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CALDERBANK OFFERS OF COMPROMISE

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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.¹

I INTRODUCTION

It would seem even on casual observance that provision for offers of compromise under the *Uniform Civil Procedure Rules 2005* (NSW)² has diminished little the indelible professional affection for *Calderbank* offers. Yet pervasive as *Calderbank* offers remain in the practice of litigious compromise, it is of much lament that judicial guidance on the subject has proved at times to be perfunctory and somewhat fragmented in formulation.³

Calderbank offers of course derive their name from the English Court of Appeal decision in *Calderbank v Calderbank*⁴ which approved of the practice of making offers of compromise expressed to be 'without prejudice' but reserving a right to refer to the

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¹ Lord Justice Fox speaking of the utility of *Calderbank* offers in litigious compromise in *Cutts v Head* [1984] Ch 290 at 315

² Rules 20.26 – 20.31 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') provide, *inter alia*, for the making, acceptance, withdrawal and disclosure of offers of compromise. Rules 42.13 – 42.17 of the UCPR compliment the earlier offer of compromise provisions and ascribe the cost consequences which follow from the acceptance or non-acceptance of an offer of compromise.

³ Or as rightly observed another commentator, *Calderbank* offers continue to be 'shrouded in mystery': see Andrew R, 'The Five Myths of Calderbank Offers' (2000) 74(7) *Law Institute Journal* 63.

⁴ The eponymic English Court of Appeal decision *Calderbank v Calderbank* is reported [1976] Fam 93; [1975] 3 WLR 586; [1975] 3 All ER 333.

document on the question of costs.⁵ Originally said to be confined to matrimonial proceedings where no payment into court procedure was available,⁶ it was not until *Cutts v Head*⁷ that the practice was formally approved for all manner of cases—but only where the option of making a payment into court was inappropriate.⁸

Calderbank offers have been an accepted practice in Australia for some time now⁹ and despite the provision for formal offers of compromise under the rules, they continue to offer a flexible means of pursuing settlement in circumstances where a formal offer is undesirable or unavailable. However, much uncertainty still surrounds the use of *Calderbank* offers. Accordingly, the avowed object of this paper is not to state the whole of the law on the subject, but to offer some discourse on the practice of *Calderbank* offers which may be of benefit to legal practitioners. The body of this paper is divided into two parts: part II addresses the appropriate form of a *Calderbank* offer, while part III considers the principles which guide the exercise of the court's discretion as to costs in relation to *Calderbank* offers.

II THE FORM OF A CALDERBANK OFFER

The defining feature of a *Calderbank* offer is its form. And while an offer not in the precise form first suggested by Cairns LJ in *Calderbank v Calderbank* will not render it inadmissible or ineffective on an argument on costs,¹⁰ a relaxation in the rigours of formality does not invite wholesale departure from the *Calderbank* form. A *Calderbank* offer should at least:

1. be marked 'without prejudice save as to costs';

⁵ The form of offer suggested in *Calderbank v Calderbank* was subsequently approved by the English Court of Appeal in *McDonnell v McDonnell* [1977] 1 WLR 34.

⁶ In fact, the making offers 'without prejudice save as to costs' was a practice rife in all manner of cases after the decision in *Calderbank v Calderbank*—and indeed, also before the decision itself, as the Lord Justice Cairns observed in *Calderbank v Calderbank* [1976] Fam 93 at 106. See also Foskett D, *The Law and Practice of Compromise*, Sweet & Maxwell, London, 2005 at 288-289.

⁷ [1984] Ch 290.

⁸ The English Court of Appeal has now made several unsuccessful attempts at providing judicial guidance on when payment into court will be considered inappropriate and resort may be had to *Calderbank* offers: see *Amber v Stacey* [2001] 1 WLR 1225; *The Maersk Colombo* [2001] 2 Lloyd's Rep 275; *Crouch v King's Healthcare NHS Trust* [2005] 1 WLR 2015; *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] 1 WLR 3595. The necessity for such a qualification on the use of *Calderbank* offers has however been rejected in Australia: see *Messiter v Hutchinson* (1987) 10 NSWLR 525 at 528 per Rogers J.; *Dobb v Hackett* (1993) 10 WAR 532; *Pirrotta v Citibank Ltd* (1998) 72 SASR 259.

