

## ***Calderbank offers 2***

- 1 It is trite to say that costs are one of the most important considerations in litigation. Not infrequently, the Court is told that costs outstrip the value of the claim. Accordingly, all litigation should be conducted with a stern eye to the costs implications of the claim and not merely as a filler for one's allocated billable hours, or for the unreasonable extension of a brief fee. The *Civil Procedure Act 2005*, s 56 compels you to do so. That section provides:

### **"56 Overriding purpose**

- (1) The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- (3A) A party to a civil dispute or civil proceedings is under a duty to take reasonable steps to resolve or narrow the issues in dispute in accordance with the provisions of Part 2A (if any) that are applicable to the dispute or proceedings in a way that is consistent with the overriding purpose.
- (4) Each of the following persons must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A):
  - (a) any solicitor or barrister representing the party in the dispute or proceedings,
  - (b) any person with a relevant interest in the proceedings commenced by the party.

- (5) The court may take into account any failure to comply with subsection (3), (3A) or (4) in exercising a discretion with respect to costs.
- (6) For the purposes of this section, a person has a *relevant interest* in civil proceedings if the person:
  - (a) provides financial assistance or other assistance to any party to the proceedings, and
  - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.
- (7) In this section:  
*party* to a civil dispute means a person who is involved in the dispute."

### **Cases where s 56 has been used to make an order for costs**

- 2 There has been an emphasis by the courts in recent years as to the public policy issues relating to the cost of the judicial system. That concern underlies s 56 and has been the subject of curial comment. *Aon Risk Services Australia Ltd v Australian National University*<sup>1</sup> is the seminal decision, but there are others. I will quote only from *Aon Risk Services*, at [113], per Gummow, Hayne, Crennan, Kiefel and Bell JJ:

"In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings."

- 3 Essentially, the same public policy considerations underlie the Court's approach to offers of compromise to settle legal proceedings, save that the public policy considerations are accompanied by the concern that private interests have in bringing litigation to a timely and economical conclusion. There have been many statements about this. It is sufficient to refer to the following:

The purpose of the rules of court in respect of offers of compromise is:

"... to encourage the proper compromise of litigation, in the private interests of the litigants and in the public interest of the prompt and economical disposal of litigation."<sup>2</sup>

- 4 Although this paper is an update of my *Calderbank* paper of 2008, it is important to understand the place that *Calderbank* offers have in the litigation process.<sup>3</sup> That necessitates an understanding of the Court's powers as to costs, including the rules of Court that govern offers of compromise. I also propose to deal briefly with the original decision in *Calderbank* itself, as it is helpful to understand the underlying jurisprudence of a particular principle or concept in order to know how it is best utilised in modern day circumstances.
- 5 The jurisdiction of any court is found in its governing legislation. Courts in New South Wales are governed by the *Civil Procedure Act* and the Uniform Civil Procedure Rules 2005 (the UCPR), either in its entirety or as modified by Sch 1. The Court's costs powers are found in the *Civil Procedure Act*, s 98 and the UCPR, Pt 42. The primary rule is that costs follow the event.<sup>i</sup>
- 6 My comments thus far may seem like the equivalent of the first set of rules you hear on your first day in kindergarten. However, the Court is constantly confronted by costs applications that display either a fundamental ignorance of the rules that govern costs, or such amazing oversight of those rules that re-education is warranted. *Old v McInnes and Hodgkinson*,<sup>4</sup> which I propose to discuss shortly, was but one example. A submission was made to the Court recently which was totally contrary to

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<sup>1</sup> [2009] HCA 27; 239 CLR 175

<sup>2</sup> *South Eastern Sydney Area Health Service & Anor v King* [2006] NSWCA 2 at [83] per Hunt AJA (Mason P and McColl JA agreeing)

<sup>3</sup> *Calderbank v Calderbank* [1975] 3 All ER 333; [1975] 3 WLR 586

<sup>4</sup> [2011] NSWCA 410

the provisions of UCPR, r 42.13A.<sup>ii</sup> One does not know what part ignorance or oversight played in the client's decision-making in relation to the litigation in either case.

7 UCPR, Pt 20 deals with "*Resolution of proceedings without hearing*". Included in Pt 20 are rules relating to mediation, arbitration, referrals to a referee and, relevantly for the purposes of today's lecture, offers of compromise and, more particularly, r 20.26. I propose only to refer to r 20.26(1)-(4). A copy of the full rule is appended.<sup>iii</sup>

8 UCPR, r 20.26(1)-(4) provides:

**"20.26 Making of offer**

- (1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
- (2) An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.
- (3) A notice of offer:
  - (a) must bear a statement to the effect that the offer is made in accordance with these rules, and
  - (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.
- (4) Despite subrule (1), a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer."

9 The consequences of accepting or not accepting a "*rules offer*" are prescribed by UCPR, Pt 42, Div 3. A copy of Div 3 is appended to this paper.<sup>iv</sup> In brief, the effect of UCPR, Pt 42, Div 3 is to provide to the offering party an indemnity costs order if the offer is not accepted. The

division is directed, therefore, to that part of the underlying purpose of offers of compromise, which is to encourage early settlement of disputes by rewarding the party who seeks to do so, and providing a disincentive to the party to whom the offer is made and who has chosen not to accept the offer.

- 10 There are exceptions to the rule and they should be well understood. It is not the purpose of today's lecture to focus on those provisions. However, litigation lawyers should well understand that it is part of their obligation to the Court, the client and to their skill set generally to be able to properly assess the quantum of the claim and the prospects of success.

