ADDRESS TO CROWN SOLICITORS SEMINAR

24TH OCTOBER 2012

CONTROLLING COSTS IN LITIGATION-INDEMNITY ORDERS AND CALDERBANKS[1]

1. The relatively simple rule of costs following the event has received significant revision over the years to the point that the topic of costs is one in itself receiving CLE lectures, text books and even loose-leaf services devoted to it. Now it is not uncommon for the simple rule to be reversed or supplemented with indemnity orders. Accordingly it is timely to focus on the indemnity costs and Calderbank letters in a bid to demystify and hopefully provide a better understanding of how decisions around these are made and how relevant principles are applied.

2. Essentially what both the Uniform Civil Liability Rules and the Calderbank regime seek to do is provide a vehicle to encourage compromise.

3. The benefit of utilising the UCPR regime places a party making an unaccepted offer which is no less favourable than the relevant order or judgment of the Court in a position of having a presumptive entitlement to an indemnity costs order from the day following the making of the offer.[2]

4. To establish this presumption in favour however it is necessary to bring the offer within the terms of Part 20 Division 4 of the UCPR. The key requirements are:

   - The offer has to be in writing to compromise the proceedings in whole or in part on specified terms[3];
   - The offer must not include an amount for costs and must not be expressed to be inclusive of costs but may propose no order as to costs or propose payment of a specified sum for costs or payment of costs to be agreed or assessed [4];
   - The offer must state that offer is made in accordance with the UCPR[5];
   - Where an interim payment has been offered or ordered the relevant offer must state whether the offer is in addition to that payment[6];

[1] Presented by John Hatzistergos, Barrister 8th Floor Wentworth Chambers to Eastern Suburbs Law Society 26 June 2013
[2] UCPR42.13A-15A
[3] UCPR 20.26(1)
[4] UCPR 20.26(2) and (3)
[5] UCPR 20.26(3)(a)
[6] UCPR 20.26(3)(b)

- An offer cannot be made unless the defendant has been given such particulars and copies and originals of documents available to the plaintiff as are necessary to enable full consideration of the offer. An order in favour of the defendant on grounds of noncompliance by the plaintiff with these requirements cannot be made unless the defendant informs the plaintiff in writing within 14 days of receiving the offer or the Court otherwise orders[7];
- Where the offer has been time limited for acceptance the closing date for acceptance must be not less than 28 days after the date of the offer where the offer is made more than 2 months from trial or a reasonable time where the offer is made less than two months before trial[8];
- Unless otherwise stated the offer is taken to provide for the payment of money or doing of an act within 28 days[9].
- Unless otherwise stated the offer is taken to be without prejudice[10];
- More than one offer in relation to the same claim can be made[11];
- Unless the Court otherwise orders an offer cannot be withdrawn during the acceptance period[12]
- An offer which purports to exclude, modify or restrict UCPR 42.14 or 42.15 is of no effect for the purposes of Division 4. This provision does not at this stage extend to UCPR 42.15A. Nevertheless I would query how a Court would view an attempted modification. Whilst it may not invalidate the offer it may chose not to enforce any deviation[13].

5. Rule 20.26 previously required that the offer had to remain "exclusive of costs". The inclusions of the words "the defendants are to pay the plaintiff's costs of the proceedings as agreed or assessed" were held to infringe the former UCPR 20.26 in ***Old v McInnes and Hodgkinson***[14]**.** On the other hand the Court of Appeal in ***Vieria v O'Shea (No 2)***[15] appeared to suggest that the Rule as it then stood would continue to operate provided the there was no inconsistency in operation. The cases since then were inconsistent in their following of both these decisions.

6. This issue eventually came up for argument before a specially convened five member Court in ***Whitney v Dream Developments Pty Ltd***[16]**.** In that case Bathurst CJ (with whom Beasley P, McColl JA and Barrett JA agreed) held that there was no inconsistency between the two decisions in ***Old*** and ***Vieria No 2*** holding **.**

> 29. The relevant passages in *Vieira v O'Shea (No 2)* supra said to give rise to inconsistency with *Old* are as follows:
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> > "[7] In written submissions in support of the motion, the appellant conceded that the offer did not comply with the UCPR because it was not "exclusive of costs". It is true that the offer was not stated to be exclusive of costs: the statement as to costs could have been understood as indicating that the offer was indeed not inclusive of costs, but was otherwise otiose as the same costs consequences followed from the application of the rules. (Somewhat opportunistically, the solicitors for the first respondent submitted