⁹ Indeed, throughout the common law world: see *Health Waikato Limited v Van Der Sluis* (1997) 10 PRNZ 514 (New Zealand); *O'Neill v. Ryanair (No. 3)* [1992] 1 IR 166 (Ireland); *Mosher v Reimer* (2004) ABQB 496 (Alberta, Canada);

¹⁰ *Jones v Bradley (No 2)* [2003] NSWCA 258 at [15]; *Brymount Pty Limited t/as Watson Toyota v Cummins (No 2)* [2005] NSWCA 69 at [15].

2. be clear, precise and certain in its terms;
3. state clearly the time in which the offer must be accepted;
4. make reference to the offer being one in accordance with the principles enunciated in the decision of *Calderbank v Calderbank*;
5. make some provision for costs separate from the principle offer;
6. state clearly that the offeror reserves its right to tender the offer on an application for costs if the offer is rejected;
7. state the costs advantage i.e. indemnity costs or party/party costs that the offeror has in mind to achieve.

The above considerations can certainly not be taken to be exhaustive. Whilst most will be familiar to legal practitioners, several merit further discussion.

A The Overarching Requirements of Clarity, Precision and Certainty

If the authorities which continue to breathe life into *Calderbank* offers lend themselves to only one unyielding proposition, it must be that an offer of compromise, as matter of principle, must be 'couched in such terms as to enable the offeree to make a carefully considered comparison between the offer made and the ultimate relief it is seeking in all respects.'¹¹ As an ancillary proposition of intrinsically equal importance, the terms of an offer must be 'clear, precise and certain for the purposes of the common law principles governing the construction of *Calderbank* offers of settlement'¹²—and moreover, as Winneke P observed in *Grabavac v Hart*,¹³ 'leave the offeree in no reasonable doubt as to the nature and extent of what is being offered.'

The sufficiency of the terms of a *Calderbank* offer is to be ascertained on a careful construction of the letter itself. To that end, a number of general considerations relative to the terms of an offer were suggested by Tadgell JA in *Grabavac*:

It would ordinarily, I should think, be pre-eminently necessary to consider whether the terms of the offer were unambiguously clear. It would be necessary also to consider whether the attention of the offeree had also been fairly drawn to the purpose for which, and the intention with which,

¹¹ *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)* [2000] FCA 602 at [24] per Goldberg J.

¹² *Perry v Comcare* (2006) 226 ALR 734 at 738 per Greenwood J. See also *John Goss Projects Pty Ltd v Theiss Watkins White Constructions Ltd (in liq)* [1995] 2 Qd R 591 at 595 per Williams J; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486 at 487 per Hodgson J.

¹³ [1997] 1 VR 154 at 155.

the offer had been made. In particular, it would be relevant to consider whether the offer was reasonably to be understood as one made simply for the purpose of inducing settlement ... or one whose purpose was also to secure a costs advantage ... and if the latter, what ultimate costs advantage the offeror had in mind to achieve.¹⁴

One would further venture the need for completeness of the offer contained in the *Calderbank* letter—*acceptance* of the offer by the offeree must be capable of supporting the existence of a binding contract. An offer will be insufficiently certain if it postulates further negotiation or perhaps requires the performance of a condition precedent prior to the effectiveness of the compromise.¹⁵

An offer of compromise found wanting in clarity, precision or certainty leads to a consequence which is no more plainly stated than in the recent decision of *Roberts v Rodier*. '[a] *Calderbank* offer that is not clear about what is being proposed is not one that it would be unreasonable for the recipient to reject.'¹⁶ Accordingly, there is much to be said for constantly bearing in mind the overarching principles of clarity, precision and certainty when drawing *Calderbank* letters.

B Without Prejudice Save as to Costs

Perhaps the pre-eminent defining characteristic of a *Calderbank* offer is the inclusion of a statement that the offer is one which is made 'without prejudice save [or except] as to costs.' The privilege which traditionally attaches to communications said to be purely 'without prejudice' has an interesting history¹⁷ and is said to be founded upon 'the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.'¹⁸ As Oliver LJ explained in *Cutts v Head*:¹⁹

[P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings.

¹⁴ *Grbavac v Hart* [1997] 1 VR 154 at 160-161.

¹⁵ See *Pearson v Williams* [2002] VSC 30 at [15] per Ashley J.

