Costs, compromise, and *Calderbanks*

Recent developments

"The issue of costs is central to essentially all forms of legal practice."[1] — GE Dal Pont, *Law of Costs*.

It is a common (though perhaps dangerous) assumption that a successful party to litigation will obtain an order that the unsuccessful party pay their costs on a party/party basis.[2]

This is traditionally known as 'costs following the event', with the 'party/party' component of a costs order usually amounting to about 70 per cent of a party's actually incurred costs.

However, the ACT Court of Appeal's recent decision in *Cooper v Singh*[3] provides a useful reminder that the awarding of costs is an entirely discretionary power that courts may exercise as they see fit.

It follows that the expectations of a party (and their counsel) as to costs may not align with the court's view as to how its discretion should be exercised.

Singh also highlights the complex relationship between *Calderbank* offers and Offers of Compromise, the latter a device created by the *Court Procedure Rules 2006* (ACT) ("the Court Rules").

Singh

In *Singh*, the plaintiff was injured in a motor vehicle accident leading to myriad personal injuries.[4] Prior to the matter being heard, the defendants made an offer to settle the case for $540,000 plus costs. The offer was stated to be pursuant to the principle in *Calderbank v Calderbank*.[5]

The effect of the *Calderbank* nature of the offer was that, should it not be accepted and the plaintiff fail to obtain an outcome better than $540,000, the defendants could seek an order that the plaintiff pay their costs on an indemnity basis from the date of the offer.

Through this regime, while a plaintiff may enjoy some success in obtaining a judgment, if a defendant can demonstrate that costs were unreasonably incurred because of a plaintiff's rejection of an offer which would have seen him or her better off overall, a *Calderbank* may provide costs protection for the defendant.

At first instance in *Singh*, the plaintiff succeeded at hearing but only for $311,603 — a sum considerably less than the defendants' *Calderbank* offer.

With the offer having been made shortly before the commencement of the hearing, the defendants sought an order that their costs, essentially those of the hearing days, be paid by the plaintiff on a full indemnity basis.

While it was not disputed during submissions that the rejection of the *Calderbank* offer was unreasonable, Associate Justice Mossop nevertheless exercised his discretion by ordering the defendant to pay the plaintiff's costs on a party/party basis up to the date of the *Calderbank* offer and thereafter each party bear their own costs.[6] This is to say, the defendants nevertheless had to wear the costs of several days in court.

In not applying a strict interpretation of *Calderbank*, Associate Justice Mossop took into account:

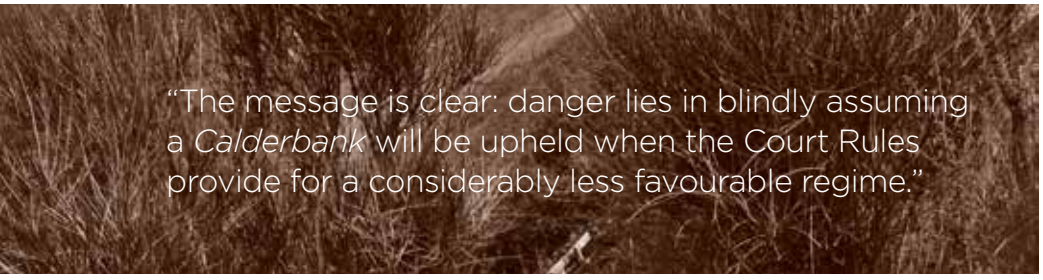
- the disparity of financial standing between the parties — with the defendants being indemnified by a large insurer, and less likely to be effected by the *Calderbank* not being upheld than the plaintiff would have been if it were; and
- the introduction of 'Offers of Compromise' provisions into the Court Rules which diverge from the orders sought through the *Calderbank* regime and may be undermined if the *Calderbank* were upheld to its highest.

Offers of compromise

Amendments to the Court Rules were introduced from 1 January 2015 to include a regime for the making of 'Offers of Compromise', which includes default outcomes in the event of a reasonable offer not being accepted. Without detailing the provisions in Part 2.10 in full, the salient point is this: if an Offer of Compromise made under the Court Rules is not accepted by a plaintiff, a defendant may expect to be ordered to pay the plaintiff's costs up to the date of the offer. Thereafter, a defendant may expect its costs to be paid **on a party/party basis**.