***Calderbank v Calderbank***

- 11 *Calderbank* offers are not made pursuant to the rules of Court. Like all legal propositions, that statement is too general, for reasons which I will explain shortly. However, the statement is sufficiently accurate as a general proposition.
- 12 *Calderbank v Calderbank* involved a matrimonial property dispute. Mrs Calderbank, who had effectively financially supported the Calderbank family during the 17 year long marriage, sought a declaration that she was the sole beneficial owner of the matrimonial home, which was registered in her name. Mr Calderbank applied for financial provision for himself or a property adjustment order under the relevant legislation.
- 13 Prior to the hearing before the trial judge, Mrs Calderbank offered to transfer a house to Mr Calderbank, which Mrs Calderbank had purchased during their marriage and was occupied by Mr Calderbank's mother, in exchange for Mr Calderbank vacating the matrimonial home. This house had a value of approximately £12,000. This offer was refused by Mr Calderbank on the grounds that it did not satisfy his needs.

- 14 At trial, the Court ordered a lump sum payment of £10,000 to Mr Calderbank from the proceeds of the sale of the matrimonial home. Each party was ordered to pay the costs of his or her own proceedings. Mrs Calderbank appealed against both the decision to award Mr Calderbank that sum of money under the *Matrimonial Causes Act 1973* (UK) and, what has become the well-known component of the *Calderbank* case, the trial judge's decision refusing to make any award of costs to the wife.
- 15 The Court of Appeal unanimously dismissed the wife's appeal against the award of financial provision in favour of her husband.
- 16 Mrs Calderbank's primary submission on costs was that she should have her costs in the proceedings below paid by Mr Calderbank as she made an offer prior to the hearing, which was greater than the lump sum awarded to Mr Calderbank by the trial judge. The offer had been made in a "*without prejudice*" letter, which Cairns LJ described, at 105, as a letter that "*could not be relied upon either before the judge at first instance or before this court*" as the without prejudice bar had not been removed.
- 17 At the time, the only form of offer of compromise for which provision was made under the rules was for payment of a sum into court. Cairns LJ considered the existence of certain kinds of proceedings where payment of a sum of money into court was not an appropriate method of compromise. Two such proceedings were those before the Lands Tribunal and in the Admiralty Division. In respect of Lands Tribunal proceedings involving claims for compensation, a party would make a sealed offer, which would not be revealed to the tribunal until the decision on the substantive issue was made and the matter turned to costs. In the Admiralty Division, when the dispute concerned a collision between two vessels and the apportionment of blame, an offer could be made by one party as to the amount of apportionment. If such an offer was not accepted and the

court's apportionment was more favourable to the party who had made the offer, then costs could be awarded on the same basis as if a payment was made into the court.

- 18 The Court of Appeal took the view that a similar practice should be adopted in the context of matrimonial proceedings concerning the issue of finances, given that it was not often practicable for the offeror to make a payment into court, as any financial settlement was likely to require a sale of the matrimonial property. As the offer made by Mrs Calderbank was more favourable than the order Mr Calderbank received from the trial judge, Mrs Calderbank was entitled to her costs of the proceedings before the trial judge.
- 19 It was eventually accepted that a *Calderbank* offer could be made in any litigation and included making an offer of a money sum.
- 20 In my 2008 paper, I set out a series of propositions derived from the case law that were applicable to the Court's consideration of *Calderbank* offers. Those propositions were as follows:
  - A *Calderbank* offer may entitle a party to a different costs order, other than that costs follow the event.
  - A *Calderbank* offer does not automatically result in the court making a favourable costs order.
  - A *Calderbank* offer is an exception to the rule that costs follow the event.<sup>5</sup>

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<sup>5</sup> In *Commonwealth v Gretton* [2008] NSWCA 117 Hodgson JA observed, at [121], that the underlying rule in relation to costs was one of fairness. His Honour said:

"In my opinion, underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs. Costs follow the event generally because, if a plaintiff wins, the incurring of costs was the defendant's responsibility because the plaintiff was caused to incur costs by the defendant's failure otherwise to accord to the plaintiff that to which the plaintiff was entitled; while if a

- The offeror bears the persuasive burden of satisfying the court to exercise the costs directions in the offeror's favour.
- An offer of compromise must be a "*genuine offer of compromise*".
- The rejection of the offer must be unreasonable.

21 The 2008 paper also sets out the types of offer that may be made.

- A *Calderbank* offer may be inclusive of costs (although it may be difficult to prove such an offer is reasonable, or that the refusal to accept was unreasonable).
- An offer which does not conform to the rules may in certain circumstances be treated as a *Calderbank* offer.
- An offer may be made limited to liability.
- An offer may take into account contributory negligence.
- A combined offer may be made on behalf of a number of plaintiffs.
- An offer may forego interest.
- An offer may include terms in addition to a money sum.
- An offer may include terms not to be disclosed.

22 Finally, a note of caution. As a general rule, an offer made before or during trial, whether made under the rules or by way of a *Calderbank* offer, does not automatically subsist for the purposes of an appeal. A fresh offer should be made on an appeal. The reason is simply that the 'ball game' has changed. A judicial officer has expressed a view on the facts and on the law. Parties should reconsider the original offer made in light of the findings made and/or the result of the first instance decision.

23 Since the 2008 paper, the number of disputes as to the entitlement of a party, who made a *Calderbank* offer, to an advantageous costs order has

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defendant wins, the defendant was caused to incur costs in resisting a claim for something to which the plaintiff was not entitled: cf *Ohn v Walton* (1995) 36 NSWLR 77 at 79 per Gleeson CJ. Departures from the general rule that costs follow the event are broadly based on a similar approach."



shrunk dramatically. For the most part, that remains the case. However, there are six cases since 2008 that warrant consideration.