¹⁶ *Roberts v Rodier* [2006] NSWSC 1084 at [8] per Campbell J.

¹⁷ In an article exhibiting tremendous learning, David Vaver (now Reuters Professor of Intellectual Property Law at Oxford) charted the history of the privilege in "'Without Prejudice" Communications—Their Admissibility and Effect' (1974) 9 *University of British Columbia Law Review* 85.

¹⁸ *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299 per Lord Griffiths. The law in relation to without prejudice communications was recently reconsidered by the House of Lords in *Bradford & Bingley Pty Ltd v Rashid* [2006] 1 WLR 2066.

¹⁹ [1984] Ch 290 at 306.

The inclusion of the additional words 'save as to costs' in a *Calderbank* letter introduces an important reservation to communications said to be purely without prejudice: 'it enables reference [to the offer] to be made on the issues of costs if it is not accepted'²⁰—which is measure further designed to facilitate litigious compromise as Fox LJ said in *Cutts v Head*:²¹

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.

It should be observed however that s 131(2)(h) of the *Evidence Act 1995* (NSW) now makes considerable inroads on the traditional common law constraints concerning the admissibility of settlement communications in relation to costs.²² Documents marked purely without prejudice lacking any reservation as to costs have been admitted pursuant to s 131(2)(h);²³ as have documents which bear no markings at all.²⁴

That said, section 131(2)(h) does not render the form of offer first suggested in *Calderbank v Calderbank* a vestige of litigious compromise. Every effort should be made to ensure that offers are marked 'without prejudice save as to costs' for such a marking conveys to the offeree, at least in part, the intention on the part of the offeror to procure some costs advantage in the circumstances the offer is unreasonably rejected.²⁵ Indeed, the mere fact that a party has appropriately adopted the form of offer approved in *Calderbank v Calderbank* may itself have some bearing on the question of costs.²⁶

C Formulating an Offer in Relation to Costs

Legal costs factor greatly in the compromise of litigation and care must be taken when formulating an offer concerning costs in a *Calderbank* letter. As Greenwood J recently observed in *Perry v Comcare*:²⁷

²⁰ Foskett D, n 6 at 288.

²¹ [1984] Ch 290 at 315.

²² Section 131(2)(h) of the *Evidence Act 1995* (NSW) provides that evidence of settlement communications may be adduced into evidence if they are relevant to the question of costs.

²³ *Nobrega v Trustees of the Roman Catholic Church (Sydney)* [1999] NSWCA 133.

²⁴ *Bruinsma v Menczer* (1995) 40 NSWLR 716.

²⁵ See generally *Jones v Bradley (No 2)* [2003] NSWCA 258 at [14]-[15].

²⁶ *Nobrega v Trustees of the Roman Catholic Church (Sydney)* [1999] NSWCA 133 at [17] per Powell JA.

²⁷ (2006) 226 ALR 724 at 738.

[The] authorities recognise the importance of isolating the term as to costs in a way which is clear and capable of proper assessment independently of the principle claim, as part of a *Calderbank* letter. The failure to make the content of the term as to costs transparently clear is generally fatal to qualifying a “without prejudice” letter (reserved as to costs) as one which should influence the discretion, in the result.

The nature of the litigation and the facts and circumstances of the case will undoubtedly dictate whether an offer concerning costs is to be formulated on a basis that ‘each party pay its own costs’,²⁸ an offer of particular sum ‘plus costs’²⁹, a sum ‘inclusive of costs’³⁰ or an offer to accept some particular sum for costs.³¹ Whichever formula is chosen, an offeree must be placed in a position of being able to carefully assess the value of the offer.

Something further need be said particularly of offers formulated ‘inclusive of costs’. It is most regrettable that such offers have, almost as a general rule, been taken to be of little weight³² and seemingly incapable of supporting an application for indemnity costs.³³ Such disparaging views are largely unmerited. A pragmatic approach to litigious compromise oftentimes dictates that an offer of compromise on a costs inclusive basis offers the most realistic means of pursuing settlement; and I hazard it remains a practice customary in many classes of litigation.

