Calderbank offers and eHi Car Services: Time for a new vehicle to encourage settlement of Cayman litigation?

Most cases should not reach trial. Parties should usually, with the help of their legal teams, be able to resolve their dispute without the cost and court time associated with a trial being incurred. Public policy encourages the settlement of disputes out of court, whether by the use of alternative dispute resolution processes such as arbitration or mediation, or by resolution on mutually acceptable terms.

In the Cayman Islands, ‘without prejudice save as to costs’ settlement offers play an important role in encouraging the settlement of litigation. This type of offer, also known as a Calderbank offer after the 1975 English case in which the concept was established,[1] was subsequently enshrined in the Grand Court Rules[2]. However, as Lady Justice Butler-Sloss observed in Gojkovic v Gojkovic[3], “Calderbank offers require to have teeth in order for them to be effective”.

This article considers whether Calderbank offers are, in Cayman practice, an effective means of encouraging parties to resolve their disputes and posits that the time has come to introduce a more robust and predictable costs procedure to operate in tandem with Calderbank offers, such as that provided under Part 36 of the Civil Procedure Rules in England and Wales, to promote the settlement of disputes out of court in order to save court time and costs. This is timely in light of the anticipated increase in Grand Court litigation as a result of the ongoing pandemic and the economic destruction it has wrought.

What is a Calderbank offer and how do such offers encourage settlement?

A Calderbank offer is an offer of settlement made by one party to existing or contemplated litigation to another on a ‘without prejudice save as to costs’ basis.

Calderbank offers can be made by any party to the actual or threatened proceedings. The offer must clearly set out the proposed settlement terms, including the scope of the settlement, the amount of any settlement sum and the period within which the offer is open for acceptance. Such an offer can be made at any time prior to judgment and there is no limit to the number of offers a party may make.

The offer is made ‘without prejudice save as to costs’, meaning that the fact and terms of the offer cannot be brought to the attention of the Court (or other tribunal resolving the dispute) until the substantive dispute has been resolved and the Court is considering the issue of costs between the parties[4].

In Cayman, the ‘loser pays’ principle applies with respect to costs such that, as a general rule, the unsuccessful
party will be ordered to pay the costs of the successful party on what is known as the ‘standard basis’. However, this relates to those costs deemed to be reasonable and proportionate, with any doubt being resolved in favour of the paying party, which is determined in amount by the process of ‘taxation’ in the absence of agreement between the parties. In practice, this typically results in the recovery by the successful party of approximately 60-70% of its costs.

Under the Grand Court Rules, the Court may also order costs payable on the ‘indemnity basis’ if the Court is satisfied that a party conducted the proceedings in a manner which was “improper, unreasonable or negligent”.[5] An indemnity costs order typically results in the successful party recovering a significantly higher proportion of its costs, however in practice such orders are rare.[6]

If a Calderbank offer made by a party is not accepted by the other party, and the party which did not accept the offer ultimately does not do better than the offer at trial, it is in the discretion of the Court to order costs against that party payable from the date on which the offer should, in hindsight, have been accepted. Such costs will typically be sought payable on the indemnity basis. This is the case even if the party that did not accept the offer enjoyed some or even substantial success at trial. So if, for example, a defendant to a claim for damages of $10 million makes a Calderbank offer to pay $8 million to settle the claim and, following a trial, the Court awards damages of $6 million, the defendant would seek its costs of the proceedings from the date on which the Calderbank offer was not accepted, notwithstanding that the claim against it substantially succeeded. If such an order was granted, the defendant would benefit further by avoiding a costs liability to the (substantially successful) plaintiff from the date on which the Calderbank offer should have been accepted.

The Court has a broad discretion concerning costs and in the case of a Calderbank offer made by a defendant which should in hindsight have been accepted, the plaintiff may, for example, be ordered to pay the defendant’s costs (plus interest) on the standard basis. In the case of a plaintiff’s offer which the defendant failed to accept, the defendant may be ordered to pay the Plaintiff’s costs (plus interest) on the more favourable indemnity basis.

In this way, a Calderbank offer encourages settlement by ‘stick and carrot’: the ‘carrot’ is the potential for the party making the Calderbank offer to receive its costs, and the ‘stick’ is the threat of the recipient of the offer having to pay costs if it does not accept the offer. As Oliver LJ said in Cutts v Head[7]:

“As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him...”