***Old v McInnes and Hodgkinson***

24 *Old v McInnes and Hodgkinson* was a demonstration of a failure to comply with UCPR, r 20.26(2) and the consequences that flowed from that failure.

The offer made in that case was in the following terms:

"The First Defendant offers to compromise the Plaintiff's claim against him on the following terms:

1. Judgment for the Plaintiff against the First Defendant in the sum of \$8,190.00.
2. First Defendant to pay the Plaintiff's costs as agreed or assessed.

This offer is made pursuant to Rule 20.26 of the Uniform Civil Procedure Rules 2005.

This offer is open for acceptance for 28 days."

25 Although in the usual case, the acceptance of an offer of compromise made in accordance with the rules results in an order for costs in precisely the terms specified in para 2 of the offer, that is, subject to the Court ordering otherwise: UCPR, r 42.13A(2)(b). By specifying, in the terms of the offer, what the costs order was to be, the offeror pre-empted the offeree's right to approach the Court for a different order.

26 The point to note, therefore, is that UCPR, r 20.26(2) is prescriptive. A failure to observe the requirements of the rule resulted in the offer being held not to comply with the rules and thus disentitling the offeror to the benefits that the rules confer.

27 The question then arose whether the offer could nonetheless be treated by the Court as a *Calderbank* offer. The Court divided on this issue, not on a point of principle, but upon the application of principle to the facts of the case.

28 The relevant principle is that an offer, purportedly made under the rules of Court, but which is defective in some way, may operate as a *Calderbank* offer. Whether it does will depend upon the intention of the offeror. Meagher JA, at [106], stated the principle in these terms:

"Whether [the] offer could operate as a *Calderbank* offer depends upon the intention of the offeror ... **as revealed by the terms of the offer ...**" (emphasis added)

This may be too narrow. A statement by the offeror in additional correspondence or other communication may be sufficient.

29 The majority, Giles and Meagher JJA, held that in circumstances where each offer was stated as being made pursuant to the UCPR (as is required by UCPR, r 20.26(3)), neither offer in that case contained a statement that it was to operate as a *Calderbank* offer. Consequently, it was held that neither offer could be relied upon as a *Calderbank* offer.

30 In a dissenting judgment, I took a different approach. I considered that three principles were relevant:

- A *Calderbank* offer provides a ready recognisable basis for the Court to exercise its discretion in power as to costs. However, the Court's discretion to make an order, other than that costs follow the event, was not confined to cases that were strictly characterised or expressly stated to be *Calderbank* offers: at [32].
- Underlying the general rule that costs follow the event and the qualifications to that rule whereby a Court may make a different

order, is "*the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs*": *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121] per Hodgson JA.

- Given the Court's discretionary power as to costs, the important public policy considerations and the private interests of parties in settling litigation, the Court was entitled to look at the conduct of the parties throughout the proceedings including attempts made at settlement and the terms of the failed UCPR offer: at [34].

31 However, the statement of the rule by Meagher JA must be accepted as the governing principle. Having said that, the outcome will depend upon the construction of the document(s) containing the offer. The cautionary tale is that: (1) it is a simple matter to comply with the rules; and (2) different judges may interpret the same document in different ways.

32 Having said that, one very good reason underlying the rule as stated by Meagher JA is that a party in receipt of an offer ought to know what the consequences of it are. A party is entitled to expect the opposing party to comply with the rules of Court and to take such advantage of non-compliance as is in its interests. Uncertainty of outcome is a significant burden in litigation and the rule, as stated by Meagher JA, has the advantage of certainty.

***Dean v Stockland Property Management Pty Ltd & Anor (No 2)***

33 This case involved a joint judgment of Giles JA, Handley AJA and Whealy J.

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<sup>6</sup> [2010] NSWCA 141

34 It was a negligence claim in a slipping case, against the owner of a shopping centre and the cleaning company engaged to attend to the shopping centre premises. The trial judge failed to give adequate reasons. That was reasonably palpable on the face of the judgment. The appeal was upheld on that ground. In the normal course, the appellant was entitled to an order for her costs of the appeal. However, she sought indemnity costs based on an offer of compromise. She contended that her offer was rule-compliant, or, alternatively, it constituted a *Calderbank* offer.

35 The offer of compromise was made four months after the notice of intention to appeal was filed and one month after the notice of appeal was filed. The offer was in the following terms:

"To the Respondents: -

The Appellant offers to compromise this matter on the following bases: -

1. Appeal allowed;
2. Verdict and judgment in the Court below set aside;
3. Proceedings remitted to the District Court for retrial;
4. Each party to pay its own costs of the appeal;
5. Costs of the first trial to follow the event of the second trial.

This offer is open for twenty-eight (28) days and thereafter is withdrawn. If this offer is not accepted in the manner prescribed by the Rules of Court and Judgment on this claim ultimately is not less favourable than this offer the Plaintiff shall seek an Order against the Defendant for costs from the date of this offer on an indemnity basis

This offer is made in accordance with Part 20 Rule 26 of the Uniform Civil Procedure Rules"

36 The offer was accompanied by a letter in the following terms (not stated to be without prejudice):

"Please find enclosed, by way of service, Plaintiff's Offer of Compromise dated 21 July 2009. We advise this Offer is open for a period of **28 days only**, and will expire on **19 August 2009**.

We have received advice from Queen's Counsel that this appeal will succeed and, accordingly, in order to avoid incurring further and unnecessary costs we propose that the appeal be settled in accordance with the abovementioned Offer of Compromise.

