OFFER'S OF COMPROMISE INCLUDING CALDERBANK OFFERS

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Introduction

1. This paper discusses the issue of offers of compromise, and how those offers may need to differ depending upon the Court in which relevant proceedings are brought and then the issue of *Calderbank* offers which are either exclusive from or may run in conjunction with formal offers of compromise.

2. Offers of compromise and *Calderbank* offers are quite obviously linked to the issue of a parties costs in proceedings and, with respect to offers of compromise, are regulated by a Court's governing Statute or Rules formulated by the relevant Court or Tribunal.

3. The successful offeror, of an Offer of Compromise, in a costs jurisdiction, may become entitled to costs on an indemnity basis from the date of offer and those offerors of *Calderbank* Offers may successfully pursue costs, however calculated, in either a costs or no costs jurisdiction.

4. Costs orders are always at the discretion of the Court or Tribunal, and dependant upon individual circumstances of a particular case. However, the proper use of formal offers of compromise and/or *Calderbank* offers, can greatly enhance an offerors prospects of obtaining an order for the payment of costs. The capacity to obtain costs orders from Tribunals is more limited and will be addressed later in this paper.

Offers of Compromise

5. The Uniform Civil Procedures Rules 2005, prescribes the manner of making an Offer of Compromise in proceedings brought under the *Civil Procedure Act 2005* (NSW). Rule 20.26 is in the following terms:

Making of offer

20.26 Making of offer

(cf SCR Part 22, rules 1A, 2, 3 and 4; DCR Part 19A, rules 1, 2, 2A, 3 and 4; LCR Part 17A, rules 2 and 5)

(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 under this rule:

(a) must identify:

(i) the claim or part of the claim to which it relates, and

(ii) the proposed orders for disposal of the claim or part of the claim, including, if a monetary judgment is proposed, the amount of that monetary judgment, and

(b) if the offer relates only to part of a claim in the proceedings, must include a statement:

(i) in the case of an offer by the plaintiff, as to whether the balance of the proceedings is to be abandoned or pursued, or

(ii) in the case of an offer by a defendant, as to whether the balance of the proceedings will be defended or conceded, and

(c) must not include an amount for costs and must not be expressed to be inclusive of costs, and

(d) must bear a statement to the effect that the offer is made in accordance with these rules, and

(e) 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 that interim payment, and

(f) must specify the period of time within which the offer is open for acceptance.

(3) An offer under this rule may propose:

(a) a judgment in favour of the defendant:

(i) with no order as to costs, or

(ii) despite subrule (2) (c), with a term of the offer that the defendant will pay to the plaintiff a specified sum in respect of the plaintiff's costs, or

(b) that the costs as agreed or assessed up to the time the offer was made will be paid by the offeror, or

(c) that the costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of a specified estate, notional estate or fund identified in the offer.

(4) If the offeror makes an offer before the offeree has been given such particulars of the offeror's claim, and copies or originals of such documents available to the offeror, as are necessary to enable the offeree to fully consider the offer, the offeree may, within 14 days of receiving the offer, give notice to the offeror that:

(a) the offeree is unable to assess the reasonableness of the offer because of the lack of particulars or documents, and

(b) in the event that rule 42.14 applies to the proceedings, the offeree will seek an order of the court under rule 42.14 (2).

(5) The closing date for acceptance of an offer:

(a) in the case of an offer made two months or more before the date set down for commencement of the trial-is to be no less than 28 days after the date on which the offer is made, and

(b) in any other case-is to be such date as is reasonable in the circumstances.

(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.

6. The statutory purpose of allowing in proceedings the consideration of offers of compromise, is a clear legislative intent that the parties should be encouraged to resolve proceedings between them with minimum costs both to the parties directly and to legal institutions as a whole.

