

CALDERBANK OFFERS

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I INTRODUCTION

It would seem that provision for offers of compromise under the *Uniform Civil Procedure Rules 2005 (NSW)*¹ has diminished little the indelible professional affection for *Calderbank* offers. As pervasive as *Calderbank* offers remain in the

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¹ 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 complement the earlier offer of compromise provisions and ascribe the cost consequences which follow from the acceptance or non-acceptance of an offer of compromise.

practice of litigious compromise, it is of much lament that [t]he area of law has become beset by technicality, much of which appears to me to be unnecessary.²

Calderbank offers of course derive their name from the English Court of Appeal decision in *Calderbank v Calderbank*³ which approved the practice of making offers of compromise expressed to be ‘without prejudice’ but reserving a right to refer to the document on the question of costs.⁴ Originally thought to be confined to matrimonial proceedings where no payment into court procedure was available,⁵ it was not until the English Court of Appeal decision in *Cutts v Head*⁶ that the practice was formally approved for all manner of cases—but only where the option of making a payment into court was inappropriate.⁷

The practice of making offers of compromise on *Calderbank* terms has spread well beyond England. Hong Kong,⁸ Singapore,⁹ New Zealand,¹⁰ Ireland,¹¹ Canada,¹² and of course Australia, all recognise *Calderbank* offers. Such offers are also firmly entrenched in international arbitration practice.¹³

Calderbank offers have been an accepted practice in New South Wales for some time now and despite the provision for formal offers of compromise under the UCPR,

² *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 1844, [19] (Gray J).

³ The eponymic decision is reported in the ‘Law Reports’ as [1976] Fam 93. The parallel citations are: [1975] 3 WLR 586; [1975] 3 All ER 333; (1975) FLR Rep 113.

⁴ The form of offer suggested in *Calderbank* was subsequently approved by the English Court of Appeal in *McDonnell v McDonnell* [1977] 1 WLR 34.

⁵ It took the English legal profession quite some time to realise the implications of *Calderbank* offers outside of matrimonial proceedings: see *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379, 1382-1383 (Sir Robert Megarry VC).

⁶ [1984] Ch 290.

⁷ The English Court of Appeal has now considered on many occasions when payment into court will be inappropriate: *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 qualification on the use of *Calderbank* offers imposed by the decision in *Cutts* and reflected in Part 36 of the *Civil Procedure Rules* has been heavily criticised in England: see Daniel L Ward, ‘New Carrots and Sticks: Proposals for Reform of CPR Part 36’ (2007) 70(2) *Modern Law Review* 278. Though also retained in Hong Kong: see *Hong Kong Shanghai Hotel v Choy Bing Wing* [1999] HKLRD 473, the payment into court qualification was rejected early on in Australia: see *Messiter v Hutchinson* (1987) 10 NSWLR 525, 528 (Rogers J.); *Dobb v Hackett* (1993) 10 WAR 532; *Pirrotta v Citibank Ltd* (1998) 72 SASR 259.

⁸ See *Chinney Construction Co Ltd v Po Kwong Marble Factory Ltd* [2005] HKCU 895.

⁹ See *SBS Transit Ltd v Koh Swee Ann* [2004] 3 SLR 365.

¹⁰ The New Zealand authorities are reviewed in John Turner, ‘Civil Procedure’ [2000] *New Zealand Law Review* 155, 167-169.

¹¹ See *O’Neill v Ryanair (No 3)* [1992] IR 166.

¹² See *Mosher v Reimer* (2004) ABQB 496; Frederick M Irvine, ‘Consequences of Calderbank Letters in Litigation in the Supreme Court of British Columbia’ (1992) 15 *Carswell’s Practice Cases (Articles)* (3d) 327.

¹³ See Poupak Anjomshoaa, ‘Costs Awards in International Arbitration and the Use of “Sealed Offers” to Limited Liability for Costs’ (2007) 10(2) *International Arbitration Law Review* 38.

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.

It is beyond the scope of this paper to offer a general commentary on the costs provisions of the UCPR and the source of the court's discretion to order indemnity costs. That task has been undertaken elsewhere.¹⁴ The object of this paper is to offer some guidance on the practice and principles of *Calderbank* offers. The substantive 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* will not render it inadmissible or necessarily ineffective on an argument as to costs,¹⁵ 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';
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; and

¹⁴ See *Pollard v Baulderstone Hornibrook Engineering Pty Ltd (No2)* [2007] NSWSC 489, [5]-[9] (Hislop J).

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

8. provide reasons why the offer should be accepted.

