Article Information

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Service: Commercial Disputes, Dispute Resolution & Litigation
Sector: Energy & Resources

Clarify the claims and counterclaims in your settlement offers: Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QCA 8

The Queensland Court of Appeal has unanimously dismissed an appeal which sought advantageous costs orders pursuant to a settlement offer purportedly made under the Uniform Civil Procedure Rules 1999 (Qld) (UCPR).

The primary issue before the court was whether an offer to settle both a claim and a counterclaim for a single amount could trigger the costs consequences under Chapter 9, Part 5 of the UCPR. If it could not, the secondary issue was whether the offer was nevertheless relevant to the exercise of the costs discretion.

The trial judge held that the offer, while valid, did not trigger the costs consequences under Chapter 9, Part 5 of the UCPR as the offer failed to distinguish between the claim and the counterclaim in the proceeding. Further, that the offer did not take effect as a *Calderbank* offer as the words "without prejudice except as to costs", without more, was insufficient to indicate that the offer was to be relied on by a party as a *Calderbank* offer. The Court of Appeal upheld the trial judge's findings.

The proceeding

The respondent, Civil Mining & Construction Pty Ltd (**Civil Mining**) was the plaintiff at first instance. The appellant, Wiggins Island Coal Export Terminal Pty Ltd (**Wiggins**) was the defendant, but had also made a counterclaim.

Before trial, Wiggins made an offer to Civil Mining expressed to be under Chapter 9, Part 5 of the UCPR. The offer was an "all up" offer to settle "all claims in the proceeding" for payment of a sum. It was accompanied by a letter, expressed as "Without prejudice except as to costs", which set out reasons why Wiggins considered Civil Mining ought to accept the offer. It was not accepted, and the matter went to trial.

At trial, both parties achieved success. Civil Mining obtained judgment on its claim, while Wiggins obtained judgment on its counterclaim. Both judgments were money orders and the net difference in amount between the two was approximately $1.8 million, in favour of Civil Mining.

The sum in Wiggins's offer was better than this net amount in favour of Civil Mining. Therefore, Wiggins sought to rely on its offer for the purposes of an advantageous costs order under rules 360 and 361 of the UCPR, alternatively for a costs order pursuant to the well-known principles in *Calderbank v Calderbank* [1975] 3 All ER 333.

Offers to settle

Chapter 9, Part 5 of the UCPR encourages parties to make offers to settle. It provides a degree of costs protection to those who do so. The particular costs consequences depend on whether the plaintiff or the defendant makes the offer.

Rule 353 of the UCPR provides:

1. A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer.
2. A party may serve more than one offer.

3. An offer must be in writing and must contain a statement that it is made under this part.

As sub-rule (1) makes plain, an offer under the UCPR can settle more than one claim in the proceeding. The judgment on a counterclaim is a separate to the judgment on the claim, for costs purposes.

However, for the purposes of Chapter 9, Part 5, "proceeding" means a proceeding started by claim or by originating application. The definitions in rule 352 do not refer to a proceeding started by counterclaim. This gave rise to the issue of whether Wiggins' offer was a valid offer under rule 353.

The more vexing issue to answer was whether Wiggins' offer, if valid, could trigger the costs consequences under rules 360 and 361. To do so, it was necessary to compare the offer against the judgment that Wiggins achieved. In short: did the offer better the judgment or not? However, it was not clear that this comparative analysis was possible. The offer did not distinguish between the claim and the counterclaim, which were each separate proceedings, and Wiggins was successful in one claim, but not the other.

The appeal

Civil Mining argued that Wiggins' offer was invalid because the counterclaim was a separate proceeding to the claim, and rule 353 did not permit one offer to settle two separate proceedings. Rather, it argued, the rule permitted one offer to settle two (or more) causes of action or claims for relief within the one proceeding.

The court acknowledged that, for some purposes, a counterclaim is separate and distinct from the principal proceeding commenced by claim. For instance, a counterclaim unquestionably results in a separate judgment and separate costs orders to those that result from the claim.1

However, the court found that counterclaims2 were not separate proceedings for the purposes of rules 352 and 353. This is because on the proper construction of rules 177 – 179, 181 and 182, a counterclaim is not an independent proceeding, but is "an incidental proceeding in the course of" the principal proceeding. As such, "claim" in rule 353 was to interpreted as including a counterclaim, with the result that Wiggins' offer was valid.

A valid offer under Chapter 9, Part 5 of the UCPR is one thing. An offer that has the costs consequences set out in rules 360 and 361 is quite another.

Like the judge at first instance, the court accepted that Wiggins' offer did not trigger those costs consequences. Because the offer did not specify the monetary amounts for which each of the claim and counterclaim individually would be settled, it did not enable the necessary comparisons to be made for the purposes of rules 360 and 361.

Finally, Wiggins argued that even if its offer did not engage rules 360 and 361, the offer was still properly to be taken into account in the exercise of the costs discretion under rule 681. It relied on its use of the words "Without prejudice except as to costs" in the letter enclosing the offer as giving the offer *Calderbank* status.

The court rejected Wiggins' argument. Wiggins' offer was expressed as made pursuant to Chapter 9, Part 5 and for no other purpose. It failed to intimate an intention to seek something other than the usual costs order. While the words "without prejudice except as to costs" are typical of a *Calderbank* offer, they are not sufficient to cloak the offer with that status.

Key takeaways

The decision reinforces the importance of clarity when making offers to settle proceedings, particularly those that involve counterclaims. While there was obvious efficiency in the brevity of expression of Wiggins' offer, the cost of that efficiency was removing the opportunity to secure an advantageous costs order on the counterclaim.

The decision also highlights the danger in assuming that an offer that is non-compliant with the UCPR will nevertheless be effective as a *Calderbank* offer.

The judgment can be located here: Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QCA 8.