WHAT MAKES A CALDERBANK LETTER EFFECTIVE?

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It appears that any offer of compromise must have been a genuine attempt, and have been rejected unreasonably, to influence the awarding of indemnity costs.

The circumstances in which a Calderbank letter may be relied upon to grant an application for indemnity costs on the application of a defendant or respondent were considered in two recent decisions.

The first decision is that of Kenny J in the Federal Court of Australia in Fyna Foods Australia Pty Ltd v Cobannah Holdings Pty Ltd (No 2) [2004] FCA 1212 delivered on 16 September 2004. The second is the decision of the NSW Court of Appeal delivered on 22 September 2001 in Leichhardt Municipal Council v Green 2004 NSWCA341.

Calderbank letters derive their name from the English Court of Appeal decision in Calderbank v Calderbank [1975]1 All ER 333. In this case, the Court in obiter dictum held that a letter expressed to be 'without prejudice' to the issue as to damages, but reserving the right to refer to the letter on the question of costs, could be both an appropriate manner of making an offer of compromise and would be admissible on the question of costs.

THE OFFERS

In Fyna Foods, the respondent forwarded a letter to the applicant which was marked 'without prejudice save as to costs', offering to settle the interlocutory application on the basis that the applicant withdraw its application for interlocutory injunctive relief and that each party bear its own costs of the proceedings. The letter provided that it was made 'in accordance with the principles enunciated in the decision of Calderbank v Calderbank [1] and Cutts v Head [2] and the offer remained open for acceptance until a certain specified time.

In the case involving the Leichhardt Municipal Council, the defendant council made an offer of settlement five weeks before trial in terms of 'verdict in favour of the Council with each party to bear its own costs. The settlement offer was expressed to be open for 28 days from the date of the letter and it was also expressed to be made in reliance upon the principles in Calderbank v Calderbank.

FYNA FOODS

In Fyna Foods, Kenny J found that there were no facts from which she could conclude that the applicant acted unreasonably in failing to accept the offer and that, accordingly, there were no grounds justifying an indemnity costs order to be made against the applicant. Her Honour also expressed doubt that the offer in its terms amounted to a genuine offer of compromise. Referring to other single-instance decisions,[3] her Honour said that an offer to settle on the basis that a party discontinue proceedings and bear its or their own costs did not amount to a genuine offer of compromise, rather it was a proposal for capitulation.

LEICHHARDT MUNICIPAL COUNCIL

In the Leichhardt Municipal Council case, the judgment of the Court of Appeal was delivered by Santow JA with whom Bryson JA and Stein NA agreed. Santow JA reviewed the various single instance authorities which had considered the principles in Calderbank v Calderbank.

His Honour found as follows:

• An offer which requires that a party capitulate on its claim including the payment of

another party's costs cannot be considered to be a genuine offer of compromise (cf. Singh v Singh (No.2) [2004]NSWSC 225).

• A cash settlement offer representing part of a plaintiffs claim is not an essential ingredient to an offer of compromise. Indeed, such a requirement would not be entirely consistent '….with the policy of the law in encouraging early settlement of disputes'. (In expressing this view, Santow JA disapproved of the approach of Dunford J in Bishop v State of New South Wales (unreported, 17 December 2000).

• The rules of court do not provide that indemnity costs are a stipulated sanction for unaccepted offers of compromise by a defendant. The rules of court provide for different costs consequences to flow from unaccepted defendant offers than from unaccepted plaintiff offers. As Santow JA expressed it: 'The rule provides basically that a defendant will be entitled to party and party costs from the date of an unaccepted offer of compromise if the plaintiff obtains a result no better than the offer.

This incentive only really has any effect when the plaintiff is successful... It is important to note that this is not really anything over and above what the defendant would recover if it had been totally successful in the case. Unlike with the case of offers by a plaintiff, the rules of Court do not provide any entitlement to indemnity costs for a defendant... it would be a curious thing if a different result were to prevail if a defendant makes its offer by way of Calderbank letter. Although the rules do not constrain a court's discretion as to costs when dealing' with a Calderbank letter … it should not be forgotten that policy objectives behind the two procedures remain wedded'.

• '... there is no principle of law or persuasive policy reason why a defendant's unaccepted offer of compromise made by Calderbank letter should give rise to costs sanctions on any basis different to that provided by the rules ... a defendant must resort to showing that the plaintiffs rejection of the offer was 'unreasonable' under the general law...'.

• 'It is preferable to consider applications for indemnity costs following unaccepted offers of compromise by defendants as being applications for a favourable exercise of the Court's general discretion to awarding indemnity costs. As far as 'Calderbank offers go, there is very little difference, the cost consequences of these lying entirely within the Court's general inherent discretion on costs.'

The Court concluded that an application for indemnity costs on the part of a defendant '... should be reserved for the most unreasonable actions by unsuccessful plaintiffs'.

CONCLUSION

Both the Fyna Foods and the Leichhardt Municipal Council cases highlight the need for any offer of compromise to contain a genuine attempt to compromise the proceedings, and that an offer which is tantamount to a capitulation is unlikely to move a Court, in the exercise of its discretion, to consider making any special costs order.

The Court of Appeal's decision in the Leichhardt Municipal Council case is, however, more farreaching. In it, the Court has said that the issue as to whether indemnity costs should be awarded falls to be determined in accordance with the Court's inherent costs jurisdiction alone. The decision also has the effect of strongly discouraging any application by a defendant for indemnity costs in reliance upon a Calderbank offer except where it can be shown that a plaintiff has acted in a most unreasonable manner in not accepting the offer. An example given by Santow JA is where a plaintiff peremptorily dismisses an offer of compromise such that an inference can be drawn that no bona fide consideration is given to early settlement of the claim.

REFERENCES

1. [1975] 1 All ER 333.

2. [l984] Ch 290.

3.Vasram v AMP Life Ltd [2002] FCA 1286; Australian Competition & Consumer Commission v Universal Music Australia Ply Ltd (No.2) [2002] FCA 192; McKerlie v State of New South Wales (No.2) [2000] NSWSC 1159.

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