SUPREME COURT OF QUEENSLAND

CITATION:	*Wagner & Ors v Nine Network Australia & Ors (No 2)* [2019] QSC 309
PARTIES:	**DENIS WAGNER** (first plaintiff) **JOHN WAGNER** (second plaintiff) **NEILL WAGNER** (third plaintiff) **JOE WAGNER** (fourth plaintiff) **v** **NINE NETWORK AUSTRALIA PTY LTD** **(ACN 008 685 407)** (first defendant) **TCN CHANNEL NINE PTY LTD** **(ACN 001 549 560)** (second defendant) **QUEENSLAND TELEVISION LIMITED** **(ACN 009 674 373)** (third defendant) **WIN TELEVISION QLD PTY LTD** **(ACN 009 697 198)** (fourth defendant) **NINEMSN PTY LTD** **(ACN 077 753 461)** (fifth defendant) **NICHOLAS CHARLES CATER** (sixth defendant)
FILE NO:	11789 of 2015
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	16 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions filed 25 November 2019, 2 and 6 December 2019

JUDGE:	Applegarth J
ORDER:	**The defendants pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the standard basis up to and including 28 February 2019, and thereafter to be assessed on an indemnity basis.**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – COSTS – INDEMNITY COSTS – SETTLEMENT OFFERS – where each of the plaintiffs was awarded damages for defamation in respect of their claims against the defendants – where the plaintiffs seek indemnity costs in reliance on s 40 *Defamation Act* 2005 (Qld) and, in the alternative, on the principles in *Calderbank v Calderbank* – where the defendants made a settlement offer prior to trial and the plaintiffs made a counter-offer – whether the defendants unreasonably failed to make a "settlement offer" because their settlement offer was not a "reasonable offer at the time it was made" – whether the defendants unreasonably failed to agree to the settlement offer proposed by the plaintiffs – whether the defendants should pay the plaintiffs' costs on the indemnity basis *Defamation Act* 2005 (Qld), s 40 *Uniform Civil Procedure Rules* 1999 (Qld), r 360 *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674; [2018] VSCA 154, cited *Calderbank v Calderbank* [1975] 3 All ER 333, considered *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946, cited *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014] QCA 23, cited *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19; [2017] QCA 70, cited *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, cited *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, cited
COUNSEL:	T D Blackburn SC and P J McCafferty QC for the plaintiffs R J Anderson QC for the defendants
SOLICITORS:	Corrs Chambers Westgarth for the plaintiffs Macpherson Kelley for the defendants

[1] The parties agree that the defendants should be ordered to pay the plaintiffs' costs of the proceedings. The issue is whether they should be assessed on an indemnity basis. The

plaintiffs submit that they should be. They rely on s 40 of the *Defamation Act* 2005 (Qld) and, in the alternative, on the principles in *Calderbank v Calderbank*.[1]

[2] Their reliance on s 40 raises two issues:

1. Did the defendants unreasonably fail to make a "settlement offer" because the settlement offer which they made dated 20 December 2018 was not a "reasonable offer at the time it was made"?

2. Did the defendants unreasonably fail to agree to a settlement offer proposed by the plaintiffs?

The plaintiffs' reliance on the principles derived from *Calderbank* raises the issue of whether the defendants acted unreasonably or imprudently in failing to accept the plaintiffs' offer to settle or, at least, in not seeking to negotiate the terms of an apology which were more palatable to the defendants than the one the plaintiffs proposed.

Section 40 of the Act

[3] Section 40 provides:

> "**40 Costs in defamation proceedings**
>
> (1) In awarding costs in defamation proceedings, the court may have regard to –
>
> (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and
>
> (b) any other matters that the court considers relevant.
>
> (2) Without limiting subsection (1), **a court must (unless the interests of justice require otherwise)** –
>
> (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff – **order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff**; or
>
> (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

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1 [1975] 3 All ER 333.

(3) In this section –

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was **a reasonable offer at the time it was made**." (emphasis added)

[4] The provisions of s 40 do not displace the Court's power to order indemnity costs for some other reason or displace the rules of Court by which parties can obtain some protection in respect of costs by making formal offers to settle.[2]

[5] In *Davis v Nationwide News Pty Ltd*,[3] McClellan CJ at CL said that s 40(2):

> "obliges parties to defamation proceedings to take a reasonable approach to negotiations for the settlement of those proceedings. A party who unreasonably fails to make or accept a settlement offer may be ordered to pay costs on an indemnity basis."