Unfortunately the present disdain for costs inclusive offers of compromise derives from observations made by Spender J in *Smallacombe v Lockyer*,³⁴ observations which have been divorced from the facts and circumstances of that particular case and uncritically applied in subsequent decisions—indeed it is doubtful that his Honour ever sought to promulgate a principle of general application. Evidently, not all members of the judiciary share such a disdain for costs inclusive offers³⁵ and the present judicial practice has

²⁸ As was the offer considered in *Cutts v Head* (1984) Ch 290; *Leichhardt Municipal Council v Green* [2004] NSWCA 341; *Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No 2)* [2004] FCA 1212

²⁹ See *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121.

³⁰ See *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97.

³¹ See *Roberts v Rodier* [2006] NSWSC 1084

³² *Perry v Comcare* (2006) 226 ALR 724 at 738.

³³ See *White v Baycorp Advantage Business Information Services* [2006] NSWSC 910 at [12] per Campbell J; *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Limited (formerly GIO Insurance Limited) & Ors* [2006] NSWSC 583 at [40]-[41] per Einstein J.

³⁴ (1993) 42 FCR 97 at 101-102: ‘However I am satisfied that I should not have regard to the making of an offer which is, in effect, an all-up offer. The letter ... is not a *Calderbank* letter nor is it a letter of the kind considered in *Messiter v Hutchinson*, nor is it in any analogous to a ‘payment in.’

³⁵ As Gillard J observed in *MT Associates Pty Ltd v Aqua-Max Pty Ltd (No 3)* [2000] VSC 163 at [126]: ‘In my opinion, it is open for a party to deliver a *Calderbank* letter in which the offer is made on an all inclusive

been criticised as placing ‘form over substance’³⁶ whereas the latter ought to prevail over the former for ‘the sufficiency of an offer is concerned with its demonstrable substance and not with its form.’³⁷

If a *Calderbank* offer is to be made ‘inclusive of costs’ it will usually be appropriate to afford the offeree the opportunity to make some inquiry of its taxed costs to date. As Goldberg J observed in *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)*:³⁸

As a matter of principle, if a party is to be put at risk of losing its costs, even if ultimately successful, by not accepting an offer made to settle or compromise the proceeding at a point of time prior to trial, that risk should only be imposed if the party is given the opportunity, at the time of the offer, to obtain its taxed costs to date in addition to the offer made, knowing that it has been able to make a careful comparative assessment of the value of the offer as against the ultimate relief sought to be obtained.

A similar consideration arises in relation to *Calderbank* offers expressing a willingness to accept a particular sum for costs, as was observed in *Roberts v Rodier*:³⁹

[A] *Calderbank* offer which has as an essential element of it that the party to whom it is made agree to pay a particular sum for costs, without the opportunity for checking or assessment, could give rise to an order for indemnity costs only in circumstances where it ought to have been obvious to the person receiving the offer that part/party costs of the offeror would be equal to or more than the sum stated in the offer.

III CALDERBANK OFFERS AND THE DISCRETION AS TO COSTS

A *Calderbank* Offers and the General Discretion as to Costs

Calderbank offers are offers which intrinsically do not comply with the *Uniform Civil Procedure Rules 2005* (NSW) and accordingly do not attract the same costs consequences as offers made in accordance with the rules.⁴⁰ While offers of compromise under the rules give rise to a *prima facie* entitlement to a costs order if the

basis. The mere fact that it required the offeree to determine the likely value of the claim and the likely cost to date does not alter the fact that an all inclusive offer has been made. During my experience in the law, spread over some 35 years, many cases are settled on an "all in" basis. There is little difficulty in making an assessment of the likely amount of the claim and costs.’ See also *Bates v Nelson* [1976] 6 SASR 149 at 158 per Mitchell J.

³⁶ Dal Pont GE, *Law of Costs*, LexisNexis Butterworths, Sydney, 2003 at 409.

³⁷ *Archital Luxfer Ltd v Henry Boot Construction Ltd* [1981] 1 Lloyd’s Rep 642 at 654 per Gibson J.

³⁸ [2000] FCA 602 at [24].

³⁹ [2006] NSWSC 1084 at [9] per Campbell J.