[7] UCPR 20.26(4)
[8] UCPR 20.26(5)
[9] UCPR 20.26(8)
[10] UCPR 20.26 (9)
[11] UCPR 20.26(10)
[12] UCPR 20.26(11)
[13] UCPR 20.26(12)
[14] [2011] NSWCA 410
[15] [2012] NSWCA 121
[16] [2013] NSWCA 188

> that a later offer of compromise did not comply with the rules because it was not stated to be exclusive of costs and therefore should be presumed to be inclusive.) The UCPR are to be construed by reference to their apparent purpose. A mere reference to costs in an offer otherwise compliant with Part 20, Div 4 will not take the offer outside the rules unless the reference operates inconsistently with the relevant costs rule: *Dean v Stockland Property Management Pty Ltd (No 2)* [2010] NSWCA 141, (Giles JA, Handley AJA, Whealy J) at [26]-[29]. The offer, if accepted, entitled the offeror to his costs: the offer did not seek to vary the effect of UCPR r 42.13A.
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> ...
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> [18] The first respondent disputed that the offer complied with the relevant rule for three reasons. First, it was said that the offer failed to state that it was 'exclusive of costs', as it was required to be by UCPR 20.26. However, the rule does not require such a statement, but merely requires that the offer 'must be exclusive of costs': r 20.26(2). The evident purpose of that requirement is that the effect of the offer, whether accepted or rejected, will be to engage the relevant costs rule in Pt 42. The offer did not purport to be inclusive of costs and there was no reason to infer that it was, so as to invalidate its operation under r 20.26, with which it purported to comply.
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> [19] The purpose of requiring an offer under the UCPR to be exclusive of costs is to allow the rules with respect to costs to operate according to their terms. Thus, where an offer is made by a plaintiff and not accepted by the defendant and the plaintiff obtains a judgment which betters the offer, the plaintiff is entitled to an award of costs assessed on the indemnity basis from the day following the day on which the offer was made, unless the Court otherwise orders: r 42.14. With respect to appeals, the rules merely pick up with appropriate modifications the provisions of Pt 20, Div 4: r 51.47. The costs rules in Pt 42, Div 3, are also subject to modifications: r 51.48."

30. What is apparently relied on to demonstrate inconsistency is the statement by the Court that a mere reference to costs in an otherwise compliant offer will not take the offer outside the rules unless the reference operates inconsistently with the relevant costs rules. An offer providing for the payment of costs as agreed or assessed does operate inconsistently because it removes the court's discretion contained in r 42.13A.

31. There is a material difference between an offer expressly making provision for costs as in *Old* and the present case, as compared with an offer which is silent as to costs. As a matter of language an offer which is silent as to costs is exclusive of costs. In these circumstances, the relevant rule in UCPR Part 42 would take effect according to its terms. There is no inconsistency between *Old* and *Vieira v O'Shea (No 2)* either in the reasoning or in the result.

7. Whilst his issue appears to be addressed in part by the amendment to the Rule now to be found in UCPR 20.26(1) (c) and (3) it is to be noted that this enables plus costs offers as indicated above but not inclusive offers.

8. The requirement for a genuine "compromise" should also be emphasised. It means just that; not capitulation. Nevertheless whilst it must be "real and genuine" [17], a walk away offer in appropriate circumstances can meet this criterion. In ***Leichhardt v Green***[18] the Santow JA (with whom other members of the Court agreed) held:

> 31… In *Singh v Singh (No 2)* [2004] NSWSC 225, Barrett J held that a `walk-away' offer was not a genuine compromise which could found the basis for an indemnity costs order. *Singh* is clearly distinguishable from the present case since the `offer' in that case in

[17] Herning v GWS Machinery Pty Ltd No 2 [2005] NSWCA 375 Anderson Group Pty Ltd and Tynan Motors Pty Limited (no2) [2006] NSWCA 120

[18] [2004] NSWCA 341

addition required the plaintiff to bear the defendant's costs to date. It was a true situation of a demand to capitulate.