[6] The provisions of s 40(2) differ from the provisions for formal offers under the *Uniform Civil Procedure Rules* 1999 (Qld). The relevant provisions of the *UCPR* are engaged if the plaintiff makes a formal offer to settle under the rules and the outcome achieved by the plaintiff is "no less favourable" than the offer.[4] The focus of s 40(2)(a) is different. Its focus is on the defendant's conduct and, in particular, a defendant's unreasonable failure to make a settlement offer or agree to a settlement offer proposed by the plaintiff.[5] While the provisions of the rules and s 40 are concerned with settlement offers, they are not necessarily engaged in the same circumstances. For example, r 360 may be engaged in a case in which the defendant did not accept an offer, but in which the defendant did not act unreasonably.[6]

[7] If s 40(2)(a) is engaged, then unless the interests of justice require otherwise, a court "must" order costs of and incidental to a proceeding to be assessed on an indemnity basis.

[8] Under r 360 the outcome achieved by the plaintiff is the yardstick by which the plaintiff's offer is measured. Under s 40(2)(a) of the Act, the result actually achieved is not directly relevant. Instead, it may be some indication of what the plaintiff stood to achieve in the event of success.

[9] In determining questions of reasonableness under s 40(2)(a), a few matters warrant attention. First, whether or not the defendant made a "settlement offer" is determined according to whether the offer was "a reasonable offer at the time it was made."

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2 *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19 at [70].

3 [2008] NSWSC 946 at [27].

4 *Uniform Civil Procedure Rules* 1999 (Qld), r 360.

5 *Nationwide News Pty Ltd v Weatherup* [2018] 1 Qd R 19 at [72].

6 Ibid.

[10] Second, in a case in which liability is in issue, there is scope for different, but reasonable, predictions about the plaintiff's prospects of success. There also will be a variety of reasonable predictions about quantum.

[11] Third, the issue of whether an offer was a reasonable one at the time it was made and the issue of whether the defendant unreasonably failed to agree to an offer proposed by the plaintiff should not be affected by hindsight bias in relation to liability or quantum.

[12] Finally, an offer is not necessarily unreasonable because it is possible to imagine a better and more reasonable offer which therefore had better prospects of being accepted. An offer to settle will not be a reasonable offer at the time it was made if it did not reflect a reasonable and realistic assessment of the plaintiff's prospects of success on liability and the probable quantum of an award in the event of success and the findings which would be made by the Court in determining contentious issues.

The defendants' offer

[13] The defendants made an offer on 20 December 2018. The terms of this offer were:

(a) the defendants pay to the plaintiffs the sum of $600,000, inclusive of costs;

(b) an "apology" be provided in the terms set out below;

(c) previous costs orders in the proceedings be vacated; and

(d) a confidential deed of settlement be executed.

[14] The proposed "apology" contemplated the following being read on *60 Minutes*:

> "In May 2015, we broadcast a report about the deaths in the town of Grantham caused by floods in 2011.
>
> An inquiry held after our report found that the Wagner family quarry did not cause or contribute to the tragic events in Grantham.
>
> 60 Minutes did not intend to suggest the Wagner family were at fault. For more on this, go to our website."

[15] The following was proposed to be made available on the website:

> "On 24 May 2015, 60 Minutes broadcast a segment on the deaths in the town of Grantham caused by the Queensland floods in 2011. Nicholas Cater appeared in the segment.
>
> After the broadcast, a Commission of Inquiry headed by Walter Sofronoff QC, found that:
>
> - The Wagner family of Toowoomba were completely innocent of any wrongdoing;
> - The quarry operations at the Wagner Quarry did not cause or contribute to the Grantham flood and the tragic events that occurred;

- The Wagner Quarry operations had in fact mitigated the devastation caused by the flood.

The Nine Network, 60 Minutes and Nicholas Cater accept Justice Sofronoff's findings. Nine did not intend to suggest the contrary and if any viewer thought otherwise, Nine apologises to the Wagner family."

[16] The plaintiffs submit that this offer was not one that was "a reasonable offer at the time it was made". The amount offered is said to have been inadequate for what, on any view, were serious imputations. The plaintiffs note that the amount being offered was expressed to be inclusive of costs, and was made at a stage when the matter had been proceeding for over three years and after the defendants had dropped their truth defences.