⁴⁰ *Jones v Bradley (No2)* [2003] NSWCA 258 at [5].

offer is not bettered,⁴¹ *Calderbank* offers are a factor ‘and possibly even a weighty factor’,⁴² which may influence the court’s discretion as to costs.⁴³

It is now well settled that it is not incumbent upon an offeror to explain the choice of a *Calderbank* letter over that of the offer of compromise procedure provided for under the rules.⁴⁴ That said, a recent decision of the Supreme Court of South Australia has suggested that ‘the fact that an offer could have been filed under the Rules of the Court is a relevant, but not a disqualifying factor.’⁴⁵

For sometime there was much uncertainty in relation to the costs consequences which attended a *Calderbank* offer—uncertainty which only finally resolved by the New South Wales Court of Appeal in *Jones v Bradley (No 2)*.⁴⁶ *Jones v Bradley (No 2)* rejected the correctness of an earlier line of authority which suggested that a *prima facie* presumption arose in the event that a *Calderbank* offer was not accepted and the recipient of the offer did not receive a result more favourable than the offer, that the party rejecting the offer should pay the costs of the other party on an indemnity basis from the date of the making of the offer.⁴⁷

The correct approach in New South Wales in relation to *Calderbank* offers is that formulated by Giles JA in *SMEC Testing Services Pty Ltd v Campbelltown City Council*.⁴⁸

The making of an offer of compromise in the form of a Calderbank Letter ... where the offeree does not accept the offer but ends up worse off than if the offer had been accepted, is a matter to which the court may have regard when deciding whether to otherwise order, but it does not automatically bring a different order as to costs. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree’s failure to accept the offer, in all the

⁴¹ See *Leichhardt Municipal Council v Green* [2004] NSWCA 314 at [19].

⁴² Dal Pont GE, n 36 at 411.

⁴³ Similar issues arise in relation to appeals. Where a *Calderbank* offer is made before a trial and rejected, the offer remains relevant for the purposes of an application for costs in the Court of Appeal. However, a failure to renew the offer between the trial and the appeal may militate against an award of indemnity costs: see *Brymount Pty Limited t/as Watson Toyota v Cummins (No 2)* [2005] NSWCA 69.

⁴⁴ *Jones v Bradley (No 2)* [2003] NSWCA 258 at [12] and the cases there cited.

⁴⁵ *Morris v McEwen* (2005) 92 SASR 281 at 289 per Besanko J; at 300 per White J.

⁴⁶ [2003] NSWCA 258.

⁴⁷ That line of authority emanated from observations made by Rolfe J in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425 at 451.

⁴⁸ [2000] NSWCA 323 at [37]. The passage was also cited with approval in *Jones v Bradley (No 2)* [2003] NSWCA at [8]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [19]; *Brymount Pty Limited t/as Watson Toyota v Cummins (No 2)* [2005] NSWCA 69 at [14].

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.

Within the rubric of the approach formulated in *SMEC Testing Services Pty Ltd*, particular focus has been placed upon the reasonableness of the offer contained in a *Calderbank* letter and whether in all the circumstances that offer was unreasonably rejected.⁴⁹ Those matters require further elaboration.

B The Reasonableness of a Calderbank Offer

A *Calderbank* offer must contain some element of genuine compromise. As Giles J observed in *Hobartville Stud v Union Insurance Co.*⁵⁰

Compromise connotes that a party gives something away. A plaintiff with a strong case, or a plaintiff with a firm belief in the strength of its case, is perfectly entitled to discount its claim by only a dollar, but it does not in any real sense give anything away, and I do not think that it can claim to have placed itself in a more favourable position in relation to costs unless it does so.

And as Rogers CJ Comm D explained in *Tickell v Trifleska Pty Ltd*⁵¹, the genuineness of an offer of compromise depends upon:

Whether in the totality of the circumstances, the offer by the plaintiff represented any element of compromise or whether it was merely, yet another, formally stated demand for payment designed simply to trigger the entitlement to payment of costs on an indemnity basis.

While a genuine offer of compromise will not be represented in *Calderbank* offer which contains a simple demand for capitulation;⁵² or in the case of a plaintiff, an offer to settle for the full sum claimed,⁵³ it should not be assumed that every genuine offer of compromise entails the offer of a cash settlement.⁵⁴ Indeed, at one end of the spectrum

⁴⁹ The English approach is reflected in the often cited passage from *Roache v News Group Newspapers Ltd*, English and Wales Court of Appeal (Civil Division), 19 November 1992, unreported, where Sir Thomas Bingham MR said: 'The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?'

⁵⁰ (1991) 25 NSWLR 358 at 368

⁵¹ (1991) 25 NSWLR 353 at 355.

⁵² See *Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No 2)* [2004] FCA 1212.

