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OFFERS OF COMPROMISE AND CALDERBANK OFFERS– MAKING AN OFFER, FORMAL REQUIREMENTS AND COSTS CONSEQUENCES

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A. INTRODUCTION

1. Offers of Compromise have existed under the *Uniform Civil Procedure Rules* and previously, under the *District Court Rules* and *Supreme Court Rules*, for a number of years. Likewise, *Calderbank* offers have been used in litigious matters for more than 30 years now, even allowing for the initial uncertainty as to whether they were available other than in matrimonial causes[1]. Formal Offers of Compromise and *Calderbank* offers remain two of the most useful means a solicitor has available to put pressure on an opponent to seriously and carefully consider settling a litigious matter.

2. This paper is an attempt to summarise the formal requirements and machinery provisions which apply to Offers of Compromise and *Calderbank* offers, set out the costs consequences that may follow from rejecting or accepting such offers and offer suggestions as to when each such offers may be appropriate to use.

[1] Which was eventually resolved in *Computer Machinery Co Ltd v Drescher* [1983] 3 All ER 153; [1983] 1 WLR 1379.

3. I gratefully acknowledge the contribution of Benjamin Kassep, a colleague on 13 Wentworth Selborne Chambers, whose March 2008 paper on *Calderbank* offers I have updated, adapted and incorporated into this paper.

B. OFFERS OF COMPROMISE – FORMAL REQUIREMENTS AND MACHINERY PROVISIONS

4. The Offer of Compromise procedure changed in some fairly significant respects with the introduction of the *Uniform Civil Procedure Rules*. Division 4 of Part 20 of the *Uniform Civil Procedure Rules* took effect on 15 August 2005. Set out below is a summary of some of the important features of the Offer of Compromise procedure, with particular attention being given to new features.

5. First, there is a formal requirement under r20.26(3)(a) that the Offer of Compromise **must** bear a statement to the effect that the offer is made in accordance with "these rules".

6. This requirement is important, because the *Uniform Civil Procedure Rules* do not otherwise require that an Offer of Compromise be prepared in a particular Court format document. Thus, there is no reason why a letter which states that it is made in accordance with Division 4 of Part 20 or r20.26 and otherwise

complies with the *Uniform Civil Procedure Rules* cannot be a valid Offer of Compromise.

7. Second, and very importantly, pursuant to r20.26(2), an Offer of Compromise "**must be exclusive of costs**" except in the case of an offer of a verdict for the defendant with each party to bear their own costs. It has been held that r20.26(2) requires that "the amount of the offer must be exclusive and not in any way inclusive of costs"; *Mid-City Skin Cancer and Laser Centre Pty Ltd v. Zahedi-Anarak & Ors* [2006] NSWSC 684. It is noteworthy that the Offer of Compromise provisions of the former *Supreme Court Rules* and the *District Court Rules* did not contain a similar provision to r20.26(2). However, it has been a well established convention in the Supreme and District Courts for some years that Offers of Compromise were expressed to be "plus costs as agreed or assessed". The decision of Justice MacDougall in *Mid-City Skin Cancer and Laser Centre* is to the effect that an Offer of Compromise expressed to be made for $X "plus costs as agreed or assessed" will be valid, despite not being in precisely the form envisaged by r20.26(2).

8. The important point to remember in relation to r20.26(2) is that an Offer of Compromise must not be expressed to be in any way inclusive of costs, except in the case of an offer by a defendant of a verdict for the defendant. Obviously, an offer by a plaintiff or defendant of $100,000 inclusive of costs would not comply with r20.26(2) and it would therefore not be taken into

consideration, as an Offer of Compromise, as regards costs. It may however be taken into account on the basis that it is treated in the same way as a *Calderbank* offer; *Ambulance Service (NSW) v Worley* (No 2) (2006) 67 NSWLR 719, at 722, though there are mixed authorities on the relevance of costs inclusive *Calderbank* offers[2].

9. Further and perhaps less obviously, if a plaintiff were to offer to settle a claim for "$100,000, plus costs in the amount of $50,000", my view is that such an offer may well be found to offend r20.26(2), with the consequence that it would not be taken into account, at least as an Offer of Compromise, in relation to costs, even if the plaintiff obtained a judgment for more than $100,000 and the specified sum for costs was reasonable in the circumstances. My view is supported by the recent Court of Appeal decision in *Penrith Rugby League Club Limited t/as Cardiff Panthers v Elliot (No. 2)* [2009] NSWCA 356, at [6] – [12].

10. The *Uniform Civil Procedure Rules* do not make specific provision for an offer to be made along with a further offer as to costs, (cf the old Part 19A r2A of the *District Court Rules*), and in my view, the language of r20.26(2) creates a real danger that a principal offer and a further offer as to costs may be found to be contrary to the requirement that the offer must be "exclusive" of costs unless very careful language is used to make clear that the principal offer and the

[2] See *Ritchie's Uniform Civil Procedure NSW*, at [42.13.25] for a list of the conflicting authorities on this issue. See also paragraphs 32 – 33 below.

costs offer are separate and the principal offer is capable of being independently accepted, even if the costs offer is not[3]. The commentary in *Ritchie's Uniform Civil Procedure NSW*, at [42.13.15] previously suggested that it would be permissible to make a principal offer and a separate costs offer under r20.26(2), but more recent updates have removed that suggestion. To avoid uncertainty, and in view of the decision in *Penrith Rugby League Club Limited t/as Cardiff Panthers v Elliot (No. 2)*, my view is it is better to simply offer a sum "plus costs as agreed or assessed" and to leave costs negotiations until later.

11. Similarly, if a defendant were to serve an Offer of Compromise in the amount of "$100,000, plus costs in the amount of $50,000", it would also, in my view, offend r20.26(2) and therefore not be taken into account, as an Offer of Compromise, in relation to costs, no matter how generous the costs offer happened to be.

12. Prior to the introduction of Division 4 of Part 20, it was well established that an Offer of Compromise which specified an offer of a verdict for the defendant with each party to pay their own costs was capable of being a genuine Offer of Compromise and thus attracting the cost sanctions of the Offer of Compromise regime; *Leichhardt Municipal Council v. Green* [2004] NSWCA 341, at [39]. To the extent that there was any remaining uncertainty regarding the status of

[3] For example, an Offer of Compromise could be sent offering to settle for "$100,000, plus costs as agreed or assessed" and a second letter could be sent offering $50,000 for costs.

such offers, it has now been removed by r20.26(2), which specifically recognises an offer of a verdict for the defendant with each party to bear their own costs. However, where a defendant offers a verdict in its favour on the basis that it will pay the plaintiff's costs, or even where the defendant offers a very small sum relative to the size of the plaintiff's claim (particularly in all or nothing type cases), the courts have held on a number of occasions that an "otherwise order" should be made and indemnity costs should not be ordered, on the basis that the offer was in fact an invitation to surrender, rather than any form of commercial compromise; *Regency Media Pty Limited v AAV Australia Pty Limited* [2009] NSWCA 368, at [25] – [35].

13. Third, r20.26(7) specifies the period of time that an Offer of Compromise **must** be left open for. In short, it provides that in the case of an Offer of Compromise made two months or more before the date set down for the commencement of the trial, the offer must be left open for a minimum of 28 days and in the case of an Offer of Compromise made less than two months before the date set down for the commencement of the trial, the offer must be left open for such time "as is reasonable in the circumstances".

14. Rule 20.26(7) represents a substantial change in the law, in the way that it permits Offers of Compromise to be left open for relatively short periods of time, depending upon the circumstances of each case. The sort of circumstances which are likely to be relevant to the determination of what

constitutes a "reasonable time" include the state of pre trial preparation, the compliance or non compliance of particular parties with directions regarding the preparation of the matter for hearing, the progress of interlocutory steps which have been taken to prepare the matter for hearing and any other information known to the parties regarding the readiness of the matter for trial. It has been held that a late Offer of Compromise which is only left open for a few days will not necessarily be an offer which was not open for a "reasonable time"; *Leda v. Weerden* (No. 3) [2006] NSWSC 220.

15. Fourth, pursuant to rules 20.25 and 20.27, if a time for acceptance is specified in an Offer of Compromise, then it is open until that time, but if no time is specified, it will remain open for 28 days from the date upon which the offer was made. Further, Division 4 of Part 20 has introduced the concept of a "final deadline" so that if an Offer of Compromise has not expired, (because the time specified for acceptance has not yet passed or in the case where no time is specified, 28 days have not yet passed since the Offer of Compromise was made), then it will expire:

(i) in the case of a jury trial – at the time at which the judicial officer begins to sum up to the jury; or

(ii) in the case of a matter referred for arbitration – at the conclusion of the arbitration hearing; or

(iii) in any other case – at the time at which the judicial officer begins to give his or her decision or his or her reasons for judgment, whichever is the earlier, on a judgment (except an interlocutory judgment).

