Applying for Costs: How to get your Calderbank in the Bank

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Introduction

Following recent changes, the new section of the Family Law Act (Cth) 1975 that we now refer to for costs, is not just s 117, but now actually more importantly section 114UB. This took effect from 10 June 2025. Subsection (1) of s114UB reiterates the longstanding general rule in Family Law that each party to proceedings is to bear their own costs. However, subsection (2) says that if the court is of the opinion there are circumstances that justify it, the court may make a costs order that it "considers just", at any stage of the proceedings. To establish *justifying circumstances*, it is not necessary that a party establish extraordinary or exceptional circumstances. There merely needs to be the existence of circumstances which justify an order in favour of the party seeking costs.

In addition to s114UB and things such as the mandatory letters of offer to be exchanged between parties within 28 days of Mediation, there is the long standing use of Calderbank offers (2025 is in fact the 50 year anniversary of the original *Calderbank* case) and that is the particular focus of this paper. There are significant Public Policy reasons for Calderbank and other offers of compromise regarding the property side of a Family Law case. Firstly, a well-crafted Calderbank offer requires the solicitor to be well versed and on top of the matter and this is just simple good practice. Secondly, a Calderbank promotes the prospects of early settlement of the matter which is beneficial financially and psychologically to the client (and the children). Thirdly, early resolution of matters reduces the burden on the Family Law court system and the public purse. Finally, in my view, costs orders and the threat of a costs order that a well-crafted Calderbank raises, encourages us as practitioners to be realistic with the case, and the client.

In my view, a Calderbank should be pitched at the middle to lower end of the range of the expected outcome. To seek your client's best possible outcome in a Calderbank offer will most likely make the exercise a waste of energy.

One optimal time for a Calderbank offer is to make it part of the requirement under Rule 4.11 of The FCFCoA Rules, which is to make a *genuine offer* with 28 days of mediation or conciliation conference. Rule 4.11, introduced in 2021, stipulates that "the offer to settle must include a statement that it is made under Division 4.2.1 of the Rules". I would suggest that this mandatory offer should be made as a Calderbank. The benefit of being a

Calderbank offer is, greater chances of recovering a significant portion of your client's costs, because it enlivens 50 years of caselaw to assist your costs application.

In considering what costs order should be made the court *must* have regard to the following contained in **s114UB(3)** of the Act**:**

(a) the financial circumstances of each party to the proceedings;

The court would obviously take a look at the Financial Statements of each party to consider this question and so, as always, it's advisable to have an up to date Financial Statement. The chances of getting a significant costs order in a matter that concerns a pool that is less than $500,000 will likely be approached with caution by a court.

However, note the case of *Cross & Beaumont* [2008] FamCAFC where the Full Court re-exercised the discretion regarding costs and made no order for costs against either party reversing the costs order against the husband at/after trial. Significantly, in the course of so doing they stated the principle "*We do not suggest that the apparent inability of a party to pay costs is a bar to an order being made, since there are cases where the conduct of an impecunious party will warrant costs being ordered without regard to the difficulties likely to be associated with enforcement*.". There are other cases that also stand for the principle that impecuniosity is not a bar to the making of a costs order such as the Full Court decision of *Nada & Nettle (Costs)* [2014] FamCAFC 207.

(b) whether any party to the proceedings is receiving assistance by way of legal aid in respect of the proceedings and, if so, the terms of the grant of the assistance to that party;

As you could expect, it will always be difficult to get a costs order against a party that is legally aided.

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting paragraphs (a) and (b), the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters, and in relation to their duty of disclosure under subsection 71B(1), 90RI(1) or 90YJA(1);

This is or will be obviously a commonly relied on subsection when seeking costs. Note that the subsection provides examples of "(mis)conduct" that could lead to a costs order such as significantly faulty court documents and failure to produce a significant discoverable document.

