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Article Information

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An Unreasonable Refusal To Settle? VWA v O'Brien

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In the matter of the *Victorian Workcover Authority v Kevin Edward O'Brien* [2017] VSC 68, a question arose as to whether the successful party was entitled to something other than a standard costs order following the rejection by the plaintiff of a *Calderbank* offer served prior to trial. The decision of the Supreme Court of Victoria offers a timely reminder when considering how to frame or respond to an offer of settlement to resolve the substantive issues in dispute.

Partner, Ian Nathaniel and **Senior Associate, Ben Hartley** discuss further.

The VWA failed in its recovery action against the owner of a thoroughbred farm under section 138 of the *Accident Compensation Act 1985*. Relevantly, the defendant served a *Calderbank* offer on the VWA expressly noting that the VWA would fail to prove causation at trial and on this basis the defendant was prepared to settle on a walk away basis. The defendant's Calderbank letter relied on three English decisions (including the seminal Calderbank decision) but not the Victorian decision of *Hazeldene's Chicken Farm*, described by his Honour Justice Forrest as "*the paradigm decision in this state on Calderbank Offers*", an omission that was viewed as "*surprising*".

The VWA justified its decision to not accept the offer based on the information it had at the date of the offer and the fact that what was proposed was a complete capitulation on the VWA's behalf, which can be difficult to sustain unless it can be shown the claim was close to hopeless and the refusal unreasonable.

Justice Forrest summarised the principles set out in *Hazeldene* in order to assess reasonableness:

- the stage of the proceeding at which the offer was received;
- the time allowed to the offeree to consider the offer;
- the extent of the compromise offered;
- the offeree's prospects of success, assessed at the date of the offer;
- the clarity in which the terms of the offer were expressed; and
- whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejection of it.

In addition, his Honour also cited authority including in the Court of Appeal in Victoria, to the effect that the rejection of an offer that does not represent a genuine comprise, but rather is an offer in the nature of a capitulation may not be unreasonable.

Having regard to these matters his Honour found that it was not unreasonable for the VWA to reject the offer as:

- it had established a duty of care and breach of that duty by the defendant, but only failed on causation. At the time of the offer the VWA was entitled to consider it had reasonable prospects.
- while the VWA was expressly taken to the absence of expert evidence on causation, the lay of evidence was critical and any expert evidence could not be properly assessed until the facts in issue were determined.
- the evidence of the VWA's expert did in fact identify a causal link, but that link was insufficient to establish causation.

The costs application by the successful defendant was rejected. The successful defendant was awarded its costs on a

standard basis, except those costs that dealt with the argument over the *Calderbank* offer.

The case, the latest in a long line of costs decisions, indicates the importance of how you frame an offer to bolster the ability to obtain beneficial costs order in the event a court finds that the offer was unreasonably refused. What is unreasonable will depend on the circumstances of the case, but requiring the other party to capitulate when there is a significant contest over the underlying facts is unlikely to result in a beneficial costs order.