DISPUTE SETTLEMENT AND COMPROMISE : THE NEED FOR AN UNCOMPROMISING STAND

Introduction

In a recent decision by the Patents Court of the Chancery Division, Laddie J in *Unilever plc v The Procter & Gamble Co*[1] drew our attention to a policy that is currently being implemented and rigorously pursued in England, i.e., a policy to ensure, as far as possible, for cases or disputes to be settled without the need for litigation. In this case, his Lordship said:

> Although the courts have always been prepared to encourage settlement of proceedings, in the past that encouragement was of a hands-off variety. The current climate is very different. It is no longer sufficient to hope that the parties have the sense to resolve their disputes without litigation. Now parties are to be penalised if they commence proceedings without first trying to resolve their differences. This policy pervades the new Civil Procedure Rules. For example, in exercising its power to award costs, the court is to have regard, amongst other things, to the conduct of the parties both before the commencement of the proceedings and during it (rr 44.3(4)(a) and 44.3(5)(a)). In particular the court must have regard to efforts, if any, made before the proceedings were commenced in order to try to resolve the dispute (r 44.5(3)) and encourages both the defendant and the claimant to make settlement offers before the litigation has commenced (r 36). Further, even where a pre-action protocol does

[1] [1999] 2 All ER 691.

not exist (ie in all cases other than personal injury and clinical negligence actions)—

> the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.' (Practice Direction, Protocols, para 4.)
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> Although the Civil Procedure Rules are not yet in force, they represent the current policy aimed at making litigation a last resort. It appears to me that the policy in favour of encouraging pre-litigation settlement is now much stronger than it has been.[2]

As was rightly noted in the above judgment, the policy to encourage settlement of proceedings is not new altogether and the mechanisms for the settlement of disputes within the traditional civil litigation system (as opposed to alternative dispute resolution) have always existed, be it in England or in the other commonwealth jurisdictions. Some of these mechanisms or procedures are codified in the rules whilst others are "purely convention-based rule". However, it is the way in which such a policy that is being pursued, at least in England, that merits consideration and re-examination. Should such a policy be equally pursued in Malaysia? Are the mechanisms for an early settlement of disputes that are available in Malaysia well placed to ensure the success of such a policy?

In this article, we will first examine some of the procedures in Malaysia and in other jurisdictions that encourage or allow parties to settle their disputes, both under the rules and outside the rules. Second, we will evaluate the effectiveness or otherwise of such procedures as a means of dispute settlement and third, what reform, if necessary, may be introduced so as to ensure that the overriding objective of encouraging parties to compromise and settle their disputes without the need for a trial can be achieved.

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[2] *Ibid* at pp. 699-700. This judgment was delivered before 26 April 1999, the date the Civil Procedure Rules came into force.

The Mechanisms For Dispute Settlement And Compromise

Under the rules of court, a payment into court and an offer of compromise are two of the procedures that may be invoked by parties in a dispute to force their opponents to compromise or settle the dispute. In Australia, the procedure for payment into court is not available in all jurisdictions. Such a procedure is still found in the Commonwealth,[3] the Australian Capital Territory,[4] Northern Territory,[5] South Australia[6] and Tasmania.[7] In the other jurisdictions, namely New South Wales, Queensland, Victoria and Western Australia, the procedure for payment into court has been replaced with offers of compromise.[8] In England, both the procedure for payment into court and an offer of compromise are now integrated and governed by Part 36 of the Civil Procedure Rules 1998 under the heading of "offers to settle and payments into court". In Malaysia, only the "old" procedure for payment into court exists and such a procedure continues to be governed by Order 22 of the Rules of the High Court 1980.[9] Other procedures within the rules of the court which facilitate early settlement of disputes include "notice by admission" and "tender before action". In Malaysia, these procedures are governed by Order 27 and Order 18 r 16 read with Order 22 of the Rules of the High Court 1980 respectively.[10]

Outside the rules of court, the modes of dispute settlement mechanism which may be utilised by parties to compromise and to arrive at

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[3](CHT) High Court Rules O 23 r 2.

[4](ACT) Supreme Court Rules O 26.

[5](NT) Supreme Court Rules r 26.12.

[6](SA) Supreme Court Rules r 39.

[7](TAS) Rules of the Supreme Court O 24.

[8]The procedure for payment into court has also been abolished in the Federal Court. In Queensland, under the new Uniform Civil Procedure Rules which came into force on 1 July 1999, the procedure is known as an 'Offer to Settle' under Chapter 9, Part 5.

[9]In the case of the subordinate courts, see O 17 of the Subordinate Courts Rules 1980.

[10]In the case of the subordinate courts, see O 22 and O 14 r 6 read with O 17 of the Subordinate Courts Rules 1980 respectively.

an amicable settlement of their disputes include the making of "without prejudice" and "without prejudice save as to costs" offers. The latter, which is also known as a *Calderbank* offer has been codified in a number of jurisdictions.[11]

There is no doubt that parties may also on their own accord reach a settlement without resorting to any of the above procedures. When the parties to a dispute decide to settle their differences or compromise, the terms of the settlement will then be reduced into a formal agreement which in itself is enforceable. If the parties so wish, they may, in addition or in lieu of any such agreement, agree to the entry of a judgment by consent. It should also be emphasized that no matter how confident a plaintiff or a defendant may be as to the outcome of a case, the risks and uncertainties associated with a trial can never be eliminated. Hence, the need to compromise or settle disputes becomes an attractive option.

Payment Into Court

A prudent defendant should invoke the procedure of payment into court and promptly make a payment into court if the defendant admits liability, i.e., admits to the claim being brought by the plaintiff. The benefit to be derived from the making of such a payment is to save on costs. If the defendant refuses to invoke such a procedure, the likely outcome would be that judgment would be entered for the plaintiff with costs. If the defendant makes a payment into court and the amount is taken out by the plaintiff, the matter "comes to and end" and neither party has to incur the additional costs which have not been incurred.[12] As stated by Devlin LJ in *A Martin French v Kingswood Hill Ltd*,[13] "a payment into court is simply an offer to dispose of the claim on terms". On the other hand, if a payment into court has been made by

[11]In England, such a procedure was added to the RSC 1965 in 1986 in the form of O 22 r 14. In Singapore, such a procedure was introduced pursuant to the Rules of the Supreme Court (Amendment No. 3) Rules 1991 in the form of O 22 r 13.

[12]When money paid into court is accepted, O 22 r 3(4) of the Rules of the High Court 1980 provides that "all further proceedings in the action ... shall be stayed".

[13][1960] 2 All ER 251 at p. 252. See also *Commonwealth v Edwards* (1975) 26 FLR 122 and *Hixon v Hixon and Fire and All Risks Insurance Co Ltd* [1988] 2 Qd R 553.

the defendant pursuant to the procedure as set out in the rules of court but the plaintiff refuses to accept the money and is only awarded a sum less than the amount paid into court, the plaintiff has thus been proven to be unreasonable in not accepting a reasonable sum which had been "offered" to her. In such a case, the plaintiff ought to be penalised as to costs.