16. As a practical matter and to avoid any uncertainty, it is advisable to specify a period for acceptance in an Offer of Compromise. Whilst *Mid-City Skin Cancer and Laser Centre* was ultimately resolved in the favour of the defendants, the dispute could have been avoided had the original Offer of Compromise specified a period of acceptance of 28 days.

17. Fifth, r20.26(4) places a prohibition on a plaintiff making an Offer of Compromise until such time as 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". However, r20.26(5) makes it clear that if the defendant wants to assert that an Offer of Compromise made by the plaintiff offends r20.26(4) and therefore should not be taken into account for purposes of costs, it is incumbent upon the defendant to raise the matter in writing within 14 days after receiving the Offer of Compromise.

18. Sixth, an Offer of Compromise cannot be withdrawn during the period of acceptance for the offer unless the Court otherwise orders. The authorities

suggests that it will ordinarily be necessary to establish some proper reason for seeking to withdraw an Offer of Compromise, such as the offer having been made as the result of a genuine mistake or a recent significant change in the complexion of the case, perhaps due to the service of new evidence or a recent judicial decision[4]. The recent decision in *Spring v Sydney South West Area Health Service* [2009] NSWSC 420, provides a useful example of the sort of circumstances which will be required before the court is likely to exercise its discretion to allow a party to withdraw an Offer of Compromise. In that case, as the result of a significant change in the law as to whether damages for loss of chance are available in personal injury/medical negligence actions, Adams J permitted a defendant to withdraw an Offer of Compromise it had made for $100,000, which the plaintiff purported to accept (after being given notice of the defendant's intention to withdraw the offer).

19. Seventh, special care should be taken with Offers of Compromise in matters in which an appeal follows a judgment at first instance. A number of recent decisions demonstrate that where a party has made an Offer of Compromise in a matter at first instance and then does better than that Offer of Compromise and receives indemnity costs at first instance, the party should not assume that the Offer of Compromise will continue to have effect as regards the costs of any appeal brought. Whilst the Court of Appeal has held that an Offer of Compromise made at first instance may be a relevant consideration in determining the costs on appeal, the Court of Appeal is not bound to act

[4] See paragraph 111 below on this issue.

according to the costs rules in relation to Offers of Compromise in the Court below and it will almost always refuse to order costs to be payable by reference to the Offer of Compromise made below; *Baresic v Slingshot Holdings Pty Ltd (No 2)* [2005] NSWCA 160, *Suresh v. Jacon Industries Pty Ltd* [No. 2] [2005] NSWCA 270, *Ainger v Coffs Harbour City Council* (No 2) [2007] NSWCA 212 and *The Anderson Group Pty Ltd v. Tynan Motors Pty Ltd* (No. 2) (2006) 67 NSWLR 706 and *Roads & Traffic Authority of NSW v Refrigerated Roadways Pty Limited (No. 2)* [2009] NSWCA 336. The prudent course for a party to take in such a situation is to make a further Offer of Compromise pursuant to Part 51, Division 8, Subdivision 1 of the *UCPR* once proceedings have been commenced in the Court of Appeal; *The Anderson Group* and *Ambulance Service (NSW) v. Worley* (No. 2) (2006) 67 NSWLR 719 and *Roads & Traffic Authority of NSW v Refrigerated Roadways Pty Limited (No. 2)*, at [24].

20. Finally, it is worth bearing in mind that there is scope for some creativity in the sort of Offer of Compromise a party to litigation makes. That is, the offer need not only be for a dollar sum plus costs as agreed or assessed. Rules 20.26(1) and 20.26(8) specifically contemplate other sorts of offers, whether in respect of the whole or part of the proceedings.

21. By way of an example, it has been held that an offer to forego interest was a valid Offer of Compromise in *Manly Council v Byrne (No. 2)* [2004] NSWCA 227. I have also been involved in a case in which a plaintiff offered to discount any damages subsequently assessed by the court by 5% if the defendants admitted liability within 28 days of the Offer of Compromise. Whilst the defendants

ultimately accepted that offer, so that the court did not have to rule on it, I have little doubt that it would have been found to be a valid Offer of Compromise.

C. *CALDERBANK* OFFERS – FORMAL REQUIREMENTS

22. 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* will not render it inadmissible or necessarily ineffective on an argument as to costs,[5] a relaxation in the rigours of formality does not invite wholesale departure from the *Calderbank* form. A *Calderbank* offer should at least:

(i) be marked 'without prejudice save as to costs';

(ii) be clear, precise and certain in its terms;

(iii) state clearly the time in which the offer must be accepted;

(iv) make reference to the offer being one in accordance with the principles enunciated in the decision of *Calderbank v Calderbank*;

(v) make some provision for costs separate from the principal offer;

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

(vi) state clearly that the offeror reserves its right to tender the offer on an application for costs if the offer is rejected;

(vii) state the costs advantage i.e. indemnity costs or party/party costs that the offeror has in mind to achieve; and

(viii) provide reasons why the offer should be accepted.

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

(I) Without Prejudice Save as to Costs

24. 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 history[6] and is said to be founded upon 'the public policy of encouraging

[6]The historical development of without prejudice communications is traced in David Vaver, '"Without Prejudice" Communications—Their Admissibility and Effect' (1974) 9 *University of British Columbia Law Review* 85. A contemporary analysis can be found in Declan McGarth, 'Without Prejudice Privilege' (2001) 5(4) *International Journal of Evidence & Proof* 213.

litigants to settle their differences rather than litigate them to a finish.'[7] As Oliver LJ explained in *Cutts*:[8]

> [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.

25. The inclusion of the additional words 'save as to costs' in a *Calderbank* offer 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'[9]—a measure further designed to facilitate litigious compromise as Fox LJ said in *Cutts*:[10]

> 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.

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[7] *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299 (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.
[8] [1984] Ch 290, 306.
[9] David Foskett, *The Law and Practice of Compromise* (London: Sweet & Maxwell, 2005) 288.
[10] [1984] Ch 290, 315.

26. 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.[11] Documents marked purely without prejudice lacking any reservation as to costs have been admitted pursuant to s 131(2)(h);[12] as have documents which bear no markings at all.[13]

27. That said, section 131(2)(h) does not render the form of offer first suggested in *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.[14] Indeed, the mere fact that a party has appropriately adopted the form of offer approved in *Calderbank* may itself have some bearing on the question of costs.[15]

(ii) The Requirements of Clarity, Precision and Certainty

[11] 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.
[12] *Nobrega v Trustees of the Roman Catholic Church (Sydney)* [1999] NSWCA 133.
[13] *Bruinsma v Menczer* (1995) 40 NSWLR 716.
[14] See generally *Jones v Bradley (No 2)* [2003] NSWCA 258, [14]-[15].
[15] *Nobrega v Trustees of the Roman Catholic Church (Sydney)* [1999] NSWCA 133, [17] (Powell JA); *Danidale Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2007] VSC 552, [15]-[17] (Habersberger J)

28. A *Calderbank* offer as a 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.'[16]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'[17]—and moreover, as Winneke P observed in *Grabavac v Hart*,[18] 'leave the offeree in no reasonable doubt as to the nature and extent of what is being offered.'

29. 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, 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

[16] *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)* [2000] FCA 602, [24] (Goldberg J).
[17] *Perry v Comcare* (2006) 150 FCR 319, 333 [51] (Greenwood J). See also *John Goss Projects Pty Ltd v Theiss Watkins White Constructions Ltd (in liq)* [1995] 2 Qd R 591, 595 (Williams J); *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1988) 13 NSWLR 486, 487 (Hodgson J).
[18] [1997] 1 VR 154, 155.

> purpose was also to secure a costs advantage ... and if the latter, what ultimate costs advantage the offeror had in mind to achieve.[19]

30. 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.[20]

31. An Offer of Compromise found wanting in clarity, precision or certainty leads to consequence 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.'[21] Accordingly, there is much to be said for constantly bearing in mind the overarching principles of clarity, precision and certainty when drawing *Calderbank* letters.