If you do not agree to this proposal and the appeal proceeds and is successful, we will rely upon this letter and the **enclosed** Offer of Compromise in support of an application that the successful Appellant's costs be paid on an indemnity basis."

- 37 The Court held that the offer did not comply with the rules. It might be said, however, that the Court reached its conclusion with some diffidence.
- 38 The Court noted that it had been held that an offer of a money sum and an identified sum for costs falls foul of r 20.26(2).<sup>7</sup> The Court expressed the view, at [23], that UCPR, r 20.26(2) might be intended to apply only to common law cases for money sums. If that was the correct construction of subrule (2), a party seeking to compromise a claim otherwise than by payment of the money sum could include a term relating to costs.
- 39 The Court recognised, however, that there are arguments pointing in the opposite direction, so that an offer of compromise cannot involve costs at all. It said that the governing reasoning was inconsistency between an offer of compromise and the provisions of the rules with respect to costs. On a natural reading of the rule, the requirement that an offer of compromise be exclusive of costs meant that the offer may not involve costs at all, that is, that the offer, to be rule-compliant, must refer to costs.
- 40 The Court accepted, as is now well-established, that an offer that does not comply with the rules may be considered as a *Calderbank* offer. However, the Court rejected that the covering letter was sufficient to enable the offer

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<sup>7</sup> *Penrith Rugby League Club Ltd Trading as Cardiff Panthers v Elliot (No 2)* [2009] NSWCA 356; *Tarabay v Fifty Property Investments Pty Ltd* [2009] NSWSC 951; *Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker (No 2)* [2007] NSWCA 194

to be treated as a *Calderbank* offer. It stated that the intention of the offeror, that the offer be treated alternatively as a *Calderbank* offer, must be made clear. The underlying tenet was that as a matter of fairness, the intention must be made clear.

***Veira v O'Shea (No 2)***<sup>8</sup>

41 This case involved a court judgment of Basten and Meagher JJA and Handley AJA. Offers of compromise had been made both before trial and during the the appeal. There was a dispute as to whether the offers complied with UCPR, r 20.26(4). The offers were alternatively relied upon as *Calderbank* offers.

42 The court held that particulars had been provided to the defendant so that subrule (4) was satisfied.

43 There was a further dispute as to whether the offer complied with UCPR, r 20.26(2). The offer included a statement to the same effect as that which had been included in *Old v McInnes and Hodgkinson*. The appellant conceded that the offer did not comply with the rules. The Court, acting on that concession, considered whether the offer should be treated as a *Calderbank* offer.

44 However, the Court made the following obiter statement:

"The UCPR are to be construed by reference to their apparent purpose. A mere reference to costs in an offer otherwise compliant with Part 20, Div 4 will not take the offer outside the rules unless the reference operates inconsistently with the relevant costs rule: *Dean v Stockland Property Management Pty Ltd (No 2)* [2010] NSWCA 141, (Giles JA, Handley AJA, Whealy J) at [26]-[29]. The offer, if accepted, entitled the offeror to his costs: the offer did not seek to vary the effect of UCPR r 42.13A."<sup>9</sup>

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<sup>8</sup> [2012] NSWCA 121

<sup>9</sup> at [7]

- 45 The question which has arisen, and properly so, is whether this statement throws doubt on that part of the decision in *Old v McInnes and Hodgkinson* which said that an offer which includes a statement that costs are to be paid on the ordinary basis as agreed or assessed, offends r 20.26(2) and thus cannot be treated as a rules offer. I will return to that question.
- 46 Insofar as the decision in *Vieira v O'Shea (No 2)* related to *Calderbank* offers, it confirmed that the question whether an offer is "capable of acceptance" is relevant to the costs discretion exercisable in the case of a *Calderbank* offer. The Court also noted that the rejection of a *Calderbank* offer as unreasonable assumes that the offer was capable of acceptance.
- 47 *Vieira v O'Shea (No 2)* involved an offer by a plaintiff to the defendants as a whole. The offer was addressed to the solicitors for the first defendant and the solicitors for the third to seventh defendants and stated that it was an offer to compromise "this action as a whole" on terms that the defendants "together" pay the specified sum (together with costs as assessed or agreed).
- 48 The Court held that an offer made in terms jointly to the defendants was not capable of being accepted by the first defendant on behalf of the other defendants in the absence of its authority to do so. This is correct and was of particular importance in *Vieira v O'Shea (No 2)*, because the interests of the first defendant and the other defendants were opposed.
- 49 This was different from the position in *Monie v The Commonwealth*,<sup>10</sup> where three plaintiffs made an offer in a single amount to the defendant Commonwealth. The Court held that it was capable of acceptance by the Commonwealth. The three claims, which involved adult members of the same family arising out of the same incident, were being prosecuted together. The Court held that the offer to compromise in a single sum was

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<sup>10</sup> [2007] NSWCA 230

a statement to the Commonwealth that it did not have to concern itself with how the plaintiffs viewed their individual claims or how they would distribute the money amongst themselves.

***Old v McInnes and Hodgkinson versus Vieira v O'Shea (No 2)***

50 What is the correct position as between *Old v McInnes and Hodgkinson* and *Vieira v O'Shea (No 2)*? There have been three first instance decisions that have tussled with this question.

***McGlen-McLeod v Galloway (No 2)*<sup>11</sup>**

51 In *McGlen-McLeod v Galloway* two offers of compromise had been served by the defendant on the plaintiff purportedly in accordance with the rules. The first offer of compromise was as follows:

"By making payment of the sum of \$4,000 plus costs in answer to the cause of action on which the plaintiff claims."