Calderbank offers are frequently deployed strategically by parties to Cayman litigation to apply costs pressure to their opponents by heightening the risk of an adverse costs order, which may prove very expensive.

In the Matter of eHi Car Services Limited

Calderbank offers were addressed by the Grand Court in the recent costs judgment delivered by The Hon. Justice Kawaley in In the Matter of eHi Car Services Limited.[8]
By way of brief background, eHi Car Services Limited ("eHi") was a provider of car rental and chauffeur services in the PRC. In April 2019, eHi entered into a merger agreement such that its shares were cancelled in exchange for the right to receive a cash payment (the "Merger Consideration"). Those shareholders who did not accept the Merger Consideration exercised their right pursuant to section 238 of the Companies Law to dissent (the "Dissenters").

On 24 June 2019, eHi issued a petition pursuant to section 238 and in late 2019 certain Dissenters issued summonses seeking interim payments from eHi in respect of their shares. The Dissenters sought an interim payment of US$6.125 per share. eHi contended that any interim payment should be limited to US$2.52 or in the alternative US$3.31 per share. After full argument, the Court awarded an interim payment at US$4.00 per share.

On the question of costs, eHi brought to the attention of the Court that it had made a Calderbank offer of US$4.2875 per share to the Dissenters, which it increased to US$4.49375 and US$4.59375 per share in subsequent offers to certain Dissenters. These offers materially exceeded the US$4 awarded by the Court and eHi therefore sought costs against the Dissenters on the basis that they had failed to beat the Calderbank offers.

Kawaley J noted that it was common ground between the parties that the critical legal requirement for the Court to assess was whether or not it was reasonable for the Dissenters not to accept the offer. Kawaley J cited with approval the test formulated by Mummery LJ in Butcher v Wolfe and Wolfe[9] that the proper approach to assessing a Calderbank offer "is to ask whether the party to whom the offer was made 'ought reasonably to have accepted the proposal in the letter?'". Kawaley J said, under Cayman law:

"... the Court should generally adopt a simple approach which leans heavily towards making it unreasonable to refuse an offer which is not bettered at 'trial'. This approach should not ordinarily be complicated by an analysis of the legal arguments used to buttress a [without prejudice] offer, unless the commercial merits of the offer and the legal basis for it are inextricably intertwined"

On the facts of the case, Kawaley J found that two of the three Calderbank offers were reasonably refused, one because it was "only open for 14 days" and based on a "complicated point", and the other because eHi had changed its position in the proceedings, widening the distance between the parties to an extent which, in hindsight, made the offer appear more generous than it would have seemed at the time. The offer that was found to have been refused unreasonably attracted only an award of costs on the standard basis.

**Calderbank offers in Cayman: Theory vs Practice**

In theory, Calderbank offers create a credible threat and serve a useful purpose but this is not always the case in practice. At the heart of concerns regarding the effectiveness of Calderbank offers is the fact that Cayman courts and tribunals frequently do not order costs against a party which fails to beat the Calderbank offer which it did not accept.

The Grand Court is bound by the Rules to take a Calderbank offer into account when deciding costs,[10] however the Court retains a broad discretion with respect to costs in such cases. When determining whether to order costs following a Calderbank offer, the Court will consider factors such as the reasonableness of the rejection of
the offer, the certainty of the terms of the offer and the adequacy of the period of time for which the offer was open for acceptance.

The Grand Court aspires to "adopt a simple approach which leans heavily towards making it unreasonable to refuse an offer which is not bettered", however the practical application of this approach is not always evident in practice.

There are relatively few reported and unreported judgments in Cayman considering the effect of Calderbank offers but there does not appear to be any case in which the Grand Court or the Court of Appeal has ordered indemnity costs following the refusal of an offer that the refusing party failed to beat at trial.[11] Indeed, Calderbank offers are on occasion given only cursory attention. For example, in Primeo Fund v Bank of Bermuda Cayman Ltd & Anor,[12] the Court of Appeal dismissed an application for costs consequent upon a Calderbank offer, stating:

"... given the high arguability of Primeo’s case overall, it was reasonable for Primeo to reject the Respondents’ Calderbank offer and that this conduct too should not count against Primeo on the question of costs of the appeal".