32 In *Bishop v State of NSW* (Dunford J, 17 December 2000, unreported), the defendant had made a `walk-away offer' requiring the plaintiff to abandon proceedings and thus avoid the risk of an anticipated order for costs. The plaintiff was wholly unsuccessful and the defendant sought indemnity costs from the date of the offer: Dunford J stated:

"There was not in any real sense an offer to compromise the proceedings, but merely an offer to induce the plaintiff to abandon his claim; and in my view orders for indemnity costs should not be used to deter persons from bringing proceedings which they feel they are entitled to bring, even if those proceedings are ultimately unsuccessful. It is different if there is a compromise involved, such as by offering part of what the plaintiff claims or can reasonably expect to receive if successful."

33 The precise terms of the offer in Bishop do not appear from the record. Dunford J reapplied this principle in *McKerlie v NSW (No 2)* [2000] NSWSC 1159 in a case in which it appears the offer included a release from an already existing costs order as well as an escape from the risk of anticipated future costs orders. Dunford J appears to endorse the view that only a cash settlement offer representing part of the plaintiff's claim can be a true offer of compromise. With respect, that does not seem to be entirely consistent with the policy of the law in encouraging early settlement of disputes.

34 Nor is the line of authority in this area uniform. In *GIO General Ltd v ABB Installation & Service Pty Ltd* [2000] NSWCA 118, the issue arose tangentially before the Court of Appeal in the following circumstances. The defendant to a mesothelioma suit (ABB) cross-claimed against GIO, who were the insurers on risk in 1986 (at the time when the plaintiff was found to have been last employed by ABB in an employment of the nature of which the disease was due). TGI had been the insurer on risk at the time of the negligent exposure to asbestos (1963-69) and GIO contended that TGI (rather than it) was liable to indemnify ABB since it was the only insurer on risk during the period of causative exposure.

35 This argument was unsuccessful, the Court holding that s151AB of the *Workers' Compensation Act* applied, which at the time provided that "*any liability of that ... is taken to have arisen when the worker was last employed ... by that employer in an employment to the nature of which the disease was due*." Thus GIO was liable. TGI claimed indemnity costs based upon *Calderbank* offers it had made to ABB prior to the cross-claim proceedings. Those offers were that TGI be let out of the proceedings on the basis it would meet its own costs to that point. In its letters it pointed out to ABB that it considered that s151AB of the *Workers' Compensation Act* would operate as a defence to its liability. Solicitors for ABB declined the offer. The trial judge rejected the application for indemnity costs and ordered GIO to indemnify ABB and pay all the costs of all parties on the insurance issue on a party-party basis. The trial judge stated:

"In the circumstances when all later insurers denied, and one would have thought on instructions and for good cause, liability to indemnify, I do not regard the actions for the solicitors for ABB, in declining to accept the *Calderbank* offer as unreasonable. I decline to make such an order."

36 Clearly the trial judge was proceeding on the basis that the offer of compromise was a valid and genuine offer of compromise, but one which should fail in the exercise of

> discretion. The Court of Appeal declined to interfere with this discretionary decision on costs, as no appellable error had been shown. Thus, it evidently concluded that no error of legal principle exists in holding that a `walk-away' offer can in a particular case be a "genuine offer of compromise". There is no reason to doubt the correctness of that conclusion. It follows the approach of Dunford J should, if understood as stating a universal, non-discretionary rule to the contrary, not be followed.

9. Since the decision of ***Jones v Bradley (No 2***)[19] it has been established that the absence of a formal offer is a relevant but not determinative consideration. Correspondence making an offer outside the formal UCPR may be admissible under s131 (2) (h) of the Evidence Act 1995 or under the general law if it substantially complies with the form suggested by Cairns LJ in ***Calderbank v Calderbank***[20]

10. The case of ***Calderbank v Calderbank***[21] was not a case of indemnity costs. Nevertheless it has and can be relied on for this purpose provided an offer meets the relevant criteria. In particular the intention must be made clear that the offer will be relied upon under the principles in ***Calderbank***[22]. In this regard it is important to note the observations in ***Interchase Corporation v ACN 010 087 573 Pty Ltd***[23] of White J who remarked that "the extent to which such a letter departs from the regime envisaged by the rules against the particular facts of each case will often determine whether it is appropriate …to make an order for costs on an indemnity basis."

