

This article discusses the use of Calderbank offers for out-of-court settlements. Calderbank offers must be considered carefully, as rejection of one may alter the decision of who is responsible for paying the legal costs of the court case. There are several requirements for an offer to be considered a Calderbank offer and used as evidence for legal costs to be claimed by one party from the other, which will be outlined below.



A. INTRODUCTION

The term Calderbank offer originates from the landmark case of *Calderbank v Calderbank* [1975] 3 All ER 333 (English Court of Appeal case) where it was established that if a party rejected an earlier, reasonable settlement offer, they may be responsible for the costs incurred from the date of that offer until resolution in court (since the matter could have ended earlier had they accepted, saving legal costs from that date).

B. REQUIREMENTS FOR A VALID CALDERBANK OFFER

The requirements of a valid Calderbank offer must include the following:

1. Provide sufficient information about the case;
2. Provide enough time for the other party to consider the offer sufficiently, with the deadline to accept the offer set out clearly;
3. Be a reasonable offer;
4. Have clear and unambiguous terms;
5. Make reference to the offer being made under the terms of *Calderbank v Calderbank*;
6. Specify that costs would be separate to the principal sum being offered;
7. State that if the offer is rejected, the party making the offer reserves its rights to use it on an application for costs and outline the costs advantage of the offer; and
8. Be marked 'Without prejudice save as to costs'.

The terms 'Without prejudice save as to costs' means that a communication is protected as being for the purpose of genuine settlement negotiations until the court delivers judgment, after which the court will address the issue of costs. However, the inclusion of these words does not necessarily indicate that the letter had some secondary characteristic which gave it the character of a Calderbank offer.¹

The "essential ingredient" in determining whether an offer is a valid Calderbank offer is the "indication by the offeror that the letter might be deployed as a basis for seeking a special costs order in the event of that party's ultimate success in the action".²

Calderbank offers are distinct from offers of compromise under rule 20.26 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR').

¹ *Zilotto v Hakim* [2013] NSWCA 539.

² *Whitney v Dream Developments Pty Ltd* (2013) 84 NSWLR 311.



C. COSTS APPLICATION

There are different types of costs awarded in court cases. Calderbank offers affect the award of indemnity costs, which refer to the legal costs incurred throughout a court matter (ie legal fees and expenses).

Calderbank offers do not have the same costs consequences as offers of compromise (pursuant to the UCPR). Calderbank offers provide a “powerful factor” in influencing the court’s discretion regarding costs, as opposed to offers of compromise which generally give an entitlement to a costs order.³

On a costs application, the party who made the offer must prove to the court that the failure to accept the offer was unreasonable. It must be shown that the offer was appropriate and reasonable to be accepted in the circumstances, had the other party considered all relevant factors.

The determination of whether the rejection of an offer was reasonable is assessed based on the relevant circumstances at the time of the offer, rather than solely by reference to the outcome of the proceedings.⁴ The assessment is made with consideration to both parties (not just the offering party), and whether a genuine compromise was made.⁵

Ultimately, the decision of a costs application will be at the court’s discretion.

D. CONCLUSION

Calderbank offers should be carefully considered for reasonableness as this may have dire costs implications for the party that rejects the offer. Parties are encouraged to enter genuine

negotiations to settle a matter outside of court, and Calderbank offers are one such method.

For more information on related matters, you may wish to read the following articles:

- [**Civil Litigation**](#): A brief guide to the procedures of going to court.
- [**Suing and Being Sued \(Legal Action\)**](#): Discusses the process of suing someone for A\$250,000.00 including the steps taken in court.
- [**Without Prejudice Communications**](#): This article examines the effect of the Without Prejudice rule and how it protects communications made in the course of settlement negotiations.

Comasters can advise you on preparing and responding to Calderbank offers.

³ *Smith v Smith* [1987] 2 Qd R 807, 810.

⁴ *Crump v Equine Nutrition Systems Pty Ltd Trading as Horsepower (No 2)* [2007] NSWSC 25, [41].

⁵ *Ryde City Council v Tourtouras (No 2)* [2007] NSWCA 262, [4].

CONTACT US