Jones v Bradley (No 2)

[2004] NSWCA 258 (16 September 2003), New South Wales Court of Appeal

'Calderbank' offers of settlement – principles on which discretion to make special costs orders should be exercised – no presumption where offer bettered

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An issue of increasing importance in arbitrations and litigation is the use of '*Calderbank*' offers or Offers of Compromise under Rules of Court. There have been effectively two lines of authority on whether, if such an offer is bettered, there is a '*prima facie presumption*' that, where an offer is made and not accepted followed by a result which is more favourable, the Court or tribunal should order costs on an indemnity or solicitor and client basis instead of on a party and party basis.

The conflict between those two lines of authority has been resolved by this decision of the New South Wales Court of Appeal, and that Court's earlier decision in *SMEC Testing Services Pty LtdvCampbelltown City Council* [2000] NSWCA 323m, which establish that there is no such '*prima facie presumption*', and which I expect will be followed by appellate courts in other Australian jurisdictions.

In their joint judgment in *JonesvBradley (No 2)*, the Court (Meagher, Beazley & Santow JJA) summarised the position in the following terms:

> 5 ***"Calderbank offers" are well recognised means of making offers of settlement in circumstances where the party making the offer ultimately seeks a costs advantage if the offer is not accepted:*** *see Calderbank v Calderbank (1975) 3 WLR 586. Such offers do not comply with the Rules of Court for making offers of compromise. Accordingly the Rules which govern costs in those circumstances do not apply and the matter remains one for the exercise of the Court's discretion.*
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> 6 *There are two lines of authority on the question of what effect a Calderbank offer has on the Court's discretion in awarding costs. The first is reflected in Rolfe J's judgment in Multicon Engineering Pty Ltd v Federal Airports Corporation (1996) 138 ALR 425 where his Honour stated at 451:*

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> *"... the proper approach to take to an offer of compromise ... or pursuant to a Calderbank letter, is that there should be a* prima facie *presumption in the event of the offer not being accepted and in the event of a recipient of the offer not receiving a result more favourable than the offer, that the party rejecting the offer should pay the costs of the other party on an indemnity basis from the date of the making of the offer."*

This line of authority has been followed in: Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2) [1999] 1 Qd R 518, and Brittain v Commonwealth of Australia [2003] NSWSC 270.

7 *The other line of authority rejects the "*prima facie *presumption" approach. In MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd (1996) 70 FCR 236 Lindgren J said at page 239:*

> *"It is important, however, to appreciate that the mere making of an offer by a Calderbank letter and its non-acceptance followed by a result more favourable will not automatically lead to the making of an order for payment of costs on an indemnity basis."*

His Honour said the manner of exercise of the discretion "depends on all relevant circumstances of that case". His Honour's view reflected the jurisprudence in the Federal Court at the time: see WCW Pty Ltd v Charthill Ltd (unreported, Federal Court, Olney J, 7 July 1992); John S Hayes & Associates Pty Ltd v Kimberly-Clark Australia Pty Ltd (1994) 52 FCR 201; and has continued to be applied in that Court: see The Sanko Steamship Co Ltd v Sumitomo Australia Ltd (unreported, Federal Court, Sheppard J, 7 February 1996) and NMFM Property v Citibank (2001) 109 FCR 77.

8 *This principle has also been enunciated in this Court. In SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 Giles JA stated at para 37:*

> ***"The making of an offer of compromise in the form of a Calderbank Letter ... where the offeree does not accept the offer but ends up worse off than if the offer had been accepted, is a matter to which the court may have regard when deciding whether to otherwise order, but it does not automatically bring a different order as to costs. All the circumstances must be considered, and while the policy informing the regard had to a Calderbank letter is promotion of settlement of disputes an offeree can reasonably fail to accept an offer without suffering in costs. In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs, and that the offeree ends up worse off than if the offer had been accepted does not of itself warrant departure."***

It appears that Priestley JA, by his Orders in this case, would endorse this approval. But in any event, the principle has been applied in the Supreme Court both at first instance and on appeal: see Enron Australia Finance Pty Limited (in liquidation) v Integral Energy Australia [2002] NSWSC 819; Nobrega v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 2) [1999] NSWCA 133; LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd [2003] NSWCA 74; and Cummings v Sands [2001] NSWSC 706.

9 *It is worth pausing to note that the difference between the two lines of authority may be "more apparent than real" as* ***in either approach the Court must consider all the circumstances of the case****: see CBA Investments Limited v Northern Star Limited (No 2) [2002] NSWCA 164. Be that as it may,* ***we consider that the approach taken by the Court in SMEC Testing Services is correct and is the approach which should be consistently applied when dealing with Calderbank offers.*** (emphasis added)