As explained by Somervell LJ in *Findlay v Railway Executive*,[14] "the main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs".

The phrase "if he goes on" in the above judgment refers to the refusal by the plaintiff to accept the money paid in, and that was what happened in the above mentioned case. The facts in *Findlay v Railway Executive* were very straightforward. In an action for damages, brought by the plaintiff in respect of personal injuries which she had suffered in a railway accident, the defendants admitted liability and paid money into court. At the trial, the plaintiff recovered a less amount than had been paid in. The judge gave the plaintiff the costs, notwithstanding the payment into court of a sum in excess of the amount of damages awarded. He gave no reason for penalising the defendants in costs, considering that the matter was in his absolute discretion. The Court of Appeal overruled the decision by holding that a defendant who has paid money into court which exceeds the sum awarded to the plaintiff is a "successful party" within the meaning of the principle laid down by Viscount Cave LC in *Compbell (Donald) & Co v Pollak*[15] and is entitled to be paid his costs as from the date of payment in.

The rationale or justification for penalising the "successful" plaintiff becomes clear when one refers to the judgment of Lord Denning. At page 972, his Lordship said:

> In the present case I can well understand that the judge wanted to award the plaintiff her costs. A judge nowadays does not know what

[14] [1950] 2 All ER 969 at p. 971.

[15] [1927] AC 809 at p. 811.

> amount has been paid into court, and it is particularly galling for a judge, whose mind may have been fluctuating between £750 and £1,000, to find that because he chose the lower figure, the plaintiff not only gets merely that lower figure, but also has to pay much of it away in costs to the defendant. Knowing how close a thing it was in his own mind, he does not want a plaintiff to suffer because the payment into court happens to exceed the amount he awards. He would prefer not to take the payment into account, but the rules require him to do it.
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> The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs. It must not be assumed, however, that, in allowing the appeal, this court is laying down a rule of law as to how a judge should exercise his discretion. We have no right to do that. It only means that in the present case, where the judge invited reconsideration of his decision, we think that, having regard to the rules as to payment into court, the plaintiff should be ordered to pay the costs from the date of payment in.

It may thus be summed up that "the effect of a payment into court is to expose the plaintiff to a risk as to costs of proceeding with the action if the offer is not accepted and final judgment falls short of the amount paid in".[16] The fact that the plaintiff is now exposed to a risk as to costs finds support in the rules of court concerning costs.[17]

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[16] Butterworths, *Halsbury's Laws of Australia*, Vol. 36 (at 1 August 1999) 325 Practice and Procedure, "(b) Payment Into Court" [325-6745].

[17] See for example, O 59 r 5(b) of the Rules of the High Court 1980 which provides that "the Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account any payment of money into court and the amount of such payment".

Offer of Compromise

As in the case of payment into court, cost is also the key factor in the case of an offer to compromise. If a defendant has made an offer to compromise and such an offer is rejected by the plaintiff, this will depend on the outcome of the trial. If the plaintiff were to succeed on terms which are more favourable than those made in the offer, the offer to compromise is ignored. However, if the plaintiff, succeeds but on terms less favourable than the terms of the offer, the plaintiff will be penalised as to costs. Hence, an offer to compromise as in the case of payment into court, "is a lever by which the party making the offer (or payment) can exert pressure on the other side to settle".[18]

An offer of compromise as a formal court procedure originated in Canada. It was first introduced in British Columbia in 1980 and followed by Ontario in 1985.[19] In both jurisdictions, the procedure is called an "offer to settle". In Victoria, Australia, offer of compromise was introduced in 1987 in the form of Order 26. This new procedure replaced the procedure for payment into court under the former Order 22. However, the procedure for payment into court is not replaced in all jurisdictions. For example, in British Columbia and Singapore, both procedures continue to operate without one being replaced by the other. As alluded to earlier, in England, both the procedure for payment into court and an offer to compromise are now integrated and governed by Part 36 of the Civil Procedure Rules 1998 under the heading of "offers to settle and payments into court".

Notice By Admission

Under the rules of procedure, a party to a cause or matter may give notice, by his pleadings or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. For proceedings in the High Court in Malaysia, the relevant rule governing admissions is Order 27 of the Rules of the High Court 1980.[20] The

[18] Butterworths, *Williams, Civil Procedure Victoria* (as at 1 August 1999) [I 26.01.5].

[19] *Ibid* at [I 26.01.0].

[20] In the subordinate courts, the relevant rule is O 22 of the Subordinate Courts Rules 1980.

purpose behind such a rule is to save time and money. In the editorial introduction to Order 27, the editors of the *Supreme Court Practice 1999* at paragraph 27/0/2 explain the working of this rule in the following terms:

> In various ways, for the purpose of reducing costs and delay, the RSC encourage parties, where appropriate, to make admissions of fact and to concede claims (or parts of claims), and not to continue to contest the uncontestable throughout the pre-trial process.

Where admissions of fact or part of a case are made by a party to a cause or matter, "any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determining of any other question between the parties".[21] However, the jurisdiction of the court is discretionary. In the absence of reasons to the contrary, the order is made so as to save time and costs.[22]

What if an amount so admitted has also been paid into court? It was held in *Lancashire Welders Ltd v Harland and Wolff Ltd*[23] that such would not constitute a sufficient reason for the refusal of an order on the admission made. In that case, the English Court of Appeal was examining the effect of Order 32 r 6 of the old RSC, which is *in pari materia* with Order 27 r 3 of the Rules of the High Court 1980, and Cohen LJ said:

> Counsel for the defendants then contends that it would be unfair to deprive the defendants of the advantage of having paid the money into court. That, says counsel, would have enabled them to recover judgment if nothing further was found due beyond the amount which they had paid into court. That, again, I do not think is a factor of any real weight because, as Singleton LJ pointed out during the argument, if judgment is entered now for the admitted sum and at the trial of the action nothing is found to be due, the defendants will still recover the whole of the costs subsequent to to-day or to the date of the judgment which we should allow to be entered.[24]

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[21] O 27 r 3 of the Rules of the High Court 1980.

[22] *The Supreme Court Practice 1999*, (Sweet & Maxwell, 1998) at paragraph 27/3/7.

[23] [1950] 2 All ER 1096.

[24] *Ibid* at p. 1098.

Defence Of Tender

The defence of tender is yet another procedure whereby litigation may be avoided. As explained in *Halsbury's Laws of Australia*,[25] if the defendant tenders money to the plaintiff before proceedings are commenced but the tender is rejected, the defendant may raise the defence of tender before the action. In Malaysia, a defendant wishing to rely on such a defence is required by Order 18 r 16 of the Rules of the High Court 1980 to pay into court in accordance with Order 22 the amount alleged to have been tendered.