(iii) Formulating an Offer in Relation to Costs

[19] *Grbavac v Hart* [1997] 1 VR 154, 160-161.
[20] *Pearson v Williams* [2002] VSC 30, [15] (Ashley J); *Rapana v McBride Street Cars Ltd* [2007] DCR 551. See also *Little v Saunders* [2004] NSWSC 655, [45] (Campbell J).
[21] *Roberts v Rodier* [2006] NSWSC 1084, [8] (Campbell J). See also *C & H Engineering v F Klucznik & Son Ltd* [1992] FSR 667, 671 (Aldous J).

32. 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*:[22]

> [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.

33. Ordinarily, a *Calderbank* offer should be expressed 'plus costs as agreed or assessed.'[23] However, the nature of the litigation undertaken together with the facts and circumstances of the case may dictate that a *Calderbank* offer be formulated on the basis that 'each party pay its own costs',[24] a sum 'inclusive of costs'[25] or an offer to accept some particular sum for costs.[26] While none of these formulations are necessarily bad, offers expressed other than 'plus costs' have attracted adverse comment and certain principles must be born in mind when considering a *Calderbank* offer drawn on such terms as to costs.

34. For many years *Calderbank* offers expressed to be inclusive of costs were viewed by some judges as incapable of supporting an application for indemnity

[22] (2006) 150 FCR 319, 334 [53].
[23] *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322, [116] (McColl JA).
[24] As was the offer considered in *Cutts v Head* (1984) Ch 290; *Leichhardt Municipal Council v Green* [2004] NSWCA 341;
[25] See *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97.
[26] See *Roberts v Rodier* [2006] NSWSC 1084.

costs.[27] That issue was exhaustively considered by the New South Wales Court of Appeal recently in *Elite Protective Personnel Pty Ltd v Salmon*.[28] While reaffirming the view that *Calderbank* offers ought to be expressed 'plus costs', the Court rejected the proposition that an offer inclusive of costs will never give rise to an order for indemnity costs. As Beazley JA said:[29]

> I do not agree that an offer which is inclusive of costs cannot ever be the basis upon which the court exercises its discretion to award indemnity costs. The award of indemnity costs involves the exercise of a discretion. The application of an 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.

35. 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)*:[30]

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[27] See *White v Baycorp Advantage Business Information Services* [2006] NSWSC 910, [12] (Campbell J); *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Limited (formerly GIO Insurance Limited)* [2006] NSWSC 583, [40]-[41] (Einstein J).
[28] [2007] NSWCA 322
[29] *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322, [5].
[30] [2000] FCA 602, [24].

> 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.

36. A similar consideration arises in relation to *Calderbank* offers expressing a willingness to pay a particular sum for costs, as was observed in *Roberts v Rodier*:[31]

> [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.

37. However, in the recent Court of Appeal decision in *Penrith Rugby League Club Limited t/as Cardiff Panthers v Elliot (No. 2)*, the Court of Appeal awarded indemnity costs to a defendant who had offered damages of $25,000 plus costs

[31] [2006] NSWSC 1084, [9] (Campbell J).

and disbursements of $25,000 in a case in which the defendant ultimately obtained a verdict in its favour. The court held, at [13], that the sum of $25,000 offered in respect of costs was clearly a significant portion of the plaintiff's costs, so that that offer materially increased the value of the overall offer to the plaintiff.

(iv) Stating the Costs Advantage Sought to Be Achieved

38. It is essential that a *Calderbank* offer state the costs advantage sought to be achieved if the offer is unreasonably rejected. The costs advantage sought will ordinarily be indemnity costs, and as Habersberger J recently said in *Danidale Pty Ltd v Abigroup Contractors Pty Ltd (No 2)*,[32] '[f]ailing to warn [an] offeree that indemnity costs would be sought if it went ahead and sued and obtained a less favourable result is one matter to take into account in deciding whether the rejection of [a *Calderbank* offer] was unreasonable.'

39. As Kirby P explained in *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd*,[33] there are compelling reasons why a party ought to be put on notice of an application for indemnity costs:

> [It is a] possibility that, in some circumstances, a special costs order will be made, including for indemnity costs. If such an order is to be made, it would be preferable that it should follow due and timely warning by the

[32] [2007] VSC 552, [17].
[33] (1995) 36 NSWLR 242, 249-250.

> successful party to the unsuccessful that indemnity costs will be sought.
>
> ...

40. Properly proved to the Court, it affords the occasion for making the special order in full knowledge that the risk has been appreciated and the party has pressed on regardless.

41. Where an offer has expressly omitted the costs advantage sought to be achieved, on occasion it may be inferred from the surrounding circumstances that the offeror intended to rely on the offer in support of an application for indemnity costs.[34] In *Assaf v Skalkos*[35] Carruthers AJ considered that:

> [A]ny prudent solicitor with experience in litigation in this Court, would construe the phrase "*without prejudice except as to costs*" continually repeated in settlement negotiations of this nature, as an indication that, if a settlement offer is unreasonably refused, then the rejecting party would be at risk of a subsequent application for a costs order on an indemnity basis.

42. Similarly, Hoeben J in *Crump v Equine Nutrition Systems Pty Ltd trading as Horsepower (No 2)*[36] considered it material that the offer in question was part of a series of offers plainly intended to operate as *Calderbank* offers:

[34] *Azzi v Volvo Car Australia Pty Ltd (Costs)* [2007] NSWSC 375, [29] (Brereton J).
[35] [2002] NSWSC 935, [110].
[36] [2007] NSWSC 25, [67].

> The offer … was effective as a Calderbank offer. Although the letter does not contain a reference to *Calderbank v Calderbank* and although it does not expressly refer to indemnity costs being claimed if the offer contained in it was not accepted, it still operated as a Calderbank offer. This is because the offer which it contained was made as part of a series of offers and counter offers which were clearly intended by the parties to operate as Calderbank offers. The considerations identified in *Nobrega v The Trustees of the Roman Catholic Church (No 2)* [1999] NSWCA 133 were clearly made out. The defendants gave to the plaintiffs 15 days within which to accept the offer. In the context of offer and counter-offer that was a sufficient amount of time to allow a considered decision to be made by the plaintiffs.

(v) The Inclusion of Reasons Why the Offer Should Be Accepted

43. The precision with which a *Calderbank* offer ought to set out why the offer should be accepted has been the subject of differing judicial views. In *Macquarie Bank Ltd v National Mutual Life Association of Australasia Ltd*,[37] Cole J expressed as a general proposition that '[t]here is no obligation upon a party making an offer of settlement in a *Calderbank* letter to specify with precision the reasons why the opposing party will fail, or should accept the offer.'

[37] (Unreported, Supreme Court of New South Wales, 27 July 1994), 4. Cited in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425, 440 (Rolfe J).

44. Conversely, Sunberg J in *Wenzel v Australian Stock Exchange Ltd*[38] said that a *Calderbank* offer 'must descend to particularity'— a proposition for which his Honour cited in support the following observations made by Lindgren J in *NMFM Properties Pty Ltd v Citibank Ltd (No 2)*:[39]

> No doubt where a party puts *with sufficient particularity* to the opposing party the reasons why the latter *must fail*, yet the latter does not recognise the inevitable, this will be a factor pointing to an award of indemnity costs. ...
>
> The requirements of 'sufficient particularity' and 'inevitability of failure' are important. In their absence, it would be open to parties to put their respective cases to the opposing party urging it to recognise the merit of what is put in the hope that if it ultimately finds favour with the Court, an award of indemnity costs will follow. If this were correct, one might ask rhetorically, 'Why write a letter as distinct from relying on the pleadings? (original emphasis)

45. Ignoring the controversy created by the differing views expressed in *Macquarie Bank Ltd* and *NMFM Properties Pty Ltd*, the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)*[40] held that it was 'neither necessary nor desirable to lay down any general rule' about

[38] [2002] FCA 353, [8].
[39] (2001) 109 FCR 77 at 98. Cited with approval in *Dukemaster Pty Ltd v Bluehive Pty Ltd* [2003] FCAFC 1, [8] (Sundberg and Emmett JJ).
[40] (2005) 13 VR 435, 442 [27] (Warren CJ, Maxwell P and Harper AJA).

the reasoning which must accompany a *Calderbank* offer. Instead, the Court endorsed what was said by Redlich J in *Oversa-Chinese Banking Corporation v Richfield Investments Pty Ltd*:[41]

> Any attempt to prescribe the reasoning which must accompany an offer should be resisted. Whether there is a need for the offeror to descend to specificity as to why the offer should be accepted must depend upon a consideration of all of the circumstances existing at the time of the offer. The extent to which the weakness of a party's position is exposed through the pleadings, affidavits and the various communications between the parties during the course of the litigation may bear upon the significance of the absence of specificity in the informal offer.[42]

46. Whatever the differences between *Macquarie Bank Ltd*, *NMFM Properties Pty Ltd* and *Hazeldene's Chicken Farm Pty Ltd* may be, the inclusion of reasons why a *Calderbank* offer should be accepted is a generally desirable practice and one which may significantly improve the reasonableness of an offer.[43] The degree of particularity into which an offeror must descend will of course depend heavily upon the nature of the proceedings and the timing of the *Calderbank* offer.[44]

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[41] [2004] VSC 351, [87].
[42] Similarly, in *Nolan v Nolan* [2003] VSC 136, [76], Dodds-Streeton J said 'The reasonableness of the offeree in rejecting a Calderbank offer is one important factor in determining the weight to be attributed to it. The degree of specificity of reasoning expressed in the letter, the stage at which the letter is received, and the content of and response to the offer, may all be relevant to reasonableness.'
[43] Indeed, in *Maher v Millenium Market* [2004] VSC 194, [31] Osborn J held that a *Calderbank* offer that did not contain an analysis of the issues was one which was not unreasonable for the plaintiff to reject.
[44] There is some suggestion that a *Calderbank* offer served early on in the proceedings should be accompanied with particular reasons: see *Nolan v Nolan* [2003] VSC 136, [74] (Dodds-Streeton J).