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

A 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 history¹⁶ and is said to be founded upon ‘the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.’¹⁷ As Oliver LJ explained in *Cutts*:¹⁸

[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.

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’¹⁹—a measure further designed to facilitate litigious compromise as Fox LJ said in *Cutts*:²⁰

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.

¹⁶The 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.

¹⁷*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.

¹⁸[1984] Ch 290, 306.

¹⁹David Foskett, *The Law and Practice of Compromise* (London: Sweet & Maxwell, 2005) 288.

²⁰[1984] Ch 290, 315.

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.²¹ Documents marked purely without prejudice lacking any reservation as to costs have been admitted pursuant to s 131(2)(h),²² as have documents which bear no markings at all.²³

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.²⁴ 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.²⁵

B The Requirements of Clarity, Precision and Certainty

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.’²⁶ 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’²⁷—and moreover, as Winneke P observed in *Grabavac v Hart*,²⁸ ‘leave the offeree in no reasonable doubt as to the nature and extent of what is being offered.’

²¹ 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.

²² *Nobrega v Trustees of the Roman Catholic Church (Sydney)* [1999] NSWCA 133.

²³ *Bruinsma v Menczer* (1995) 40 NSWLR 716.

²⁴ See generally *Jones v Bradley (No 2)* [2003] NSWCA 258, [14]-[15].

²⁵ *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)

²⁶ *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)* [2000] FCA 602, [24] (Goldberg J).

²⁷ *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).

²⁸ [1997] 1 VR 154, 155.

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 purpose was also to secure a costs advantage ... and if the latter, what ultimate costs advantage the offeror had in mind to achieve.²⁹

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.³⁰

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.'³¹ Accordingly, there is much to be said for constantly bearing in mind the overarching principles of clarity, precision and certainty when drawing *Calderbank* letters.

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*:³²

[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

²⁹ *Grabavac v Hart* [1997] 1 VR 154, 160-161.

³⁰ *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).

³¹ *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 (2006) 150 FCR 319, 334 [53].

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.

Ordinarily, a *Calderbank* offer should be expressed ‘plus costs as agreed or assessed.’³³ 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’,³⁴ a sum ‘inclusive of costs’³⁵ or an offer to accept some particular sum for costs.³⁶ 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.

For many years *Calderbank* offers expressed to be inclusive of costs were viewed by some judges as incapable of supporting an application for indemnity costs.³⁷ That issue was exhaustively considered by the New South Wales Court of Appeal recently in *Elite Protective Personnel Pty Ltd v Salmon*.³⁸ 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:³⁹

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.

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

³³ *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322, [116] (McColl JA).

³⁴ As was the offer considered in *Cutts v Head* (1984) Ch 290; *Leichhardt Municipal Council v Green* [2004] NSWCA 341;

³⁵ See *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97.

³⁶ See *Roberts v Rodier* [2006] NSWSC 1084.

³⁷ 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).

³⁸ [2007] NSWCA 322

³⁹ *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322, [5].

Goldberg J observed in *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)*.⁴⁰

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 pay a particular sum for costs, as was observed in *Roberts v Rodier*.⁴¹

[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.

D Stating the Costs Advantage Sought to Be Achieved

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)*,⁴² '[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.'

As Kirby P explained in *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd*,⁴³ 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

⁴⁰ [2000] FCA 602, [24].

⁴¹ [2006] NSWSC 1084, [9] (Campbell J).

⁴² [2007] VSC 552, [17].

⁴³ (1995) 36 NSWLR 242, 249-250.

be preferable that it should follow due and timely warning by the successful party to the unsuccessful that indemnity costs will be sought. ...

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.

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.⁴⁴ In *Assaf v Skalkos*⁴⁵ 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.

Similarly, Hoeben J in *Crump v Equine Nutrition Systems Pty Ltd trading as Horsepower (No 2)*⁴⁶ considered it material that the offer in question was part of a series of offers plainly intended to operate as *Calderbank* offers:

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.

E The Inclusion of Reasons Why the Offer Should Be Accepted

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*,⁴⁷ Cole J expressed as a general proposition that '[t]here is no obligation upon a party making an offer of settlement in

⁴⁴ *Azzi v Volvo Car Australia Pty Ltd (Costs)* [2007] NSWSC 375, [29] (Brereton J).

⁴⁵ [2002] NSWSC 935, [110].

⁴⁶ [2007] NSWSC 25, [67].

⁴⁷ (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).

a *Calderbank* letter to specify with precision the reasons why the opposing party will fail, or should accept the offer.’