The second offer of compromise was as follows:

"By making payment of the sum of \$20,000 plus costs in answer to the cause of action on which the plaintiff claims."

52 The plaintiff succeeded in her action, but the award of damages was only \$700, well below both offers of compromise.

53 The defendants sought a costs order pursuant to UCPR, r 42.15 or, alternatively, an order that the plaintiff should not be entitled to any costs as the amount of damages fell below the prescribed limit of \$40,000 in UCPR, r 42.35. The plaintiff submitted that the offers did not comply with UCPR, r 20.26, because of the inclusion of the phrase "*plus costs*" in the

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<sup>11</sup> [2012] NSWDC 11



offers and that although the size of the verdict fell below the prescribed limit, the costs should still follow the event.

- 54 Gibson DCJ, at [10], that the relevant problem identified by the Court in *Dean v Stockland Property Management* was that any reference to costs in offers, including such expressions as "*plus costs*" or "*exclusive of costs*", save for the exception contained within r 20.26(2), "*fatally taints the offer of compromise*".
- 55 In her review of the decision of *Dean v Stockland*, the trial judge noted that post-*Dean* the relevant question for courts to determine was how to interpret the Court of Appeal's statement, at [26], that an offer of compromise referring to costs were not necessarily "*of no effect*".
- 56 After considering how *Dean v Stockland* had been dealt with by courts at all levels of the hierarchy, the trial judge noted that there had been a tendency in the District Court for offers of compromise "*plus costs*" to be deemed valid rule offers. This was to be contrasted with Justice Barrett's decision in *Tuheta Pty Ltd v Ehrenfeld*,<sup>12</sup> where his Honour held that an offer of compromise not "*exclusive of costs*" did not comply with the rules: citing the decision of *Dean v Stockland*. However, his Honour construed the offer as a *Calderbank* offer, as that intention was apparent on the face of the offer of compromise.
- 57 The trial judge noted, at [20], that there was also inconsistency amongst various decisions as to how *Dean v Stockland* ought to be interpreted, namely, whether the offer ought to be treated as a *Calderbank* offer or not.<sup>13</sup> Her Honour considered that the Court in *Dean v Stockland* warned against such an approach. With the respect that must be given to her Honour's decision, especially in circumstances where she appears to have been provided with little assistance from counsel, the Court of Appeal in

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<sup>12</sup> [2010] NSWSC 799

*Dean v Stockland* was dealing with something quite different, at [19], namely, whether an offer inclusive of costs could operate effectively as a *Calderbank* offer. The Court in *Dean v Stockland* expressly stated:

"An offer that does not comply with the rules relating to the making of offers of compromise can operate and be taken into account as a *Calderbank* offer ..."<sup>14</sup>

58 The trial judge correctly followed *Old v McInnes and Hodgkinson*. The application by the defendants for indemnity costs based on the offers of compromise purportedly made under the rules was dismissed.

59 I would add one note of correction. In *Old v McInnes and Hodgkinson*, I agreed with Giles and Meagher JJA that the offers of compromise were non-compliant as rules offers. I dissented on the question whether the offers could be considered as *Calderbank* offers.

***Rebecca Nemeth v Westfield Limited & P T Limited***<sup>15</sup>

60 In *Nemeth v Westfield*, the defendant's offer was made purportedly under the rules in terms:

"Judgment for the plaintiff against the first and second defendants in the sum of \$[X] plus costs agreed or assessed."

61 The trial judge was confronted with a submission that although on the authority of *Old v McInnes and Hodgkinson* the offer was not rule-compliant and therefore not effective as offer made under the rules, there was a conflict between that and the decision in *Vieira v O'Shea (No 2)*. The submission pointed out that there was a common member of the bench in each decision.

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<sup>13</sup> see *Waco v Kwikform v Jabbour* [2011] NSWSC 1328

<sup>14</sup> at [31]

<sup>15</sup> [2012] NSWDC 77

62 The trial judge concluded that the decisions were not conflicting given the concession in *Vieira v O'Shea (No 2)* that the offer did not comply with the UCPR because it was not made exclusive of costs. His Honour considered, therefore, that he was bound by *Old v McInnes and Hodgkinson*. His Honour did not expressly find that the offer could be treated as a *Calderbank* offer, but approached the matter on the basis of the exercise of discretion conferred by the *Civil Procedure Act*, s 98. Accordingly, his Honour made a costs order, partially upon an indemnity basis.

***Rail Corporation NSW v Vero Insurance Ltd (No 2)*<sup>16</sup>**

63 In *Rail Corporation NSW v Vero Insurance Ltd*,<sup>17</sup> Garling J had given judgment for the first and second plaintiffs in the sums of \$5,392,327.14 and \$166,270.15 respectively. The plaintiff made two offers prior to the commencement of the hearing, at dates when the defendant was fully apprised of the issues in contention and the likely quantum of damages to which the plaintiffs would have been entitled if successful.

64 The first offer was in the form of a "*without prejudice*" letter dated 7 March 2011 and included the following term:

"The plaintiffs will accept \$3,500,000 inclusive of costs in full and final settlement of their claims against the defendant."

65 This offer was open until 5 pm on 11 March 2011. It lapsed without being accepted.

66 The second offer of 31 March 2011 was a notice of offer of compromise in the form of a facsimile. This offer included the following terms:

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<sup>16</sup> [2012] NSWSC 926

<sup>17</sup> [2012] NSWSC 632

"1. Verdict and judgment for the plaintiffs as against the defendant in the sum of \$2,600,000.

2. Defendant to pay the plaintiffs' costs and disbursements as agreed or assessed.

...