D. COSTS CONSEQUENCES OF ACCEPTING/REJECTING OFFERS OF COMPROMISE AND *CALDERBANK* OFFERS

(i) Offers of Compromise

47. Division 3 of Part 42 sets out the particular cost consequences which are to follow the acceptance or non acceptance of an Offer of Compromise. Rule 42.13A provides that where an Offer of Compromise is made by a plaintiff and accepted by a defendant or made by a defendant and accepted by a plaintiff, the plaintiff will ordinarily be entitled to an order against the defendant for the plaintiff's costs in respect of the claim, assessed on the ordinary basis, up to the time "**when the offer was made**", unless, the offer is stated to be a verdict for the defendant with each party to bear their own costs or, the Court orders otherwise.

48. The position prior to the introduction of the *Uniform Civil Procedure Rules* was that where a plaintiff accepted an Offer of Compromise, he or she was entitled to costs up to the date of acceptance. That has now changed, so that the plaintiff in the same situation is only entitled to costs up to the date the offer was made, absent an otherwise order. That difference can be of some significance in the couple of months leading up to a hearing.

49. Rule 42.14 provides that where a plaintiff equals or beats an Offer of Compromise, (which has not been accepted by a defendant), the ordinary position is that the plaintiff will be entitled to:

(i) Costs on an ordinary basis up to the day after the Offer of Compromise was made; and

(ii) Costs on an indemnity basis thereafter.

50. On the other hand, r42.15 provides that where a defendant equals or beats an Offer of Compromise, (which has not been accepted by a plaintiff), by the plaintiff obtaining a smaller judgment than that offered by the defendant, the ordinary position will be as follows:

(i) The plaintiff will be entitled to costs on an ordinary basis up until the day following the day on which the Offer of Compromise was made; and

(ii) The defendant will be entitled to costs on an indemnity basis thereafter.

51. Further and significantly, r42.15A has now been inserted, effective from 8 December 2006, to plug what was a long standing lacuna in the legislative scheme as regards Offers of Compromise under the former *District Court Rules* and *Supreme Court Rules* and the *Uniform Civil Procedure Rules*, as initially passed. Up until the insertion of r42.15A, there was no specific provision which covered the situation of a verdict being entered for the defendant and

the defendant therefore beating an Offer of Compromise it had previously made, whether for a sum of money plus costs or for a verdict for the defendant with each party to pay its own costs. A number of judges have pointed out the existence of that gap in the legislative scheme: *Multicon Engineering Pty Ltd v. Federal Airports Corporation* (1996) 138 ALR 425, at 433 and *Notaras v Hugh & Ors* [2003] NSWSC 919, at [4]. The consequence was that in such situations, Offers of Compromise are treated as if they were *Calderbank* offers and it was incumbent upon the wholly successful defendant to demonstrate that the plaintiff had unreasonably failed to accept the offer in the circumstances of the case; *SMEC Testing Services Pty Ltd v. Campbelltown City Council* [2001] NSWCA 323, at [37].

52. Rule 42.15A has now filled that gap in the legislative scheme. It provides that where a defendant equals or beats an Offer of Compromise, (which has not been accepted by the plaintiff), by the defendant obtaining a judgment in its favour, the ordinary position will be as follows:

(i) The defendant will be entitled to costs on the ordinary basis up until the day following the day on which the Offer of Compromise was made; and

(ii) The defendant will be entitled to costs on an indemnity basis thereafter.

53. Thus, contrary to the position prior to the introduction of r42.15A, a wholly successful defendant who beats an Offer of Compromise will now have a prima

facie entitlement to indemnity costs from the day after the day upon which the Offer of Compromise was made.

54. It needs to be emphasised that under rr42.14, 42.15 and 42.15A, the Court has the discretionary power to make an "otherwise order" in appropriate circumstances.

55. Because of the costs consequences which can follow the failure to accept an Offer of Compromise, both plaintiffs and defendants have very real reasons to properly consider any reasonable Offer of Compromise which is served upon them. Indeed, the pressure on a plaintiff to very carefully consider any reasonable Offer of Compromise made by a defendant has increased under r42.15, in that the ordinary position where a defendant equals or beats an Offer of Compromise is now that the plaintiff will pay the defendant's costs on an indemnity basis from the day after the day on which the offer was made. Previously, the position under Part 52A r22(6) of the *Supreme Court Rules* and Part 39A r25(6) of the *District Court Rules* was that where a defendant equalled or beat an Offer of Compromise, then "unless the Court in an exceptional case and for the avoidance of substantial injustice otherwise orders", the plaintiff was entitled to costs up until the day the offer was made on an ordinary basis and the defendant was entitled to costs on a party/party basis thereafter. As decisions like *Leichhardt Municipal Council v. Green* demonstrate, it was difficult for a defendant to prove an entitlement to indemnity costs under the previous regime, *Leichhardt Municipal Council v. Green* [2004] NSWCA 341, at [52]-[58].

56. For an example of a recent decision in which the Court ordered that defendants who beat their Offer of Compromise receive indemnity costs from the day after the service of an Offer of Compromise, see *Mid City Skin Cancer and Laser Centre v. Zahedi-Anarak & Ors* [2006] NSWSC 1149.

57. Plaintiffs in smaller personal injury claims also need to give careful consideration to making early and realistic Offers of Compromise, noting the combined effect of ss338 and 340 of the *Legal Profession Act*. In short, a well calculated Offer of Compromise is virtually the only means by which a plaintiff can avoid the costs cap contained in s338 in a personal injury claim in which damages of less than $100,000 are recovered.

(ii) Calderbank Offers

(a) General Principles

58. *Calderbank* offers are offers which intrinsically do not comply with the UCPR and accordingly do not attract the same costs consequences as offers made in accordance with the Rules.[45] While Offers of Compromise under the UCPR give rise to a *prima facie* entitlement to a costs order if the offer is not bettered,[46]

[45] *Jones v Bradley (No2)* [2003] NSWCA 258, [5]. For some time there was much uncertainty in relation to the costs consequences which attended a *Calderbank* offer. The New South Wales Court of Appeal in *Jones v Bradley (No 2)* rejected the correctness of an earlier line of authority (beginning with *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425) 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.

[46] See *Leichhardt Municipal Council v Green* [2004] NSWCA 314, [19].

Calderbank offers are only a factor, though possibly a 'powerful factor',[47] that may influence the court's discretion as to costs.[48]

59. Though *Calderbank* offers do not attract a *prima facie* entitlement to a costs order as would a formal Offer of Compromise made under UCPR r 20.26, as the New South Wales Court of Appeal explained in *Fordyce v Fordham (No 2),*[49] the rejection of a *Calderbank* offer involves considerations not conceptually disparate from those that follow rejection of a formal Offer of Compromise—since the Rules are a principled reflection of the antecedent principles enshrined in *Calderbank.*[50] Accordingly, a *Calderbank* offer, as the Court observed, 'may attract costs awarded on the same basis as if those formal procedures had been invoked.'[51] There are sound considerations why a *Calderbank* offer should, where appropriate, attract the same costs consequences as formal Offers of Compromise. As the Full Court of the Federal Court of Australia explained in *WSA Online Limited v Arms (No 2)*:[52]

> A Calderbank offer is a less formal means of proposing resolution of a proceeding or proceedings than the procedure under O 23 of the Federal Court Rules. ... [And although] [a] Calderbank offer does not carry the same presumptive entitlement to indemnity costs ... the public policy of encouraging settlement of litigation should

[47] *Smith v Smith* [1987] 2 Qd R 807, 810 (Smith J).
[48] 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.
[49] [2006] NSWCA 362.
[50] [2006] NSWCA 362, [20].
[51] [2006] NSWCA 362, [20].
[52] [2006] FCAFC 108, [16] (Nicholson, Mansfield and Bennett JJ).