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

The significant wording in this subsection in my mind is "*whether the proceedings were necessitated*.". That being an Application in a Proceeding has been "necessitated" and there were no other options but for a party to seek relief from the court to get compliance or enforcement of "*previous orders of the court*". I can see this subsection being often used in Enforcement Applications and the like.

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

Whilst in Commercial law proceedings costs often flow in favour of a party who achieves what they set out to obtain in their Application, Family Law courts at first instance do not take this approach. The significance here is obviously "wholly unsuccessful". The difficulty with this subsection is that it requires "wholly" not partially unsuccessful.

Appeals are different in that an appellant that has been wholly unsuccessful in their appeal will ordinarily be required to pay the respondent's costs: *Medlow & Medlow (No 2)* [2016] FamCAFC 63.

Subsection s114UB(e) needs to be read in conjunction with s114UB(7) and there appears to be some conflict or overlap in these two parts of the Act. **s114UB(7) states**:

> *Subject to subsection (3), the court may make a costs order in favour of, or against, a party to the proceedings regardless of the degree to which the party has been successful in the proceedings.*

This subsection is interesting because it highlights that "… *regardless of the degree to which the party has been successful…* " the court may make a costs order. Because of the lower bar in section 114UB(7) I would see this being relied on much more commonly than subsection 114UB(e).

(f) whether a party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer;

This is the subsection that I would submit has the most potential to achieve a significant costs order in favour of your client. An early, well constructed and well-pitched written offer could secure your client a costs order of several ten of thousands of dollars, if not well in excess of $100,000 if there has been a considerable expenditure of costs, subsequent to a "successful" letter of offer. The amount of costs that could be ultimately secured through a Calderbank offer could be of a size that is not dissimilar to the area of dispute in a trial.

(g) such other matters as the court considers relevant.

This is obviously just the catch-all subsection that provides the court with a wide discretion.

None of the s114UB(3) considerations have Priority or Precedence

In considering whether it is appropriate and just to make an order for costs in favour of a party, it is unnecessary for the Court to be satisfied in respect to each and every factor set out in section 114UB; *Fitzgerald v Fish* [2005] FamCA 158. Nor does any factor set out in that section have priority over another: *Medlon & Medlon (No 6) (Indemnity Costs)* [2015] FamCAFC 157.

28 day deadline to make a Costs Application

Remember that subsection (4) of section 114UB requires that the deadline for any application for costs is 28 days from final order in the proceedings.

The Evolution of Calderbank Offers

Now I would like to retrace the history of Calderbanks for a mixture of reasons. Firstly, it is always good to go to the source of principles because they are often stated with powerful clarity. The other reason is because s114UB has only been in force for around three months and there is very little caselaw as yet.

Calderbank v Calderbank [1976] Fam 93, [1975] 3 All ER 333

Going back to the beginning of it all, it may surprise you that the original *Calderbank* case was a 1975 Family Law case in the United Kingdom. It concerned the division of a GBP 78,000 matrimonial pool after 17 years of marriage. Mrs Calderbank had inherited GBP 80,000 during the course of the marriage which was very close to the marital pool available for division at trial. Mr Calderbank was awarded at first instance GBP 10,000 plus costs (because he was awarded GBP 10,000). On appeal the husband was awarded the same GBP 10,000 but the costs order was reversed and the wife got costs against the husband because he had rejected her letter of offer of him retaining "the house at Alderley Edge" with a then value of GBP 12,000. Thereafter the Calderbank principle was born and later spread from the U.K. Family Law jurisdiction to all corners of the Common Law world.