[17] The plaintiffs further submit that, the offer having come after the Court of Appeal ruled that the plaintiffs' imputations were capable of being conveyed, it should have been obvious to the defendants that there was a high risk that they would lose on liability. I do not agree that the Court of Appeal decision meant that there was a high risk that the defendants would lose. The Court of Appeal decided a question of capacity, not whether the imputations were in fact conveyed. That remained an issue for the jury. However, the Court of Appeal's ruling required the defendants to make a realistic estimate of the risk that similar arguments to those which prevailed before the Court of Appeal would appeal to a jury. The defendants should have appreciated that there was a substantial risk that the jury would find that one or more of the imputations were conveyed. If it did, the jury almost inevitably would find that they were defamatory.

[18] The plaintiffs further submit that the proposed "apology" was inadequate. I agree. While the statement proposed to be read on *60 Minutes* reported the fact that the Inquiry found that the Wagners' quarry did not cause or contribute to the tragic events in Grantham, the statement did not accept that fact or apologise. The statement that *60 Minutes* did not intend to suggest that the Wagner family were at fault was appropriate. However, the statement did not clearly withdraw that or any other imputation and there was no real apology in the statement to be read on the program. The statement that more could be found on the website fell short of conveying an apology to viewers on the program. The statement on the website went further in accepting the findings of the Inquiry. After stating that Nine did not intend to suggest contrary to the findings of the Inquiry, it stated "if any viewer thought otherwise, Nine apologises to the Wagner family". It seems unlikely that such a statement on the website would be read by many viewers of *60 Minutes*.

[19] Therefore, I find that the content of the statement proposed to be read on *60 Minutes* was inadequate and did not constitute an effective apology. It would have been of limited value to the plaintiffs and of far less value than a proper apology which unconditionally withdrew the suggested imputations, said they were unfounded and apologised.

[20] I avoid hindsight bias in comparing the monetary amount offered to the plaintiffs with the amount actually awarded to them. However, the offer to pay the four plaintiffs a total sum of $600,000, inclusive of costs, with previous costs orders being vacated, required the plaintiffs to pay their costs out of the $600,000 amount. The costs would have been significant. The

amount being effectively offered to each plaintiff probably would have been substantially less than $100,000 each.

[21] Even taking account of the value to the plaintiffs of the statements which the defendants offered to publish on *60 Minutes* and on the Nine website, I do not consider that the defendants' offer was reasonable to reflect the substantial risk of the jury finding that the program conveyed the alleged meanings and an assessment of damages of many hundreds of thousands of dollars to each plaintiff. If the defendants had reasonably estimated the plaintiffs' prospects of success on liability at 50 per cent and made a prediction of an award to each plaintiff as low as $300,000, then a reasonable offer would have been $600,000 plus costs, not $600,000 with the plaintiffs being required to bear their own costs. Even if the defendants took the unreasonably optimistic view that the plaintiffs' prospects of success on liability were as low as 33 per cent, and that each plaintiff might be awarded $500,000 each, then the offer would have been unrealistically low. A reasonable and realistic offer by the defendants should have reflected the substantial risk of a jury verdict in the plaintiffs' favour (being a risk of at least 40 per cent) of an award to each plaintiff somewhere in the vicinity of $500,000 – $600,000[7], and being obliged to pay two sides' costs.

[22] I conclude that the defendants' offer of 20 December 2018 was not one that was a "reasonable offer at the time it was made". The defendants do not advance any argument as to why it would have been reasonable for them to not make any offer. In the circumstances, I am satisfied that the defendants unreasonably failed to make a "settlement offer", and the first limb of s 40(2)(a) is engaged.

[23] This makes it strictly unnecessary to consider the second limb of s 40(2)(a).

The plaintiffs' offer

[24] By letter dated 14 February 2019 the plaintiffs offered to settle their claims. They foreshadowed reliance on s 40 of the Act and also on the *Calderbank* principles. The plaintiffs' offer of settlement contained two alternative proposals. The first proposal was made to, and was contingent on it being accepted by, all the defendants. The second proposal contained two separate offers. One was to the Nine Network defendants and there was a separate offer to Mr Cater. The offer to the Nine Network defendants was not contingent on the offer to Mr Cater being accepted. The offer to Mr Cater was not contingent on the Nine Network defendants accepting the offer made to them.

[25] The first proposal, which was made to all the defendants, provided as follows:

(a) judgment be entered for the plaintiffs against the defendant;

(b) the defendants pay to each of the plaintiffs the sum of $150,000;

(c) the defendants provide an apology (in terms set out in the letter), there being a different apology for the Channel Nine defendants and Mr Cater;

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[7] Compare the award of $600,000 to the plaintiff in *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674 and the awards in *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201.