> nevertheless lead the court to make an order for indemnity costs where a Calderbank offer has been made in terms which are clear and where it is appropriate to do so.

60. 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.[53] That said, 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.'[54]

61. 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*:[55]

> 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

[53] *Jones v Bradley (No 2)* [2003] NSWCA 258, [12] and the cases there cited.
[54] *Morris v McEwen* (2005) 92 SASR 281, 289 (Besanko J), 300 (White J).
[55] [2000] NSWCA 323, [37].

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.

(b) The Unreasonable Rejection of a Calderbank Offer

62. *SMEC Testing Services Pty Ltd* has met with successive approval from New South Wales Court of Appeal.[56]As Hoeben J recently explained in *Crump v Equine Nutrition Systems Pty Ltd Trading as Horsepower (No 2)*[57] the decision also made clear that 'the reasonableness or otherwise of the refusal to accept [a] *Calderbank* offer [must] to be considered by reference to the situation at the time when the offer was made and not solely by reference to the ultimate outcome of the proceedings.'

63. There is no room for hindsight analysis in assessing whether the rejection of a *Calderbank* offer was reasonable—'courts have warned of the dangers of judging the reasonableness of a settlement offer through the prism of hindsight.'[58]

64. 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

[56]*AVS Australian Venue Security Services Pty Ltd v Criminale (No 2)* [2007] NSWCA 34, [7]; *Porter v Lachlan Shire Council (No2)* [2006] NSWCA 252, [6]; *Jones v Bradley (No 2)* [2003] NSWCA, [8]; *Leichhardt Municipal Council v Green* [2004] NSWCA 341, [19]; *Brymount Pty Limited t/as Watson Toyota v Cummins (No 2)* [2005] NSWCA 69, [14].
[57] [2007] NSWSC 25, [41].
[58] *Stipanov v Mier (No 2)* [2006] VSC 424, [12] (Hollingworth J). See also *Seven Network Ltd v News Ltd* [2007] FCA 1489, [44] (Sackville J); *McDonnell v McDonnel*l [1977] 1 WLR 34, 38 (Ormrod LJ), with whom Sir John Pennycuick agreed.

rejected.[59] As Santow JA observed in *Leichhardt Municipal Council v Green*,[60] 'the question of reasonableness in rejecting an offer is not answered by a presumption; it depends on the circumstances of each case.' Elaborating on *Leichhardt Municipal Council*, the New South Wales Court of Appeal in *South Eastern Sydney Area Health Service v King*,[61] said that the 'circumstances of each case' entails a consideration of 'the relevant strengths and weaknesses of each party's case as they may have been apparent to the parties at the time the offer was made.'[62] The 'relevant strengths and weaknesses' includes not only a party's prospects on liability but 'its prospects of success in relation to the quantum of damages it claims.'[63]

65. On the present state of the authorities, there are differences in view as to whether the rejection of a *Calderbank* offer must be 'unreasonable' or 'plainly unreasonable' before indemnity costs will be ordered. The issue was expressly considered by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* where the Court held that 'the considerations can be sufficiently accommodated by applying a test of unreasonableness.'[64]

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[59] *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, 239 (Lingren J); *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd* (1994) 52 FCR 201, 206 (Hill J).
[60] [2004] NSWCA 341 at [56].
[61] [2006] NSWCA 2, [90] (Hunt AJA, McColl JA) with whom Mason P agreed.
[62] See also *Dunstan v Rickwood (No 2)* [2007] NSWCA 266, [50] (McColl JA), with whom Beazley and Ipp JJA agreed, 'Whether or not it was reasonable for a party to reject an offer of settlement will rarely however be determined by a bald comparison between the offers made and the outcome. Rather, the question whether a party's attitude to settlement offers have been so unreasonable as to warrant an indemnity costs order requires careful analysis of the issues in the proceedings and the state of the evidence at the time the various offers were made: *Rolls Royce Industrial Power (Pacific) Ltd (Formerly John Thompson (Australia) Pty Limited) v James Hardie & Co Pty Ltd (Pacific) Limited* [2001] NSWCA 461; (2001) 53 NSWLR 626.'
[63] *Seven Network Ltd v News Ltd* [2007] FCA 1489, [63] (Sackville J).
[64] (2005) 13 VR 435, 441 [23] (Warren CJ, Maxwell P and Harper AJA).

66. The Full Court of the Federal Court also rejected the more stringent test of plain unreasonableness in *Black v Lipovac*.[65] In doing so, the Court added that 'to adopt an especially high standard of unreasonableness would operate as a fetter on the discretion to award indemnity costs and diminish the effectiveness of the *Calderbank* offer as an incentive to settlement.' Justice Sackville in *Seven Network Ltd v News Ltd*[66] recently doubted whether in any event the 'insertion of 'plainly' before 'unreasonable' add[ed] anything of substance.'

67. Outside of Australia, neither the practice in England nor Hong Kong dictates that the rejection of a *Calderbank* offer must be plainly unreasonable before indemnity costs will be ordered.[67]

68. Despite of the considerable weight of authority against the test of plain unreasonableness, the New South Wales Court of Appeal continues to—at least in theory—insist that the rejection of a *Calderbank* offer must be plainly unreasonable.[68] In practice however, the more stringent test is seldom applied by the Supreme Court of New South Wales[69] and it must be seriously doubted whether any application for indemnity costs would ever call for dismissal solely

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[65] (1998) 217 ALR 386, 432 [218] (Miles, Heerey and Madgwick JJ).
[66] [2007] FCA 1489, [62].
[67] See *McDonnell v McDonell* [1977] 1 WLR 34, 38 (Ormrod LJ); *Butcher v Wolf* [1999] 1 FLR 334, 340 (Mummery LJ); *Chinney Construction Co Ltd v Po Kwong Marble Factory Ltd* [2005] HKCU 895, [44] (Cheung J).
[68] *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2)* [1999] NSWCA 133, [21] (Powell JA) with whom Priestly JA and Sheppard AJA agreed; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74, [108] (Young CJ in Eq) with whom Meagher and Hodgson JJA agreed; *Sydney City Council v Geftlick* [2006] NSWCA 280, [90] (Mason P), with whom Hodgson and Tobias JJA agreed; *Dunstan v Rickwood (No 2)* [2007] NSWCA 266, [44] (McColl JA), with whom Beazley and Ipp JJA agreed; *Peter Willis v Health Communications Network Ltd (No 2)* [2008] NSWCA 2, [22] (Mason P, Tobias and McColl JJA). Two first instance decisions have questioned the New South Wales Court of Appeal's approach. Justice Hunter in *Walter Construction Group Ltd v Walker Corp Ltd* [2001] NSWSC 359, [33] expressly declined to adopt the test of plain unreasonableness ordained by the Court of Appeal, at that time, in *Nobrega*. Justice Adams in *Alves v Patel* [2005] NSWSC 841, [7] doubted '[w]hether there is a real distinction between a refusal that is plainly unreasonable as distinct from merely unreasonable.'
[69] A good example may be found in *CBA Investments Ltd v Northern Star Ltd (No 2)* [2002] NSWCA 146.

on the basis that the rejection of a *Calderbank* offer, though shown to be unreasonable, was not *plainly* unreasonable.

69. In considering the unreasonable rejection of a *Calderbank* offer, it is not necessary to establish actual misconduct on the part of the offeree[70] or show that the offeree acted with 'wilful disregard of know facts or clearly established law', or that it acted with 'high-handed presumption.'[71]

70. Lastly, there is some suggestion that a court should not be overly disposed towards the acceptance of 'technical' reasons why a *Calderbank* offer was not seriously considered. As Gillard J expressed in *M.T. Associates v Aqua-Max Pty Ltd*:[72]

> Any form of offer assuming it can be adduced into evidence should be considered by the Court on the question of costs and overly technical reasons given by the other party for not seriously considering an offer should be rejected … In days of old, points were taken justifying the refusal of an offer because of some point. In this day and age where costs in heavy litigation are high, litigants and their lawyers must consider all offers of settlement bona fide and reasonably.