Cutts v Head [1984] 1 Ch 290

Mr Cutts sought injunctions and damages against Albert and George Head to allow him to continue fish from part of a river in Hampshire England. The Heads counterclaimed and sought declarations for Mr Cutts to not be able to access that section of river and for damages for trespass and nuisance. The plaintiff was successful receiving 2,500 pounds in

damages and half of his costs. The significance of *Cutts v Head* was that the decision of the English Court of Appeal set the precedent of *Calderbank* offers not just for Family Law cases but for all manner of cases in the United Kingdom. It is interesting that Mr Cutts desire to fish a particular stretch of river has led to thousands of solicitors all over the world referring to that case in countless legal letters and documents…

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) [2005] VSCA 298 (13 December 2005)

This significant case concerned the injury of Ms Wallace whilst working as a chicken catcher at Hazeldene's Chicken Farm. She was hit by a forklift in a large poultry shed. The trial judge apportioned the responsibility 55% to Hazeldene Chickens, 30% to Ms Wallace herself and 15% to the labour hire company that procured Ms Wallace to Hazeldene. The significance of the case obviously comes from the Offers of Compromise with reference to the then *Supreme Court (General Civil Procedure) Rules* 1996. Prior to Hazeldene there was a difference between the rules governing trial offers and appeal offers but that decision abolished the distinction. What this decision by the Victorian Court of Appeal also did was to reject the presumption that indemnity costs being a matter of course when a result at trial or appeal result is similar or better than the Calderbank offer. The full bench said:

> "The correct approach, in our view, is to treat the rejection of a Calderbank offer as a matter to which the Court should have regard when considering whether to order indemnity costs. As Gyles, J.A. stated in *SMEC Testing Services Pty Ltd v Campbelltown City Council*27 - "In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rules as to costs…".

Their honours went on to say that "The critical question is whether the rejection of the offer was unreasonable in the circumstances." And went to say that "It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters stated in *Hazeldene*:

a) the stage of the proceeding at which the offer was received;
b) the time allowed to the offeree to consider the offer;
c) the extent of the compromise offered;
d) the offeree's prospects of success, assessed as at the date of the offer;
e) the clarity with which the terms of the offer were expressed;
f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

The Court of Appeal granted the respondent to the Appeal (WorkCover) indemnity costs because it considered the appellant's (Hazeldene's) rejection of the respondent's Calderbank offer was unreasonable and therefore entitled the respondent to indemnity costs. The Court of Appeal was also critical of Hazeldene pursuing the appeal because an appeal court will only intervene in a trial judge's decision on apportionment in an exceptional case and the case was clearly not exceptional.

What does a Calderbank Offer need to Contain?

In light of *Hazeldene*, there are several things that I would recommend a Family Law Calderbank Offer should contain to secure a costs order:

1. The well used heading "Without Prejudice Save as to Costs";
2. An asset and liability table with as many of the significant assets and liabilities as possible and the most accurate value of each asset and liability that can be obtained at that stage. Note that just because a former matrimonial home for example may appreciate or depreciate in value over the course of proceedings this will not in itself cause a letter of offer to be nugatory;
3. Correct and complete citation of the seminal case Calderbank cases:
    - *Calderbank v Calderbank* [1975] 3 All ER 33;
    - *Cutts v Head* [1984] 1 Ch 290
    - *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* (No 2) [2005] VSCA 298
4. The exact period for which the offer is open, recommending the standard minimum of 14 days;
5. Correct calculation of the offer in both percentage and monetary terms of the overall pool. Having a clear percentage split could also assist greatly where the value of an asset is not yet clear, or may change over time;
6. The offer contains the offer in both non-super and super components;
7. The offer stipulates what will occur with the liabilities and which party or parties will bear the liabilities;
8. The issue of costs must also be addressed, which would normally be a statement that each party bear their costs to date, unless perhaps there are extant costs orders. Note when receiving an offer or Calderbank that Rule 12.05 requires you to inform your client of the up to date costs and the estimate future costs to finalise proceedings (in effect a verbal or written Costs Notice).

9. If there is a parenting offer and a financial offer, that each offer is very clearly mutually exclusive. You don't want your property offer to fail because it is tied to the outcome of parenting proceedings.
10. The offer has taken in to account tax considerations (CGT can often be overlooked);
11. The financial offer is clear and can easily be compared with the result from trial.