7. I emphasise, though do not detract from any part of the above Rule, the following points for an enforceable, to the extent Courts will enforce, an Offer of Compromise:

   a. Must be in writing and clearly identify the proceedings, or part of the proceedings, to which it intends the offer relates;
   b. The offer must be exclusive of costs or in any way attempt to deal with the issue of costs. There is an exception to this in that the offer may propose a judgment in favour of the Defendant with the Defendant paying a specific sum with respect to the Plaintiff's costs;
   c. The offer must bear a statement that the offer is made in accordance with the UCPR.

d. Generally the offer must remain open for a period of 28 clear days after the date of the offer.

8. The UCPR also prescribes the method by which an Offer of Compromise may be accepted. Rule 20.27 specifically prescribes that the only way an offer can be accepted is by the serving of a written notice of acceptance on the offeror during the period prescribed by the offer for acceptance.

9. The formal acceptance of an Offer of Compromise may be withdrawn in certain limited circumstances.

10. Rule 20.28 prescribes that an acceptance may be withdrawn if the payment of money contained within the offer is not forthcoming within 28 days after the acceptance of the offer or if the Court grants the offeree leave to withdraw acceptance. Such order for withdrawal would usually only be made if the offeree can prove some form of fundamental mistake, fraud or duress as having been applied by the offeror. A critical element of the process of a formal Offer of Compromise is that no communication of the offer is to be made to the Court prior to judgment. The Court is granted power to consider the withdrawal of an acceptance on terms considered appropriate by the Court.

11. The acceptance or rejection of an Offer of Compromise has clear consequences for both parties to the proceedings.

12. Rule 42.13A, 42.14 and 42.15 of the UCPR are in the following terms:

42.13A Where offer accepted and no provision for costs

(1) This rule applies if the offer:

(a) is accepted by the offeree, and

(b) does not make provision for costs in respect of the claim.

(2) If the offer proposed a judgment in favour of the plaintiff in respect of the claim, 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.

(3) If the offer proposed a judgment in favour of the defendant in respect of the claim (including a dismissal of a summons or a statement of claim), the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on the ordinary basis up to the time when the offer was made.

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

(cf SCR Part 52A, rule 22; DCR Part 39A, rule 25)

(1) This rule applies if the offer is made by the plaintiff, but not accepted by the defendant, and the plaintiff obtains an order or judgment on the claim 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 no more favourable to plaintiff

(cf SCR Part 52A, rule 22; DCR Part 39A, rule 25; LCR Part 31A, rule 20)

(1) This rule applies if the offer is made by the defendant, but not accepted by the plaintiff, and the plaintiff obtains an order or judgment on the claim no more 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.

13. It is noted from the above Rule that, whilst it to an extent provides the consequences of acceptance or refusal of an Offer of Compromise the Court retains a broad discretion in terms found within the various above Rules as, "unless the Court orders otherwise".

14. The Court retains a clear discretion to either follow the Rules and order the payment of costs either on a party/party, indemnity, or other basis or indeed to consider a parties reasons for not accepting an Offer of Compromise and make orders reflecting the consideration of the Court. This discretion of the

Court was firmly re-iterated by five justices of the NSW Court of Appeal in *Whitney v Dream Developments Pty Ltd* (2013) 84 NSWLR 311. The Court of Appeal held that any Offer of Compromise which prescribed an agreement between the parties as to costs was invalid as it was in effect taking away from the Court its inherent power to order costs as it seems fit. There is thus a clear disjunction between the Rule prescribing a parties "entitlement" to costs either on a party/party or indemnity basis and the clear discretion in the Court to award costs contrary to any entitlement referred to in the Rules. To this extent it should be noted that s60 of the *Civil Procedure Act 2005* is in the following terms

> ***Proportionality of Costs***
> *In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.*

Clearly the overarching principle contained in s60 *Civil Procedure Act 2005* is to provide that the Court should apply consideration aimed at resolving issues between the parties in the most cost effective manner. It must be noted that any Offer of Compromise in such terms must be a real compromise to be a genuine Offer of Compromise. The offeror must be seen to be giving something away that it may otherwise be entitled to gain should the proceedings continue to conclusion. Thus "walk away" offers of compromise may well be considered no real compromise. In *Miwa Pty Ltd v Siantan Properties Pte Ltd [No 2] [2011] NSWCA 334* the Court held that for an offer to be "real and genuine" the offeror must give something away which was otherwise attainable.