(d) previous costs orders in the proceedings be vacated; and

(e) the defendants pay the plaintiffs' costs on the standard basis as agreed or as assessed.

[26] The apology sought from the Channel Nine defendants was to be broadcast on *60 Minutes* once and also made available on the *60 Minutes* website for 60 days. It was as follows:

> "The Nine Network and 60 Minutes wish to make the following apology to the Wagner family.
>
> On 24 May 2015, the Nine Network broadcast a segment on 60 Minutes entitled 'The Missing Hour'.
>
> In this segment the Nine Network and 60 Minutes falsely and unfairly blamed the Wagner family for the killer flood which hit the town of Grantham in January 2011, killing 12 people including an infant child. The Nine Network and 60 Minutes did so by wrongly asserting that this event was caused by the collapse of a quarry wall owned by the Wagners.
>
> The Nine Network and 60 Minutes also falsely accused the Wagner family of attempting to conceal the truth about the role their quarry played in the event becoming known and of refusing to answer to the public.
>
> In broadcasting these matters, the Nine Network and 60 Minutes unjustifiably defamed the Wagner family.
>
> The Nine Network and 60 Minutes unreservedly accept that these claims and accusations against the Wagners were unfair, unjustified and without foundation.
>
> After the broadcast, a Commission of Inquiry headed by Walter Sofronoff QC, who is now the President of the Queensland Court of Appeal, found that:
>
> (a) the Wagner family were completely innocent of any wrongdoing;
>
> (b) the quarry operations at the Wagner quarry did not cause or contribute to the Grantham flood and the tragic events that occurred; and
>
> (c) the Wagner quarry operations had in fact mitigated the devastation caused by the flood.
>
> Justice Sofronoff also found that the Wagner family were wrongly subjected to many untruthful and vicious allegations by certain sections of the media.
>
> The Nine Network and 60 Minutes wish to take this opportunity to correct our errors and express our sincere apology to members of the Wagner family for the distress and embarrassment that our programme has caused them."

[27] The apology sought from Mr Cater was to be in a letter as follows:

> "**APOLOGY TO THE WAGNER FAMILY**
>
> To the Wagner family,

> On 24 May 2015, while appearing as a guest on the 60 Minutes programme, I unfairly and wrongly blamed the collapse of a quarry wall you owned for the killer flood in January 2011 that wrecked the town of Grantham and killed 12 people including a child.
>
> I claimed that this event was caused by the collapse of a quarry wall owned by you.
>
> In making this claim I accept that I harmed your reputation.
>
> I unreservedly accept that my claim was without foundation and is false.
>
> I acknowledge that on 7 October 2015, Walter Sofronoff QC – the head of the Grantham Floods Commission of Inquiry who heard evidence from flood victims and qualified experts who were engaged as independent witnesses and who I note is now the President of the Court of Appeal in Queensland – presented his report in which he completely exonerated you from any blame.
>
> Justice Sofronoff found, and I unreservedly accept, that you are completely innocent of any wrongdoing, that the quarry operations did not cause or contribute to the Grantham flood and that the operations had in fact mitigated the devastation caused by the flood to some extent.
>
> I also acknowledge that you were also exonerated from any wrongdoing by the 2012 Queensland Commission of Inquiry presided over by the current Chief Justice of the Queensland Supreme Court, the Honourable Catherine Holmes.
>
> I take this opportunity to correct my error and unreservedly withdraw my untrue allegation. I also wish to express my sincere apology to you for the distress and embarrassment I have undoubtedly caused to you and your family."

[28] The second proposal contained separate offers to the Channel Nine defendants and Mr Cater. It did not require acceptance by all defendants. So far as the Channel Nine defendants were concerned its terms were identical to the first offer. However, a separate offer was made to Mr Cater in these terms:

(a) judgment be entered for the plaintiffs against the defendant;

(b) Mr Cater provide an apology to the plaintiffs (in terms set out in the letter);

(c) previous costs orders in the proceedings be vacated; and

(d) there be no orders as to costs.

[29] The defendants do not specifically address the plaintiffs' reliance upon the second limb of s 40(2)(a). Instead, building upon their earlier submissions about the reasonableness of their offer, and in the context of responding to the plaintiffs' reliance upon *Calderbank* principles, the defendants submit that their refusal of the plaintiffs' offer was not imprudent.