This Notice of Offer of Compromise is made in accordance with r 20.26 of the *Uniform Civil Procedure Rules 2005 (NSW)*."

67 Garling J stated, at [34], the question of whether the first offer was a *Calderbank* offer did not "*depend upon the fact that the letter made no specific reference to Calderbank, nor ... the phrase 'Without Prejudice save as to Costs'*." He considered the offer operated as a *Calderbank* offer.

68 In determining whether the second offer was an offer of compromise that complied with the rules, Garling J noted, at [72], that the Court of Appeal's statement in *Vieira v O'Shea (No 2)* at [7], that:

"A mere reference to costs in an offer otherwise compliant with Part 20, Div 4 will not take the offer outside the rules unless the reference operates inconsistently with the relevant costs rule"

seemed to contradict the majority statement in *Old v McInnes and Hodgkinson* that an offer, which included an offer to pay costs, did not comply with the rules.

69 His Honour also noted that judgments of the Supreme Court and of the Court of Appeal held that offers for a defined sum expressed to be either "*plus costs*" or "*together with costs*" were in compliance with the rules whilst the inclusion of the term "*inclusive of costs*" was not in accordance with the rules. His Honour set out a number of those decisions of the Court of Appeal where the Court had held that offers of compromise containing the phrase "*plus costs*" were in compliance with the rules: see

*Ambulance Service of NSW v Worley (No 2)*;<sup>18</sup> *Macquarie Radio Network Pty Ltd v Arthur Dent (No 2)*;<sup>19</sup> *San Rumble (No 2)*;<sup>20</sup> *The Uniting Church v Takacs (No 2)*;<sup>21</sup> *Koee Communications Pty Ltd v Primus Telecommunications Pty Ltd (No 2)*;<sup>22</sup> *Nominal Defendant v Hawkins*.<sup>23</sup> A consideration of each of these cases reveals that the question of compliance with Pt 20, r 20.26(2) was not in issue.

- 70 In deciding whether the offer of compromise complied with the rules, Garling J found it necessary to engage in a purposive construction of the UCPR in accordance with the principles of statutory construction, as his Honour found that "*no clear or consistent guideline is available*".
- 71 In the alternative, Garling J considered, at [100], that if he was incorrect in finding that the offer of compromise complied with the rules it nonetheless "*ought to be regarded as analogous to a Calderbank offer*". In arriving at this conclusion, his Honour considered, at [105], that whilst the offer did not make any suggestion that, if not accepted, it would be relied upon as a *Calderbank* offer, the correct approach for the court was to discern the intention of the plaintiffs in making the offer, in particular, "*whether they would rely on the offer [in] an application for indemnity costs*". Relevant to his Honour's determination was the experience and skill of the lawyers and parties involved in the proceedings.

## Conclusion

- 72 *Old v McInnes and Hodgkinson* has made a clear statement of the law as to what constitutes a complying offer of settlement for the purposes of Pt 20, r 20.26 and Pt 42, r 42.13 ff. The statement in that case, that an offer of settlement that provides that the defendant is to pay the plaintiff's

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<sup>18</sup> [2006] NSWCA 236; 67 NSWLR 719

<sup>19</sup> [2007] NSWCA 339

<sup>20</sup> [2007] NSWCA 259; 48 MVR 492

<sup>21</sup> [2008] NSWCA 172

<sup>22</sup> [2008] NSWCA 85

costs as agreed or assessed offends Pt 20, r 20.26(2), was part of the ratio decidendi as the matter in issue was whether the offers of settlement did so comply.

- 73 In *Vieira v O'Shea (No 2)* obiter comments were made that that may not be so.
- 74 There is also a long line of decisions where the inclusion of a reference to costs has been accepted as complying with Pt 20, r 20.26(2). However, in none of those cases was the present question put in issue.
- 75 It is my view that *Old v McInnes and Hodgkinson* represents the law as it presently stands in New South Wales. It must be conceded, however, that the proliferation of inconsistent statements on a matter of practice and procedure, but which has such a substantial impact on the parties, is unsatisfactory and should be addressed by the Rules Committee of the Courts.
- 76 As to *Calderbank* offers, it must also be said that *Old v McInnes and Hodgkinson* has also given rise to some confusion and the expression of different views. Overall, there has been a tendency by trial judges to follow my dissenting reasons. I would not feel confident to predict that my reasons would be upheld by a specially constituted bench of the Court, should the Court consider that such a course was appropriate.
- 77 Subject to that issue, the various statements referred to in the 2008 *Calderbank* paper as being relevant to the Court's exercise of discretion to make an advantageous costs order should a *Calderbank* offer be made, remain good. As this paper is entitled "*Calderbank* offers 2", I could stop there. However, in the hope of being of assistance to litigants and litigation lawyers, I would offer two pieces of advice.

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<sup>23</sup> [2011] NSWCA 93; (2011) 58 MVR 362

- 78 First, if it is intended that a rules offer is to operate additionally as a *Calderbank* offer, but should for some reason be found to be non-compliant, that intention should be stated in the covering letter.
- 79 Secondly, in making a rules offer, as the law presently stands, no reference should be made to costs. In following that advice, you have the comfort of knowing that in *Vieira v O'Shea (No 2)*, Basten JA peremptorily dismissed a submission that a rules offer which made no reference to costs might be construed as being inclusive of costs.

