Presentation by
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on *Calderbank* Offers

For the Television Education Network,

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Context of the debate

- In *Colgate Palmolive v Cussons Pty Ltd* (1993) 118 ALR 248, Sheppard J identified the following circumstances as warranting an award of indemnity costs, whilst noting that the list should not be regarded as exhaustive or the categories closed (at 257) :
- (1) The making of allegations of fraud knowing them to be false, and the making of irrelevant allegations of fraud.
- (2) Evidence of particular misconduct that causes loss of time to the court and to other parties.
- (3) The fact that the proceedings were commenced or continued for some ulterior motive.
- (4) The fact that the proceedings were commenced or continued in wilful disregard of known facts or clearly established law.
- (5) The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.
- (6) *An imprudent [or unreasonable] refusal of an offer to compromise.*
- (7) An award of costs against a contemnor.

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Starting with the end in mind

- What am I seeking to achieve by making an offer to my opponent?
- Am I seeking to avoid litigation at all, by making a generous offer in a complex case where the relief at final hearing will be either discretionary or involve impressionistic matters? Or be so expensive that the game will not be worth the candle?
- Am I seeking to lay the foundation for a submission that my client is acting reasonably, as a pre-condition to the relief sought?
- Am I seeking to lay the foundation for an application in due course for indemnity costs? Only if you are in this sub-category, are the principles relating to *Calderbanks*, engaged.

Starting with the end in mind (contd.)

- Is your client's lay opponent so unreasonable that your most likely ally in the proceedings might actually be the opposing solicitors?
- If so, think of appealing to their good common sense as colleagues at an early stage by a reasonable offer.

Where the game is (perhaps) not worth the candle

- *FPA* litigation where eligibility is unlikely to be in issue, and where the real issue is how much
- Oppression remedies, particularly in the context of closely held family corporations, where neither side is desirous of creative accounting coming to the attention of the court
- Other family disputes
- Where commercial in confidence information likely to be tendered in court, may come to the attention of a trade rival, and there is no compulsory requirement to arbitrate etc. (which might afford some confidentiality)

Laying the foundation for establishing reasonableness as a precondition to relief

- Some claims require a prospective plaintiff to make an offer to the prospective opponent prior to litigation, for example, a claim for an easement under section 88K *Conveyancing Act*
- Other claims are greatly assisted if there is a reasonable attitude shown towards resolving a dispute, prior to litigating, by making reasonable offers on an open basis (ie. not without prejudice), so that these letters can be tendered on some interim application or at final hearing

Laying the foundation for establishing reasonableness as a precondition to relief (contd.)

- In section 88K cases, one has to have sought to obtain the easement, or another easement to the same effect, as pre-condition to the court's jurisdiction being enlivened. One may as well take the opportunity to make a generous offer as to compensation and thus make a virtue of necessity
- In disputes between neighbours regarding for example dividing fences, or nuisance related complaints, give and take is key and once again, open correspondence (not without prejudice) is fundamental

Laying the foundation for an application for indemnity costs

- Must be marked "Without prejudice save as to costs"
- Clear, precise and certain in terms
- Musts state the time for which open
- Must refer to *Calderbank v Calderbank*
- *Ought* make provision for costs separate to principal offer
- Address upon the advantages of accepting the offer
- Reserve rights to tender on costs

For purposes of settlement only or for a costs advantage? Seminar paper, p.5 Item B,

- Consider the goal of settlement only, where there is related litigation, with different case numbers , arising out of similar facts
- Might be some of the same parties , or some different parties
- Might span different courts, eg might be a Federal element to State litigation where eg leave required from FMC to proceed against a bankrupt in SC litigation under Sec 37 A *Conveyancing Act*
- For above reasons, might not be able to be an offer of compromise

Inclusion of reasons: p 9, Item E

- In *Huntsman Chemical Co. v International Pools* (1995) 125 FLR 151, Kirby P (as he then was) considered what he regarded as a powerful case for indemnity costs. The case involved the late abandonment of appeals that were "self-evidently hopeless".
- Kirby P noted that, outside of the area of unreasonable rejection of compromise offers,
- " ... the making of such an order in such a case would accurately have been described as extremely rare. In the past, such orders have generally been made ... only in cases where the bringing of the proceedings was, or bordered on, vexation or oppression of a litigant or a misuse of the Court's process." His Honour was, therefore, of the view that, if a special costs order was to be sought outside of such well-established circumstances, particularly in commercial cases, the legal advisers of the party seeking such an order,
- " ... would be well advised to warn their opponents that continued prosecution of the appeal [or action], or of the hopeless points, will result in an application to the Court for a special costs order." (at 157) Because of the lack of warning in that case his Honour refused to make an order for indemnity costs. Mahoney J concurred, albeit hesitantly.