(c) Factors Relevant to the Assessment of Calderbank Offers and Their Unreasonable Rejection

[70] *Oversa-Chinese Banking Corporation v Richfield Investments Pty Ltd* [2004] VSC 351, [93] (Redlich J).
[71] *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435, 442 [29] (Warren CJ, Maxwell P and Harper AJA).
[72] [2000] VSC 163, [74]-[76].

71. As the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* made clear, it is neither possible nor desirable to give an exhaustive list of relevant circumstances which might affect the assessment of a *Calderbank* offer. Nevertheless, several considerations have been identified as important to the discretion to award indemnity costs.

(1) *A Genuine Element of Compromise*

72. A *Calderbank* offer must contain some element of genuine compromise.[73] Compromise, as Giles J explained in *Hobartville Stud v Union Insurance Co*,[74] ordinarily entails giving something away:

> 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.

[73] *Ryde City Council v Tourtouras (No 2)* [2007] NSWCA 262, [4] (Santow, McColl and Basten JJA).
[74] (1991) 25 NSWLR 358, 368.

73. As Rogers CJ Comm D explained in *Tickell v Trifleska Pty Ltd*[75], 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.

74. While a genuine element of compromise will not be represented in *Calderbank* offer which contains a simple demand for capitulation; [76] or in the case of a plaintiff, an offer to settle for the full sum claimed,[77] it should not be assumed that every genuine offer must entail the offer of a cash settlement.[78] Indeed, at one end of the spectrum 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 or *Calderbank offer*.[79]

75. In those cases that 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

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[75] (1990) 25 NSWLR 353, 355.
[76] *Westbury Holdings Kiama Pty Ltd v ASIC* [2007] NSWSC 1064, [10] (Barrett J).
[77] *Leichhardt Municipal Council v Green* [2004] NSWCA 341, [30].
[78] *Leichhardt Municipal Council v Green* [2004] NSWCA 341, [33], disapproving *Bishop v State of New South Wales*, (Unreported, Supreme Court of New South Wales, Dunford J, 17 December 2000) and *McKerlie v State of New South Wales (No 2)* [2000] NSWSC 1159 which suggested that a genuine Offer of Compromise required some cash offer of settlement.
[79] *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [36]; *Atton v National Mutual Life Association of Australasia (No 2)* [2007] NSWSC 348, [3] (Gzell J). The position is however different in the Federal Court of Australia. A 'walk away' offer will not constitute a genuine Offer of Compromise: *Spalla v St George Motor Finance Ltd (No 8)* [2007] FCA 1537, [25] (Kenny J); *Vasram v AMP Life Ltd* [2002] FCA 1286, [12] (Stone J); *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd (No 2)* (2002) 201 ALR 618, 631 [60]-[61] (Hill J). *Cf Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844, [19] (Gray J) 'I am by no means certain that this is a universal rule.'

of the litigation. As Santow JA explained in *Leichhardt Municipal Council v Green*:[80]

> 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.

(2) The Timing of the Offer

76. The timing of a *Calderbank* offer has assumed crucial significance in the discretion to award indemnity costs. 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.'[81]

77. *Calderbank* offers cannot lightly be ignored even if made late in proceedings or left open only for a limited period of time. In *Penrith Rugby League Club Limited t/as Cardiff Panthers v Elliot (No. 2)*, the Court of Appeal awarded

[80] [2004] NSWCA 341, [37].
[81] *Jones v Bradley (No 2)* [2003] NSWCA 258, [13].

indemnity costs on the basis of a *Calderbank* offer which was left open for 6 days and made less than 3 weeks before the trial was scheduled to begin. 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*:[82]

> 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.

- *Offers Made Early on in Proceedings*

78. *Calderbank* offers made early on in proceedings have received cautious judicial treatment; for without the benefit of expert's reports, particulars or evidence, an offeree of a *Calderbank* offer often only has a limited ability to assess the strengths and weaknesses of its case.[83]

[82] (2005) 92 SASR 281, 302.
[83] See *Edwards Madigan Torillo Briggs Pty Ltd v Stack* [2003] NSWCA 302, [22] (Davies AJA), with whom Mason P and Meagher JA agreed.

79. The same considerations may also apply in respect of appeals. In *McFadzean v Construction Forestry Mining and Energy Union (No2),*[84] the Victorian Court of Appeal declined to order a number of unsuccessful appellants to pay the respondents' costs on an indemnity basis following the rejection of a *Calderbank* offer on the grounds that at the time of receiving the offer, the respondents had not filed their Statement of Argument; '[h]ence at the time the offer was made the appellants did not know the real strengths and weaknesses of the respondents' arguments on the appeals.'

80. The considerations will however be somewhat different were the evidence in the proceedings is peculiarly within the knowledge of the offeree of a *Calderbank* offer. In *Atton v National Mutual Life Association of Australasia (No 2)*[85] Gzell J saw little difficulty in ordering the plaintiff to pay the defendant's costs on an indemnity basis following the rejection of a *Calderbank* offer, despite the fact no evidence had been served at the time of the making of the offers, since '[t]he elements necessary to establish the plaintiff's claim were peculiarly within his knowledge and he was ... able to assess his position by reference to the evidence that would be adduced by him at the time the offers were made.' A similar view was also taken by the Supreme Court of Western Australia in *Mount Lawley Pty Ltd v Western Australian Planning Commission*.[86]

81. In a decision that stands somewhat removed from cautious judicial treatment *Calderbank* offers made early on in proceedings have received, Adams J in

[84] [2007] VSCA 313, [9] (Warren CJ, Nettle and Redlich JJA).
[85] [2007] NSWSC 348, [8]
[86] [2006] WASC 82, [93] (Templeman J)

Alves v Patel, [87] interestingly rejected a submission that the unavailability of expert reports and the late provision of particulars coupled with the complexity of the issues in the case rendered the rejection of a *Calderbank* offer not unreasonable. In making an order for the payment of costs on an indemnity basis, his Honour said:[88]

> The defendant submits that, having regard to the manner in which the plaintiff conducted the litigation and the complex and difficult nature of the case made it was not unreasonable for him to refuse the plaintiff's *Calderbank* offers …
>
> When dealing with the issue of costs in the context of settlement negotiations it is important to recognize, as it seems to me, that such negotiations often take place before the trial commences, well before the evidence is concluded and often before its detail is clear. Moreover, as the matter proceeds, the absence of settlement in the period – sometimes lengthy – before trial will often lead to further investigation and the collection of further evidence. *The notion that Calderbank offers can safely be ignored without costs consequences just because the offeror's case is not ready for trial or all pre-trial requirements as to service of reports or supply of particulars have not been complied with cannot be right: much will depend on a*

[87] [2005] NSWSC 841
[88] [2005] NSWSC 841, [13]-[16].

> *commonsense approach to the case and the particular circumstances at the time of the offer.*
>
> *The mere fact that a defendant does not know precisely what the value of the plaintiff's claim or the scope of the evidence proposed to be led in support of it when a Calderbank offer is made does not mean that it is not unreasonable for such an offer to be ignored. After all, the defendant is not without the means of independently estimating the value of the case. Offers are very often made and accepted because the value of the claim is difficult to estimate. Much also depends also on the extent to which the offer is exceeded by the judgment.*
>
> In short, the question is not so much what is the "true" value of the plaintiff's case but, having due regard to the imponderables and uncertainties in the case, whether it was "plainly" unreasonable to refuse the plaintiff's offers, bearing mind the "ordinary rule is that costs when ordered in adversary litigation are to be recovered on the party and party basis": per Sheppard J in *Sanko Steamship Co* (*supra*). These are all very much matters of fact and degree. (my emphasis)

82. Though not strictly referable to the earliness of the offer, Hislop J in *Portelli v Tabriska Pty Ltd (No 2)*[89] declined to make an order for indemnity costs on the grounds that the plaintiff did not have, when assessing the defendant's *Calderbank* offer, the benefit of considering several New South Wales Court of

[89] [2008] NSWSC 94, [16]

Appeal decisions handed down shortly after the expiration of the offer and which significantly changed the plaintiff's prospects of success.

- *Offers Made Late in the Proceedings*

83. *Calderbank* offers served days before, or even mid-trial are a frequent occurrence in litigation practice. The Full Court of the Supreme Court of Western Australia however spoke inimically of such offers in *Maclean v Rottnest Island Authority*:[90]

> [T]he Court should not encourage the use of a Calderbank letter delivered shortly before trial when the other party might reasonably be expected to have their minds on a number of matters. The use of a Calderbank letter is an aid to the administration of justice and should be encouraged. Its use as an indiscriminately wielded tactical weapon should be discouraged.