15. When considering an Offer of Compromise after judgement, the Court will always look to the terms of the offer and determine whether there was a real compromise offered with the offeror surrendering part of their legitimate claim

to obtain an agreement and thus foreshorten the proceedings.

Calderbank Offers

16. *Calderbank* Offers obtain their name from a judgment of the English Court of Appeal in *Calderbank v Calderbank [1975] 3 AII ER 333*, which Court approved a practice of making Offers of Compromise expressed to be "without prejudice" but still reserving a right to rely upon the offer on the question of costs at the conclusion of the proceedings. *Calderbank* Offers have been embraced, to a greater or lesser degree by Courts and Tribunals in Australia and with respect to Tribunals, *Calderbank* Offers have become the standard process by which costs, otherwise excluded from consideration, can become part of the orders of the Tribunal at the conclusion of the hearing. I will deal with Tribunals, and those entities considerations of *Calderbank* Offers, later in the paper.

17. *Calderbank* Offers are not prescribed by Rules or Regulations to be in a set format as is apparent, for example, upon a consideration of the UCPR. However, there has evolved, following the consideration by Courts and Tribunals of successful and unsuccessful *Calderbank* Offers, a format which should be followed in every case, if a litigant wishes consideration to be given to the offer.

18. A *Calderbank* offer should contain the following:

    a. The offer should be clear and precise on its terms;
    b. The offer should clearly indicate the proceedings that it pertains to;
    c. The offer must be marked with "without prejudice save as to costs";
    d. If costs are mentioned they should be separate from the principle offer and put in $ terms;
    e. The offer should indicate that is the intention of the offeror to tender the offer in an Application for Costs if the offer is rejected;

f. If it is in a costs jurisdiction, the offer should contain a statement to the effect of the cost advantage to the offeror in claiming indemnity costs over party/party costs;
g. The offer should clearly state, though in short terms, why the offer should be accepted by indicating to the offeree the reason why it is said that the prospects of success, in the case of the offeree, is remote.

19. A *Calderbank* Offer cannot be made subject to some other relevant condition. In this way an offer, for example, which said it would be subject to a Deed of Release entered into between the parties would fail for lack of precision. There cannot be contained within a *Calderbank* Offer a provision which requires the acceptance of some imprecise terms.

20. Whilst it can be noted that a *Calderbank* Offer may contain a representation as to costs, in clear comparison with a formal Offer of Compromise, the issue of costs should be segregated in terms such as “plus costs as agreed or assessed” this is of course if once again, the *Calderbank* Offer is being made within a costs jurisdiction. A *Calderbank* Offer may be made “inclusive of costs” but then the offeree would be entitled to seek an explanation of what the offerors costs were anticipated to be and then given time to consider the whole of the offer.

21. A *Calderbank* Offer is not constrained by the formal need to have it remain open for say 28 days in the case of the UCPR or 14 days in terms of the Federal Court Rules. It is nonetheless essential that it be made in time for the offeree to give consideration to the offer, with the offeree fully informed of the position of the proceedings, at the time the offer was made.

22. The issue of onus as to whether an Offer of Compromise should have been accepted as opposed to the acceptance of a *Calderbank* Offer, is quite different. With respect to an Offer of Compromise, made under the Rules of Court, there is *prima facie* a presumption in favour of the offeror and against an offeree, assuming of course the judgment is in favourable terms to the

offeror. This is clearly different from a *Calderbank* Offer, where it is left to the offeror to satisfy the Court of Tribunal that the offeree has unreasonably rejected the offer.