However, the Court Rules are less advantageous in the case of personal injury claims, with Rule 1011(2)(a) limiting a defendant's protection to being excused from paying a plaintiff's costs from the date of the offer but **not** recovering its own costs. The policy intention for the distinction in personal injury matters is to level the playing field in that jurisdiction, which often pits impecunious plaintiffs against deep-pocketed insurer defendants with considerable litigation experience.

As *Singh* was a personal injury case, Associate Justice Mossop found that enforcing the *Calderbank* offer would place the defendant in a better position than had it followed the Offer of Compromise regime. As that regime reflects a considered policy choice, the court's discretion was best exercised by not enforcing the *Calderbank*. Rather, the status quo



under Rule 1011(2)(a) was followed as if the *Calderbank* was an Offer of Compromise.

Appeal

On appeal, the Court of Appeal found no error in Associate Justice Mossop's exercise of his discretionary power and, for that reason, refused to vary the orders made. The Court of Appeal did however make clear that the making of orders that brought the outcome in line with the Offers of Compromise regime was, fundamentally, a discretionary choice — with the effect that each case needs to be considered on its own facts.

The Court endorsed Associate Justice Mossop's statement as to the desirability of consistency, as far as is possible, between the *Calderbank* and Offer of Compromise regime, albeit again with the caveat that it was 'a factor in the matters to be taken into account, in the exercise of the discretion' rather than the determinative criterion.[7] In this context, Associate Justice Mossop had observed:

> But for the introduction of rules-based offers of compromise and the specific provisions of those rules relating to personal injury proceedings, I would have made an order that required the plaintiff to pay the defendants' costs from the date of expiry of the defendants' offer on a party and party basis. However, in the light of the existence of the provisions for rules-based offers which provide a regime more favourable to a plaintiff in personal injury proceedings, I consider it appropriate to give weight to the desirability of there being some consistency in approach between costs orders made as a result of offers of compromise and costs orders made as a result of *Calderbank* offers.[8]

Conclusion

Had *Singh* been a commercial dispute, it is possible that the defendant's *Calderbank* offer would more been more favourably considered by the court. However, given Rule 1011(2)(b) evinces a policy intention that a defendant only recover its costs on a party/party basis (as opposed to recovering a full indemnity), even in commercial disputes the introduction of Offers of Compromise may lead to conflict as to the enforceability of *Calderbank* offers. The message is clear: danger lies in blindly assuming a *Calderbank* will be upheld when the Court Rules provide for a considerably less favourable regime.

Exacerbating this uncertainty is that the specific nature of any given dispute may also enliven other legislation containing its own specific rules on the question of costs.[9] In any case, the positioning of one's client to obtain maximum protection for them in relation to costs throughout litigation — including during any pre-litigation stages — is a step requiring detailed consideration.

At the very minimum, any 'offer', however described, should be demonstrably a *bona fide* attempt to resolve the matter and be coupled with sufficient information for its recipient to properly assess or understand why its rejection, if rejected, will be unreasonable.

Ian Meagher

DIRECTOR, BRADLEY ALLEN LOVE

Endnotes

1. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2003) 1.

2. While the relevant court rules provide an unbridled discretion, the law has long accepted that costs typically go to the victor to indemnify them from expenses incurred in bringing or defending the proceedings: *Court Procedure Rules 2006* (ACT) r 1721; *Harold v Smith* (1860) 157 ER 1229.

3. [2017] ACTCA 21 (11 May 2017) ('*Singh*').

4. *Singh v Cooper* [2015] ACTSC 243 (21 August 2015).

5. [1975] 3 All ER 333.

6. *Singh v Cooper* (No 2) [2015] ACTSC 368 (27 November 2015).

7. [2017] ACTCA 21 (11 May 2017) [32] (Murrell CJ, Elkaim and Jagot JJ).

8. *Singh v Cooper* (No 2) [2015] ACTSC 368 (27 November 2015) [34].

9. The examples here a deserving of an article each unto themselves, but without limitation such examples may include the *Leases (Commercial and Retail) Act 2001*, *Civil Law (Wrongs) Act 2002 (ACT)*, and the *Fair Work Act 2009 (Cth)*.