When money is paid into court in support of a plea of tender, the general rule which does not allow disclosure of such payment to the court does not apply.[26] The significance of such a defence and the difference of such a defence from the procedure of payment into court was explained by Wills J in the case of *Griffiths v School Board of Ystradyfodwg*.[27] His Lordship noted that:

> If the plea of tender is made out, the action ought never to have been brought, and the defendant is entitled to his costs, and in order to get them he is obliged to go to trial and have the issue tried which is raised by the plea of tender. That is a very different state of things from that which exist where the defendant pays money into court as an offer to buy peace, and pleads a denial of liability in case the plaintiff does take out the money in satisfaction of his claim as he is entitled to do, there is no issue remaining to be tried, and no reason why he should not proceed to tax his costs under O XXII r 7.

What the rule hopes to achieve is that once the defendant has made a tender, the plaintiff ought not to have commenced the action. As noted by Denman J in the same case, if the defendant has pleaded tender and paid the money into court after the plaintiff commenced the action, the plaintiff may still take out the money in satisfaction of his

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[25] Vol. 20 at paragraph [325-6715].

[26] See O 22 r 7 of the Rules of the High Court 1980.

[27] (1890) 24 QBD 307.

claim. However, the plaintiff will not be entitled to his costs. Likewise, if the money paid into court after the plea of tender has been made is not taken out and the plaintiff fails to recover more than the sum tendered, he is bound to pay the costs of the action.[28]

One should however note that such a defence has limited application. This defence may only be raised in answer to a liquidated claim. Hence, in *Davys v Richardson*,[29] the defence set up in answer to a claim for unliquidated damages was rejected by the court.

"Without Prejudice" Offer

Whilst the above procedures for payment into court, offer of compromise, notice by admission and defence of tender may be regarded as formal court procedures that allow or encourage parties to compromise or settle their differences, "without prejudice" offers may be regarded as a non-formal court procedure.

To fully understand and appreciate the nature and rationale of this rule, one must refer to the judgment of the House of Lords in *Rush & Tompkins Ltd v Greater London Council*.[30] In a judgment delivered by Lord Griffith, the House of Lords explained that the purpose of the "without prejudice rule" is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement".[31] At pages 739-740, his Lordship explained:

> The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] 1 All ER 597 at 605–606, [1984] Ch 290 at 306:
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> > That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry

[28] See also *Dixon v Clark* (1848) 5 CB 365; 136 ER 919.

[29] (1888) 21 QBD 202.

[30] [1988] 3 All ER 737.

[31] *Ibid* at p. 740.

> is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'
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> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.[32]

In that case, it was held by the House of Lords that the without prejudice correspondence entered into with the object of effecting the compromise of an action remained privileged regardless of whether a compromise had in fact been reached.

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[32] See also the pronouncement by the High Court of Australia on the policy behind the "without prejudice rule" in *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285 at p. 291.

The application of the without prejudice rule was held as not to be confined to admissions only, but rather applied to all bona fide without prejudice statements which touched upon the strengths or weaknesses of the parties' cases or which placed a valuation on a party's rights. In the *Unilever plc v The Procter & Gamble Co*[33] decision, Laddie J reasoned that to reach a conclusion to the contrary would undermine the public policy rationale for the rule, which was currently stronger than ever before, i.e., that parties should be encouraged to resolve disputes without litigation.

In that case, the defendant had brought proceedings in France against a third party for patent infringement. During the course of a subsequent without prejudice meeting with the plaintiff, the defendant allegedly stated that it would soon be taking similar action in the United Kingdom. The plaintiff contended that that statement constituted both an assertion that the sale and marketing of a certain product in the United Kingdom infringed the defendant's patent, and a threat to take proceedings in the United Kingdom in respect of the alleged infringement. On the basis of the alleged statement, the plaintiff commenced proceedings for a declaration that the sale or manufacture of the product would not infringe the defendant's patent. The defendant applied to have the proceedings struck out as an abuse of process, contending that the statement was protected from use in the proceedings by the without prejudice rule. The plaintiff contended that that rule applied only to admissions, and did not extend to an assertion of the type allegedly made by the defendant.

Based on the above facts and arguments, Laddie J made the following ruling:

> In any negotiation to avoid future proceedings, an early step will be for each party to lay its cards on the table. The rights-holder will say what rights he has and why he thinks they are being breached by the defendant. He will almost always say that he is prepared to protect and enforce his rights. In many cases those statements could be construed as a claim of right. Absent protection by the without prejudice rule, the addressee of these statements would be able to

[33]Above note 1.

commence declaratory proceedings. So the very negotiations designed to avoid litigation will become the triggering event for their commencement. I can hardly think of something more calculated to deter a rights-holder from entering into discussions for a compromise. Absent a claim of right and subject to limitation periods and laches, a prospective plaintiff is entitled to decide for himself when he will bring his action (*Barclays Bank plc v Homan* [1993] BCLC 680 at 693). If entering into without prejudice discussions with a possible infringer will give the infringer the right to commence proceedings for declaratory relief, there is no point in negotiating. The only safe course will be to sue first and negotiate second. The alternative would be for a rights-holder to enter into negotiations but not to disclose what rights he believes he has and not to indicate what, absent a settlement, he intends to do with them. Such deceptive negotiations might well undermine the validity of any settlement reached, again undermining the policy in favour of parties compromising their differences. Furthermore in most pre-emptive settlement negotiations the putative defendant will have to disclose what his commercial intentions are. If they include an intention to commence an activity which the rights-holder believes will infringe his rights, then the rights-holder might well be able to sue for quia timet relief assuming, of course, that Mr Hobbs is right that any such threat, not being an admission, falls outside the scope of the without prejudice rule. Once again, the discussions designed to head off litigation would in very many cases trigger the litigation. In my view this would undermine the public policy principle of the privilege.

It seems to me that the rule against the subsequent use of without prejudice discussions is wide enough to cover all statements made by each party touching upon the strength or weakness of its own and its opponent's case and any valuation, for whatever reason, it places on its or its opponent's rights. These are the issues which go to the heart of any attempt to compromise litigation. Parties should be free to discuss them without fear of their words coming back to haunt them in court proceedings. For these reasons, I have come to the conclusion that the without prejudice rule covers not only admissions but assertions also, that P & G's statement is covered by it and that *Muller's* case does not require me to hold otherwise.[34]

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[34] *Ibid* at p. 699.