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i "42.2 General rule as to assessment of costs

Unless the court orders otherwise or these rules otherwise provide, costs payable to a person under an order of the court or these rules are to be assessed on the ordinary basis."

ii "42.13A Where offer accepted

- (1) This rule applies if the offer concerned:
- (a) is made by the plaintiff and accepted by the defendant, or
  - (b) is made by the defendant and accepted by the plaintiff.
- (2) The plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, assessed on the ordinary basis up to the time when the offer was made, unless:
- (a) the offer states that it is a verdict for the defendant and the parties are to bear their own costs, or
  - (b) the court orders otherwise."

iii "Division 4 Compromise

**20.25 Definitions**

In this Division:

*final deadline* for an offer means:

- (a) if the trial is before a jury, the time at which the judicial officer begins to sum up to the jury, or
- (b) if the proceedings have been referred for arbitration, the conclusion of the arbitration hearing, or
- (c) in any other case, the time at which the judicial officer begins to give his or her decision or his or her reasons for decision, whichever is the earlier, on a judgment (except an interlocutory judgment).

*offer* means an offer of compromise referred to in rule 20.26.

*period for acceptance* for an offer means the period from when the offer is made until:

- (a) the expiration of the time limited by the offer or, if no time is limited, the expiration of 28 days after the offer is made, or
- (b) the final deadline for offers in respect of the claim to which the offer relates, whichever first occurs.

**20.26 Making of offer**

- (1) In any proceedings, any party may, by notice in writing, make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms.
- (2) An offer must be exclusive of costs, except where it states that it is a verdict for the defendant and that the parties are to bear their own costs.

- (3) A notice of offer:
  - (a) must bear a statement to the effect that the offer is made in accordance with these rules, and
  - (b) if the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to the payment so made or ordered.
- (4) Despite subrule (1), a plaintiff may not make an offer unless the defendant has been given such particulars of the plaintiff's claim, and copies or originals of such documents available to the plaintiff, as are necessary to enable the defendant to fully consider the offer.
- (5) If a plaintiff makes an offer, no order may be made in favour of the defendant on the ground that the plaintiff has not supplied particulars or documents, or has not supplied sufficient particulars or documents, unless:
  - (a) the defendant has informed the plaintiff in writing of that ground within 14 days after receiving the offer, or
  - (b) the court orders otherwise.
- (6) An offer may be expressed to be limited as to the time it is open for acceptance.
- (7) The following provisions apply if an offer is limited as to the time it is open for acceptance:
  - (a) the closing date for acceptance of the offer must not be less than 28 days after the date on which the offer is made, in the case of an offer made 2 months or more before the date set down for commencement of the trial,
  - (b) the offer must be left open for such time as is reasonable in the circumstances, in the case of an offer made less than 2 months before the date set down for commencement of the trial.
- (8) Unless the notice of offer otherwise provides, an offer providing for the payment of money, or the doing of any other act, is taken to provide for the payment of that money, or the doing of that act, within 28 days after acceptance of the offer.
- (9) An offer is taken to have been made without prejudice, unless the notice of offer otherwise provides.
- (10) A party may make more than one offer in relation to the same claim.
- (11) Unless the court orders otherwise, an offer may not be withdrawn during the period of acceptance for the offer.
- (12) A notice of offer that purports to exclude, modify or restrict the operation of rule 42.14 or 42.15 is of no effect for the purposes of this Division.

#### **20.27 Acceptance of offer**

- (1) A party may accept an offer by serving written notice of acceptance on the offeror at any time during the period of acceptance for the offer.
- (2) An offer may be accepted even if a further offer is made during the period of acceptance for the first offer.
- (3) If an offer is accepted in accordance with this rule, any party to the compromise may apply for judgment to be entered accordingly.

#### **20.28 Withdrawal of acceptance**

- (1) A party who accepts an offer may withdraw the acceptance in any of the following circumstances by serving written notice of withdrawal on the offeror:
  - (a) if the offer provides for payment of money, or the doing of any other act, and the sum is not paid to the offeree or into court, or the act is not done, within 28 days after acceptance of the offer or within such other time as the offer provides, or
  - (b) if the court grants the party leave to withdraw the acceptance.
- (2) If acceptance of an offer is withdrawn:
  - (a) except as provided by paragraph (b), all steps in the proceedings that have been taken as a consequence of the offer having been accepted cease to have effect, and
  - (b) the court may give directions:
    - (i) to restore the parties as nearly as may be to their positions at the time of the acceptance, and
    - (ii) to give effect to any steps in the proceedings that have been taken as a consequence of the offer having been accepted, and
    - (iii) to provide for the further conduct of the proceedings, and may do so either after the offer is withdrawn or when granting leave to withdraw the offer.

#### **20.29 Failure to comply with accepted offer**



- (1) If the plaintiff, being a party to an accepted offer, fails to comply with the terms of the offer, the defendant is entitled:
  - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or
  - (b) to an order that the proceedings be dismissed, and to judgment accordingly, as the defendant elects, unless the court orders otherwise.
- (2) If the defendant, being a party to an accepted offer, fails to comply with the terms of the offer, the plaintiff is entitled:
  - (a) to such judgment or order as is appropriate to give effect to the terms of the accepted offer, or
  - (b) to an order that the defence be struck out, and to judgment accordingly, as the plaintiff elects, unless the court orders otherwise.
- (3) If a party to an accepted offer fails to comply with the terms of the offer, and a defendant in the proceedings has made a statement of cross-claim or cross-summons that is not the subject of the accepted offer, the court:
  - (a) may make such order or give such judgment under this rule, and
  - (b) may make such order as to the further conduct of proceedings on the statement of cross-claim or cross-summons, as it thinks fit.