Conversely, Sunberg J in *Wenzel v Australian Stock Exchange Ltd*⁴⁸ 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)*:⁴⁹

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)

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)*⁵⁰ held that it was ‘neither necessary nor desirable to lay down any general rule’ about 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*.⁵¹

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.⁵²

⁴⁸ [2002] FCA 353, [8].

⁴⁹ (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).

⁵⁰ (2005) 13 VR 435, 442 [27] (Warren CJ, Maxwell P and Harper AJA).

⁵¹ [2004] VSC 351, [87].

⁵² 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.’

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.⁵³ 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.⁵⁴

III CALDERBANK OFFERS AND THE DISCRETION AS TO COSTS

A *The General Principles*

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.⁵⁵ While offers of compromise under the UCPR give rise to a *prima facie* entitlement to a costs order if the offer is not bettered,⁵⁶ *Calderbank* offers are only a factor, though possibly a 'powerful factor',⁵⁷ that may influence the court's discretion as to costs.⁵⁸

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)*,⁵⁹ 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*.⁶⁰ Accordingly, a *Calderbank* offer, as the Court observed, 'may attract costs awarded on the same

⁵³ 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.

⁵⁴ 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).

⁵⁵ *Jones v Bradley (No 2)* [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.

⁵⁶ See *Leichhardt Municipal Council v Green* [2004] NSWCA 314, [19].

⁵⁷ *Smith v Smith* [1987] 2 Qd R 807, 810 (Smith J).

⁵⁸ 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.

⁵⁹ [2006] NSWCA 362.

⁶⁰ [2006] NSWCA 362, [20].

basis as if those formal procedures had been invoked.⁶¹ 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)*:⁶²

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 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.

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.⁶³ 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.’⁶⁴

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*:⁶⁵

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 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

SMEC Testing Services Pty Ltd has met with successive approval from New South Wales Court of Appeal.⁶⁶ As Hoeben J recently explained in *Crump v Equine Nutrition*

⁶¹ [2006] NSWCA 362, [20].

⁶² [2006] FCAFC 108, [16] (Nicholson, Mansfield and Bennett JJ).

⁶³ *Jones v Bradley (No 2)* [2003] NSWCA 258, [12] and the cases there cited.

⁶⁴ *Morris v McEwen* (2005) 92 SASR 281, 289 (Besanko J), 300 (White J).

⁶⁵ [2000] NSWCA 323, [37].

*Systems Pty Ltd Trading as Horsepower (No 2)*⁶⁷ 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.’

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.’⁶⁸

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.⁶⁹ As Santow JA observed in *Leichhardt Municipal Council v Green*,⁷⁰ ‘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*,⁷¹ 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.’⁷² 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.’⁷³

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’

⁶⁶ *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].

⁶⁷ [2007] NSWSC 25, [41].

⁶⁸ *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 McDonnell* [1977] 1 WLR 34, 38 (Ormrod LJ), with whom Sir John Pennycuik agreed.

⁶⁹ *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).

⁷⁰ [2004] NSWCA 341 at [56].

⁷¹ [2006] NSWCA 2, [90] (Hunt AJA, McColl JA) with whom Mason P agreed.

⁷² 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.’

⁷³ *Seven Network Ltd v News Ltd* [2007] FCA 1489, [63] (Sackville J).

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.'⁷⁴

The Full Court of the Federal Court also rejected the more stringent test of plain unreasonableness in *Black v Lipovac*.⁷⁵ 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*⁷⁶ recently doubted whether in any event the 'insertion of 'plainly' before 'unreasonable' add[ed] anything of substance.'

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.⁷⁷

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.⁷⁸ In practice however, the more stringent test is seldom applied by the Supreme Court of New South Wales⁷⁹ and it must be seriously doubted whether any application for indemnity costs would ever call for dismissal solely on the basis that

⁷⁴ (2005) 13 VR 435, 441 [23] (Warren CJ, Maxwell P and Harper AJA).

⁷⁵ (1998) 217 ALR 386, 432 [218] (Miles, Heerey and Madgwick JJ).

⁷⁶ [2007] FCA 1489, [62].

⁷⁷ See *McDonnell v McDonnell* [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).

⁷⁸ *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 Geflick* [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.'

⁷⁹ A good example may be found in *CBA Investments Ltd v Northern Star Ltd (No 2)* [2002] NSWCA 146.

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

In considering the unreasonable rejection of a *Calderbank* offer, it is not necessary to establish actual misconduct on the part of the offeree⁸⁰ or show that the offeree acted with ‘wilful disregard of know facts or clearly established law’, or that it acted with ‘high-handed presumption.’⁸¹

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*:⁸²

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

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

A *Calderbank* offer must contain some element of genuine compromise.⁸³ Compromise, as Giles J explained in *Hobartville Stud v Union Insurance Co*,⁸⁴ ordinarily entails giving something away:

⁸⁰ *Oversa-Chinese Banking Corporation v Richfield Investments Pty Ltd* [2004] VSC 351, [93] (Redlich J).