⁵³ *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [30].

⁵⁴ *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [33], disapproving *Bishop v State of NSW*, Dunford J, 17 December 2000, unreported and *McKerlie v NSW (No 2)* [2000] NSWSC 1159 which suggested that a genuine offer of compromise required some cash offer of settlement.

of compromise, a 'walk away' offer based upon each party paying its own costs may, albeit in rare circumstances, constitute a genuine offer of compromise.⁵⁵

In those cases which do involve some compromise of the quantum claimed by the plaintiff, the genuineness of an offer cannot be adduced from simple mathematical calculation; much depends upon the circumstances and nature of the litigation. As Santow JA explained in *Leichhardt Municipal Council v Green*.⁵⁶

In some cases a plaintiff's offer which allows only a small discount from 100% success on the claim can be genuine and realistic always depending upon the circumstances. The same is true of defendant's offers: in some cases it will not be necessary to offer any monetary proportion (however slight) of the plaintiff's claim.

C The Unreasonable Rejection of a Calderbank Offer

The failure of an offeree to accept a *Calderbank* offer which was not bettered on judgment will not lead to a presumption that the offer was unreasonably rejected.⁵⁷ As Santow JA observed in *Leichhardt Municipal Council v Green*,⁵⁸ 'the question of reasonableness in rejecting an offer is not answered by a presumption; it depends on the circumstances of each case.'

The reasonableness in rejecting of a *Calderbank* offer is to be resolved by reference to the facts at the time of the making of the offer⁵⁹ but with the benefit of hindsight as to manner in which the proceedings were finally disposed.⁶⁰ Factors which might militate against a finding of unreasonableness in relation to the rejection of a *Calderbank* offer include: a genuine doubt as to the worth of the offer,⁶¹ uncertainty as to the terms of the offer,⁶² and an 'offer made so late in the proceedings, or open for so short a period as to make it entirely reasonable for the offeree not to act upon it.'⁶³

⁵⁵ *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [36].

⁵⁶ [2004] NSWCA 341 at [37].

⁵⁷ *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236 at 239 per Lingren J. For example, a *Calderbank* letter containing an offer only \$2000 better than the plaintiff's award at trial was seen as constituting an insufficient basis on which to disturb a costs order in favour of the successful plaintiff in *Humphries v TWT Ltd* (1993) 113 FLR 422.

⁵⁸ [2004] NSWCA 341 at [56].

⁵⁹ *Shaw v Jarldorn* (1999) 76 SASR 28 at 30 per Doyle CJ.

⁶⁰ *Fried v National Australia Bank Ltd* [2001] FCA 1280 at [17] per Gray J.

⁶¹ *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97 at 101 per Spender J.

⁶² *Roberts v Rodier* [2006] NSWSC 1084 at [9]. The position in the United Kingdom is now somewhat different. Whereas the recipient of a *Calderbank* offer was once free, as in New South Wales, to simply not accept an unclear or ambiguous offer: see *C & H Engineering v Klucznik & Son Ltd* [1992] FSR 667 at 671, since the English Court of Appeal decision in *Butcher v Wolfe* [1999] 2 FCR 165, a duty to seek clarification

As for the latter of the factors listed above, there can be no rule of general application which dictates precisely when the rejection of a *Calderbank* offer can be taken to be reasonable based upon considerations referable to the timing of the offer. As the New South Wales Court of Appeal has observed, ‘when considering whether the time in which a *Calderbank* offer must be accepted is reasonable, it is necessary to look at all the circumstances surrounding the making of the offer.’⁶⁴

Calderbank offers cannot lightly be ignored even if made late in proceedings or left open only for a limited period of time. It is incumbent upon all legal practitioners to make every reasonable attempt to obtain instructions irrespective of the timing of an offer. As White J said in *Morris v McEwen*.⁶⁵

It is to be expected in every case where solicitors for a party receive an offer, expressed to be open for only a limited time, those solicitors will, in the proper exercise of their professional duty, make all reasonable efforts to obtain their client’s instructions with respect to the offer within the time stipulated. If they do not, and the offer lapses, the solicitors may expose themselves to an action in professional negligence from their own client.

