



LAWYERS & ASSOCIATES

OFFERS OF SETTLEMENT AT A GLANCE

In the vast majority of cases, disputes between litigants settle to avoid the expense, time and effort of trial. There are 2 different types of offers that can be made, a "*Calderbank*" (also known as a "*without prejudice save as to costs*") and "*without prejudice*" offer. The offer maybe to perform or agree certain terms of settlement (normally that one party pays the other party a sum of money) in full and final settlement of the dispute.

A *Calderbank* offer is an offer made inclusive of legal costs and is therefore an offer for a precise amount. This offer is often more effective to settle a dispute than a *without prejudice* offer. The reason being is that if a party rejects a *Calderbank* offer made by the other party and the Court awards the party who rejected the offer a less favorable amount than the offer, the party who rejected the offer may have to pay a higher amount at trial for the other party's legal costs than what they would otherwise have to pay. This represents a significant advantage for the party making the offer because awards for legal costs to successful litigants are usually limited to the amounts allowed by prescribed scales of fees which usually allow the successful party to recover from the other party between 50% to 70% of the actual costs they incurred. Hence, the court may order that the party who rejected the offer which was more favorable than the amount they were awarded by the Court, pay costs to the other party above the usual award of costs. However, in all cases the court will take a number of factors into account before deciding to award higher costs against a party who rejects a *Calderbank*

offer, including whether or not it was unreasonable for the party to reject the *Calderbank* offer and if the offer was genuine. Therefore, if a party wishes to rely on a *Calderbank* offer in the event the other party is unsuccessful at recovering a higher amount than the offer, the offer must comply with certain requirements.

On the other hand a "*without prejudice*" offer is an offer made in the course of negotiations which cannot be used as evidence in court and is therefore subject to privilege. However, the issue of whether or not certain communications are privileged depends on the party's intentions and the nature of the communication. The use of the words "*without prejudice*" does not ensure that the communication cannot be used as evidence in court, there has to be settlement negotiations for privilege to apply.

CONCLUSION

A *Caldebank* offer can be very effective in resolving a dispute early on in a proceeding but the offer must comply with certain requirements before a party making the offer can rely on it. Alternatively, a party wishing to make an offer may decide to make their offer "*without prejudice*" especially if the other party is likely to be awarded significantly more at trial. If you require further information on offers of settlement, please contact MLB Lawyers & Associates.

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