11. In the case of Calderbank letters the principles for the awarding of indemnity costs are set out set out in ***Hazeldene's Chicken farm Pty Ltd v Victorian Workcover Authority (no 2***[24]***)*** and relevantly approved by Basten JA in ***Miwa v Siantan Properties Pty Ltd No 2***[25]***.***

12. In ***Hazeldene*** the Victorian Court of Appeal referred to **Grbavac v Hart**,[28] where Hayne, J.A. cited with approval what the New South Wales Court of Appeal had said in ***Maitland Hospital v Fisher (No.2)***[29] about the policy rationale underlying the availability of special orders for costs where offers of compromise are rejected. The Court of Appeal said that what was said in that case is equally relevant to the exercise of the costs discretion where a ***Calderbank*** offer has been made. The policy objectives were said to be:

> "(1) To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its 'bottom line' will be revealed to the

[19] [2003] NSWCA 258
[20] [1975] 3All ER 333
[21] 1976 Fam 93
[22] See Dean v Stockland [2012] NSWCA 66 at [31]-[34] and more recently JKB Holdings Pty Ltd v de la Vega (op cit) at [17]-[20]
[23] (2000) 45 ATR 445 at 452
[24] 13 VR 435
[25] (2011) NSWCA 344 at paragraph 12

court;
(2) To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and
(3) To indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. This is deemed appropriate because, from the time of the rejection or deemed rejection of the compromise offer, notionally the real cause and occasion of the litigation is the attitude adopted by the defendant which has rejected the compromise. In such circumstances that party should ordinarily bear the costs of litigation."

13. The Court also acknowledged other competing objectives of equal importance stating

> "Potential litigants should not be discouraged from bringing their disputes to the Courts. It is such considerations which underlie the general rule that an order for special costs should only be made in special circumstances."

The test of unreasonable rejection

23 In our view, these competing considerations can be sufficiently accommodated by applying a test of (un)reasonableness. The critical question is whether the rejection of the offer was unreasonable in the circumstances.[31] We see no justification for a more stringent test such as "manifestly" or "plainly" unreasonable.

24 Of course, deciding whether conduct is "reasonable" or "unreasonable" will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions. As Gleeson, C.J. said recently, "unreasonableness is a protean concept".[32] But a test of reasonableness is, we think, entirely appropriate to the exercise of a discretion such as this.

Factors relevant to assessing reasonableness

25 The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations.[33] It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:

a) the stage of the proceeding at which the offer was received;
b) the time allowed to the offeree to consider the offer;
c) the extent of the compromise offered;
d) the offeree's prospects of success, assessed as at the date of the offer;
e) the clarity with which the terms of the offer were expressed;
f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

26 It has been argued on occasion that the maker of a Calderbank offer should not be entitled to costs unless the offer sets out, with some reasonable specificity, the basis for the offeror's contention that the offeree should accept the compromise – for example, because the offeree's case was hopeless or because the offeree had no reasonable prospects of doing better in the proceeding than was being offered in advance.

27 Once again, we think it neither necessary nor desirable to lay down any general rule in this regard. We agree with what Redlich, J. said in *Aljade*, as follows:

> "Any attempt to prescribe the reasoning which must accompany [a Calderbank] offer should be resisted. Whether there is a need for the offeror to descend to specificity as to why the offer should be accepted must depend upon a consideration of all of the circumstances existing at the time of the offer. The extent to which the weakness of a party's position is exposed through the pleadings, affidavits and the various communications between the parties during the course of the litigation may bear upon the significance of the absence of specificity in the informal offer."[34]

28 As we said at the outset, the unreasonable refusal of an offer of compromise is, by itself, a proper ground for the award of indemnity costs or - in the present case - the award of solicitor-client costs. It follows that it is not necessary for the applicant for such an order to establish matters which might be relevant to other, well-recognised, grounds for indemnity costs. Once again we would adopt what Redlich, J. said in *Aljade*, as follows:

> "It is not necessary to establish misconduct by the offeree before the rejection of the offer can be viewed as unreasonable. Lack of merit in the way a party has conducted its case is not a pre-requisite for the making of an indemnity costs order [on this ground]."[35]

29 Nor is it necessary for the applicant offeror to show that the offeree acted with "wilful disregard of known facts or clearly established law", or that it acted with "high-handed presumption".[36] We agree with Redlich, J. that such conduct is not a prerequisite for a finding that the rejection of a Calderbank offer was unreasonable.[37]

14. It will be noted that the position as expressed above specifically rejects a more stringent test than that of reasonableness. Nevertheless a different view was expressed by Shepperd J in ***Sanko Steamship Company Ltd v Sumitomo Australia Ltd*** where his Honour stated:

