropriate offer and result in an order for indemnity costs: *Manly Council v Byrne (No 2)*.⁶⁰

- **offer including terms in addition to a money sum**

65 An offer of compromise does not only have to be in respect of a money sum, or, alternatively, it may include terms in addition to a money sum: Again this proposition was the reason *Calderbank* offers received approval in England in the cases to which I have referred. However where the offer is not of a money sum, or there are other terms involved, a question may arise as to whether the offeror has received a more favourable verdict.

66 This question arose in *Sabah Yazgi v Permanent Custodians Limited (No 2)* (a rules case).⁶¹ The offer in that case sought: judgment for \$50,000 against Ms Yazgi; a declaration that that judgment was secured against her interest in the property; orders for the appointment of a trustee under the *Conveyancing Act* s 66; and an order for the distribution of the

⁵⁸ [2007] NSWCA 70

⁵⁹ Ibid per Beazley JA (with whom Mason P agreed) at [20]-[22]

⁶⁰ [2004] NSWCA 227

proceeds of sale. Permanent Custodian's claim for possession failed and the Court ordered that Ms Yazgi's interest in the property by mortgage was nil. However, it also noted an offer that had been made by Ms Yazgi to repay \$54,000.⁶²

67 Although the amount of \$50,000 that Permanent Custodians was prepared to accept by way of a judgment against Ms Yazgi was less than the sum of \$54,562.15 plus interest that she was prepared to pay by way of agreement (and without any legal obligation to do so), an agreement to pay an amount is both conceptually and juridically different from a judgment in a lesser sum. Likewise, Permanent Custodians failure to obtain an order for possession meant there was no legal barrier to Ms Yazgi staying in the property until it was sold. The right to possession is a significant right of monetary value. Further, under the Court's orders there was no monetary judgment sum against her. This was also of practical importance, as Ms Yazgi's personal and real property could be made the subject of enforcement proceedings and she was not thereby liable to bankruptcy. Finally, there was no sum secured against her interest in the property. In short, notwithstanding that the money component of the offer was less than Ms Yazgi was prepared to offer, the offer was so conceptually different that the appellant could not establish that its offer was less than it had been awarded under the Court order.

- **Terms not be disclosed**

68 In *Commonwealth v Gretton* the Commonwealth's offer of compromise included a clause that the terms of the offer not be disclosed. With strictly limited exceptions, such a clause is not an order that a court may make. Nonetheless, having regard to the flexible nature of *Calderbank* offers, the Court held that the inclusion of such a clause did not disentitle a party to the favourable exercise of the Court's discretion. However, a non-

⁶¹ [2007] NSWCA 306

disclosure clause may be relevant to the exercise of the court's discretion and the offeror bears the onus of satisfying the court that such a clause did not have any relevant effect on the offeree's acceptance of the offer or otherwise bore upon the exercise of the discretion. The Commonwealth had not discharged that onus.

Pre-trial *Calderbank* offers and appeals

- 69 One principle that must be borne in mind is that an offer made pre-trial does not necessarily continue to operate for the purposes of an appeal. The Court of Appeal almost invariably refuses to exercise its discretion in favour of a party who has made an offer of compromise pre-trial but who has not renewed that offer or made a new offer prior to the appeal. If there is an appeal, a separate offer of compromise should be made: see *Baresic v Slingshot Holdings Pty Ltd (No 2)*.⁶³

***Calderbank* offers v rules offers**

- 70 When and why would you advise your client to make a *Calderbank* offer rather than an offer under the rules? Let me deal with the “*why*” part of the question first. To answer that question, it is necessary to have regard to the provisions of the rules. In the first place, it should be recognised that offers that may be made under the rules have become increasingly flexible. Thus:
- a) an offer may be made relating to the whole or part of a claim: Pt 20 r 20.26(1);
 - b) an offer need not be restricted to a money sum: Pt 20 r 20.26(8);
 - c) more than one offer may be made under the rules in relation to the same claim: Pt 20, r 20.26(10);

⁶² Ibid at [6]–[10].

⁶³ [2005] NSWCA 160

- d) offers made under the rules may be made at any time, including during the course of the trial: Pt 20 r 20.26(7); Pt 42 rr 42.14 and 42.15.

71 However there are restrictions:

- a) an offer **must** be made exclusive of costs, unless the offer is for a verdict for the defendant and each party to pay their own costs: Pt 20 r 26.2;
- b) an offer may not be withdrawn during the period of acceptance, without the leave of the court: Pt 20 r 26 .11;
- c) the offer must state that it is an offer made in accordance with the rules: Pt 20 r 26.3(a);
- d) an offer that purports to modify or restrict the operation of the rules is not an offer for the purposes of Pt 20: Pt 20 r 26.12.

