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CALDERBANK OFFERS: THE BASICS

INTRODUCTION

A Calderbank offer is an offer of settlement made in a "without prejudice" communication, which can have its confidential nature waived in an application for indemnity costs (*Calderbank v Calderbank* [1975] 3 All ER 333). Making a "without prejudice" settlement offer before commencing litigation is a useful way to resolve disputes without recourse to litigation and is useful for reducing costs.

WHAT MAKES A VALID PRE-LITIGATION OFFER?

1. The offer must be made prior to the commencement of litigation;
2. The offer must be made in writing to the receiving party;
3. The offer must be reasonable;
4. The offer must give the receiving party a reasonable amount of time to accept the offer; and
5. The offeror must obtain judgment which is not less favourable than the terms of the offer.

WHAT HAPPENS IF YOU UNREASONABLY REJECT A CALDERBANK OFFER?

If the offer is unreasonably rejected, the party making the offer may be liable for costs on an indemnity basis and may have to pay more than just standard costs.

For example, in *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) and Pegela Pty Ltd v The National Mutual Life Assurance Association of Australasia Ltd* (2012) VSC 177, the Defendant made an offer to the Plaintiff prior to the first trial which was not accepted. During the proceedings, 3 more offers of compromise were put forward by the Defendant, all of which were rejected. The Defendant succeeded at Trial and applied for indemnity costs. In the first instance before the Court the Court found that the Plaintiffs acted unreasonably in rejecting the offers however in front of the Court of Appeal it was found that the primary judge erred in deeming the Plaintiff's conduct unreasonable.

WHAT CONSTITUTES AN UNREASONABLE REJECTION?

Whether or not the rejection of a Calderbank offer is unreasonable is a discretionary power. However, the Courts will usually have regard to:

- Whether there was sufficient time to consider the offer;
- Whether the offeree had adequate information to enable it to consider the offer; and
- Whether any conditions are attached and if so, whether those conditions are reasonable

For example, in *Ismail v NSW Land & Housing* [2014] NSWSC 1434 a Calderbank offer, which was open for 14 days, was sent to the Defendant who ultimately succeeded at Court. Under these circumstances, the Court granted the Defendant's application for indemnity costs.

In *Vale v Eggins* (No 2) [2007] NSWCA 12 the Respondent had not, once he made the offer of compromise, served all the medical reports which he already had in his possession. In those circumstances the fact that the Respondent did not serve this evidence was relevant to an assessment of the offer made he ought not to be entitled to the favourable costs provisions under the Rules.

In *Elite v Salmon* [2007] NSWCA 322 the Court stated that greater sympathy may be accorded to a defendant who receives an offer early in proceedings where there has been no reasonable opportunity for it to assess its questions of liability or exposure in damages.

CONCLUDING REMARKS

Clearly, while Calderbank offers are a useful tool for parties seeking to apply for indemnity costs, parties should carefully draft such letters in order to ensure that they constitute reasonable offers of compromise. Meanwhile, those receiving Calderbank offers should give them due consideration in order to avoid cost orders against them.

For more information

For more information on Calderbank offers contact our Principal Solicitor/ Director:

Jessica Rippon
T + 02 9239 3120
M: 0421 877 932
E: jrippon@constructionlegal.com.au