

HIGH COURT OF AUSTRALIA

GAGELER AND STEWARD JJ

Matter No S85/2022

JOHN JAMES DAVID HOOD

APPLICANT

AND

DOWN UNDER ENTERPRISES INTERNATIONAL
PTY LIMITED

RESPONDENT

Matter No S87/2022

JOHN JAMES DAVID HOOD

APPLICANT

AND

NEW DIRECTIONS AUSTRALIA PTY LIMITED

RESPONDENT

Hood v Down Under Enterprises International Pty Limited

Hood v New Directions Australia Pty Limited

[2023] HCA 12

20 April 2023

S85/2022 & S87/2022

ORDER

Matter No S85/2022

Application dismissed.

Matter No S87/2022

Application dismissed.

On appeal from the Federal Court of Australia

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hood v Down Under Enterprises International Pty Limited Hood v New Directions Australia Pty Limited

Practice and procedure – Costs – Offers of compromise – *Calderbank* letter – Application to amend orders – Where applications for special leave determined, and orders for costs made in favour of respondents – Whether applicant's failure to engage with respondents' *Calderbank* offer unreasonable – Whether *Calderbank* offer was open for acceptance when application for special leave instituted or before significant costs incurred – Whether orders should be amended such that applicant pay costs on indemnity basis.

Words and phrases – "amend", "*Calderbank* letter", "costs", "High Court scale of costs", "indemnity costs", "orders".

1 GAGELER AND STEWARD JJ. On 19 September 2022, this Court made orders dismissing the applicant's applications for special leave to appeal from a unanimous judgment of the Full Court of the Federal Court of Australia, relevantly with costs ("the Orders")¹. Following disagreement between the parties over particularisation of the costs, on 10 November 2022 the respondents' solicitors wrote to the applicant's solicitors, purportedly in accordance with the principles set out in *Calderbank v Calderbank*², demanding payment of a reduced amount of the costs the respondents were entitled to claim pursuant to the High Court scale of costs. Relying on the applicant's failure to respond to that letter, as well as a subsequent letter dated 1 December 2022, the respondents now seek to have the Court amend the Orders so that the applicant is required to pay those costs, and the costs of these applications, on an indemnity basis. The respondents say that the applicant, having failed to demonstrate any reasonable basis for refusing to engage with the so-called "Calderbank Letter", has acted so unreasonably as to justify that costs now be paid on an indemnity basis. In support of that proposition the respondents rely upon *Stewart v Atco Controls Pty Ltd (In liq) [No 2]*³ and *Whittle v Filaria Pty Ltd*⁴.

2 Neither authority supports an order for indemnity costs in the present case. In *Stewart v Atco Controls Pty Ltd (In liq) [No 2]*⁵, the Court held that the successful appellants should have an order for indemnity costs of the appeal to the Court of Appeal, but not of the appeal to this Court. As to the latter, the Court said there was no failure on the part of the respondent that could found an order for indemnity costs because *at the time of the appeal* there was no extant offer by the appellants for the respondent to accept⁶. That is, the failure to accept the offer was not unreasonable because the offer was not open for acceptance when the appeal was instituted or before significant costs had been incurred⁷.

1 *Hood v Down Under Enterprises International Pty Ltd* [2022] HCASL 162.

2 [1976] Fam 93.

3 (2014) 252 CLR 331.

4 [2004] ACTSC 131.

5 (2014) 252 CLR 331 at 335 [8] per Crennan, Kiefel, Bell, Gageler and Keane JJ.

6 (2014) 252 CLR 331 at 335 [7] per Crennan, Kiefel, Bell, Gageler and Keane JJ.

7 See, eg, *Brymount Pty Ltd v Cummins [No 2]* [2005] NSWCA 69 at [29]-[30] per Beazley JA (Ipp and McColl JJA agreeing); *Trustee for the Salvation Army (NSW) Property Trust v Becker [No 2]* [2007] NSWCA 194 at [8]-[9] per Ipp JA (Mason P

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The circumstances of the present applications are not dissimilar. The respondents' offer was plainly not open for acceptance by the applicant when the applications for special leave to appeal were instituted or on foot. As explained above, it was only made after the applications for special leave had been disposed of. An offer to compromise made in these circumstances cannot ground an order for indemnity costs. The respondents have not identified any cogent basis upon which this Court can act to amend the Orders. The respondents' applications to amend the Orders should be dismissed.

and McColl JA agreeing); *Monie v The Commonwealth [No 2]* [2008] NSWCA 15 at [71] per Campbell JA; *Bulsey v Queensland* [2016] QCA 158 at [80]-[81] per McMeekin J (Fraser JA and Atkinson J agreeing).