84. Whether a *Calderbank* offer served late in the proceedings will give rise to indemnity costs will depend heavily on the surrounding circumstances.

(3) The Time Allowed to the Offeree to Accept the Offer

[90] [2001] WASCA 323, [36].

85. The time afforded an offeree to accept a *Calderbank* offer assumes crucial significance in the discretion to award indemnity costs. As the English Court of Appeal said in *Young v Young,*[91] '*Calderbank* offers do not bite until the recipient has a reasonable opportunity to consider the proposed compromise.'

86. While there is considerable safety in allowing, wherever possible, a *Calderbank* offer to remain open for a period of 28 days—the same period for which formal Offers of Compromise under UCPR r 20.26(7)(a) must be left open—offers left open for shorter periods have sounded in indemnity costs. Much of course depends on the circumstances and careful attention is often directed to whether the time afforded an offeree to accept a *Calderbank* offer had any bearing on its decision to reject it.[92]

87. It is extremely difficult to offer any real guidance as to what constitutes a reasonable time. In *Rosselli v Rosselli (No 2)*[93] a *Calderbank offer* made two weeks before trial and left open for seven days sounded in an order for indemnity costs. Conversely, an offer left open for 14 days and made early on in the proceedings was held to afford the offeree insufficient time to consider the offer in *Edwards Madigan Torillo Briggs Pty Ltd v Stack*.[94]

88. A *Calderbank* offer left open for 2 days and made mid-trial (2 days before the resumption of the hearing) did not sound in indemnity costs in *Carr v Fischer*.[95] In *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd*[96]Lingren J described a *Calderbank* offer left open for 1 day as 'an extreme case.' As noted above, in

[91] [1998] 2 FLR 1131, 1140 (Thorpe LJ), with whom Chadwick and Butler-Sloss LLJ agreed.
[92] See *Codent Ltd v Lyson Ltd* [2006] All ER (D) 138, 141 [51] (May J).
[93] [2007] VSC 438.
[94] [2003] NSWCA 302, [22] (Davies AJA), with whom Mason P and Meagher JA agreed.
[95] [2005] NSWSC 31.
[96] (1996) 70 FCR 236, 240

Penrith Rugby League Club Limited t/as Cardiff Panthers v Elliot (No. 2), a *Calderbank* offer made less than 3 weeks before the trial was scheduled to begin and left open for 6 days was found to have been open for a reasonable time and therefore resulted in an order for indemnity costs.

89. In *Ghunaim v Bart (No 2)*[97] the New South Wales Court of Appeal described the period of 3 hours afforded an offeree to accept a *Calderbank* offer on the first day of trial as a 'period so brief it might be regarded as derisory.'

(4) The Clarity of the Terms of the Offer: Is There a Duty to Seek Clarification of an Uncertain Offer?

90. The consideration which arises under this heading is an English one. It remains untested in Australia and is included solely out of interest.

91. Unlike in Australia, English practice recognises that an offeree who does not seek clarification of an uncertain *Calderbank* offer may be taken to have unreasonably rejected it. A clear statement of the principle was offered by Roch LJ in *Hobin v Douglas*:[98]

> 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. In the

[97] [2006] NSWCA 82, [28] (McColl JA), with whom Giles and Ipp JJA agreed.
[98] [2000] PIQR Q1, Q10.

circumstances of this case and in the light of the encouragement that this court is giving to the increasing use of *Calderbank* offers to mitigate the rising costs of litigation, I would dismiss this appeal against the costs order made by the judge.

92. In *Phyllis Trading Ltd v 86 Lordship Road Ltd*,[99] the English Court of Appeal ordered a landlord to pay a nominee purchaser's costs from the date of a *Calderbank* offer on the ground that the offer had been unreasonably refused by the landlord. The offer in question was entirely uncertain on its face for it could not be ascertained whether the amount offered was inclusive of costs or whether the nominee purchaser was proposing to make an additional payment by way of costs.

93. In ordering costs against the landlord, Thorpe LJ observed that '[i]f the offer [was] in any way unclear to him, he has an undoubted obligation to seek clarification.'[100]

94. Like *Calderbank* offers, the duty to seek clarification was first recognised by the English Court of Appeal sitting on appeal from the Family Division of the High Court of Justice.[101] Its application outside of the Family Division was initially rejected by Aldous J sitting in the Chancery Division in *C & H Engineering v F Klucznik & Son Limited*.[102] It was not until the English Court of Appeal decision

[99] [2002] 2 EGLR 85.
[100] *Phyliss Trading Ltd v 86 Lordship Road Ltd* [2002] 2 EGLR 85, 88 [29].
[101] See *Gojkovic v Gojkovic (No 2)* [1992] Fam 40, 59 (Butler-Sloss LJ).
[102] [1992] FSR 667. The report of the case in the *Fleet Street Reports* is not however entirely clear. The principle is better reported in the *Times Law Reports*, 26 March 1992, 1 where it is expressly noted that Aldous J rejected what Butler-Sloss LJ said in *Gojkovic v Gojkovic (No 2)* [1992] Fam 40, 59.

in *Butcher v Wolf*[103] that the duty was effectively extended to all manner of cases.

(d) Other Considerations Relevant to the Discretion as to Costs

95. Outside of the factors relevant to assessing the reasonableness of a *Calderbank* offer, several other considerations have been identified as relevant to the discretion as to costs. A few of these shall be considered below.

(1) The Nature of the Proceedings

96. The nature of the proceedings may have an impact on the assessment of *Calderbank* offers. In *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd (No 2),*[104] despite finding that the defendant's *Calderbank* offer was a reasonable one, Barrett J declined to order indemnity costs on the grounds that the proceedings were hard-fought by well resourced commercial parties on issues which were 'not clear cut.' Similarly, in *Ng v Chong*[105] Hamilton J declined to order indemnity costs on account of the complex nature of the case.

97. The fact that proceedings involve public rights, and more importantly, human rights, may well be a relevant consideration to the award of indemnity costs.

[103] [1999] 1 FLR 334.
[104][2002] NSWSC 72, [53]-[55]. See also *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Limited (formerly GIO Insurance Limited)* [2006] 583, [37] (Einstein J).
[105] [2005] NSWSC 385, [14].

However, in a recent decision of the High Court of New Zealand, *Rapana v McBride Street Cars Ltd*,[106] Asher J warned that '[t]he fact that there may be elements of public interest in a case does not preclude an effective *Calderbank* offer.'[107] His Honour added, 'I would have had concerns if the ''public interest'' factor was the sole basis for the ... rejection of [a] Calderbank offer.'[108]

98. If the effectiveness of a *Calderbank* offer was to become curtailed by public interest factors, the Crown and its instrumentalities—who are often named defendants to public interest proceedings—would be less able to protect their position as to costs through the device of *Calderbank* offers.

99. The operation of *Calderbank* offers is not limited to suits between private parties or public authorities and private parties. As Connolly J explained in *Matthew James Traynor (By His Next Friend Peter Traynor) v Australian Capital Territory*,[109] there is also 'no reason why the principles of *Calderbank* offers should not also apply to litigation between governments.'

(2) Changes in the Nature of the Case Presented

100. A party who 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*:[110]

[106] [2007] DCR 551.
[107] *Rapana v McBride Street Cars Ltd* [2007] DCR 551, 559 [28].
[108] *Rapana v McBride Street Cars Ltd* [2007] DCR 551, 559 [30].
[109] [2007] ACTSC 85, [11].
[110] (2005) 92 SASR 281, 293. Special leave to appeal to the High Court of Australia refused: *McEwen v Morris* [2006] HCATrans 56.

> 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)

101. Similarly, in *Fowdh v Fowdh*[111] 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.

[111] (Unreported, New South Wales Court of Appeal, 4 November 1993), 6.

102. Clearly there must be a 'significant change'[112] in the nature of the case presented or the 'manner in which the evidence emerges at trial'[113] and not merely something as a 'result of the ordinary risks and vicissitudes of litigation'[114] 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*.[115]

(3) Disentitling Conduct

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

[112] *Shaw v Jarldorn* (1999) 76 SASR 28, 30 (Doyle CJ).
[113] *Shaw v Jarldorn* (1999) 76 SASR 28, 34 (Perry J).
[114] *Shaw v Jarldorn* (1999) 76 SASR 28, 30 (Doyle CJ).
[115] (2001) 53 NSWLR 626. See also *Beoco Limited v Alfa Laval Co Limited* (1994) 4 All ER 464.

> bearing on the result cannot, in my view, have the benefits of a *Calderbank* offer.[116]

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

(4) A Failure to Negotiate?