What a Calderbank Offer does not need to Contain

A Calderbank offer does not need to contain advocacy. It does not need to have argument put forward to convince the other side.

No limit on the number of Calderbanks

You can make several Calderbanks over the course of proceedings, when new information comes to light for example.

***Paladin Projects Pty Ltd v Visie Three Pty Ltd* (No 2) [2024] QSC 244**

Offer open for just 6 days

Whilst not in the Family Law jurisdiction, a recent Queensland Supreme Court case *Paladin Projects Pty Ltd v Visie Three Pty Ltd* (No 2) [2024] QSC 244 which concerned a large scale property development, held that the (first) respondent was entitled to costs even though the Calderbank offer was left open for just six days! The reasoning for this was there had been a default under the Building Industry Fairness Act 2017 which has very tight and standard deadlines. The Calderbank Offer was made on 12 June 2024 being six business days after the First Respondent had received the Applicant's outline of submissions and seven days prior to the hearing of the proceeding. Further, the Calderbank Offer was made less than one month after the proceeding was commenced on 16 May 2024.

Whilst I would recommend sticking to the standard 14 days of an offer being open, there may be circumstances where a shorter timeframe could be considered reasonable. There could be circumstances, such as the settlement of the sale of a matrimonial property ordered to be sold, that a party is refusing to sign or similar which could give rise to an urgent application and a Calderbank offer that is less than 14 days.

Scale Costs vs Indemnity Costs

The award of costs at Scale (party-party costs) are by and large the norm in Family Law. Firstly, an applicant for indemnity costs carries the onus of establishing that the case falls within the "exceptional" category of cases, where such an order is justified: *Kohan & Kohan* [1992] FamCA 116; *D & D (Costs) (No)* (2010) FLC 93, and *Phillips & Hansford* [2020] FamCA 28.

Misconduct that causes a loss of time to the court and the other parties falls within the category of exceptional circumstances, where an order for indemnity costs may be justified: *Moy & Pao* [2022]FedCFamC1A 17 at [32]referring to *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.

Conditions that could lead to a potential award of Indemnity Costs are:

- Flagrant and/or repeated disregard for court orders;
- Wilful failure to disclose a material fact, asset or significantly relevant piece of information that has caused the court or other parties to incur significant unnecessary costs;
- Knowing abuse of process, assertion of knowing false facts,

Just for clarity's sake, there is a third category of costs being Solicitor-client costs which are the total amount a solicitor bills their client just for legal services, whilst Indemnity costs also cover all disbursements which could be expert/valuation reports, filing and service fees, interpreter fees, etc.

Unrepresented Litigant

In considering whether to make such an order, as a general rule the Court is reluctant to order indemnity costs against an unrepresented litigant: *Kristiansen & Kristiansen* [2025] FedCFamC1A 129.

Costs Ordered to be paid in a Fixed Sum

Rule 12.17(1)(a) of the FCFCoA Rules permits the Court to order costs in a specific amount. The power to do so is to "avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation": *Graham & Squibb [2019] FamCAFC 33* at [92] quoted the reasoning in *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 199 at 120.

In *Braithwaite* v Braithwaite [2007] FamCA 468 the Full Court of the Family Court accepted that in an appropriate case, a judicial officer should make an order in a sum certain, rather than put the parties to the expense and stress of further proceedings to assess costs.

The reasoning for this is also stated in *Warbick and Warbick* (No 2) [2021] FamCA 101 where the Full Court dealt with circumstances where party/ party costs were not properly quantified, as was the case before the primary judge. At [13] the Full Court said: "*We do not intend to permit the costs question to become, in effect satellite litigation. It is appropriate that the wife's costs are fixed and this issue is brought to a close*.".