### **20.30 Disclosure of offer to court or arbitrator**

- (1) No statement of the fact that an offer has been made may be contained in any pleading or affidavit.
- (2) If an offer is not accepted, no communication with respect to the offer may be made to the court at the trial or, as the case may require, to the arbitrator.
- (3) Despite subrule (2), an offer may be disclosed to the court or, as the case may require, to the arbitrator:
  - (a) if a notice of offer provides that the offer is not made without prejudice, or
  - (b) to the extent necessary to enable the offer to be taken into account for the purpose of determining an amount of interest up to judgment, or
  - (c) after all questions of liability and relief have been determined, to the extent necessary to determine questions as to costs, or
  - (d) to the extent necessary to enable the offer to be taken into account for the purposes of section 73 (4) of the [Motor Accidents Act 1988](#), section 137 (4) of the [Motor Accidents Compensation Act 1999](#) or section 151M of the [Workers Compensation Act 1987](#).

### **20.31 Compromises in certain Supreme Court proceedings**

- (1) This rule applies to proceedings in the Supreme Court concerning:
  - (a) the administration of a deceased person's estate, or
  - (b) property the subject of a trust, or
  - (c) the construction of an Act, instrument or other document, involving any matter in which one or more persons have the same interest or liability.
- (2) The court may approve a compromise:
  - (a) that one party has assented to, or
  - (b) that the court has sanctioned on behalf of one party, being in either case a compromise that affects other persons (not being parties) having the same interest or liability, but only if the court is satisfied that the compromise will be to the benefit of those other persons.
- (3) A compromise referred to in subrule (2) binds the absent persons unless the court's approval of the compromise has been obtained by fraud or non-disclosure of material facts.

### **20.32 Offer to contribute**

- (1) If in any proceedings:
  - (a) one party (*the first party*) stands to be held liable to another party (*the second party*) to contribute towards any debt or damages which may be recovered against the second party in the proceedings, and
  - (b) the first party, at any time after entering an appearance, makes an offer to the second party to contribute to a specified extent to the debt or damages, and
  - (c) the offer is made without prejudice to the first party's defence,

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the offer must not be brought to the attention of the court or any arbitrator until all questions of liability or amount of debt or damages have been decided.

- (2) In subrule (1), *debt or damages* includes any interest up to judgment claimed on any debt or damages."

iv "Division 3 Offers of compromise

**42.13 Application**

This Division applies to proceedings in respect of which an offer of compromise (the *offer concerned*) is made under rule 20.26 with respect to a plaintiff's claim (the *claim concerned*).

**42.13A Where offer accepted**

- (1) This rule applies if the offer concerned:
- (a) is made by the plaintiff and accepted by the defendant, or
  - (b) is made by the defendant and accepted by the plaintiff.
- (2) The plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, assessed on the ordinary basis up to the time when the offer was made, unless:
- (a) the offer states that it is a verdict for the defendant and the parties are to bear their own costs, or
  - (b) the court orders otherwise.

**42.14 Where offer not accepted and judgment no less favourable to plaintiff**

- (1) This rule applies if the offer concerned is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim concerned no less favourable to the plaintiff than the terms of the offer.
- (2) Unless the court orders otherwise, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim:
- (a) assessed on the ordinary basis up to the time from which those costs are to be assessed on an indemnity basis under paragraph (b), and
  - (b) assessed on an indemnity basis:
    - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
    - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

**42.15 Where offer not accepted and judgment as or less favourable to plaintiff**

- (1) This rule applies if the offer concerned is made by the defendant, but not accepted by the plaintiff, and the plaintiff obtains an order or judgment on the claim concerned as favourable to the plaintiff, or less favourable to the plaintiff, than the terms of the offer.
- (2) Unless the court orders otherwise:
- (a) the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and
  - (b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:
    - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
    - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

**42.15A Where offer not accepted and judgment as or more favourable to defendant**

- (1) This rule applies if the offer concerned is made by the defendant, but not accepted by the plaintiff, and the defendant obtains an order or judgment on the claim concerned as favourable to the defendant, or more favourable to the defendant, than the terms of the offer.
- (2) Unless the court orders otherwise:
- (a) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and

- (b) the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:
  - (i) if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and
  - (ii) if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.

**42.16 Costs with respect to interest**

- (1) If a plaintiff obtains an order or judgment for the payment of a debt or damages and:
  - (a) the amount payable under the order or for which judgment is given includes interest or damages in the nature of interest, or
  - (b) the court, by a separate order, awards the plaintiff interest or damages in the nature of interest in respect of the amount,then, for the purpose of determining the consequences as to costs referred to in rule 42.14, 42.15 or 42.15A, the court must disregard so much of the interest, or damages in the nature of interest, as relates to the period after the day on which the offer was made.
- (2) For the purpose only of this rule, the court may be informed of the fact that the offer was made, and of the date on which it was made, but must not be informed of its terms.

**42.17 Miscellaneous**

- (1) Before the court makes any order under rule 42.14 or 42.15, the party to whom the offer is made may request the party making the offer to satisfy the court that the party making the offer was at all material times willing and able to carry out the offer.
- (2) If the court is satisfied that the party making the offer was at all material times willing and able to carry out the offer, then, unless the court orders otherwise, the party making the request must pay such of the costs of the party to whom the request is made as have been occasioned by the request.
- (3) If the court is not satisfied that the party making the offer was at all material times willing and able to carry out the offer, then, unless the court orders otherwise:
  - (a) rules 42.14 and 42.15 do not apply, and
  - (b) the party to whom the request is made must pay the costs of the party making the request occasioned by the request.
- (4) Unless the court orders otherwise, any application for an order for costs under rule 42.14 or 42.15 must be made forthwith after the order or judgment giving rise to the entitlement to the order for costs is made or given."