SUPREME COURT OF QUEENSLAND

CITATION:	*Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd & Anor* [2016] QCA 130
PARTIES:	**COMGROUP SUPPLIES PTY LIMITED** ACN 008 732 465 (applicant) **v** **PRODUCTS FOR INDUSTRY PTY LTD** ACN 111 733 576 (first respondent) **GAVIN DUNWOODIE** (second respondent)
FILE NO/S:	Appeal No 1983 of 2015 DC No 3538 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil) – Further Order Application for Extension of Time s 118 DCA (Civil) – Further Order
ORIGINATING COURT:	District Court at Brisbane – [2014] QDC 293
DELIVERED ON:	13 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Margaret McMurdo P and Atkinson and Mullins JJ Judgment of the Court
ORDER:	**The applicant is to pay the respondents' costs on the standard basis from 25 February 2015 to 20 May 2015 and on an indemnity basis from 21 May 2015 onwards.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK OFFERS – PARTICULAR CASES – where the applicant rejected a *Calderbank* offer of compromise made by the respondents primarily because it thought it would be successful on the appeal – where appeal courts are reluctant to encourage *Calderbank* approaches in appeals – where the applicant's proposed amended notice of appeal was bound to fail and did not raise any significant questions of law – whether the applicant should pay part of the respondents' costs on an indemnity basis

Calderbank v Calderbank [1975] 3 WLR 586, cited
Stewart v Atco Controls Pty Ltd [No 2] (2014) 252 CLR 331; [2014] HCA 31, applied

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: No appearance for the applicant
No appearance for the respondents

[1] **THE COURT:** On 8 April 2016 the court refused this application for leave to appeal. It is common ground that the applicant should pay the costs of the appeal but the respondents seek an order that part of those costs be paid on an indemnity basis.

[2] The basis on which the respondents seek their costs on an indemnity basis is because they made an offer to the applicant pursuant to the principles in *Calderbank v Calderbank*[1] which was not accepted. The law with regard to costs when a *Calderbank* offer has been made was set out by the High Court in a joint judgment in *Stewart v Atco Controls Pty Ltd [No 2]*[2] where the court held at [4]:

> "This Court has a general discretion as to costs. The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it would appear to require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation."

[3] The *Calderbank* offer in this case was sent by the respondents shortly after the outlines of argument on the application for leave to appeal had been filed by the applicant and the respondents. The respondents offered to settle the appeal on the basis that the respondents would pay to the applicant an additional sum of $26,400 (that is, in addition to the money paid pursuant to the District Court judgment); the respondents would pay the applicant's costs of the appeal on the standard basis; and the appeal would be dismissed. The justification for the calculation of the additional sum offered was given and it was then said that the offer was open for acceptance for 15 days from the date of the offer. The respondents reserved their rights to rely upon the offer as to the issue of costs including seeking indemnity costs against the applicant.

[4] On 20 May 2015 the offer was rejected. The reasons given were that the offer was not a significant compromise of the matters pressed by the applicant; contrary to the applicant's justification of the amount offered by its being an apportionment of the claim made, the applicant said that a claim for accessorial liability for breach of fiduciary duty was not an apportionable claim; and the applicant was confident that it would be successful on the appeal.

[5] The applicant then made an alternative *Calderbank* offer to the respondents, offering as follows:

---

1 [1975] 3 WLR 586.
2 (2014) 252 CLR 331.

1. that the applicant discontinue its application for leave to appeal and acknowledge that the judgment in the District Court in its favour had been fully satisfied;

2. that each party release the other from any liability to pay costs in the District Court proceedings including the costs orders made by the court; and

3. that each party pay its own costs in the Court of Appeal.

[6] That offer too was open for 15 days and the applicant said that if it received a more favourable result in the Court of Appeal then it would seek to rely on that offer in an application that the respondents pay the applicant's costs of the Court of Appeal on an indemnity basis from the date of expiry of the offer.

[7] The applicant in this case was entirely unsuccessful and the respondents are entitled to their costs. The fact that they made a *Calderbank* offer which was rejected is, in this case, a strong factor in favour of their application for indemnity costs. It appears that the primary reason the applicant did not accept the offer was that it thought it would be successful on the appeal. It was not. In all of the circumstances the applicant's rejection of the offer was unreasonable. The compromise offered by the respondent in this was considerably more advantageous to the applicant than the decision made by the court.

[8] Although appeal courts are reluctant to encourage these *Calderbank* approaches in appeals for fear that it might stultify the development of the law, the court concluded that an examination of the merits of the proposed amended notice of appeal showed that it was bound to fail and did not raise any significant questions of law but rather the application of well-established principles of law to the facts of the case.

[9] The applicant also submitted that the application for indemnity costs was made more than seven days after the orders were made by the Court of Appeal in the substantive judgment, outside the time allowed by the rules. The applicant was given 14 days to make submissions as to costs but did not make submissions within that time. Leave was granted by the President, under paragraph 52(3) of Practice Direction 3 of 2013, to allow the respondents to make their submissions on costs with the applicant having leave to file an outline in response by 29 April 2016. This point is without merit.

[10] In all the circumstances the appropriate order as to costs is that the applicant pay the respondents' costs on the standard basis from 25 February 2015 to 20 May 2015 and on an indemnity basis from 21 May 2015 onwards.