Significant Family Law Cases concerning Principles on Costs

Higginbotham & Robinson **[1991] FamCA 4 (*"Higginbotham"*)**

This in authority for the proposition that the fact that an offer just exceeds the award is no bar to an award for costs. In *Higginbotham,* the wife made an offer to settle in terms that were almost identical to the orders made following the 5 day trial. The only difference between the offer (of a $500,000 payout) and the trial orders was that the husband retained a four-horse goose neck trailer. This enlivens the adage that one shouldn't put the cart before the house [sic]. The trial judge refused to award costs on the basis that the orders, which the wife had originally sought, were outside the range. The wife appealed successfully.

On Appeal the Full Court considered the old section 117 (2A)(f) [which is the equivalent of the new s114UB(3)(f)]:

> *whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer;*

and held

> "*when one looks at paragraph (f) it is quite clear that the purpose of that provision is to ensure that offers to settle, if made seriously, are considered seriously, to ensure that the cost of litigation is avoided, the workload of this Court is lightened, and one other consideration is certainly that a party with greater wealth is not placed in a position whereby he or she can wear out the other by simple attrition. In the circumstances of this case, although paragraph (f) does not have a priority per se, the considerations represented by paragraph (f) are of overriding importance. It is, therefore, my view that her Honour erred in not awarding the wife reasonable costs incurred after the date on which the offer was made*…".

This authority will assist when the written offer is "almost identical" to the final outcome of the case. I would also add that just because an offer is marginally less than the amount ordered by a Court does not mean that it is not a factor to be taken into account in determining whether costs should be awarded. In essence if an offer is materially similar to the outcome after trial, there should be reasonable prospects to achieve a costs order.

Harris & Harris **[1991] 15 Fam LR 26 (*"Harris"*)**

In *Harris,* the wife made an offer to settle by way of consent orders, the proposed minutes of which she filed. The husband rejected these proposed orders, and **the trial judge held that the filed minutes constituted an offer to settle**. The trial judge made an order for costs

against the husband. One of the husband's grounds of appeal concerned the costs order. The Full Court said:

Under s 117(2A)(f), one of the matters to which the court shall have regard is "whether either party to the proceedings has, in accordance with section 117C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer..." **His Honour considered that the minutes constituted an offer to settle "otherwise" than in accordance with s 117C, and that, for that reason, an order for the costs incurred by the wife since the filing of the minutes was appropriate.**

We do not wish to be taken as endorsing the view that where a party recovers that which he or she seeks by way of property settlement in an application or in any other documents such as, for instance, the minute in question here, an order for costs should follow as a matter of course. However, we are also of opinion that in the circumstances of this case the trial judge was within the limits of the proper exercise of his discretion. **Orders for costs are peculiarly a matter which are within the discretion of the trial judge and it is only in the rarest of cases that the Full Court should interfere with a costs order.**

Also of interest in *Harris* is the question of how clear an offer needs to be. The trial judge was of the opinion that if the recipient of an offer cannot objectively have a clear understanding of the terms of the offer then there is an onus on the recipient "to seek to clarify the ambiguity rather than sit back…". However the Full Court in *Harris* was of the opposite view and said:

> *"However, our major disagreement with his Honour is that in our view where the offer contained in a notice filed under section 117C is ambiguous or unclear there is no obligation on the offeree to seek to clarify the terms of that notice, at least in the sense that the offeree may be disadvantaged on the issue of costs as a consequence of failing to do so. The only qualification we would make to that is that where the suggested ambiguity or lack of clarity related only to an obvious typographical error or other similar misdescription, the offeree, in choosing to ignore the obvious intent of the offer, may do so at some possible risk on the broad issue of costs under s117."*

