

update

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Friday Facts: Calderbank offers explained

Quite often clients will find themselves in a position where they have been sued for an unrealistic damages claim. If offers of settlement are not accepted by the claimant then clients are faced with no option but to defend the claim.

It is in those circumstances that precautions can be taken to protect a client's position on the legal costs which they expend. One such precaution is what has become known as a "Calderbank" offer named after the decision in *Calderbank v Calderbank* [1975] 2 All ER 333.

A Calderbank offer is essentially a written offer made on a without prejudice basis. However unlike other without prejudice correspondence, it is made expressly reserving the right to bring the offer to the notice of the Court on the question of costs if the result for the party served with the offer is not more favourable than what has been offered.

Unlike formal offers of compromise which can be served during the course of proceedings by a party, a Calderbank offer is an "all-in" offer made inclusive of any claim for legal costs which the opposing party may be seeking. For that reason a Calderbank offer is a precise amount that is offered in full and final settlement of the claim. There is no need to guess what amount of legal costs will be taxed over and above the amount of a formal offer of compromise.

Once making the offer, if a more favourable result is not achieved by the opposing party, the Calderbank offer can be produced to the

Court in support of an application for an order of indemnity costs in favour of the offeror from the date that the offer was made.

The Court in exercising its discretion will decide having regard to the Calderbank offer whether it should award costs to a party on a more favourable basis than that which they would ordinarily obtain. However, in exercising that discretion, the factors set out in *Calderbank v Calderbank* will be taken into account.

Those factors include:

- the circumstances which existed at the time the offer was made
- the clarity with which the terms of the offer were made
- whether the offer was a genuine attempt by the offeror to settle the dispute: that is for example an offer to pay \$1 against a claim of \$100,000 is unlikely to be considered by the Court to be a genuine attempt to settle the dispute. For that reason it is important that the Calderbank offer set out the basis and reasoning of the offer that is contained within it so that the Court can assess reasonableness

- whether the Calderbank offer has remained open for acceptance for a reasonable period of time such that the party receiving the offer has an opportunity to consider it and obtain any necessary advice on it: an offer that is open for only 48 hours is unlikely to be considered to be open long enough for the party considering the offer to obtain legal advice. As a rule of thumb an offer that is open for 14 days is more likely to be considered by the Court to be a reasonable period

There is no doubt that a properly thought out and drafted Calderbank offer is a useful tool that can be used not only to protect a client's position on costs, but also to assist in attempting to settle a dispute early on in a proceeding.

For more information

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