Inclusion of reasons, contd

- Rolfe A-JA dissented on that issue. His Honour considered that the continuance of the appeals with no prospect of success could only be explained by "carelessness and inertia":
- "In my view the action of the appellants in abandoning the appeal indicates they had no faith in the possibility of its success and, therefore, it was not an appeal which should have been brought, or having been brought, prosecuted after reasonable time for consideration. To that extent, although it was not fought out to the end, it constituted a form of abuse of process of the Court". (at 179)

- "I do not view the difference of opinion on the Court of Appeal in the above case as indicative of any disagreement as to the underlying principle that if a case is or should have been perceived by the party prosecuting it to be hopeless to the point of vexation or oppression then the discretion to award indemnity costs will have been enlivened.
- Whether the order should be made and, if so, the extent of it may well depend not only upon the inherent hopelessness of the case *but also other relevant circumstances including due and reasonable warning or the lack of it by the defending parties*."

  per Higgins J in *Guissepe Emanuele & Ors v Hedley & Ors* [1997] ACTSC 108

- If a point is hopeless and doomed to failure, then say so, perhaps in open correspondence

Part III A General Principles
Calderbanks v Offers under the Rules

Per McDougall J in *Owners Corporation Strata Plan 61288 v Brookfield Multiplex Limited [*2012] NSWSC 1586 (12 December 2012) paras [13] ff

- The authorities relating to the consequences, in terms of costs, of non-acceptance of offers of compromise are voluminous. In some respects although not for present purposes, they do not speak with unanimous voice. I take as my starting point the proposition that non-acceptance of the offers triggers a prima facie entitlement to costs on the indemnity basis on the part of the offerors, the defendants: see McColl JA, with whom Mason P and McClellan CJ at CL agreed in *Caine v Lumley General Insurance* (No 2) [2008] NSWCA 109 at [32].
- *It follows, her Honour said at [32], that it was for the respondent offeree in that case to show why the Court should deprive the offeror of its prima facie entitlement.*
- At [35], and having considered relevant authorities, her Honour stated that in general terms, exceptional circumstances were required to justify depriving an offeror of the indemnity costs consequences of non-acceptance of an offer in circumstances where the offeree had not bettered the offer. I do not propose to refer to the decision to which her Honour referred in support of that proposition. It is sufficient to note that it has been said more than once, and at the intermediate appellant level.

Calderbanks v Offers under the Rules, contd

- Nonetheless as was pointed out for the Owners Corporation, the discretion to displace the prima facie cost consequences of non-acceptance is a judicial one, which must be exercised on reasonable grounds, bearing in mind the purposes of the rule, and taking into account the facts of the particular case. It is inappropriate that such a discretion should be limited by an invariable requirement to show "exceptional" circumstances.
- Having said that, I do not suggest that McColl JA indicated that there was such an invariable requirement. The fact that her Honour referred to the "general" situation indicates, in my respectful view, that her Honour was fully cognisant of the need to consider the facts of the particular case, and of the inappropriateness of circumscribing the rule by some uniform and general requirement.
- The purpose of the rule is, clearly enough, to encourage the proper compromise of litigation. That takes into account both the private interests of litigants and the public interest in the prompt and economical disposition of litigation. The rule seeks to achieve that purpose by providing significant consequences for non-acceptance of an offer followed by an outcome, to the offeree, more adverse than the terms of the offer. Thus it may be seen that the objective of the rule is to require an offeree to give serious and careful consideration to the terms of the offer and, in particular, to the risks of or following from non-acceptance.

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Part III, A-B: discretion as to costs

- A *Calderbank may* justify a special award as to costs
- Is the offeree who refuses, worse off than had the offer been accepted?
- The situation must be addressed at the time of the offer, not in hindsight
- Analysis includes relative strengths and weaknesses of prospects on liability and also irt quantum

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Part III, C

- Must be some genuine element of compromise-not a mere demand to capitulate
- Timing of an offer may well be important: when made, and how long open for
- The earlier in the proceedings, the less able an offeree may possibly be to assess its position (and hence, the less unreasonable rejection may be)
- *Vice versa*
- Though not necessarily so: p 18 *Alves v Patel*

Part III C 3

- *Calderbanks* ought not be made too close to trial or they may be perceived as an attempt to deflect trial preparation.
- Nor ought be open for too short a period: no specific guidance possible other than to say use good common sense.

Further research / recent cases/ own notes

- *Lahoud v Lahoud* [2012] NSWSC 284: elements of uncertainty in the Calderbank, in relation to set offs as to costs orders and did not cater for interest; held-not unreasonable for offeree to not accept the Calderbank.

Comments and constructive criticism
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