***In the Marriage of Pennisi* [1997] 22 FamLR 249 ("*Pennisi*")**

This a somewhat convoluted Full Court authority that involved two written offers from the husband to the wife prior to trial, the second offer being more advantageous to the wife than the second. The wife's appeal of the trial judge's decision was successful in part largely due to the Full Court awarding the wife more on Appeal due to s75(2) factors gaining her an additional $45,106 and ultimately 80% of the pool. The Appeal also concerned the trial Judge's costs order against the wife because of the written offers. The wife was successful

on Appeal in regard to both Appealing her award and quashing the costs order she had made against her because of the husband's written offer/s. The wife also sought costs of her Appeal and because she was successful in her Appeal she was also awarded Appeal costs. The trial Judge had ordered for the wife to pay the husband's costs because the husband had made written letters of offer (under the old s117C) that was "described by his Honour to have been 'successful, as less money is going to the wife than would have under his offers". The trial judge also went on to say:

"It makes the matter really difficult for determination [the wife's care of the 3 children], but there is no point in making provision for an offer to be made and filed if in fact parties are free to ignore the offer, litigate and incur horrendous costs to receive a small amount that they would have had if the offer were made.".

The Full Court on Appeal in *Pennisi* stated the following principles regarding costs:

1. *The Full Court should be reluctant to interfere with a trial Judge's discretion as to costs but that if the result is plainly unjust or if the discretion was exercised on the wrong principles then the Full Court must interfere;*
2. *Considerations of justice impose a duty upon an appellate court to reconsider a trial order as to costs when it disturbs the findings of fact at trial which were material to the making of such an order;*
3. *Upon finding that the discretion should be re-exercised, the appellate court has the choice of exercising the discretion afresh or remitting the matter for re-hearing;*
4. *a key consideration is whether the Full Court considers itself in a position to exercise its discretion as to costs on the material before it, and public policy considerations concerning finality and the avoidance of delay and expense to the parties;*
5. *The authorities in the Appellate jurisdiction addressing the circumstances where fresh evidence will be received, and the processes for applying to have such evidence put before the Court, are equally applicable in appeals from costs orders and that in effect the Court has an unfettered discretion to receive fresh evidence;*
6. *Offers must be seen in the context of the case and the extent of the offeree's knowledge of the parties' financial circumstances while the offer is live. In the family law jurisdiction, it is not uncommon to find relationships where one party, often the wife, has significantly less grasp of the parties' financial arrangements, or the financial circumstances are so complex that it would be premature to accept an offer. There are also cases where the contents of the offer are in themselves the subject of disputed value and legitimate subject matter for*

determination. These and other features of the context of offers must be taken into account when considering whether it was reasonable or not to accept an offer, no matter how close to the ultimate result the offer may be.

***Browne & Green* [2002] Fam LR 428 (*"Browne & Greene*")**

This was a case concerning a marriage of just three years with no children. At trial the husband had (pre relationship) assets of approximately $3million and the wife $1million. The wife sought $1 million at trial, The husband sought she receive $50,000. The trial Judge ordered the wife receive $400,000. On Appeal the wife was not awarded anything, just the keep of her pre relationship $1million. On Appeal the husband was awarded 75% of the husband's costs of the proceedings before the trial judge from a date one week after the making of the open offer. The wife was also ordered to pay the costs of the appeal on a party/party basis.

The Full Court stated the principle:

> Costs "… *is a discretionary area of the law and the basis upon which an appellate court can interfere with a discretion is well known. Unless there has been*
> *• an error in approach or principle,*
> *• the failure to take into account relevant circumstances,*
> *• the taking into account of irrelevant circumstances,*
> *• the making of findings of fact unsupported by the evidence,*
> *the challenge must be that the orders fell outside a reasonable exercise of discretion, that is, that the orders were "unreasonable or plainly unjust*"."

Browne & Greene stands for the principle that a trial judges orders for costs (being discretionary) are considered to be particularly immune from attack.

