Article Information

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You should have settled: why Calderbank offers are important

If you receive a settlement offer during a dispute, be careful to understand what kind of offer it is. If it is a 'Calderbank offer', and you reject it, you could be ordered to pay more of the other side's legal costs if you are not successful.

What is a Calderbank offer?

A Calderbank offer is a type of settlement offer. It is made prior to judgment in a dispute. It can even be made prior to legal proceedings being commenced.

If the offer is rejected and the case proceeds to judgment, if the offering party can show that given the final result, it was unreasonable for the other party to reject their offer, it can effect who will be ordered to pay the costs of the proceeding, and how much.

How does it work?

A Calderbank offer must generally be in writing. It must state that it is "without prejudice save as to costs" and that it is made pursuant to the principles established in *Calderbank v Calderbank* (or a statement to that effect). "Without prejudice" means that the settlement offer is without prejudice to the party's right to initiate or continue litigation, and the letter cannot be tendered as evidence in any proceeding. The exception "save as to costs" means that if the case proceeds to judgment, the offer can be relied on in court when determining who will pay the costs of the proceeding. For example, whether the unsuccessful party should pay costs at all if they made a reasonable offer, or whether a successful party should have its costs paid on an 'ordinary' basis (also known as party/party costs), or an 'indemnity' basis (in which case all reasonably incurred costs are awarded).

Distinction with offers of compromise

Under rule 20.26 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**), a party can make an offer of compromise, which is different to a Calderbank offer. Offers of compromise under the rules must not include an amount for costs and must not be expressed to be inclusive of costs. It was said in *Whitney v Dream Developments Pty Ltd* that "[t]he use of the phrase "exclusive of costs" suggests that what is intended is that a compliant offer will not deal with costs at all". Accordingly, while offers of compromise must not refer to costs (and are taken to be exclusive of costs), Calderbank offers may be made inclusive of costs.

What happened in this case?

The recent case of *Meldov Pty Ltd v Bank of Queensland (No. 2)* (**Meldov No 2**) provides a good example of the operation of these principles. It concerns the costs of the dispute in *Meldov Pty Limited v Bank of Queensland* (**Meldov No 1**). Meldov No 1 involved a contest between two mortgagors, the Bank of Queensland Ltd (**BOQ**) and a second mortgagor, Meldov Pty Ltd (**Meldov**), over the proceeds of sale of a property. The BOQ had mistakenly advanced more money than it intended to the borrowers under an 'all moneys' mortgage. Due to the mistaken advance, Meldov was seeking $150,000.00, which had been secured by a second mortgage on the property, claiming that the mistaken advance was not secured under the BOQ's 'all moneys' mortgage. Meldov was wholly unsuccessful.

Meldov No 2 was concerned with how much of the BOQ's costs in Meldov No 1 would have to be paid by Meldov, the unsuccessful plaintiff. The decision was handed down on 11 June 2015. The BOQ submitted evidence that it had made a Calderbank offer to Meldov almost a year before, on 18 July 2014, where it offered Meldov $80,000 "in full and final settlement of the proceeding". The offer was expressed to be open for twelve days. Meldov did not accept the offer and it

expired.

Application of the principles relating to Calderbank offers

Justice Slattery reviewed the principles relating to Calderbank offers, and observed the following:

- the party making the offer must give a reasonable time for the other party to consider the offer and take legal advice before deciding whether or not to accept the offer
- the party who makes the offer must prove to the court that the other party's failure to accept the offer was unreasonable
- there is no presumption that a successful party who makes an offer that is rejected, and that achieves a better result than what they offered, will be awarded indemnity costs
- whether the rejection of an offer was unreasonable is to be assessed by reference to the circumstances at the time the offer was made, and
- the issue of costs should be clearly dealt with in the offer, i.e. the offer should state whether the offer is inclusive or exclusive of the costs of the dispute.

Arguments put forward and the Decision

Meldov put forward a number of arguments that it was reasonable to refuse the offer, which Justice Slattery dealt with in turn. These were:

- that the statement of agreed facts had not been agreed upon when the offer was made; while this was true, Justice Slattery found that the material facts had not changed, and it was not a case where some new fact had emerged after the offer had expired
- that the 12 day period in which the offer was open for acceptance was less than reasonable; Justice Slattery found it was reasonable, given the detailed analysis of the situation contained in the Calderbank letter
- the letter was confusing, in that Meldov did not know whether the offer was inclusive or exclusive of costs; Justice Slattery found the words "in full and final settlement of the proceeding", and "with payment to be made within 28 days of written acceptance" amounted to the offer being clearly inclusive of costs; in addition, Meldov could have resolved its concern with a simple enquiry, which did not happen
- that the proceedings were complex; Justice Slattery held that Calderbank offers in complex proceedings are "not unknown", and that this does not provide a party with a justification for refusing to accept an offer
- that the offer of $80,000.00 was low compared to what Meldov claimed; Justice Slattery held that while a low Calderbank offer can be confronting, this does not serve to make it unreasonable, and instead such an offer can allow plaintiffs to make a realistic assessment of their true position
- that Meldov doubted whether the offer was genuine; Justice Slattery found that as Meldov had spent approximately $40,000.00 on the proceeding at that point, accepting an offer of twice that amount would have been a profitable decision and as such it clearly bore the hallmarks of a genuine offer from another party
- that difficulty in quantifying its own costs was a reason not to accept the offer; Justice Slattery held that this could have been resolved through a simple request from Meldov's solicitors, and
- that there was uncertainty about the law at the time; Justice Slattery held that this is not an unusual situation, however even if it was accepted that legal uncertainty can provide a party with good reason not to accept an offer, theirs was not a particularly confusing area of the law.

Result

The result was that not only did Meldov lose the case and have to pay its own costs, it paid the BOQ's costs on an ordinary basis up to the expiry of the offer, and on an indemnity basis from the expiry of the offer until the date of judgment – nearly a whole year.

The take-away

The important point to remember is this: when you receive a Calderbank offer, weigh it up very carefully, be sure to take legal advice and, most importantly, if the offer is reasonable, consider seriously whether it would be best to settle. As this case demonstrates, sometimes you should.