> … it seems to me that one needs to be careful about making orders based on perceived unreasonable conduct in refusing to accept offers. It is in the public interest, as well as in the interests of parties to litigation, for negotiations to settle cases to take place and for settlements to be achieved if they possibly can be. It has been said that the fact that the law does not provide a full indemnity for costs may be an important spur to settlement; see the judgments of Devlin LJ in Berry v British Transport Commission (1962) 1 QB 306 at 323 and Handley JA in Cachia v Hanes (1991) 23 NSWLR 304 at 318 referred to in the judgment in Cussons at 227-8. In some cases the so called Calderbank approach may place a weapon in the hands of parties to litigation which ought not be allowed to be abused. The ordinary rule is that costs when ordered in adversary litigation are to be recovered on the party and party basis. Any attempt to disturb that situation needs to be carefully considered. It should only be departed from where the conduct of the party against whom the order is sought is **plainly unreasonable**.[26]

[26] (FCA,Sheppard J, 7 February 1996,unreported), at 9-10

15. Recently in ***Nu Line Construction Group Pty limited v Fowler (aka Grippaudo)*** [27]Ward J appeared not to agree with this test (at least in relation to Rules and Calderbank offers) of compromise stating:

> Save where there is a special costs order by reference to the procedure provided for under the Rules or in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333; 3 WLR 586, it has been said that a court should depart from the general rule (and award indemnity costs only where the conduct of the party against whom the order is sought is "plainly unreasonable" (*Sydney City Council v Geftlick* [2006] NSWCA 280; *Dunstan v Rickwood (No 2)* [2007] NSWCA 266). In *Leichhardt Municipal Council v Green* [2004] NSWCA 341, Santow JA (at [57]) said that indemnity costs orders should be reserved for the most unreasonable actions by unsuccessful plaintiffs."

16. ***Nu Line*** is also instructive on the question of reasonableness. In that case a ***Calderbank*** letter had been submitted on 12 September 2006 by the Defendant offering payment in settlement of $100,000.00 "representing full and final payment of moneys relating to this matter." That offer was rejected by the Plaintiff two days later. On 9 April 2008 the Plaintiff offered to accept the sum of $500,000.00 in full and final settlement stating:-

> "In light of the continued failure by you to make any genuine attempt to settle the matter we have advised our client that it is open to it to seek a judicial declaration that the funds advanced to you in the course of this matter represent a one third interest in the Property."

17. The matter was ultimately determined with a verdict for the Defendant resulting in the Defendant seeking indemnity costs from 12 September 2006. In refusing to accede to the application Ward J accepted the two prerequisites for a claim for indemnity costs. These were whether there was a genuine offer of compromise and whether the rejection of the offer was unreasonable[28].

18. In considering whether there was a genuine offer of compromise Her Honour held that the fact that judgment ultimately handed down was in the Defendant's favour is not a factor that goes to whether the offer was a genuine offer of compromise[29].

> "40 In *Regency Media*, their Honours adopted the statement of Basten JA in *Robb Evans* at [22] (his Honour there referring to an offer of compromise made under the formal procedure provided for in the rules) that:
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> > Whether or not the offer involved a genuine compromise must be assessed by reference to the rule pursuant to which the offer was made. That rule refers to an offer to compromise a claim in proceedings on specified terms. Subject to an exception in the case of judgment for the defendant on the basis that each party bear its own costs, the offer must be exclusive of costs: r 20.26(2). Consistently with that approach, the costs consequences are measured by reference to the order or judgment "on the claim concerned": r 42.15(1). The fact that a party which failed

[27] [2012] NSWSC 816
[28] See paragraphs 37 and 47 of the Judgment
[29] See paragraphs 40 and 41 of the Judgment

> to accept an offer incurs costs in pursuing litigation to a result which is less favourable to it than the offer, is not a factor which is material to determining whether the offer itself was a genuine offer of compromise for the purposes of r 20.26.
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> 41 Hence the fact that the judgment ultimately handed down was in the defendants' favour is not a factor that goes to whether the offer was a genuine offer of compromise (applying the principles in *Calderbank*)."

In holding that the sum offered by the Defendant did involve a genuine offer of compromise Her Honour focused on the Defendant's perspective in finding a genuine element of compromise was involved[30].