23. The question of reasonableness of a rejected offer can also be considered alongside whether or not the offeree was offered a genuine compromise. *Hobartville Stud Pty Ltd v Union Insurance Co Ltd (1991) 25 NSW LR 358*, at 368. Giles J held:

> *"Compromise promotes a party give something away. A Plaintiff with a strong case, or a Plaintiff with a firm belief in the strength of its case, is perfectly entitled to discount its claim by only a dollar, but it does not in any real sense give anything away, and I do not think it can claim to have placed itself in a more favourable position in relation to costs unless it does so."*

24. The judgment of Giles J is, however, not to be considered strictly applicable in every case as it will very much depend upon the circumstances of the case, what each party is risking and the ultimate strength of each parties case.

25. The timing of a *Calderbank* Offer is critical, if the offeree of a *Calderbank* Offer has only limited time to consider the offer or indeed if it is made at a time in the proceedings when all of the relevant facts have not been either found or disclosed, the *Calderbank* Offer may be of little value if the offeree cannot make a timely and effective assessment of the terms of the offer and the consequences of its refusal.

26. The terms of a final judgment of the Court may be determinative of the success or otherwise of a *Calderbank* Offer or indeed a formal offer of compromise, where the Court is exercising its ultimate discretion. For example in *Fowdh v Fowdh* an unreported judgment of the NSW Court of Appeal, in which Mahney AP held that whilst on the basis of the offer rejected by the offeree, in the normal course of events indemnity costs may flow, in

that particular case the judgment was found in favour of the offeror in circumstances quite different from the case run by the offeror. Costs were not awarded on an indemnity basis because the ratio of the case found by the Court, was different from the case run by the offeror.

27. Furthermore, an offeror may disentitle themselves from costs that might flow following a *Calderbank* Offer if the Court were to determine that the offeror proceeded during the case in a manner apparently to extend the time the case ran or acted otherwise unreasonably during the course of the proceedings. An offeror should be mindful that a ***Calderbank*** Offer though seemingly generous, is not an insurance policy against an unreasonable offeror.

Calderbank Offers in Proceedings Before Tribunals

28. As a general rule, costs do not follow the event in proceedings before Tribunals and indeed the awarding or ordering of costs in favour of a successful litigant before Tribunals is generally excluded by legislation, but still allows the issue of costs to be raised in certain circumstances. In matters before the Civil and Administrative Tribunal the issue of costs, as to that statute, is dealt with in s60 in the following terms:

> ***60 Costs***
>
> *(1) Each party to proceedings in the Tribunal is to pay the party's own costs.*
>
> *(2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.*
>
> *(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:*
>
> *(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,*
>
> *(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,*

> *(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,*
>
> *(d) the nature and complexity of the proceedings,*
>
> *(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,*
>
> *(f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),*
>
> *(g) any other matter that the Tribunal considers relevant.*
>
> *(4) If costs are to be awarded by the Tribunal, the Tribunal may:*
>
> *(a) determine by whom and to what extent costs are to be paid, and*
>
> *(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.*
>
> *(5) In this section:*
>
> ***"costs"** includes:*
>
> *(a) the costs of, or incidental to, proceedings in the Tribunal, and*
>
> *(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.*

29. It can be seen from the above that the overarching principle is that each party is to bear its costs of the proceedings but the Tribunal may award costs in "special circumstances".

30. A discussion on this point was made in the paper presented at Hunter Street Chambers by Simon McMahon in February 2016 and reference should there be made to paragraphs 41 to 47 of Mr McMahon's paper.

31. The *Fair Work Act 2009* gives specific attention to the issue of costs in proceedings both before the Fair Work Commission or in proceedings under the *Fair Work Act* brought before a Court of competent jurisdiction, such as the Federal Court or Federal Circuit Court, and prescribes limitations upon the

awarding of costs in Court proceedings. Section 611 of the *Fair Work Act 2009* is in the following terms:

> ***Costs***
>
> *(1) A person must bear the person's own costs in relation to a matter before the FWC.*
>
> *(2) However, the FWC may order a person (the **first person**) to bear some or all of the costs of another person in relation to an application to the FWC if:*
>
> *(a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or*
>
> *(b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.*
>
> *Note: The FWC can also order costs under sections 376, 400A, 401 and 780.*
>
> *(3) A person to whom an order for costs applies must not contravene a term of the order.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*

Section 570 of the *Fair Work Act* is further in the following terms:

> ***Costs only if proceedings instituted vexatiously etc.***
>
> *(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.*
>
> *Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.*
>
> *(2) The party may be ordered to pay the costs only if:*

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

32. It can be seen from the above provisions found in the Fair Work Act 2009 that costs can only be awarded by the Fair Work Commission, in essence, if an applicant made an application vexatiously or without reasonable cause or it is responded to in the same terms, or indeed an application was made without any reasonable prospect of success.