Although the court tilts in favour of upholding the privilege against disclosure when "balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation", a fundamental difference between the procedures for payment into court and offer of compromise on the one hand compared with "without prejudice" offers on the other must be pointed out. This lies in the fact that in the case of the latter, the lever by which parties may be forced to compromise is absent. If a plaintiff were to choose not to accept the "without prejudice" offer and succeeds at the end of the trial but on such terms that are less favourable than those made in the offer, the plaintiff is not penalised as to costs as such an offer cannot be taken into account by the court in view of the rule against disclosure. Hence the usefulness of such a rule, in terms of trying to force a compromise, is lost.

"Without Prejudice Save As To Costs"

The "without prejudice rule" discussed above "binds" both parties. Not only is the offeree precluded from making a disclosure of the offer, the offeror is also barred from disclosing what may have been said by the offeree in reply to the offer. Once again, quoting Lord Griffith, "even as between the parties to without prejudice correspondence they are not entitled to discovery against one another".

As noted earlier, in the event that an offer "without prejudice" has been rejected and the offeree only succeeds in obtaining a judgment on such terms less favourable than the terms made in the offer, the offeror could still not show proof of the rejection of the offer when the court decides on the question of costs of the proceedings. This was held to be so in a case decided more than a century ago - *Walker v Wilsher*.[35] However, if the offer or correspondence though made without prejudice to the questions in the case but contains a statement which reserves the right of the offeror to refer to the offer on the question of costs, such an offer or correspondence could be considered. Such an offer, more commonly known as a *Calderbank* offer,

[35](1889) 23 QBD 335.

was first used in the case of *Calderbank v Calderbank*,[36] a family law case.

In explaining why the giving effect to a *Calderbank* type of offer is "more likely to fulfill than to frustrate the public policy of facilitating compromises", Fox LJ had this to say in *Cutts v Head*[37]:

> I will consider first the question of policy. *Walker v Wilsher*, there is no doubt, proceeds on a policy consideration, namely that the compromise of disputes should be facilitated. Now, an offer of compromise in the *Calderbank* form is not, so far as the substantive issues in the action are concerned, an inhibition on compromise. Down to judgment, the proposal for compromise cannot be referred to. The matter only arises on the question of costs after the issues have been decided. As to that, I am not convinced that the reservation as to costs would inhibit a reasonable compromise. If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.
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> Furthermore, the existing practice, both under the Rules of the Supreme Court and other procedures, are difficult to reconcile with the existence of any public policy objection to the *Calderbank* type of offer.
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> Thus, the procedure under the rules of court for payment into court in cases where a debt or damages are claimed is, in effect, a *Calderbank* procedure, since the fact of the payment into court cannot be referred to until the issue of liability has been determined. It then becomes material on the question of costs. Other examples are the 'sealed offer' in arbitration proceedings (see *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870) and in Lands Tribunal proceedings (referred to by Cairns LJ in *Calderbank v Calderbank* and also the Admiralty procedure in apportionment disputes in collision cases (also referred to by Cairns LJ in *Calderbank v Calderbank*). The sealed offer is not a new procedure: its seems

[36] [1975] 3 All ER 333.

[37] [1984] 1 All ER 597.

to date back to practice adopted in compulsory arbitrations under the Lands Clauses Acts.

In the circumstances, I do not think that we would be justified in rejecting *Calderbank* offers on grounds of public policy. In principle, they are more likely to fulfil than to frustrate the public policy of facilitating compromises. And we have no reason to suppose that, in the various jurisdictions to which I have referred where something akin to the *Calderbank* offer has been operated over a substantial period, the practice has been found to be in any way unsatisfactory or that any criticism of it has developed.

There remains, however, the problem of the effect which, on the authority of *Walker v Wilsher*, attaches to the words 'without prejudice'. That, as I have indicated, derives, in my view, from two sources: public policy and an implied agreement that the words are to have a particular effect. The question of public policy I have dealt with. As regards the conventional basis (ie agreement) that depends on what, by implication, is to be attributed to the words 'without prejudice'. It appears from what we are now told by counsel that the practice of making offers in the *Calderbank* form is by no means limited to the Family Division (where it was adopted after the decision in *Calderbank v Calderbank*) but is used in both the Queen's Bench and the Chancery Divisions to a considerable extent. Counsel for the plaintiff, as I understood him, found on inquiry that the practice in the Chancery Division was now more widespread than he had previously supposed. It seems also to be in use to some extent in the Court of Appeal where the dispute concerns the quantum of damages awarded in the court below. It is clear, therefore, that there has, over the years, developed a substantial body of practice adopting the *Calderbank* form or something very similar to it. It seems to me that, if the practice is valid, there is no reason for restricting it to the Family Division (though it was in relation to certain Family Division proceedings that Cairns LJ recommended it in *Calderbank v Calderbank*). Logically, it should then be of universal application, as was indeed the view of Sir Robert Megarry V-C in *Computer Machinery Co Ltd v Drescher* [1983] All ER 153, [1983] 1 WLR 1379.

In the end, I think that the question of what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which

> is immutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in *Walker v Wilsher* and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs.[38]

It thus becomes clear that a *Calderbank* offer is to all intents and purposes, akin to a payment into court or an offer of compromise as all these "offers" are made with the sole purpose of forcing a compromise. Although all these three types of procedure prevent the disclosure of such offers or payment to the court before the court has decided on the substantive questions in the case, such a fact may nevertheless be disclosed and be considered when the court considers the question of costs.

The remainder of the article will focus on the three procedures, i.e., payment into court, offer of compromise and "without prejudice save as to costs" offers. In particular, an examination of how effective each of these procedures have been in promoting dispute settlement by way of forcing a compromise will be made.

Alternative Methods?

Since all the three methods of dispute settlement, i.e., payment into court, offer of compromise and "without prejudice save as to costs" offers share the common feature of forcing a compromise and thus avoiding a trial, an important question that arises is, can a party to a dispute invoke any of the above procedures if such a party wishes to force her opponent to compromise and reach a settlement? The answer depends on a number of factors. First and foremost will be the jurisdiction in which the matter has arisen. If the matter is before the English court, the Civil Procedure Rules in Part 36 allows for the making of a payment into court *or* the making of an offer to settle. If the matter is before a court in Victoria, Australia, a payment into

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[38] *Ibid* at pp. 612-613.

court technically cannot be made as Order 22 has been replaced with Order 26 which makes provision for an offer of compromise.[39] If the matter is before a court in Malaysia, the normal procedure appears to be that of payment into court under Order 22.

The second factor would be the nature of the dispute, or more accurately, the type of claim or action that has been commenced. Here we see that the procedure for payment into court has very limited application. The procedure for payment into court can only be invoked in an action for debt or damages, i.e., in respect of money claims.[40] In Australia, such is also the case for proceedings in the High Court and in the Australian Capital Territory.[41] The phrase which limits the application of the procedure, i.e., "in any action for a debt or damages" is not found in the Supreme Court Rules applicable to the Northern Territory, South Australia and Tasmania. Despite the absence of such a phrase in these Rules, it is just not possible that the procedure for a payment into court be made applicable to actions for non-money claims and this has been confirmed in a number of decisions.[42] The reasons are obvious, as the payment into court must correspond to a money claim. Hence, the effectiveness of the procedure which allows for a payment into court is severely curtailed.