***Lenova & Lenova* (Costs) [2011] FamCAFC 141 (30 June 2011)**

This case had many hearings with several Melbourne Family Lawyers you will be familiar with, but we just want to focus on the Costs aspect of this case which is contained in the final decision, a decision of the Full Court of the Family Court. Commencing at para 10 their honours said:

> "*In this jurisdiction, costs do not "follow the event"; the Act prescribes, relevantly, that "subject to subsection (2) ... each party to proceedings under this Act shall bear his or her own costs" (s 117(1)). As a result, a litigant, or prospective litigant, cannot rely upon a costs order following upon success in the action as a means of dissuading the other party from pursuing unmeritorious litigation or as a means of seeking to persuade the other party from pursuing litigation.*

A timely offer in writing genuinely made might, then, be seen as an important part of a limited armoury available to prospective litigants seeking to avoid the costs of litigation. Conversely, where, consequent upon success in an action, a litigant can point to the making of a genuine and timely offer having been made, that offer might be seen as an important (albeit not the only) matter in the exercise of the discretion as to the ordering of costs.

That consideration must, of course, be balanced against a litigant having a limited capacity to meet a costs order, as well as any other relevant considerations. But, a limited financial capacity to meet an order can not be determinative; if it were, a party would always be able to plead impecuniosity as a means of avoiding a costs order in circumstances where pursuit of the litigation has continued in the face of a reasonable offer to cease that litigation and the incurring of its attendant costs."

There are other decisions apart from *Lenova* which whilst under the old legislation still have application because they consider the same issues or principles of costs in Family Law such as *Kohan v Kohan* (1993) FLC 92-340 where the Full Court observed:

"The intent of s117(1) and 117(2) is that in this jurisdiction costs should not follow the event as a matter of course. However, where the justice of the matter so requires, the court may make such order as the Court considers just."

Interest on Costs

Don't forget about Interest payable on costs. Note section 117B provides for Interest on Moneys ordered to be paid. See Rule 12.19 that provides that interest on costs is at the variable rate provided in Rule 10.17 being 6% above the cash rate last published by the Reserve Bank.

Sections 95 & 96 FLA: Duty to act consistently with the overarching purpose

The overarching duty in s95 is also similarly found in Rule 1.04 of the *FCFCoA Rules* 2021 and 67 of the *Federal Circuit and Family Court Act* imposing obligations to conduct proceedings, including negotiations for settlement, in a way that is consistent with the overarching purpose applying to practice and procedure in the court, being the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

Section 96 of the Family Law Act even goes far as to empower courts to make costs orders against solicitors if do not abide by their overarching duty.

Duty of parties

(1) The parties to proceedings under this Act must conduct the proceedings (including negotiations for settlement of the dispute to which the proceedings relate) in a way that is consistent with the overarching purpose of the family law practice and procedure provisions.

Duty of lawyers

(2) A party's lawyer must, in the conduct of proceedings under this Act on the party's behalf (including in the conduct of negotiations for settlement of the dispute to which the proceedings relate):

(a) take account of the duty imposed on the party by subsection (1); and

(b) assist the party to comply with the duty.

Costs orders

(4) In exercising the discretion to award costs in proceedings under this Act, a court must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) Without limiting the exercise of that discretion, a court may order a party's lawyer to bear costs personally.

(6) If a court orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from the lawyer's client.

Significant Family Law Rules regarding costs

FCFCoA (FAMILY LAW) RULES 2021

What should be of interest to Family Law lawyers is Rule 12.15:

Costs order against lawyer

(1) The court may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be incurred by a party or another person, or to be thrown away, because of:

(a) a failure to comply with these Rules or an order; or

(b) a failure to comply with a pre-action procedure; or

(c) improper or unreasonable conduct; or

(d) undue delay or default.

(2) A lawyer may be in default if a hearing may not proceed conveniently because the lawyer has unreasonably failed:

(a) to attend, or send another person to attend, the hearing; or

(b) to file, lodge or deliver a document as required; or

(c) to prepare any proper evidence or information; or

(d) to do any other act necessary for the hearing to proceed.