[30] The defendants argue that it was not imprudent to reject that offer, made before the jury had reached its verdict, being an offer which required an acceptance that the program carried the imputations, which the defendants had always, and reasonably, denied. They point out that

the offer was not couched in terms of a hypothetical apology of the kind discussed in my quantum decision.[8] The defendants submit that the refusal of "an absolute apology in the circumstances was not conduct that justifies an award of indemnity costs." They further submit that because the apology was an inseverable aspect of the plaintiffs' offer to settle, the refusal of the offer in its entirety was the inevitable consequence.

[31] The apology proposed by the plaintiffs in their offer was a full one. It was not a hypothetical or conditional apology of the kind which may be made by a publisher, either unilaterally or by agreement, in order to mitigate damages. I am not presently concerned with an apology which is made in order to mitigate damages and which is relied upon at trial for that effect. I am concerned with a proposed apology advanced in order to settle proceedings.

[32] The plaintiffs might have couched their offer in a form which was more palatable to the defendants. The apology might have been cast in terms such as "It has been pointed out to us that some viewers may have interpreted the program as suggesting …". Such an offer may have had better prospects of being accepted by the defendants. However, the apology proposed by the plaintiffs was not unreasonable because it, in effect, required the defendants to accept that they falsely accused the Wagner family of certain things. That they did so was demonstrated at the trial.

[33] Whatever may be said about the terms of the apology proposed by the plaintiffs, it, unlike the defendants' offer, was a real apology. The quantum offered by the plaintiffs, namely $150,000 each, was a reasonable sum to reflect the realistic prospects of the plaintiffs at the time the offer was made and the quantum which was in prospect. Leaving aside the apology aspect, the sum of $150,000 was 25 per cent of a prospective award of $600,000 or 33 per cent of a prospective award of $450,000. A 60 per cent chance of a plaintiff winning on liability and recovering an amount of $600,000 (less than the amount awarded in *Harbour Radio*) equates to $360,000. Leaving aside hindsight bias and adopting a
50 per cent figure on liability, the plaintiffs' offer of $150,000 was 50 per cent of a possible quantum of $300,000. An award was always likely to substantially exceed that amount. The offer of $150,000 was a reasonable discount to account for the realistic prospects of the plaintiffs succeeding.

[34] Resolving the proceeding simply by receiving payment of an amount without an apology or equivalent form of public vindication would have deprived the plaintiffs of the benefit of the judgment and award of damages which was in prospect. It is difficult to place a monetary value on the apology which the plaintiffs sought, either in terms of its value to the plaintiffs (compared to a judgment and findings in their favour) or the reputational cost to the defendants in having to broadcast the apology on *60 Minutes* and publish it on the *60 Minutes* website for 60 days.

[35] In my view, the offer made by the plaintiffs was a reasonable one at the time it was made.

[36] It probably was unreasonable of the defendants to not accept it. It should not be assumed that the rejection of a reasonable offer *per se* amounts to an unreasonable rejection. However,

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[8] *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [128].

when the plaintiff does better than the offer there is a persuasive burden on the defendant to show that its rejection of the offer was not unreasonable.[9] The conclusion that the defendants unreasonably failed to accept the plaintiffs' offer would engage the second limb of s 40(2)(a). However, I find it unnecessary to reach that conclusion because the first limb is engaged.

[37] If the reason for the defendants not accepting the plaintiffs' offer was dissatisfaction with the form of words used in the proposed apology, then one would have expected their solicitors at the time to have said so at the time. If the problem was that the plaintiffs' draft required them to publicly accept that their program accused the plaintiffs of certain things, and the defendants did not want to publicly and unconditionally acknowledge that, then they could and should have said so. They did not.

[38] The weak terms of the statement to be made on *60 Minutes* under the defendants' offer (which did not use the term "apology") and the absence of any attempt by the defendants after 14 February 2019 to negotiate a more palatable form of apology suggest that the defendants did not want to broadcast an actual apology on *60 Minutes* which used the word "apology".

[39] In any case, if the reason for not accepting the plaintiffs' offer was that the defendants were prepared to broadcast an apology cast in terms that the program *may* have been interpreted by viewers as conveying certain things, then the defendants should have made a further offer in those terms. In not doing so they unreasonably failed to make a "settlement offer" that would have been a reasonable offer on or after 14 February 2019. This would be an additional basis to engage the first limb of s 40(2)(a) of the Act. I will return to this in considering my discretion as to costs.

