DEFECTIVE CALDERBANK OFFER-"RES JUDICATA"

In *State of New South Wales v Dueeasy Pty. Ltd.* [unreported] NSW Supreme Court 28th February, 1992, Giles J held that in considering costs on an award of $144,640, the Arbitrator was correct in refusing to take into account a Calderbank offer of $190,000. (Calderbank v Calderbank [1975] 3 All ER333 see generally Commercial Arbitration, Sharkey and Dorter pp 261-263)

The claimant, a contractor made a number of claims against the NSW Public Works Department [the respondent] arising out of a contract to construct sewer lines. Some of the unresolved claims were referred to arbitration. The respondent made the following offer, *without prejudice* except as to costs:

> The (respondent) is prepared to pay your company $190,000 in full settlement of all claims under or arising out of the Contract, including but not limited to those raised by your company in the arbitration.
>
> In addition the (respondent) will pay the Arbitrator's costs to date and your Company's costs in the arbitration. If those costs cannot be agreed, they would be taxed in the usual way.

The offer was rejected. The hearing proceeded and the Arbitrator awarded the contractor $144,640. In its submission on costs, the respondent produced the letter and said that because the contractor had recovered less than the amount offered the contractor should pay the respondent's costs after the making of the offer.

The contractor argued that the offer was for:

(1) claims raised by the contractor in the arbitration; and
(2) those not raised by the contractor in the arbitration.

The Arbitrator said that the criterion to be used in considering the effect of an offer was as stated by Donaldson J in *Tramountana v Armadora SA v Atlantic Shipping Co. SA* (1978) 2 All E.R. 870 at 877:

> I think that (the Arbitrator) should ask himself the question: "Has the Claimant achieved more by rejecting the offer and going on with the Arbitration than he would have achieved if he had accepted the offer.

Giles J Held that the application of that criterion was proper. The Arbitrator decided:

> In view of the condition included in the (respondent's) letter I find I am unable to answer the question. There has been no evidence presented to the effect that no other claims are contemplated by the (contractor) outside those that were the subject of the arbitration . . .
>
> It is apparent that the (respondent's) offer made on 23rd August was not in settlement solely of the matters in Arbitration. It is accordingly not a valid offer of compromise in respect of these proceedings . . .
>
> In view of these factors, it is held that the so-called Calderbank letter is flawed and cannot be taken into account in the exercise of discretion as to costs.

The respondent sought leave to appeal. Giles J. refused leave. He found that the contractor had previously made at least one claim arising out of the contract which the contractor had not raised in the arbitration. Giles J. said:

> Had the arbitrator been aware of the additional claim not raised in the arbitration, being a claim the value of which he could not determine, it seems to me inevitable that he could not have been able to take the letter into account in exercising his discretion as to costs.

Giles J referring to the Arbitrator said:

> He was faced with a letter which, on the submissions before him, required him to pay regard to whether or not there were or might be claims other than those raised by (the contractor) in the arbitration . . . There was, however evidence before him which would indicate the possibility of other claims, being the letter itself. From the letter it could only be concluded that the Department had in mind the possibility of claims other than those raised by (the contractor) in the arbitration. That is why it framed the letter in the clear terms in which it did. It seems to me that there was evidence there on which it was quite open to the arbitrator to conclude, having adverted to the fact that there was evidence specifically directed to (the contractor's) contemplation, that there was a possibility of a claim by (the contractor) other than those claims raised in the arbitration.

Giles J. found that a claim included in the contractor's final statement under clause 42.6 of NPWC3 was not taken up in the arbitration and he said:

> . . . there was no evidence before me, or so far as appears before the arbitrator, to show that it had been abandoned in such a way that it would no longer have been open to (the contractor) to revive it. In point of principle the existence of at least one claim seems to me to illustrate the difficulty faced by the Department.

Giles J. found that the respondent had an onus of proof. He said:

> I think that the correct analysis is that whatever burden there was lay upon the Department. It sought to put the letter before the arbitrator and to rely upon its effect as a Calderbank letter. For that purpose, if there were any evidence required going beyond the letter itself to give it such effect, the Department had to put that evidence before the arbitrator. If that involved the Department demonstrating that there were no claims other than those raised by (the contractor) in the arbitration, it seems to me that the burden of doing so fell upon the Department. While it is true that that might require the Department to shoulder a very difficult burden, that is because of the way in which the letter was framed.

