

Litigation - Calderbank Open Offers (Episode 2)

Hi, my name is Gillian Cantrell. I'm a solicitor in our Disputes and Investigations Group and this is our second instalment of the Defendant's Toolkit. This week we're discussing another useful tool which can be used by defendants, the Calderbank letter.

Generally speaking, there's a rule in legal proceedings that costs follow the event. This means that typically the party that loses the case may be liable to pay an award of damages, their own costs and the other side's costs.

As a defendant, a Calderbank letter can help you minimise your own risks and increase risk for the other side. If you've sent a Calderbank letter, even if the plaintiff achieves an award of damages, it could still be held liable by the court to pay the reasonable legal costs of the defendant from the date that the Calderbank letter was issued.

The Calderbank letter will be marked without prejudice save as to costs and it essentially contains a settlement offer for the plaintiff to consider. Being marked without prejudice save as to costs means that the court will not be aware that any such letter or settlement offer exists before the proceedings have been determined. So, it will not prejudice the court's view on liability.

The court will be made aware of the Calderbank when it considers the issue of costs following the judgement. The benefit of a Calderbank is that if the settlement offer contained in the letter is not accepted by the plaintiff and the court's award does not exceed what was offered, the defendant can rely on the letter in support of its application for the costs of the proceedings from the date that the letter was issued.

The Calderbank effectively puts the plaintiff on its risk at an earlier stage in the proceedings if it doesn't achieve the quantum of damages that it is seeking. This tool can be very useful in focusing the plaintiff's mind on what a realistic recovery might be in the case.

We have all had experience of claims where a plaintiff's claim at the outset of a case may be unrealistic, but it can be quite difficult to get the plaintiff to engage on that element of a dispute until much closer to the trial.

A Calderbank might help to achieve this without the defendant having to make a lodgement which will be considered in the next instalment of the series. Equally the defendant can also make an open settlement offer to the plaintiff during the course of the proceedings.

The difference between this option and the Calderbank letter is that this type of letter or offer is not marked without prejudice and therefore can be opened and considered by the court. This can have the effect of influencing the court's views and liability which obviously carries risks from the defendant's point of view.

However, the main benefit of an open offer is that if a party fails to accept an open offer and the court determines that the plaintiff's rejection of that offer was unreasonable, the court is required to take the rejected offer into account when considering the plaintiff's position on costs after the determination of the case. The appropriateness of either of these tactical options will of course have to be considered by your legal team.

Other more appropriate options may be open to the defendant to strengthen its position in defending vexatious litigation and in this regard, Rebecca will be discussing the options of making a lodgement in proceedings in our video next week.

In the meantime, should you have any queries on any of the material covered today or if we can assist you, please do not hesitate to contact us. Thanks for listening.