D Disentitling Conduct and Changes in the Nature of the Case Presented

It is not well known that a party to proceedings may be denied the benefits of a *Calderbank* offer by virtue of its conduct. While the circumstances which might justify the refusal of a costs order in respect of a *Calderbank* offer cannot be taken to be confined, the authorities which have considered the issue have focused upon some fundamental change in the nature of the case presented at trial or an element of disentitling conduct.

A party which makes a *Calderbank* offer but succeeds at trial on a case different than that contemplated at the time of making the offer may be denied indemnity costs. As Besanko J observed in *Morris v McEwen*.⁶⁶

of the terms of an offer has been recognised. As Roche LJ observed in *Hobin v Douglas* [1999] EWCA Civ 1903: ‘An offeree is not entitled to take a *Calderbank* offer at face value; there is, in an appropriate case, an obligation to explore the offer made, if some modification or addition to the terms of the offer could produce a settlement of this issue or issues involved.’ Whether a similar duty will evolve in Australia remains to be seen. The better view, I think, is that although no affirmative duty arises *per se* on the part of an offeree to seek clarification of the terms of an ambiguous *Calderbank* offer, a failure to do so may of its own accord be probative as to whether the offer was unreasonably rejected.

⁶³ Dal Pont GE, n 36 at 408. See also *Equuscorp Pty Ltd v Jimenez (No 2)* [2002] SASC 266 at [25] per Besanko J; *Maclean v Rottnest Island Authority* [2001] WASCA 323 at [36].

⁶⁴ *Jones v Bradley (No 2)* [2003] NSWCA 258 at [13].

⁶⁵ (2005) 92 SASR 281 at 302.

⁶⁶ (2005) 92 SASR 281 at 293.

In broad terms, a *Calderbank* offer will be relevant to the judge's discretion as to costs if, in all the circumstances, the judge considers that the offeree acted unreasonably in rejecting the offer. *It will be relevant to that question that the plaintiff has not exceeded the Calderbank offer because the defendant has introduced into his counterclaim a new claim after the Calderbank offer has withdrawn or has lapsed or has been refused.* (my emphasis)

Similarly, in *Fowdh v Fowdh*⁶⁷ Mahony AP said:

It is one thing for a plaintiff to present her evidence, make an offer of compromise, and to succeed at the trial on that evidence. In such a case, indemnity costs may be warranted. It is another thing for the plaintiff to present a case and make an offer of settlement, and then to succeed at the trial upon a relevantly different case. A plaintiff who has done that may not readily receive indemnity costs. I do not mean by this that minor differences between the case at offer and the case at trial will be of significance or that, if the difference be significant, a discretionary judgment for indemnity costs may not be given. But where the difference between the position at offer and the position at trial be as the Master assessed it to be, a decision to refuse indemnity costs may readily be understood.

Clearly there must be a 'significant change'⁶⁸ in the nature of the case presented or the 'manner in which the evidence emerges at trial'⁶⁹ and not merely something as a 'result of the ordinary risks and vicissitudes of litigation'⁷⁰ which the parties will be presumed to have anticipated. For example, a successful cross-claim brought after the expiration of a *Calderbank* offer was held by the New South Wales Court of Appeal to be a significant change in circumstances in *Rolls Royce Industrial Power (Pacific) Ltd (formerly John Thomson (Aust) Pty Ltd) v James Hardie & Co Pty Ltd*.⁷¹

A party which fails to observe some fundamental obligation or conducts its case in a manifestly unfair or unreasonable manner⁷² may be disentitled from relying upon a *Calderbank* offer in relation to the question of costs. In *Morris v McEwen*⁷³ the Supreme Court of South Australia considered disentitling conduct in the context of a defendant who failed to make complete discovery of all of its documents and who latter sought to

⁶⁷ New South Wales Court of Appeal, 4 November 1993, unreported at 6.

⁶⁸ *Shaw v Jarldorn* (1999) 76 SASR 28 at 30 per Doyle CJ.

⁶⁹ *Shaw v Jarldorn* (1999) 76 SASR 28 at 34 per Perry J.

⁷⁰ *Shaw v Jarldorn* (1999) 76 SASR 28 at 30 per Doyle CJ.

⁷¹ (2001) 53 NSWLR 626. See also *Beoco Limited v Alfa Laval Co Limited* (1994) 4 All ER 464.

