

Is that your best offer? The costs implications of Calderbank offers

by Mark Brookes, Partner

Introduction

Courts recognise the significant time, costs and risks that are incurred by parties contesting litigation and have developed a number of initiatives to promote the early settlement of disputes. This article examines the use of *Calderbank* settlement offers and the costs consequences that followed in a recent dispute before the New South Wales Court of Appeal.

Costs awards

There is a longstanding principal that the costs of a dispute before the courts 'follow the event', entitling the successful party, whether plaintiff or defendant, to recover its legal costs incurred in prosecuting or defending the action.

There are two primary basis of awards for costs available to the courts. The first is the standard, or party/party basis, which provides that a successful party may recover all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed. Standard costs are assessed against a pre-determined scale of costs applicable to the particular court the dispute is heard in.

The second is the indemnity, or solicitor/client basis, which allows a successful party to recover all costs of a reasonable amount incurred in respect of the dispute.

Assessment of costs on the indemnity basis is clearly more advantageous for a successful party, and accordingly, the usual order given by the courts is that costs are determined on the standard basis unless there are special circumstances that warrant the order of costs on an indemnity basis. One such circumstance that may warrant the award of indemnity costs is when a *Calderbank* offer has been made by one of the parties.

In brief

§ There is more to making an effective *Calderbank* offer than simply marking a letter 'without prejudice save as to costs'. This article examines the key components.

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Calderbank offers

Calderbank offers have their origin in the decision of *Calderbank v Calderbank* [1975] 3 All ER 333. In essence, a *Calderbank* offer is an offer of settlement made by one party to a dispute on a 'without prejudice save as to cost' basis. The maker of a *Calderbank* offer will have a prima facie right to recover costs on an indemnity basis from when the offer was made if the offer is rejected and the offeree does not obtain a more favourable result at trial.

However, the rejection of a *Calderbank* offer is not in itself sufficient to give rise to a right to indemnity costs on the part of the offeror. It must be shown that the offer constituted a genuine compromise by the offeror and that



the offeree's rejection of the offer was, in the circumstances, unreasonable.

The rationale behind *Calderbank* offers is that parties should endeavour to achieve the settlement of disputes as early as possible. For a party proposing to deliver a

settlement offer to the other side, this means putting to the offeree a genuine offer to settle the dispute, and for a party receiving such an offer, to give reasonable consideration to that offer given the circumstances.

County Securities Pty Ltd v Challenger Group Holdings Pty Ltd (No 2) [2008] NSWCA 273

County Securities Pty Ltd (**County**) sought recovery of \$338,639.84 it had wrongly paid in interest on the purchase of a business known as the Equity Swap Business from Challenger Group Holdings Pty Ltd (**Challenger**).

The interest related to unpaid capitalised interest which had accrued on Challenger's accounts with external margin lenders. The agreement between the parties was to be completed 'at book', thus involving no profit for Challenger and no loss to County. The interest component of the sale price represented a profit for Challenger as it was recouping an interest expense which it had incurred and recorded in its books, but had never paid.

On 9 February 2007 County's solicitors wrote to Challenger's solicitors making a *Calderbank* offer of \$320,000.00 (inclusive of interest) plus costs up to the date

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of acceptance of that offer. At the date the offer was made, interest of \$110,925.42 had accrued on the principal sum, making County's total claim at that date in the order of \$449,565.26. Challenger did not respond to the offer.

Judgement

In August 2008, County were awarded judgement on appeal in the amount of \$338,639.84 plus interest of \$124,535.96 and costs. County subsequently sought indemnity costs from the date of its *Calderbank* offer on 9 February 2007.

At the hearing of the application for indemnity costs, Justice McColl determined that County had made a genuine offer of compromise, because on at least two previous occasions County had clearly communicated the basis of its claim to Challenger, putting them on notice of the strength of its case.

Further, while County's offer (\$320,000.00) was only slightly less than the principal amount of its claim (\$338,693.94), it represented a significant discount in the order of \$129,565.26 on the principal sum plus interest accrued at the date of the offer. Her Honour stated that the offer represented a genuine inducement for Challenger to compromise against the risks which are inherent in any litigation.

Finally, her Honour determined that given the evidence available at the time the offer was made, it was apparent that County never intended to assume liability for the accrued and unpaid interest on the margin loans. Her Honour weighed the significant element of compromise contained in County's offer of 9 February 2007 against the objective facts in Challenger's knowledge, and found that Challenger's conduct in not accepting the offer was in the circumstances unreasonable.

Implications

When engaged in a dispute it is important to be mindful of the potential costs consequences that flow from making *Calderbank* offers. When proposing to make an offer of compromise, make sure that the offer:

- communicates the basis of your claim or defence to the offeree containing detailed reasoning why the offer should be accepted;
- reflects a genuine compromise of the proceedings. An offer that contains no real element of compromise, but is designed merely to trigger the costs sanctions, may not be treated as a genuine offer of compromise;
- provides the offeree with adequate time to consider the offer; and
- foreshadows an application for indemnity costs in the event that the offer is rejected.

Likewise, when presented with an offer of compromise, it is important that proper consideration is given to the offer taking into account the evidence available at the time the offer is made as well as each party's prospects of success in the litigation.

Given that the gap between costs recoverable under a standard and indemnity costs award is often substantial, any right to an indemnity costs award is an important consideration for a party to a dispute. By complying with these 'best practices' when dealing with settlement offers, it provides the greatest protection setting up/defending an application for indemnity costs should the dispute proceed to trial.

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