The third factor concerns the party wishing to force the compromise. Whilst a defendant may make a payment into court or serve an offer of compromise in every case and thus initiate the settlement

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[39] Unless the action was commenced before 1 January 1987.

[40] O 22 r 1(1) and O 17 r 1(1) of the Rules of the High Court 1980 and Subordinate Courts Rules 1980 respectively.

[41] (CTH) High Court Rules O 23 r 1(1) and (ACT) Supreme Court Rules O 26 rule 1(1).

[42] See for example, *Nichols v Evans* (1883) 22 Ch D 613. This was a case involving an action for an account. It was held by Fry J that payment into court did not avail the defendant, and the court's discretion as to costs was unaffected by the payment on the basis that if the plaintiff seeks an account, it is impossible to satisfy that demand by any specific payment of money. Likewise, payment into court was held to be not available in the case of a claim in detinue: *Alan v Dunn* 156 ER 1330. In *Directors of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 HKC 417, the Privy Council held that a claim for compensation for resumption of land was not an "action for debt or damages".

mechanism, a plaintiff does not have such an option. In the case of a payment into court, the plaintiff is unable to make a payment into court unless a counterclaim has been served on such a plaintiff. However, exceptions are created under the procedure for an offer of compromise. For example, in Victoria, Australia, a plaintiff is permitted to serve an offer in cases where the plaintiff makes a claim for damages for or arising out of death or bodily injury.[43]

However, the more searching question is can a party, no matter in which jurisdiction, resort to the "purely convention-based rule" of making a "without prejudice save as to costs" offer when the procedure for payment into court or an offer of compromise as provided for under the rules of court is available? Put simply, if a defendant in Malaysia is sued by a plaintiff for damages for negligence, will, should or could the court take into account the fact that an offer "without prejudice save as to costs" was made but unreasonably ignored or rejected by the plaintiff when considering the question of costs. Will the "without prejudice save as to costs" offer be disregarded on the ground that the defendant ought to have invoked the procedure for payment into court under Order 22 of the Rules of the High Court 1980? In *Thrimmalai & Anor v Mohamed Masry bin Tukimin,*[44] Shankar J (as he then was) expressed the view that "a genuine offer letter without admission of liability can be made to do the work of an actual payment into court". If we accept this view, a *Calderbank* offer can be made a substitute for a payment into court. However, not all the cases in the other jurisdictions that have dealt with this issue subscribe to the same view.

To review these cases, one may begin with the case of *Messiter v Hutchinson.*[45] In this case, a thorough examination of this issue was made by the Supreme Court of New South Wales. The plaintiff in this case sued the defendant on a policy of insurance in respect of a thoroughbred colt called "Le Cartier" and the only issue between the parties was as to the "actual value" of the horse at the time when it had to

[43](VIC) Rules of the Supreme Court R 36.02(2) and (1) respectively.

[44][1987] 1 MLJ 153.

[45](1987) 10 NSWLR 525.

be destroyed on 17 March 1985. The defendant made a "without prejudice save as to costs" offer to the plaintiff but the plaintiff failed to respond to such an offer.

When the plaintiff succeeded in the claim but was only awarded an amount less than what was offered by the defendant, Rogers J had to decide whether the offer should be taken into account by the court in determining whether to make a special costs order displacing the usual order that costs follow the event. It should be noted in this case that the defendant did not make a payment into Court when such a procedure existed under the rules of court. Nonetheless, the defendant submitted that a special order should be made, by reason of the without prejudice offer that was made on that date and the outcome of the case.

Rogers J reviewed the relevant authorities and concluded as follows:

> The offer made by the letter of 3 April is of a kind which in England has become known as a Calderbank letter, taking its name from the comments of Cairns LJ in *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 WLR 586; [1975] 3 All ER 333. In *Cutts v Head* [1984] Ch 290 the Court of Appeal held that a Calderbank letter may be relied on in proceedings in any division of the Court, not just in family disputes. However, Oliver LJ, who delivered the principal judgment, repeatedly said (at 301, 309, 310, 312) that the procedure may be adopted only where the facility of a payment into Court is not available. His Lordship concluded, in a passage which had the explicit concurrence of Fox LJ (at 317), that (at 312):
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> > "I would add only one word of caution. The qualification imposed on the without prejudice nature of the *Calderbank* letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a *Calderbank* offer as carrying the same consequences as payment in."

In the subsequent decision of the Court of Appeal in *Corby District Council v Holst and Co Ltd* [1985] 1 WLR 427; [1985] 1 All ER 321, where again the judgment of the Court was that of Oliver LJ, his Lordship said (at 433; 326):

> "... The costs of legal proceedings are by statute left to the discretion of the court, and that discretion is to be exercised in accordance with the rules. One of the matters which may be taken into account, and, indeed, ordinarily would be, is an open offer by the defendant of everything to which the plaintiff ultimately shows himself entitled. Whether, however, such an offer is to be treated for all purposes in the same way as a payment into court must itself be a matter on which the judge of trial will have to make up his own mind in the exercise of his discretion. So far as payment in is concerned, that is specifically dealt with in RSC Ord 62, r 5, which merely provides that such a payment shall to such extent, if any, as may be appropriate in the circumstances be taken into account. But whether what the judge has before him is an offer or a payment in, the effect of it is left to his discretion."

It is relevant to note that the Rule Committee in England has accepted the qualification laid down by Oliver LJ in *Cutts*. Although it has now, in O 22, r 14, sanctioned the use of written offers endorsed "without prejudice save as to costs" the proviso to sub r (2) excludes from consideration on the question of costs such letters from a party who could have made a payment into Court.

There are good reasons why, generally speaking, in order to get the benefit of an offer of payment, a defendant should be required to comply with the provisions of Pt 72. It is no longer necessary that the defendant should actually be out of pocket by paying into Court the requisite sum of money; the provision of security is sufficient. However, the rules rightly take the view that, all other things being equal, a plaintiff who is desirous of accepting an offer should not be left to look for the actual amount from a possibly impecunious defendant. The fundamental difference between a Calderbank letter and a payment into Court is that the latter is backed either by a deposit of money in the Court or the bond of an authorised person (see Pt 22, r 14). Counsel for the plaintiff in the present case submitted that, as a matter of principle, for the reasons which prompted Oliver LJ and the Rule Committee in England, the Court should not have regard to a Calderbank letter in circumstances where payment into court can be effected under the rules.