33. The question of costs under the Fair Work Act was given close consideration by Judge Driver, of the Federal Circuit Court in *Cheng v Western Pursuits Trust (No 2), [2017] FCCA 659*. In that case the Respondent had made a *Calderbank* Offer which offer satisfied in large measure the requirements of a valid offer referred to earlier in this paper. In his judgment Judge Driver referred to a judgement of his brother Judge O'Sullivan in *Govan v Health Services Union (No 1) (No 2)*, [2015] FCCA 1244 where His Honour held that for the purposes of s570(2)(b) of the *Fair Work Act* the Court must be satisfied that:

(a) A party must have engaged in an unreasonable act of omission: and

(b) That the unreasonable act or omission must have caused another party to incur costs in connection with the proceedings.

34. Furthermore, His Honour Judge Driver held with respect to "walk away" offers:

"[42] It is established that a "walk away" offer will be treated as constituting a compromise where the offeror has a strong case

> *and the compromise is found to be the offer to give up pursing costs which would in likelihood be payable if the offeree continues. The stronger the merits of the offerors case, the more compelling is the conclusion that the 'walk away' offer constituted a true compromise. Such findings have been made in the context of applications pursuant to s570(2)(b) of the Fair Work Act."*

35. His Honour Judge Driver then continued to give consideration to a judgment of a Full Court of the Federal Court in *Trustee for the MTGI Trust* [2011] *FCAFC 53* at [125] where the Full Court held:

> *"It is well held that a failure to accept a Calderbank Offer may justify the exercise of the Court's discretion to award costs on an indemnity basis. Principles referable to Calderbank Offers are well known. As the Full Court explained in Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd [No 2][2011] FCAFC 141:*
>
> > *The purpose of the principles governing Calderbank Offers and Offers of Compromise in accordance with Court Rules is to ensure that, when one party makes another an offer that contains a genuine element of compromise the recipient of the offer is compelled to give real consideration to the costs and benefits of prosecuting its claim by reason of the prospect of suffering an indemnity costs order should its failure to accept the offer prove unreasonable."*

36. In *Cheng* Judge Driver gave full consideration to the principles concerning the awarding of costs to an unsuccessful litigant but still concluded that Ms Cheng, whilst being offered a very reasonable position to vacate the proceedings without her paying any of the Respondent's costs, still held in favour of Ms Cheng on the costs issue and did not award costs in favour of the Respondent. The Court found:

Her case failed not because she was found to be untruthful or because her claim was found to be a sham but, rather because she presented nothing to support it. It is impossible to say whether the outcome might have been any different if her case had been properly prepared and presented….In my view, in the Fair Work jurisdiction which is, in principle a no costs jurisdiction, there rejection of a 'walk away' offer is not, of itself, unreasonable. Something more would need to be demonstrated in order to establish that the rejection of the offer was unreasonable in the circumstances of the particular case…Ms Cheng, who is a vulnerable and trouble young woman." (should not be required to pay the Respondent's costs).

Conclusion

37. Both formal Offers of Compromise and *Calderbank* Offers have an important part to play in potentially foreshortening proceedings before Courts and Tribunals. Though formal Offers of Compromise have prescribed formats with which an offeror must comply, and the principles associated with *Calderbank* Offers have been developed by the jurisprudence of the Courts a degree of necessary formality, ultimately it is the Court's discretion to make orders for costs, which discretion is exercised very much bearing in mind the individual circumstances of each case.

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