There is a discernible pattern in the Cayman authorities against the award of adverse costs consequent upon the failure to accept a Calderbank offer which in hindsight should have been accepted because the rejecting party did not beat the offer at trial. Calderbank offers are dealt with superficially or deemed to have been rejected unreasonably on grounds including the strong arguability of the rejecting party’s case (even though that case ultimately failed), because the goalposts subsequently shifted as a result of change to the offeror’s case, because they were not sufficiently clear or because the offer was not kept open long enough (even in the absence of a request for additional time). As Gray J of the Federal Court of Australia lamented with regard to Calderbank offers, "[t]he area of law has become beset by technicality, much of which appears... to be unnecessary. [13]

There does therefore appear to be a disconnect between the simple and robust approach advocated in favour of the costs consequences of rejecting a Calderbank offer that is not subsequently improved upon, and the actual ordering of such costs. This has the undesirable effects of discouraging the making of Calderbank offers, emboldening recipients of offers who do wish to accept them and ultimately undermining the purpose of such offers: to promote the settlement of disputes without the need for a trial. In the language of Lady Butler-Sloss and Justice Gray respectively, Calderbank offers in Cayman lack ‘teeth’ and have become unnecessarily ‘beset by technicality’.

**Time for additional procedural tools to promote settlement?**

In England, the unpredictability and unreliability of Calderbank offers as a means by which to secure a costs order should your opponent not better the offer was addressed by the introduction of Part 36 of the Civil Procedure Rules, which provides a strict procedure for the making of settlement offers. If the strict procedure is complied with by the party making the offer, the Court is bound (save for a judicial discretion to prevent injustice) by the Rules to order costs against a party which ultimately fails to beat a Part 36 offer.
Part 36 provides that:

1. If a Plaintiff does not accept a Defendant’s offer and then fails to ‘beat’ it the Plaintiff will be ordered to pay the Defendant’s costs, potentially including pre-action costs, on the standard basis; and interest on those costs.

2. If a Defendant does not accept a Plaintiff’s offer and subsequently fails to ‘beat’ it, the Defendant will be ordered to pay interest on the whole or part of the sum awarded to the Plaintiff and the Plaintiff’s costs on the indemnity basis along with interest on those costs, and an additional amount which is calculated based on the value of the claim which is before the Court[14].

One of the important distinctions between Calderbank offers and Part 36 offers is that, unlike the broad judicial discretion applicable to the former, the costs consequences in relation to the latter shall be awarded "unless it would be unjust to do so". In practice, a party which does not accept a Part 36 offer which it then fails to beat almost invariably suffers the costs consequences of that decision. Such costs consequences can be significant with the effect any offer must be considered seriously before it is left unanswered or expressly rejected.

A further important distinction is that a Part 36 offer remains open for acceptance unless it is withdrawn. If a Part 36 offer is withdrawn then the costs consequences set out above no longer apply. This automatically addresses and resolves some of the issues arising from Calderbank offers, referred to above, such as the length of time a Calderbank offer is open for acceptance and whether changing contours of the litigation subsequently render a previously made offer more attractive.

No such procedure exists under the Cayman Grand Court Rules or Court of Appeal Rules. Accordingly, parties to English litigation wishing to make a ‘without prejudice save as to costs’ settlement offer can choose between making a Part 36 offer and a Calderbank offer whereas in Cayman only the latter is available. This deprives litigants of certainty and the Court of a proven method of settling cases. A Part 36 type regime would give ‘teeth’ to the making and consideration of settlement offers, and would afford greater predictability to litigants as to the consequences of the same.

An analysis of Cayman cases and practice concerning the costs consequences of Calderbank offers suggests the time is ripe to re-evaluate the costs rules in the jurisdiction, particularly at a time when the caseload of the Cayman Courts is anticipated to rise sharply, so as to promote the public policy of encouraging the settlement of disputes out of Court and to optimise the use of Court resources.

[3] [1992] 1 All ER 267, [31].
[4] This is different to a ‘without prejudice’ offer, which cannot be referred to or relied upon by either party, even on the issue of costs.
[6] An award of costs on the indemnity basis is more generous than the standard basis as the costs recovered do not have to be proportionate, the hourly rates fixed by Practice Direction 1 of 2011 do not apply; foreign lawyers’ fees may be recovered before they are admitted to the Cayman Islands’ bar and any doubt is resolved in favour of the receiving party.
[10] Unless, at the time the offer was made, the party making the offer could have protected its position by means of a payment into court: GCR O.22, r. 14(2).
[14] The ‘additional amount’ is calculated at 10% of the award of damages up to £500,000 and 5% above this sum, capped at £75,000 – CPR36.17(4)(d)(ii).