

### Refusing a *Calderbank* offer

Melissa Tovey reports on *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2]* 2014 [HCA] 31

#### Introduction

The High Court recently has had cause to consider when a party will have acted reasonably in refusing a *Calderbank* offer where the principal reason for rejection is that party's confidence that it will be successful in the litigation, which confidence is, ultimately, misplaced.

#### Background

The underlying proceedings, *Stewart v Atco Controls Pty Limited (In Liquidation) [No 2]* 2014 [HCA] 31, which concerned the priority of a liquidator's lien, was summarised in the Winter 2014 edition of *Bar News*.

In brief, at first instance in proceedings brought by Atco Controls Pty Limited (Atco), the Supreme Court of Victoria (Davies J) held that the liquidator of Newtronics Pty Limited (receivers and managers appointed) (in liquidation) (Newtronics), which was a wholly-owned subsidiary of Atco, was entitled to a lien for his professional remuneration and expenses over a fund of \$1.25m held by Newtronics prior to being obliged to pay the fund to Atco. The fund comprised settlement proceeds arising from related proceedings involving other parties. Davies J also ordered Atco to pay the liquidator's costs of the proceedings (as distinct from, and in addition to, the sum secured by the lien).

Shortly after commencing those proceedings, the liquidator (Mr Stewart) had offered to Atco that he would claim only a nominal amount for his remuneration and expenses caught by the lien if Atco discontinued the proceedings (the first offer). Atco did not accept this offer. Ultimately, the quantum of Mr Stewart's remuneration and expenses exceeded the amount of the fund, such that there would have been nothing available to pay to Atco.

Atco appealed the decision of Davies J. Before the hearing of the appeal, Mr Stewart made a further offer to Atco on the following terms (the second offer):

- Mr Stewart to retain the settlement sum (viz. the \$1.25m);
- \$55,000 paid into court by Atco by way of security for costs of the appeal to be released to Mr Stewart; and
- mutual releases.

The second offer, particularly in relation to the release of the security sum, implicitly provided that the liquidator would not press any claim for legal costs of the proceedings below as ordered by Davies J. The second offer was not accepted by Atco.

Atco succeeded on appeal to the Court of Appeal, with the effect that the second offer had no work to do. However, the High Court overturned the Court of Appeal decision and, as a result, made an order for costs in favour of Mr Stewart against Atco in both the Court of Appeal and High Court proceedings.

#### Issue before the High Court

As a result of the proceedings in the High Court, Mr Stewart applied to the High Court for indemnity costs on the basis of Atco's rejection of the second offer.

As the second offer only related to the Court of Appeal proceedings, the High Court considered only the costs situation in the Court of Appeal, there being no relevant offer in relation to the High Court proceedings.

The issue before the High Court was whether, in light of the Court of Appeal decision being overturned, Atco's rejection of the second offer was such that it was appropriate for the usual rule as to costs to be displaced and whether an order for indemnity costs in relation to the Court of Appeal proceedings was warranted.

It appears that the only argument Atco raised in opposition to the indemnity order was that its conduct in not accepting the second offer was not unreasonable in circumstances where, inferentially, Atco took the view that it was ultimately going to be successful in the appeal and was successful before the Court of Appeal.

#### Reasoning

Without deciding whether reasonableness is a factor which militates against the making of an indemnity costs order, the High Court<sup>1</sup> took the view that in this particular instance, something more than just a belief of success was required before the discretion would not be exercised in favour of indemnity costs, after rejection of a *Calderbank* offer.

In particular, the High Court took the view that since the substantive dispute concerning the liquidator's entitlement to a lien was well-established, to succeed Atco would have had to establish that the principle in *In re Universal Distributing Co Ltd (In Liq)*<sup>2</sup> did not apply. In such circumstances, it was not reasonable for Atco to have rejected the second offer.<sup>3</sup> The High Court ordered that the costs of the Court of Appeal proceedings be paid on the indemnity basis.