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Caution to be exercised when relying on Calderbank letters

In a recent application for review of a decision of Senior Member Allen dated 8 July 2005, Jacobson J of the Federal Court held that the Senior Member erred in finding that he could interpret an earlier blanket costs order to include provision for an exclusion of costs beyond a certain date, based on a *Calderbank* style letter issued by the Military Rehabilitation and Compensation Commission (MRCC).

Collins v Military Rehabilitation and Compensation Commission

NSD 1337/2005: judgment delivered orally on 7 December 2005, written reasons to follow.

Background

Mr Collins suffers from a work related psychiatric condition. He had been paid compensation on the basis of a 20 % whole person impairment. In an application before the AAT, Mr Collins asserted that his impairment level was now 40%, and the MRCC maintained that it had not degenerated beyond 20%. In the months leading up to hearing, the MRCC offered to settle on the basis of a 30% WPI. When no reply was received, it sent a *Calderbank* style letter.

On the morning of the hearing, the parties settled for a 30% WPI, as offered by MRCC. However, costs discussions stalled when MRCC sought to rely on the *Calderbank* letter. The matter was resolved via consent orders, wherein costs were to be 'as agreed or taxed'. The orders were adopted in consent orders, by SM Kelly. The MRCC made it very clear that it intended to rely on the terms of the *Calderbank* letter, although there was no reference to this in the consent terms.

The question of costs could not be resolved. The matter went to taxation, but again discussions stalled by reason of the *Calderbank* letter. The issue was referred to SM Allen for determination of whether or not the MRCC could rely on the letter. On 8 July 2005, SM Allen held that in the taxation of the applicant's costs, no allowance should be made for items incurred after the date of the *Calderbank* letter. Thus, the letter was upheld as a valid basis for reducing the applicant's claimed costs.

The application in the Federal Court

The applicant lodged an application for review of the decision of SM Allen in the Federal Court under the AD(JR) Act and the Judiciary Act. Jacobson J handed down his oral decision on 7 December 2005.

In short, he held that the AAT had 'spent' its power to make an order on costs when it made the consent decision that costs were payable 'as agreed or taxed'. SM Allen had no power to 'go behind' that determination, and factor in a reduction in costs taking into account the

Calderbank letter. Jacobson J considered provisions of the SRC Act, the AAT Act and the Acts Interpretations Act, and was of the view that SM Allen had impermissibly varied the costs order. He did not accept the respondent's submission that SM Allen was interpreting the costs order, and putting it 'into context'. Jacobson J found that disallowing costs beyond a certain date was not a valid exercise of section 67(13) of the SRC Act, as it was a blanket disallowance rather than a consideration of the reasonableness of items claimed in a taxable bill of costs.

Jacobson J added that, in his view, *Calderbank* letters had no application where there was no contested hearing. It did not matter that the matter was settled on the morning of the hearing - it could not be said that Mr Collins had had an adjudicated hearing in which he fared no better than the offer of MRCC. This was more by way of obiter.

Finally, Jacobson J was at first not minded to award Mr Collins his costs in this application. He expressed some concern that his solicitors had pressed this application, when the difference in costs offers was only around $5,000. Had he not awarded costs, this would have been a futile victory for Mr Collins, as any costs gained on taxation would have been lost by proceeding on this application. However, he ultimately did award costs, but his hesitation sounded as a warning for future litigants.

Implications for clients

There is no authority to support Jacobson J's proposition that *Calderbank* letters cannot be relied upon unless there is a contested hearing. However, this judgment may well be relied upon as independent authority on this point. Points for consideration are:

- if an agency wishes to rely upon a *Calderbank* letter, and a matter is settled on the day of hearing with no agreement on costs, there should be an 'on the spot' application for a limited costs order
- consent terms should not include a blanket reference to 'costs as agreed or taxed' if the agency intends to run an argument that costs should be reduced by reason of the lateness of acceptance of an offer. Even if the matter is not 'contested', the AAT retains a general discretion on costs, regardless of whether the principles in *Calderbank* actually apply (as interpreted by Jacobson J)
- wherever possible, the quantum of costs should be agreed at the time of settlement and not left 'for another day'. This is often difficult when a matter is settled on the steps of the Court, but should be encouraged.

AGS acted as solicitor for the respondent in this matter.

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