72 Notwithstanding these restrictions, there is a singular advantage in making an offer under the rules as opposed to the making of a *Calderbank* offer. If a successful offer is made under the rules, the consequences which follow are virtually automatic. A successful offer made by a plaintiff (a successful offer being one that where the judgment on the claim is no less favourable to the plaintiff than the terms of the offer) results in an order that the plaintiff is to have costs assessed on an ordinary basis from the day after the date on which the offer was made and thereafter on an indemnity basis: Pt 42 r 42.14.

73 The rule is subject to the court making a different order. A different order will only be made in “*exceptional circumstances*”⁶⁴. The effect of Pt 42 r 42.14 is to place **an onus on the offeree** to establish exceptional circumstances.

⁶⁴ *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2; *Fowdl v Fowdl* (Court of Appeal, 4 November 1993 unreported, Kirby P) at 12, 16; *Hillier v Sheather* (1995) 36 NSWLR 414 at 422–423; *Morgan v Johnson* (1998) 44 NSWLR 578 at 581–582.

- 74 This is to be contrasted with the position under a *Calderbank* offer. A *Calderbank* offer constitutes no more than a discretionary consideration for the court in determining the appropriate costs order. It is often a powerful consideration. However, the fact that the offeror bears a persuasive burden of having the court exercise the costs discretion in the offeror's favour, is an important matter of which both legal representatives and clients ought to be aware.
- 75 The second question is "*when*" would you make a *Calderbank* offer rather than a rules offer? Having regard to the flexibility now encompassed in rules offers, there may not be many circumstances when a *Calderbank* offer will provide you with flexibility that you would not otherwise obtain under a rules offer. Making an offer inclusive of costs is the obvious circumstance. There may be others, but they do not readily come to mind. That then leads me to my final question.
- 76 Why would you **not** make a rules offer? That question has effectively been answered in what I have already said. In summary:
- an offer made under the rules will generally have the same flexibility as is available under a *Calderbank* offer;
 - it will have virtually automatic, favourable costs consequences for your client;
 - your client will have no persuasive burden (or onus) in having the court make a favourable costs order;
 - the burden is on the offeree to establish 'exceptional circumstances';
 - and finally there is less likelihood of a second 'mini hearing' and therefore less likelihood of incurring the additional costs that inevitably are involved in a second hearing, regardless of whether that 'mini hearing' is in court or by way of oral submissions.

Conclusion

- 77 What I have just said is really the conclusion in this matter. Offers of compromise are important litigation tools. They need to be used knowledgeably and in a timely way. You have an obligation to understand the law, both statutory and caselaw, that relate to both types of offer. The purpose of this paper is to aid your understanding as to what is involved in making a *Calderbank* offer and to caution you to always think first about whether your client is better advised to make an offer under the Rules.

Uniform Civil Procedure Rules 2005

“20.26 Making of offer

- (1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
- (2) An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.
- (3) A notice of offer:
 - (a) must bear a statement to the effect that the offer is made in accordance with these rules, and
 - (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.
- (4) Despite subrule (1), a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff’s claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer.
- (5) If a plaintiff makes an offer, no order may be made in favour of the defendant on the ground that the plaintiff has not supplied particulars or documents, or has not supplied sufficient particulars or documents, unless:
 - (a) the defendant has informed the plaintiff in writing of that ground within 14 days after receiving the offer, or
 - (b) the court orders otherwise.
- (6) An offer may be expressed to be limited as to the time it is open for acceptance.
- (7) The following provisions apply if an offer is limited as to the time it is open for acceptance:
 - (a) the closing date for acceptance of the offer must not be less than 28 days after the date on which the offer is made, in the case of an offer made 2 months or more before the date set down for commencement of the trial,

- (b) the offer must be left open for such time as is reasonable in the circumstances, in the case of an offer made less than 2 months before the date set down for commencement of the trial.
- (8) Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.
- (9) An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.
- (10) A party may make more than one offer in relation to the same claim.
- (11) Unless the court orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.
- (12) A notice of offer that purports to exclude, modify or restrict the operation of rule 42.14 or 42.15 is of no effect for the purposes of this Division.”

“42.14 Where offer not accepted and judgment no less favourable to plaintiff

- (1) This rule applies if the offer concerned is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim concerned no less favourable to the plaintiff than the terms of the offer.
- (2) Unless the court orders otherwise, the plaintiff is entitled to an order against the defendant for the plaintiff’s costs in respect of the claim:
 - (a) assessed on the ordinary basis up to the time from which those costs are to be assessed on an indemnity basis under paragraph (b), and
 - (b) assessed on an indemnity basis:
 - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
 - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.”