19. In considering whether it was reasonable for the Plaintiff to reject the offer Her Honour noted as follows:-

> "52 The solicitor now acting for Nu Line Construction (Mr Zwar) notes the observation in *Law of Costs* by G E Dal Pont (2nd edn) at [13.62] that offers made before or shortly after the proceedings are commenced may be made at a time when it is difficult to make an informed assessment of the offeror's defence.
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> 53 In *Elite* at [146], Basten JA said that:
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> > ... the fact that a defendant's offer is made early in the proceedings should not by itself be given significant weight in assessing the reasonableness of the plaintiff in rejecting it. Nor should significant weight usually be given to what the plaintiff did or did not know at that stage. Were it otherwise, the more complex the litigation the less likely that the rejection of an early offer which proves to have been fair and reasonable, will have costs consequences. That tendency would diminish rather than enhance the purpose to be discerned from Calderbank offers and court rules."[31]

20. Her Honour concluded that she was not satisfied that it was unreasonable for the Plaintiff to reject the offer of compromise made when what was being sought by the Plaintiff at the time was an entitlement to an interest in the land even though that was not ultimately pressed in the proceedings. At paragraph 72 of the judgment Her Honour stated:-

> "72 Having regard to the matters set out above, on balance I am not satisfied that it was unreasonable for Nu Line Construction to reject an offer of compromise made at a time (September 2006) when what was then being asserted was an entitlement to an interest in the land and there was a not unreasonable position that payment of a sum in anticipation of the sale proceeding may have given rise to an interest of some kind in the land (and what had not been asserted was any restitutionary claim to the repayment of moneys paid in that regard). While I accept that the basis on which it was suggested that there was an enforceable contract for the sale of land was untenable (and was not ultimately pressed in the proceedings), there had been a payment made in relation to the anticipated sale (of at least $60,000) and I am not satisfied that it was unreasonable for Nu Line Construction at that stage (and before any limitation issue arose or was

[30] See paragraph 46 of the Judgment

[31] Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 322

> maintainable) to reject an offer that required it to give up any claim in relation to the land."

21. In considering the reasonableness of rejecting an offer it is relevant to consider an "an all or nothing case". In this respect attention is drawn to the comments made by Ward J in ***Lahoud v Lahoud***[32] at paragraph 53:-

> "53 Insofar as the authorities in this area have referred to situations where the case is an 'all or nothing' case, there was room at the time both offers were made for there to be determinations both as to the outcome of the audit and as to the construction of the Deed that could potentially have led to a range of outcomes. (By the time of the second offer there was also the potential outcome that the audit itself would be held invalid, as the Joseph Lahoud parties contended.) Thus it is not a case that falls neatly into the category considered by their Honours in *Regency Media* at [29]:
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> > As is usually the case in proceedings turning on an issue of contractual interpretation, this was an all or nothing case. The claims did not involve a process of evaluation or assessment in which the end result could vary over a range. Either one party or the other party was correct. Whilst a marginal difference between the offer and the result may constitute a real and genuine offer of compromise in a personal injury context, that is not generally true in an all or nothing case. (See *Anderson Group* supra at [9]; *Robb Evans* supra at [18].)"

22. Falling outside The UCPR and the ***Calderbank*** regime clearly do not preclude Courts from exercising discretion to award costs including indemnity costs in appropriate cases. Notwithstanding the analysis that I presented these schemes are aimed at limiting argument where indemnity costs are sought to a principled basis. However in any case it necessary to analyse the conduct of the proceedings to see what course they have taken and whether or not an argument can be made. The conduct of the parties will be critical. In the recent decision of the High Court in ***Board of Bendigo Institute and Further Education v Barclay [No 2]*** the ordinary principle that no order as to costs is made against an intervenor was not displaced. Nevertheless Heydon J severely criticised the Federal Minister who intervened in support of an unsuccessful Respondent to an appeal and acted as a partisan making extensive submissions including going to factual material. The Ministers' arguments were held to go no further than the Respondents and lengthened the hearing. His Honour intimated that an order for payment of 15% of the Appellant's costs was reasonable but no order was made as the Court had declined to allow the Minister to make submissions on the costs orders that should follow and hence it would be unjust to so order. Perhaps an appropriate cautionary not on which to end.

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[32] Lahoud v Lahoud [2012] NSWSC 284 at paragraph 53

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