I do not think it appropriate that the exercise of discretion under s 76 should be fettered in the way suggested. As the Court of Appeal pointed out in *Cutts*, there are in accepted practice, for example in Admiralty disputes, methods of making offers other than payment into Court and the Calderbank letter. In addition in New South Wales the rules themselves recognise offers of contribution (cf Pt 6, r 11) as between tortfeasors. The public policy on which the judgments in *Cutts* rest argues against a hard and fast exclusion of the availability of this method for disposition of disputes by compromise. The purpose of a Calderbank letter is, after all, essentially the promotion of settlement of disputes. Although, historically, the Calderbank letter evolved in circumstances where the procedure of payment in, for one reason or another, was unavailable, there is to my mind no reason in principle why it must necessarily and invariably be so restricted. The discouragement to practitioners to the use of the Calderbank letter in instances where the procedure of payment in is available is that the consequences of payment in, prescribed by the rules will not automatically be available. As Ormrod LJ pointed out in *McDonnell v McDonnell* [1977] 1 WLR 34 at 38; [1977] 1 All ER 766 at 770:

> "... It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A *Calderbank* offer should influence but not govern the exercise of discretion."

In my view, at least as a matter of principle, a Calderbank letter should be permitted to be taken into account by the Court in determining whether a special order displacing that which generally obtains of costs following the event should be made. Particularly should this be the case in New South Wales where, as I have pointed out, the rules permit security from an authorised person instead of the deposit of money. Why should the bond from an insurance company authorised by Pt 22 necessarily carry any more weight than a Calderbank letter from BHP? In considering what weight should be given to an offer, the Court will no doubt pay regard to all relevant circumstances including the reason why no payment in was made, the security of payment available to the plaintiff and the time at which the Calderbank letter was received by the plaintiff.

> So long as adequate consideration is given to the matters I have mentioned, it seems to me there is no reason why the Court should not foster all means whereby parties may properly attempt to dispose of their disputes prior to actual hearing, either in Court or by a referee or arbitrator. So long as it may fairly be done, the Court should do nothing which would dissuade or discourage a party from making bona fide offers of settlement, no matter how late. Delay in making an offer may, of course, entail consequences in the precise order made but should not automatically demand a complete disregard of the offer of settlement.
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> I feel greatly comforted in the view that I have taken by what fell from Oliver LJ in *Cutts* (ibid at 306):
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> > "... 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 even if it is as much as or more than everything to which he is entitled in the action."[46]

Rogers J thus took a very pragmatic and flexible, as opposed to, a technical and strict approach in dealing with the issue before the court. What was regarded as of paramount importance was the underlying policy behind such an offer or payment, i.e., to encourage the settlement of disputes. Rogers J ought to be applauded for adopting such an approach as the signal would be sent out to all offerees that any such offer for settlement should be treated seriously and not be dismissed without any due consideration.

The above approach espoused by Rogers J was endorsed by the Federal Court in Australia in *Smallacombe and Others v Lockyer Investment Co Pty*[47] and *MGICA (1992) Ltd v Kenny & Good Pty Ltd and Another (No 4)*.[48]

If one intends to rely on the above authorities and make such a *Calderbank* offer instead of making a payment into court when such

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[46] *Ibid* at pp. 527-529.

[47] 114 ALR 568.

[48] 140 ALR 707.

a procedure is available, it should be emphasized that for such a *Calderbank* offer to be valid, Rogers J did spell out the requirements which must be observed and these requirements are necessary so as to safeguard the interests of the offerees. Two of the safeguards mentioned by Rogers J include (1) any likelihood of the plaintiff suffering detriment by accepting the *Calderbank* letter instead of actual payment into Court and (2) whether the plaintiff was given sufficient time for consideration of the defendant's offer or that in some other way the plaintiff was prejudiced and unable to deal with the offer of settlement within the time limited. In addition, Rogers J was very much influenced by the fact that in New South Wales, the rules permit security from an authorised person instead of the deposit of money. Not all jurisdictions permit security from an authorised person instead of the deposit of money and Malaysia is one such example.

It should also be noted that despite the above approach being taken by the Supreme Court of New South Wales and the Federal Court of Australia in the above cases, there are equally sufficient Australian authorities to show the reluctance on the part of the court to give effect to such an offer in the *Calderbank* form if a procedure for payment into court exists under the rules.

The first of such cases is *Biernacki v Klenka*,[49] a decision of the Supreme Court of the Australian Capital Territory. In delivering the judgment of the Supreme Court, Kelly J rightly pointed out that although there are differences between the procedures applicable in each court in respect of payment in, the general scheme of the rules of each court relating to payment in is much the same. His Lordship then examined the judgment of Rogers J in *Messiter v Hutchinson* as that case was relied on by the defendant in support of the argument that the plaintiff ought to pay the defendant's costs incurred after the written offer was made. Kelly J very clearly said that the conclusion that he had arrived at in that case should not be taken "as disagreeing with his (Rogers J's) view that the court should foster all proper means for the disposition of disputes before hearing". However, *Messiter v Hutchinson* was distinguished based on the following grounds:

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[49](1988) 80 ACTR 1.

> It seems to me that *Messiter v Hutchinson*, supra, is distinguishable. Rogers J was dealing with an offer which had to do with the subject-matter of the action. The question he had to consider related to a situation where he had to exercise the discretion of the court as to costs in much the same way as if a payment in had been made. It is unnecessary for me to form any concluded opinion as to whether, given the facts he was dealing with, I should approach the question of discretion in the way he did. But I am not to be taken as disagreeing with his view that the court should foster all proper means for the disposition of disputes before hearing.
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> On the other hand, I am considering a case where the taxing officer had, in my opinion, no discretion at all because O 65, r 58 does not provide for one. It seems to me clearly to override the taxing officer's discretionary powers under rr 43 and 53, providing as it does for specific disallowance. Such a provision demonstrates a clear intention that costs of taxation may, in such circumstances, be disallowed only in one way. It is this lack of discretion which differentiates the tender provided for in r 58 from an ordinary payment into court.
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> I do not think it would be just to vary the taxing officer's decision as to the disputed items on the basis of some supervisory discretion which would be exercised to vary a decision properly arrived at. Nor do I think that s 15 of the Act is applicable to this case. It seems to me to relate to the court's power to award costs on the determination of matters, but if it is applicable it is to be noted that s 15(2) is subject to the rules of court, including, of course, O 65, r 58.
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> Although the disputed costs were unnecessarily incurred, I see no injustice in the result. The defendant chose to use a novel procedure, not provided for by the rules. In doing so she took the chance that it might not be successful, choosing, one would think, deliberately not to use the simple specific procedure for which O 65, r 58 provides and which would have achieved the end she sought.[50]

Hence, by electing to use a "novel procedure", the defendant in *Biernacki v Klenka* failed to persuade the court to penalise the plaintiff as to costs unnecessarily incurred. However, the reason for arriving at

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[50] *Ibid* at pp. 7-8.

such a conclusion seems to have been the interpretation of whether the rules governing the taxation of costs allows for such a discretion to be exercised or not when the procedure as provided for in the rules is not invoked.