⁸¹ *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).

⁸² [2000] VSC 163, [74]-[76].

⁸³ *Ryde City Council v Tourtouras (No 2)* [2007] NSWCA 262, [4] (Santow, McColl and Basten JJA).

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.

As Rogers CJ Comm D explained in *Tickell v Trifleska Pty Ltd*⁸⁵, 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;⁸⁶ or in the case of a plaintiff, an offer to settle for the full sum claimed,⁸⁷ it should not be assumed that every genuine offer of compromise entails the offer of a cash settlement.⁸⁸ 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.⁸⁹

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 of the litigation. As Santow JA explained in *Leichhardt Municipal Council v Green*:⁹⁰

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

⁸⁴ (1991) 25 NSWLR 358, 368.

⁸⁵ (1990) 25 NSWLR 353, 355.

⁸⁶ *Westbury Holdings Kiama Pty Ltd v ASIC* [2007] NSWSC 1064, [10] (Barrett J).

⁸⁷ *Leichhardt Municipal Council v Green* [2004] NSWCA 341, [30].

⁸⁸ *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.

⁸⁹ *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.'

⁹⁰ [2004] NSWCA 341, [37].

will not be necessary to offer any monetary proportion (however slight) of the plaintiff's claim.

2 The Timing of the Offer

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.'⁹¹

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*:⁹²

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.

(a) Offers Made Early on in Proceedings

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.⁹³

The same considerations may also apply in respect of appeals. In *McFadzean v Construction Forestry Mining and Energy Union (No2)*,⁹⁴ the Victorian Court of

⁹¹ *Jones v Bradley (No 2)* [2003] NSWCA 258, [13].

⁹² (2005) 92 SASR 281, 302.

⁹³ See *Edwards Madigan Torillo Briggs Pty Ltd v Stack* [2003] NSWCA 302, [22] (Davies AJA), with whom Mason P and Meagher JA agreed.

⁹⁴ [2007] VSCA 313, [9] (Warren CJ, Nettle and Redlich JJA).

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.'

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)*⁹⁵ 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*.⁹⁶

In a decision that stands somewhat removed from cautious judicial treatment *Calderbank* offers made early on in proceedings have received, Adams J in *Alves v Patel*,⁹⁷ 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:⁹⁸

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

⁹⁵ [2007] NSWSC 348, [8]

⁹⁶ [2006] WASC 82, [93] (Templeman J)

⁹⁷ [2005] NSWSC 841

⁹⁸ [2005] NSWSC 841, [13]-[16].

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 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)

Though not strictly referable to the earliness of the offer, Hislop J in *Portelli v Tabriska Pty Ltd (No 2)*⁹⁹ 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 Appeal decisions handed down shortly after the expiration of the offer and which significantly changed the plaintiff’s prospects of success.

(b) Offers Made Late in the Proceedings

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 Rottneest Island Authority*:¹⁰⁰

[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.

⁹⁹ [2008] NSWSC 94, [16]

¹⁰⁰ [2001] WASCA 323, [36].

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*

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*,¹⁰¹ ‘*Calderbank* offers do not bite until the recipient has a reasonable opportunity to consider the proposed compromise.’

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) 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.¹⁰²

It is extremely difficult to offer any real guidance as to what constitutes a reasonable time. In *Rosselli v Rosselli (No 2)*¹⁰³ 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*.¹⁰⁴

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*.¹⁰⁵ In *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd*¹⁰⁶ Lingren J described a *Calderbank* offer left open for 1 day as ‘an extreme case.’

¹⁰¹ [1998] 2 FLR 1131, 1140 (Thorpe LJ), with whom Chadwick and Butler-Sloss LLJ agreed.

¹⁰² See *Codent Ltd v Lyson Ltd* [2006] All ER (D) 138, 141 [51] (May J).

¹⁰³ [2007] VSC 438.

¹⁰⁴ [2003] NSWCA 302, [22] (Davies AJA), with whom Mason P and Meagher JA agreed.

¹⁰⁵ [2005] NSWSC 31.

¹⁰⁶ (1996) 70 FCR 236, 240

In *Ghunaim v Bart (No 2)*¹⁰⁷ 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?

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

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*:¹⁰⁸

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 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.

In *Phyllis Trading Ltd v 86 Lordship Road Ltd*,¹⁰⁹ 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.