(3) An order under subrule (1) may be made on the initiative of the court, or on application by a party to the proceeding or by another person who has incurred the costs or costs thrown away.

(4) An order under subrule (1) may include an order that the lawyer:

(a) not charge the lawyer's client for work specified in the order; or

(b) repay money that the client has already paid towards those costs; or

(c) repay to the client any costs that the client has been ordered to pay to another party or another person; or

(d) pay the costs of a party; or

(e) repay another person's costs found to be incurred or wasted.

Federal Proceedings (Costs) Act 1981 (Cth)

It should be considered that the FCFCoA has the power to grant an appellant and/or respondent costs certificates pursuant to s 6 (respondents), ss 7 and 9 (appellants) and s 8 (to cover the costs of a new trial) of the Federal Proceedings (Costs) Act 1981 (Cth), being certificates that in the opinion of the Court it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant and/or respondent in respect of the costs incurred by them in relation to an appeal and in relation to the new trial.

The above mentioned sections of the Federal Proceedings (Costs) Act 1981 (Cth) are somewhat duplicitous in that they provide for both respondent and appellants and any Independent Children's Lawyer that may also be party to such an appeal the same recourse to a "costs certificate" on the following simplified grounds:

1) where a Federal appeal succeeds on a question of law;
   This would cover cases where new law has been made and/or law clarified or similar.
2) for a respondent in circumstances where the payment of the relevant costs or a part of the relevant costs would cause the respondent undue hardship; and/or
   the respondent is, by reason of lack of means, unable to pay the relevant costs or a part of the relevant costs; or
   situations where the whereabouts of the respondent are unknown and the appellant's costs cannot be otherwise recovered; and finally
3) The FCFCoA grants a certificate stating that, in the opinion of the court, it would be appropriate for the Attorney - General to authorize a payment under this Act, which is obviously a discretionary decision of the court that it is just and/or appropriate for a cost certificate to be granted.

Freezing Order

In the event it becomes necessary to make an Application in a Case because a party is dealing with matrimonial assets in a manner that is outside the reasonable expected use or pattern it may be necessary to apply for a "Freezing Order". Subject to determination by the court Rule 5.26 could be enlivened to award costs against a party to freeze assets that are being dealt with in a nefarious manner.

Security for Costs

Security for Costs is a rare beast in Family Law. However, if the circumstances arise see Rule 12.02:

(2) In deciding whether to make an order, the court may consider any of the following matters:

(a) the applicant's financial means;

(b) the prospects of success or merits of the application;

(c) the genuineness of the application;

(d) whether the applicant's lack of financial means was caused by the respondent's conduct;

(e) whether an order for security for costs would be oppressive or would stifle the proceeding;

(f) whether the proceeding involves a matter of public importance;

(g) whether a party has an order, in the same or another proceeding (including a proceeding in another court), against the other party for costs that remain unpaid;

(h) whether the applicant ordinarily resides outside Australia;

(i) the likely costs of the proceeding;

(j) whether the applicant is a corporation;

(k) whether a party is receiving legal aid;

(l) any other relevant matter.

Conclusion

I would recommend making a Calderbank offer as early as possible in a matter. In some cases before proceedings have commenced. Since 2021 it has been mandatory under the Family Law Rules to make a *genuine offer* within 28 days of Mediation. Why not make that mandatory *genuine offer* under Rule 4.11 a Calderbank offer too? Make sure you have satisfied the requirements of a Calderbank offer earlier explained. I can only see a Calderbank as a win/win scenario because, firstly, it will cause you, and then your opponents, to really focus on the case and be realistic. Secondly, Calderbanks create pressure and have real potential to settle the matter, which should ultimately satisfy your

client. Finally, if your Calderbank does not lead to settlement and you have to go through trial, you will hopefully get the icing on the cake which is recovery of your client's costs from the date of the Calderbank. Good luck!

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