To avoid arriving at the conclusion as was reached in *Biernacki v Klenka*, a defendant should use the procedure of payment into court as provided for in the rules unless the rules concerning taxation of costs expressly recognises a *Calderbank* offer.

The effectiveness of a *Calderbank* offer is further affected by the following requirement. If a defendant were to make a without prejudice offer, such an offer will not be admitted for the purpose of determining costs if the defendant fails to disclose clearly an intention to use the offer on the question of costs. Such was the decision of the Supreme Court of New South Wales in *Amev Finance Ltd v Artes Studios Thoroughbreds Pty Ltd*.[51]

The Singapore Court of Appeal also made reference to this in *Shi Fang v Koh Pee Huat*.[52] This was a family law case concerning the division of assets. On the question of the admissibility of a "without prejudice" offer when determining the question of costs, LP Thean JA said:

> The judge also took into account a 'without prejudice' offer of $230,000, made to the wife in 1993, in settlement of all her claims, to which she did not respond. He also took into account a renewed offer of $150,000, on the *Calderbank* basis, made by the husband on 9 May 1995. Again, the learned judge said that she did not respond, even after it has been increased orally to $170,000. The judge was of the view that the wife had been labouring under the mistaken belief that she could get a great deal more money. In his view, the $230,000 offer was very close to what she got. He was sure the father would have been amenable to further negotiations and the offer could have been improved if she had gone back with a reasonable counter-offer. The sum of $230,000 in 1993 would have been almost as good as the $250,000 she got in 1995. Hence, the judge was of the view that no order for costs ought to be made.

[51](1988) 13 NSWLR 486.

> With respect, in our opinion, the learned judge ought not to have taken into account the husband's 'without prejudice' offer. *Walker v Wilsher* (1889) 23 QBD 335 established the principle that a 'without prejudice' offer is inadmissible on the question of costs. An exception is made, following *Calderbank v Calderbank* [1976] Fam 93 and *Cutts v Head* [1984] Ch 290 for *Calderbank* letters. However, the first offer by the husband in this case was not made in a *Calderbank* letter. In any event, it was superseded by the second offer, which was substantially below what was awarded.[53]

In *John S Hayes & Associates Pty Ltd v Kimberly Clark Australia Pty Ltd*,[54] the Federal Court of Australia also held that the mere writing of a "*Calderbank* letter" does not generate the same presumptive entitlement to indemnity costs that is provided for in Order 23 of the Federal Court Rules. Hence the court may still exercise its discretion against penalising the plaintiff.

However, in *Multicon Engineering Pty Ltd v Federal Airports Corp*,[55] the Supreme Court of New South Wales refused to adopt the line of approach taken in *Biernacki v Klenka* and *John S Hayes & Associates Pty Ltd v Kimberly Clark Australia Pty Ltd*. The preferred approach by Rolfe J is found at pages 451-452 of the judgment:

> In my opinion the proper approach to take to an offer of compromise, whether made under the Rules or pursuant to a Calderbank letter, is that there should be a prima facie presumption in the event of the offer not being accepted and in the event of the recipient of the offer not receiving a result more favourable than the offer, that the party rejecting the offer should pay the costs of the other party on an indemnity basis from the date of the making of the offer. I proceed on the basis that the unreasonableness was the failure by the offeree to accept the offer, which unreasonableness is demonstrated, prima facie, by the ultimate result. This approach is consistent with

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[52] [1996] 2 SLR 221.

[53] *Ibid* at p. 237.

[54] (1994) 52 FCR 201.

[55] (1996) 138 ALR 425.

the decisions to which I have referred, the policy evidenced by the Act and the Rules and the widely accepted philosophy that settlements should be encouraged. The relevant Rules provide that costs will be paid on the basis set out therein "unless the Court otherwise orders". My understanding is that the court is required to proceed on the basis that it should make the order provided for by the Rules, unless the party rejecting the offer is able to establish good reason for having done so.

It seems to me anomalous that there is no provision whereby a defendant, which is totally successful, is placed in the same position as a plaintiff, which is totally successful. In my view the Rules should be reviewed. The decisions of this court have overcome the anomaly by an application of similar reasoning in the event of an offer of compromise by way of a Calderbank letter. Cole J observed that by taking that step the defendant, which is ultimately successful, has done everything it can to extricate itself from expensive and extensive litigation, and it seems to me that if a defendant has done that and its prognostication of the case proves to be correct, in the relevant sense, it is totally unfair that it should be required to pay costs as if it had not acted in that way. In the circumstances the relevant unreasonableness of the recipient of the offer is the failure to accept what is established to be an appropriate offer. That is well illustrated in this case. FAC took, as it turned out, a very real commercial risk in making its offer on 17 March 1993. If that offer had been accepted MCE would have been immeasurably financially better off and, conversely, FAC would have been worse off.

That is the starting point from which I propose to proceed and, in my opinion, it is not only consistent with the thrust of the Act and Rules, the general philosophy behind the desirability of settlements and the decisions of this court, but it is also removes from the arena questions to be considered in relation to indemnity costs, which are really only relevant to a consideration of costs on that basis absent any offer of compromise. In saying what I have I acknowledge the force and accept the applicability of the principle that each case must be determined by an exercise of the judicial discretion having regard to the particular facts of each case. Thus the prima facie position having been established the court must be satisfied that an order for indemnity costs is not appropriate. As I have indicated, if that is not done there is a failure to exercise the judicial discretion.

> I would also observe that where a party wishes to have a difficult question of law resolved, perhaps because as an insurer it is one that affects it in its business on a regular basis, the other party, if minded to make an offer, should not be deprived of the benefit of that offer because, irrespective of the offer, the first mentioned party wishes to have a final determination of the matter of law. The offering party does not wish to be a party to a binding precedent. It wishes to resolve its dispute and be rid of expensive litigation. If the offeree insists on going ahead for its own particular reasons, whether they be those to which I have just referred or other reasons, in the face of an offer, which turns out to be a better offer than the judgment or order the offeree ultimately receives, no matter how important the point of law, I do not see why the offeree should not be paid its costs on an indemnity basis. This is reflected, from time to time, at an appellate level, by the grant of special leave or leave to appeal being conditional on the applicant's paying the respondent's costs in any event.
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> There is, in my opinion, a further reason for approaching the matter in this way. As was pointed out by Rogers CJ Comm D in *AWA*, and referred to by me in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (SC(NSW), Rolfe J, 23 May 1996, unreported), there is strong authority for the proposition that a case, even though it may appear to be weak, should not be struck out without a hearing on the merits. Accordingly, in my opinion, this provides a further reason why a party being sued should have the full benefit of an offer of compromise or the furnishing of an offer in a Calderbank letter.