What is not canvassed in the judgment is the doctrine of *res judicata* and the possibility that all other claims by the contractor against the respondent arising out of the contract were merged in the award and that therefore the award gave the contractor less than the offer.

Giles J considered the doctrine of *res judicata* in *Onerati v Phillips Constructions Pty. Ltd.* (1989) 16 NSWLR 730. In that case he held that after an arbitration in which the owner had made a claim for some items of defective work, the doctrine of *res judicata* prevented the owner from subsequently making a claim in respect to other items of defective work. The doctrine precludes the commencement of fresh proceedings upon the same or substantially the same grounds. At p. 739 Giles J says:

> The policy is that there should be finality in litigation: thus it is said in *Halsbury*, 4th ed, vol 16, par 1527 at 1027, that the doctrine of res judicata is "a fundamental doctrine of all courts that there must be an end of litigation" The builder should be able to say that so far as it was concerned that was an end to the claims which could be made against it for such breach of contract, and to order its affairs accordingly.

A frequently quoted authority is *Henderson v Henderson* (1843) 67 ER 313. Wigram V-C at p.319 said:

> Where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The test in *Tramountana* is:

> Has the Claimant achieved more by rejecting the offer and going on with the Arbitration than he would have achieved if he had accepted the offer?

If the contractor had accepted the Calderbank offer, the contractor would have received $190,000 and could not thereafter pursue the other claims arising out of the contract but not raised in the arbitration. By going on with the arbitration, the contractor received $144,640 but could the contractor then pursue the other claims arising out of the contract but not raised in the arbitration? If not, then the contractor would have achieved less by rejecting the offer.

How should an offer be expressed? In *Tramountana* Donaldson J said:

> If a party wishes to make a 'sealed offer' and to have it considered in the context of an order for costs, he must offer to settle the action for £x plus costs.

At p.743 of *Onerati*, Giles J points out that an arbitration is a contractual matter. It is possible for the parties to agree that the arbitration will be in respect of certain claims only and not all claims. In an arbitration the terms of reference can be such that the doctrine of *res judicata* and the principle in *Henderson v Henderson* do not apply to bar claims not included in the arbitration.

In an arbitration, before an offer of settlement is made, it is important to consider whether the offeror can insist upon an award that will clearly invoke the doctrine of *res judicata*. This involves examining two separate aspects of the terms of reference of the arbitrator. The first is to ascertain the cause of action and whether it is broad enough to cover all claims. Secondly, depending upon the terms of reference, it could be that if the offer is accepted, there is no longer a dispute and the arbitrator might no longer have jurisdiction to make an award on liability as distinct from an award on costs. The power to make the award on costs appears to be preserved specifically by sections 34 and 37 of the Uniform Commercial Arbitration Act.

Offers of compromise frequently include terms other than solely payment of

money in satisfaction of the claims made in the arbitration. Amendments to the uniform Commercial Arbitration Act or the Rules of Court could facilitate such compromise offers and protect the offeror with respect to costs. *The Law and Practice of Compromise* 3rd Ed. Fosker, D Sweet & Maxwell, London [1991] at p.120 makes the point:

> Mere passive refusal of the offer should not be regarded as acceptable behaviour when considering the question of costs.

PHILIP DAVENPORT

COURT USE OF MEDIATION PROCESSES

SUPREME COURT OF NEW SOUTH WALES

Rogers CJ Comm D
24 February 1992, Unreported

A W A Limited v George Richard Daniels
T/A Deloitte Haskins & Sells & Ors

This case canvasses the extent to which courts should make use of mediation processes and the issues this raises.

The hearing was in its twelfth day and it was estimated to last for three months. It was a multi-party dispute involving six senior counsel and seven junior counsel. As His Honour said:

> "The Court is crowded with instructing solicitors and paralegal persons, lap top computers, and arch lever files of documents in their dozens."

Some days previously His Honour had suggested mediation but one of the parties was reluctant to agree to this. His Honour indicated that he was considering making an order that the parties enter into mediation even though one of the parties objected to this. Ultimately, however, all parties agreed to submit the matter to mediation. His Honour accordingly directed that the matter be referred to mediation and directed that the parties have persons present with authority to give instructions to counsel representing them. His Honour was only prepared