⁷² Two decisions of the High Court of Ireland have briefly considered the issue in the context of the raising of improper allegations during the course of proceedings by an otherwise successful plaintiff: see *Shelley-Morris v. Bus Atha Cliath* [2003] 1 IR 263; *Murnaghan v Markland Holdings Ltd* [2004] IEHC 406.

⁷³ (2005) 92 SASR 281.

rely on a *Calderbank* offer. In relation to the conduct of the defendant, Debelle J poignantly observed:

A party who does not observe an obligation as fundamental as making full discovery of documents and the failure to do so has a material bearing on the result cannot, in my view, have the benefits of a *Calderbank* offer.⁷⁴

No doubt the observations in *Morris v McEwen* represent the singular application of a much broader principle which is yet to be refined in relation to *Calderbank* offers.

E An Application for Indemnity Costs

Something need be said of applications for indemnity costs founded upon the unreasonable rejection of a *Calderbank* offer. It is generally not well understood that the supporting principles are not of equal application as between the plaintiff and defendant to proceedings. Whereas a plaintiff who has made a *Calderbank* offer and obtains a judgement more favourable at trial will be entitled to indemnity costs from the date of the offer or shortly thereafter,⁷⁵ the same cannot be said of a *Calderbank* offer made by defendant, which will only usually found an application for party and party costs. As Santow JA explained in *Leichhardt Municipal Council v Green*:⁷⁶

The first thing to be noted is that under the Rules of Court, indemnity costs are not the stipulated costs sanctions for unaccepted offers of compromise by defendants. As indicated above, the rules of court provide for different costs consequences to flow from unaccepted defendant offers than from unaccepted plaintiff offers ... The rule provides basically that a defendant will be entitled to party and party costs from the date of an unaccepted offer of compromise, if the plaintiff obtains a result no better than the offer ... Unlike with the case of offers by a plaintiff, the rules of Court do not provide any entitlement to indemnity costs for a defendant ... Given that this is the case under the Rules, it would be a curious thing if a different result were to prevail if a defendant makes its offer by way of *Calderbank* letter ... It is difficult to accept that the fact that a *Calderbank* offer by a defendant was not accepted gives rise to a prima facie entitlement to costs on an indemnity basis, when the course of authority in this area has been so overwhelmingly to the contrary. Such a large disparity between the result flowing from an offer of compromise under the Rules and a *Calderbank* offer can serve no useful purpose ... It is respectfully submitted that there is no principle of law or persuasive policy reason why a defendant's unaccepted offer of compromise made

⁷⁴ *Morris v McEwen* (2005) 92 SASR 281 at 283. A similar view in relation to non-disclosure of documents is reflected in the *obiter dicta* of Dame Elizabeth Butler-Sloss P in *Norris v Haskins* [2003] EWCA Civ 1084 at [13].

⁷⁵ See *Archital Luxfer v Henry Boot Construction Ltd* [1981] 1 Lloyd's Rep 642 at 654-655 per Gibson J.

⁷⁶ [2004] NSWCA 341 at [42]-[46].

by *Calderbank* letter should give rise to costs sanctions on any basis different to that provided by the Rules. Under the rules, such costs would only be awarded in exceptional circumstances if the Court “otherwise orders”.

As the Santow JA concluded, indemnity costs orders in favour of a defendant ‘should be reserved for the most unreasonable actions by unsuccessful plaintiffs.’⁷⁷

IV CONCLUSION

Calderbank offers remain an important tool in promoting litigious compromise. The so called ‘carrot’ and ‘stick’ approach engendered in the costs sanctions which follow from the unreasonable rejection of a *Calderbank* offer has shown remarkable resilience over the years and it continues to encourage compromise.⁷⁸

Calderbank offers are not the simple extension of offers of compromise under the rules; they offer a flexible alternative to the more formal procedure provided under the rules, albeit not necessarily with the the same costs consequences. Provided the limitations of *Calderbank* offers are consistently born in mind, there is no reason why they cannot continue to be an effective tool in the promotion of litigious compromise.

⁷⁷ *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [57].

⁷⁸ The ‘stick’ and ‘carrot’ approach was explained by the New South Wales Court of Appeal in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 in the following terms: ‘[r]elevantly, the ‘carrot’ is the promise of indemnity costs to a plaintiff in the event that the defendant is found unreasonably to have refused an offer of compromise. The ‘stick’ is the threat of the penalty of the imposition of an indemnity costs order against a defendant in such circumstances.’