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.’¹¹⁰

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

¹⁰⁷ [2006] NSWCA 82, [28] (McColl JA), with whom Giles and Ipp JJA agreed.

¹⁰⁸ [2000] PIQR Q1, Q10.

¹⁰⁹ [2002] 2 EGLR 85.

¹¹⁰ *Phyllis Trading Ltd v 86 Lordship Road Ltd* [2002] 2 EGLR 85, 88 [29].

of Justice.¹¹¹ 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*.¹¹² It was not until the English Court of Appeal decision in *Butcher v Wolf*¹¹³ that the duty was effectively extended to all manner of cases.

D Other Considerations Relevant to the Discretion as to Costs

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

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)*,¹¹⁴ 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*¹¹⁵ Hamilton J declined to order indemnity costs on account of the complex nature of the case.

The fact that proceedings involve public rights, and more importantly, human rights, may well be a relevant consideration to the award of indemnity costs. However, in a recent decision of the High Court of New Zealand, *Rapana v McBride Street Cars Ltd*,¹¹⁶ 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.'¹¹⁷ His Honour added, 'I would have had concerns if the "public interest" factor was the sole basis for the ... rejection of [a] *Calderbank* offer.'¹¹⁸

¹¹¹ See *Gojkovic v Gojkovic (No 2)* [1992] Fam 40, 59 (Butler-Sloss LJ).

¹¹² [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.

¹¹³ [1999] 1 FLR 334.

¹¹⁴ [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).

¹¹⁵ [2005] NSWSC 385, [14].

¹¹⁶ [2007] DCR 551.

¹¹⁷ *Rapana v McBride Street Cars Ltd* [2007] DCR 551, 559 [28].

¹¹⁸ *Rapana v McBride Street Cars Ltd* [2007] DCR 551, 559 [30].

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.

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*,¹¹⁹ 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***

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*:¹²⁰

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*¹²¹ 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.

¹¹⁹ [2007] ACTSC 85, [11].

¹²⁰ (2005) 92 SASR 281, 293. Special leave to appeal to the High Court of Australia refused: *McEwen v Morris* [2006] HCATrans 56.

¹²¹ (Unreported, New South Wales Court of Appeal, 4 November 1993), 6.

Clearly there must be a ‘significant change’¹²² in the nature of the case presented or the ‘manner in which the evidence emerges at trial’¹²³ and not merely something as a ‘result of the ordinary risks and vicissitudes of litigation’¹²⁴ 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*.¹²⁵

3 **Disentitling Conduct**

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 bearing on the result cannot, in my view, have the benefits of a *Calderbank* offer.¹²⁶

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?**

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

¹²² *Shaw v Jarldorn* (1999) 76 SASR 28, 30 (Doyle CJ).

¹²³ *Shaw v Jarldorn* (1999) 76 SASR 28, 34 (Perry J).

¹²⁴ *Shaw v Jarldorn* (1999) 76 SASR 28, 30 (Doyle CJ).

¹²⁵ (2001) 53 NSWLR 626. See also *Beoco Limited v Alfa Laval Co Limited* (1994) 4 All ER 464.

¹²⁶ *Morris v McEwen* (2005) 92 SASR 281, 283. See also *Gojkovic v Gojkovic* [1992] Fam 40, 59 (Butler-Sloss LJ).

in *GW v RW*,¹²⁷ '[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.'

Similarly, in *A v A (Costs Appeal)*¹²⁸ 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.

...

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.

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.¹²⁹

E Applying for Indemnity Costs

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.¹³⁰

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 consequence of the offer

¹²⁷ [2003] 2 FLR 108, 137 [97].

¹²⁸ [1996] FLR 14, 25.

¹²⁹ See *Butcher v Wolf* [1999] 1 FLR 334, 344 (Simon Brown LJ), with whom Mantell LJ agreed; *Phylliss 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.'

¹³⁰ *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).

of compromise provisions contained in the *Supreme Court Rules 1970* (NSW),¹³¹ the New South Wales Court of Appeal in *Porter v Lachlan Shire Council (No 2)*¹³² 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*.¹³³

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 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*.¹³⁴

IV CONCLUSION

Calderbank offers remain an important tool in promoting litigious compromise. The 'carrot' and 'stick' approach engendered by 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.¹³⁵

Not the simple extension of offers of compromise under the Rules, *Calderbank* offers present a flexible alternative to the more formal procedure provided under the Rules.

¹³¹ See *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [42]-[46] per Santow JA.

¹³² [2006] NSWCA 252, [13].

¹³³ [2007] NSWSC 427, [6].

¹³⁴ 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.'

¹³⁵ 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.'