In view of the differing views and approaches taken by the courts, one may conclude that the issue can only be resolved by way of intervention by the Rules Committee.

Beyond Encouraging - From Encouraging to Compelling

Where both parties are adamant and refuse to pursue the options of a settlement, the procedure for payment into court, offer of compromise and "without prejudice save as to costs" offer will be of little, if no effect, on the policy to encourage the settlement of proceedings. To ensure that the policy of encouraging the settlement of proceedings is successfully implemented in Malaysia, some of these strict measures must be adopted.

First, the scope of the procedure must be expanded. In this context, the inflexible procedure for payment into court which has proven to be limited in its application must be replaced or supplemented with other more flexible dispute settlement procedures such as offers of compromise or offers to settle.

Second, for a mechanism to promote settlement to be truly effective, the procedure should not only strive for a settlement of dispute after an action has been commenced, but instead strive for the avoidance of litigation altogether. Here, one should take cognisance of the new Civil Procedure Rules in England. In Part 36, R 36.10 expressly provides that the court is required to take into account any offer to settle made *before* the commencement of proceedings when making any order as to costs.

Third, an offer in the form of a *Calderbank* letter should now be codified and given proper recognition under our rules of court. In addition to the mere codification of such as offer, as was the case under the English RSC in the form of Order 22 r 14 in 1986, the rules should also remove the weaknesses and doubts that have existed concerning this mechanism as a procedure to force a compromise. For example, the rules should state that such an offer may be used even if the procedure for payment into court or to serve an offer of compromise were to be available.

Fourth, Order 59 of the Rules of the High Court 1980 should confer powers on the courts to penalise parties that have failed to make any attempts or efforts to compromise. Parties found to have rejected genuine and reasonable offers for a settlement and the modes for settlement should be severely penalised. The modes for settlement should not be limited to just the procedures that are available under the rules of court. The basis of taxation on which a party is to be penalised should be stated clearly. Over and above that the court should be allowed to impose other forms of penalties on parties who have been found to be unco-operative.

Finally, we must take heed of the overriding objective of the new Civil Procedure Rules in England as was alluded to by Laddie J in the opening paragraph of this article. Within less than three months of the coming into force of the Civil Procedure Rules in England, Queensland, Australia also introduced a new set of Civil Procedure Rules. In Chapter 1 Part 5 of the Uniform Civil Procedure Rules, the philosophy

and the overriding obligations of the parties and the court are expressly set out. Part 5(1) states the purpose of the rules as that of facilitating the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. Part 5(2) requires the rules "to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules" whilst Part 5(3) provides that "in a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way. Where a party is in breach of this implied undertaking, the court is empowered to dismiss the proceeding or impose a sanction as to costs. The coming into force of these Rules in these jurisdictions is a reflection of the philosophy that early settlement of disputes should be encouraged.

Conclusion

What is the position in Malaysia? Despite the current scheme of dispute settlement procedures, happily, one does find evidence of efforts being made on the part of our courts to encourage the settlement of proceedings. One such case is *Thrimmalai & Anor v Mohamed Masry bin Tukimin*.[56] Presumably, this is only one of many cases where judges take an active role in promoting dispute settlement. In this case, the plaintiff sued the defendant for damages as a result of a road accident. As noted by Shankar J (as he then was), the disparity in what the plaintiff was asking and what the defendant was prepared to offer was so wide that there was no option but for the case, in the words of his Lordship, "to go the whole hog". Be that as it may, his Lordship said that he did at the commencement of the trial, in an effort to see "if the gap could be bridged", asked counsel for both parties what their respective estimates were for general damages. His Lordship's effort was to no avail.

When the High Court had to consider the question of costs after having found the defendant liable and having quantified the amount of damages, Shankar J made the following observation:

[56] Above note 44.

> Maintaining credibility must be a matter of mutual concern both for the law and lawyers alike. The problems generated in this respect by permitting plaintiffs to persist in exaggerated notions of the value of their claims must be self-evident. One way of putting matters back into proper perspective is to take cognizance of the cases of *Calderbank v Calderbank* [1975] 1 All ER 333; *Cutts v Head & Anor* [1984] 1 All ER 597; and generally Supreme Court Practice (1985) - 22/1/6, 62/2/11 and 62/2/86. A genuine offer letter without admission of liability can be made to do the work of an actual payment into court.
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> But there are extenuating circumstances here. This case was plaintiffs' counsel's maiden voyage into the sea of litigation and the client has been brought safely home to port. Liability not being in issue, it was open to the defendant to take the usual precautionary measures to save costs. Since this has not been done, I order that the costs of this action be taxed and paid by the defendant to the plaintiffs.[57]

From the above ruling of Shankar J, three points may be made. The first is that the defendant in having not invoked a procedure such as the making of a *Calderbank* offer or a payment into court had failed to use a lever by which the defendant could have exerted pressure on the plaintiff to settle the claim. As a result, the plaintiff who persisted with the inflated claim was left off the hook on the question of costs.

The second point was alluded to earlier, i.e., that in the High Court's view, a *Calderbank* offer may be used as a substitute for a payment into court.

The third point is that although the trial judge made every effort to find a way for an amicable settlement, there was nothing much that the court could do. This was because the mechanism for dispute settlement leaves the matter for settlement entirely in the hands of the parties.

In order to ensure that parties compromise, the rules committee and the court ought to take an uncompromising stand. The time has come, if not long overdue, for us to, at least, introduce some, if not all of the changes that we see that have taken place in the other ju-

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[57] *Ibid* at p. 156.

risdictions. Novel and radical procedures must be explored and introduced to ensure that civil proceedings are resolved at a minimum of expense and in an expeditious way.

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MALAYSIAN ADMINISTRATIVE LAW : A REVIEW OF THE POST-*UEM* DEVELOPMENTS

I. INTRODUCTION

An attempt is made in this article to review the Malaysian Administrative Law with particular emphasis on the case law developments and their implications in the post-*UEM*[1] era.

II. The Position In The Pre-*UEM* Era

Before we begin with the subject matter proper, an overview of the position prior to the period under study is necessary because we cannot look at the present without knowing the past. First, it needs to be pointed out that Administrative Law is mainly judge-made law. Case law develops on a case-by-case basis and the pace of progress may be slow.[2] A more pertinent matter to bear in mind is that the development of our public law has always been determined and moulded by our perception of the basic principles of law that govern our system. Until very recently, there was not much realisation on our part that the Constitution is our supreme law and as such, no other law can override it. Due to this problem, ever since *Karam Singh*,[3] our courts have consistently and inadvertently rejected arguments seeking to defend,

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[1] *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

[2] Reference to the case law of another jurisdiction having laws *in pari materia* with ours is inevitable in view of the paucity in our case law.

[3] *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129.