***Calderbank* principles**

[40] The defendants do not contest the plaintiffs' reliance upon the following statement of the principles about when a failure to accept a *Calderbank* offer can lead to an order for indemnity costs:

> "[5] The failure to accept a Calderbank offer is a matter to which a court should have regard when considering whether to order indemnity costs. The refusal of an offer to compromise does not warrant the exercise of the discretion to award indemnity costs. The critical question is whether the rejection of the offer was unreasonable in the circumstances. The party seeking costs on an indemnity basis must show that the party acted 'unreasonably or imprudently' in not accepting the Calderbank offer.
>
> [6] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2),* the Victorian Court of Appeal stated that a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard to at least the following matters:
>
> (a) the stage of the proceeding at which the offer was received;

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9 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th ed, 2018) [13.84] in the context of *Calderbank* offers.

(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."[10]

[41] The plaintiffs' *Calderbank* offer was made at an advanced stage of the proceeding when the liability issues were simple and clear. The issue was whether the broadcast conveyed the alleged imputations. The plaintiffs' prospects of success, assessed at the date of the offer, were substantial. The extent of the compromise offered by them was substantial. It involved a substantial discount on account of risk on liability in respect of the quantum likely to be awarded to each plaintiff in the event of success. The offer was expressed in clear terms. There were alternative offers which remained open for acceptance within 28 days.

[42] Subject to consideration of the precise terms of the apology proposed by the plaintiffs, I consider that the defendants acted unreasonably or imprudently in not accepting the offer. If the defendants were interested in fine-tuning or toning down the terms of the apology to be broadcast on *60 Minutes*, then they should have tried to do so. They did not. In the circumstances their failure to accept the plaintiffs' offer was imprudent or unreasonable.

[43] Mr Cater's refusal to accept the separate offer made to him was imprudent or unreasonable since that offer did not require him to pay any damages or costs to the plaintiffs. The apology sought from Mr Cater was an appropriate one.

The discretion as to costs

[44] Neither offer was said to have been made as a formal offer pursuant to the *UCPR*.

[45] I have concluded that the first limb of s 40(2)(a) is engaged because the defendants unreasonably failed to make a "settlement offer". The result is that I must order costs of and incidental to the proceedings to be assessed on an indemnity basis unless the interests of justice require otherwise. The defendants do not make a specific submission that if s 40(2)(a) is engaged then the interests of justice require a different form of order to the one stated in the subsection. However, I should consider that issue.

[46] If I had not reached the conclusion that the first limb of s 40(2)(a) was engaged then I would have considered the appropriate order as to costs and made that order as a matter of discretion, having regard to relevant matters, including the respective offers made by the parties. Having considered their respective offers, and the absence of any further offer by the defendants after 14 February 2019 or a proposal to reword the proposed apology into a more palatable form, I would have awarded costs on an indemnity basis after 28 February 2019.

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[10] *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014] QCA 23 at [5]-[6] (citations omitted).

This was a fortnight after the plaintiffs' offer, which should have been a sufficient time for the defendants to raise, in "without prejudice save as to costs" negotiations, any concerns which they had about the form of apology proposed by the plaintiffs.

[47] Because the plaintiffs have engaged s 40(2)(a), I should consider whether the interests of justice require an order other than that the plaintiffs recover their costs of and incidental to the proceedings to be assessed on an indemnity basis.

[48] Although the defendants have not framed their arguments in terms of "the interests of justice", I consider that there are reasons why, in the interests of justice, an award of indemnity costs should apply only after 28 February 2019. There is no evidence of the parties making any offer to settle earlier than the offers which I have discussed. Until the Court of Appeal's decision on 3 November 2017 about the imputations, the defendants were entitled to assume that they had better prospects in defending the plaintiffs' claim than they in fact did. Although the defendants' offer to settle was unreasonable for the reasons which I have given, it seems to have had the utility of prompting a counter-offer. In all the circumstances, and having regard to the way in which the parties to the proceedings conducted their cases, I consider that it is not in the interests of justice for the plaintiffs to receive an indemnity for their costs over the course of the whole proceeding.

[49] They should, however, recover costs on an indemnity basis after 28 February 2019. The defendants failed to accept the plaintiffs' offer or to make a new offer which refined the wording of the apology proposed by the plaintiffs so that the defendants did not publicly acknowledge that the imputations were in fact conveyed to viewers.

[50] The defendants acted imprudently in that regard. The policy of encouraging settlements and requiring parties who do make a reasonable offer to settle to pay indemnity costs is evident in s 40. In the circumstances of this case the policy and the interests of justice are best advanced by requiring the defendants to pay indemnity costs, but only from 28 February 2019.

[51] Therefore, the order as to costs will be:

> "The defendants pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the standard basis up to and including 28 February 2019, and thereafter to be assessed on an indemnity basis."