105. Though untested in Australia, there is considerable English authority for the proposition that a party's refusal to negotiate or respond constructively to a *Calderbank* offer may be a relevant consideration in the exercise of an award of indemnity costs. As Nicholas Mostyn QC (sitting as a deputy High Court judge) said in *GW v RW*,[117] '[i]f a party refuses to negotiate in *Calderbank* correspondence, or adopts a manifestly unreasonable stance, then he or she can expect to be penalised in costs.'

106. Similarly, in *A v A (Costs Appeal*)[118] Singer J said:

> A spouse who does not respond constructively to a Calderbank offer, whether a good offer as in this case or only one that is bad or indifferent, stymies whatever chance there is of settlement.

[116] *Morris v McEwen* (2005) 92 SASR 281, 283. See also *Gojkovic v Gojkovic [*1992] Fam 40, 59 (Butler-Sloss LJ).
[117] [2003] 2 FLR 108, 137 [97].
[118] [1996] FLR 14, 25.

> While one can never say that this or any other case would have settled if the Calderbank door had been kept open by timely and reasonable reply, the critical point is that to slam the door through inactivity, lack of objectivity, indecision or for whatever other reason makes potentially avoidable inevitable. These observations most potently apply where, as here, the issues were clear and the evidence in relation to them sufficiently established at the time of the offer. If ever the Calderbank procedure is to be effective, it must ... have teeth. This is to my mind clear case where the sanction of costs should bite to bring liability for them home to the person whose failure to follow the established route has led to them.

107. While the clearest statements on the duty to negotiate are evidently found in decisions emanating from the Family Division of the High Court of Justice, the operation of duty clearly extends to all manner of proceedings, including commercial cases.[119]

(e) Applying for Indemnity Costs

[119] See *Butcher v Wolf* [1999] 1 FLR 334, 344 (Simon Brown LJ), with whom Mantell LJ agreed; *Phyliss Trading Ltd v 86 Lordship Road Ltd* [2001] 2 EGLR 85, 88 [29] (Thorpe LJ) 'The whole purpose of the [*Calderbank*] mechanism is to avoid unnecessary litigation and to curtail the escalation of unnecessary costs. The recipient of a *Calderbank* letter takes a real risk if he opts for summary rejection. As authority in this court makes plain, if he regards the offer as insufficient, he has some obligation to state what would be sufficient.'

108. It is important to bear in mind that the applicant for indemnity costs bears the onus of showing the rejection of a *Calderbank* offer was unreasonable.[120]

109. Also, whereas it was once considered that a *Calderbank* offer made by a defendant would not found an order for costs on an indemnity basis, as a consequence of the Offer of Compromise provisions contained in the *Supreme Court Rules 1970* (NSW), [121] the New South Wales Court of Appeal in *Porter v Lachlan Shire Council (No 2)*[122] acknowledged the change brought about by the introduction of the UCPR. The changes were fully explained by Brereton J in *Hali Retail Stores Pty Ltd*:[123]

> Mr Parker submitted that on the authority of *Leichhardt Municipal Council v Green* [2004] NSWCA 341, in any event the starting position in the case of a Defendant's offer was not that there would be an indemnity costs order in favour of the Defendant after the date of the offer. However, as emerged in argument, *Leichhardt Municipal Council v Green* was concerned with former (NSW) Supreme Court Rules 1970, Pt 51A, r 22(6) and its District Court equivalent, which provided that where an offer was made by a Defendant and not accepted by the Plaintiff, and the Plaintiff obtained a result not more favourable than the offer, then except in an exceptional case the Plaintiff was entitled to an order against the Defendant for costs up to and including the day the offer was made on a *party-party* basis and

[120] *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, 240 (Lingren J); *Sural Spa v Downer EDI Rail Pty Ltd* [2007] NSWSC 1292, [8] (Einstein J).
[121] See *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [42]-[46] per Santow JA.
[122] [2006] NSWCA 252 , [13].
[123] [2007] NSWSC 427, [6].

> the Defendant was entitled to an order against the Plaintiff for the Defendant's costs thereafter, assessed on a *party-party* basis. UCPR 42.15 changes that position, so that where a Defendant's offer is not accepted and the Plaintiff obtains a judgment no more favourable than the offer, the Defendant is entitled to an order for costs assessed *on the indemnity basis* from the day after the offer was made. That change in the Rules undermines the continued application of *Leichhardt Municipal Council v Green*.[124]

E. CONCLUSION – WHEN TO USE OFFERS OF COMPROMISE OR *CALDERBANK* OFFERS

110. Prior to the fairly significant changes to the Offer of Compromise procedure brought about by the commencement of the *Uniform Civil Procedure Rules*, there were fairly powerful reasons for preferring a *Calderbank* offer, depending upon the particular circumstances of the case. The earlier Offer of Compromise procedures were fairly technical and attended to by quite rigid rules. For instance, under the former *District Court Rules* and *Supreme Court Rules*, an Offer of Compromise had to be kept open for a minimum of 28 days. That made an Offer of Compromise a fairly unattractive proposition once a trial

[124] The same view has also been accepted elsewhere: *Pollard v Baulderstone Hornibrook Engineering Pty Ltd (No 2)* [2007] NSWSC, [7] (Hislop J) 'The court may also make an order that a defendant is entitled to indemnity costs where an offer has been made in a Calderbank letter and the judgment obtained by the plaintiff is less favourable to him or her than the terms of the offer.'

date was less than four weeks away and in those circumstances, *Calderbank* offers were almost invariably used.

111. Division 4 of Part 20 of the *Uniform Civil Procedure Rules* contains provisions which are far more flexible and in my view, they have achieved the result of making an Offer of Compromise preferable to a *Calderbank* offer in most circumstances.

112. Without labouring the point, Offers of Compromise may now be made in relation to the whole or part of a claim[125], Offers of Compromise are not restricted to offers of a money sum[126], multiple Offers of Compromise can be made in the same proceedings[127] and Offers of Compromise may be made at any time, including after the commencement of a hearing[128].

113. It is important however to note that there are still some formal restrictions regarding Offers of Compromise. In particular:-

- Once an Offer of Compromise has been made, it may not be withdrawn during the period of acceptance without the leave of the court[129];

- The Offer of Compromise must state that it is an offer made in accordance with the *Uniform Civil Procedure Rules*[130];

[125] Rule 20.26(1)
[126] Rule 20.26(8)
[127] Rule 20.26(10)
[128] Rules 20.26(7), 20.25 and 20.27 and Rules 42.14 and 42.15
[129] Rule 20.26(11)
[130] Rule 20.26(3)(a)

- An Offer of Compromise must be exclusive of costs except in the case of a verdict for the defendant, with each party to bear their own costs[131].

114. In my view, it is really only the restriction on withdrawing Offers of Compromise that is likely to be of any practical significance. Even in that respect, I believe it will only be in rare cases where it will be necessary to seek to withdraw an Offer of Compromise which has been made after careful consideration and assessment of the case. In any event, the courts have held that leave to withdraw an Offer of Compromise can be ordered where there has been a significant change in the complexion of the case brought about by the discovery of new evidence or a recent judicial decision[132].

115. The most significant advantage in making an Offer of Compromise as opposed to a *Calderbank* offer is that where the offeror equals or beats it, he or she will almost invariably be entitled to an order for indemnity costs from the day after the day upon which the Offer of Compromise was made. An otherwise order will only be made in "exceptional circumstances"[133]. Thus, where a party equals or beats an Offer of Compromise, the onus is on the offeree to prove that exceptional circumstances exist such as to disentitle the offeror to the ordinary order of indemnity costs from the day after the day upon which the offer was made.

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[131] Rule 20.26(2)
[132] *Sherratt Limited v John Bromley (Church Stretton Limited)* [1985] 1 QB 1038 and *Scanruby Pty Limited v Caltex Petroleum Pty Limited* [2001] NSWSC 411 and *Spring v Sydney South West Area Health Service* [2009] NSWSC 420
[133] *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2, at [83]

116. By contrast, a party who equals or beats a *Calderbank* offer retains the onus of satisfying the court that the offeree's rejection of the offer was, in all the circumstances, unreasonable. As a practical matter, it can often be difficult to prove that the rejection of such an offer was unreasonable. Further, the very process of trying to prove that the rejection of a *Calderbank* offer was unreasonable can itself involve further time and costs being incurred, even though the courts usually frown upon further evidence being adduced for the purpose of determining whether the rejection of the offer was unreasonable[134].

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16 FEBRUARY 2010

[134] *Elite Protective Personnel Pty Limited v Salmon* [2007] NSWCA 322, at [147]