IN THE SUPREME COURT OF NORTHWEST TERRITORIES

BETWEEN:

INKIT LTD.

Plaintiff

- and -

POLAR PARKAS LTD.

Defendant

Claim by Inkit Ltd. for costs, following a judgment of $12,959. Polar Parkas Ltd. moves for relief from obligation to pay costs based on oral offer, made without reference to Rules and costs, at the outset of the proceedings, to pay Inkit almost exactly the same amount that Inkit recovered in the judgment.

Motion heard: November 24, 1995

Judgment filed: December 18, 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE J.B. VEIT

Counsel for the Applicant: Ms. S.M. MacPherson

Counsel for the Respondent: R.C. Rehn, Esq.

Summary

Can an oral proposal for settlement, without reference to costs implications, offered at the very outset of the dispute (while one lawyer acted for both the plaintiff and the defendant) and not subsequently repeated during the litigation, shield an unsuccessful litigant from all or part of the costs ordinarily imposed?

No.

The defendant accepts that, typically, a litigant who does not use either the Rules or common law techniques for fixing opponents with costs cannot expect to be shielded in costs. However, it argues that the use of a lawyer who acted for both parties at the time of the offer to transmit the offer takes this situation out of the normal application of the law. This argument is rejected. The core of the law in this area is that parties opposite must be informed, directly or by implication of law, of the likely costs result of their refusal of settlement. The character of the messenger who delivers this message is immaterial.

CASES AND AUTHORITY CITED:

BY THE DEFENDANT POLAR PARKAS: **Calderbank v Calderbank** [1975] 3 W.L.R. 586, at 595-6(C.A.)

BY THE COURT: Stevenson & Cote, **Civil Procedure Guide 1992**, pp. 509 and ff.; **Cutts v Head** [1984] 2 W.L.R. 349 (C.A.)

1. Background

In earlier proceedings, Inkit obtained a judgment against Polar Parkas. As the successful party, it claims costs.

Polar Parkas contests its obligation to pay costs. It relies on the fact that, at the outset of the legal dispute, if offered to pay Inkit an amount that equalled roughly half their claim and, in fact, was slightly higher than the trial award. This offer was made orally; it did not include reference to any costs consequences; it was never repeated; it was made at a time when one lawyer represented both the plaintiff and the defendant and about the same time the lawyer was advising Polar Parkas that it would have to obtain separate counsel for this trial.

2. Principles

The parties agree that, according to standard principles, as set out for example in the English decision in **Calderbank**, Polar Parkas has not met the requirement of the law to be awarded costs.

Calderbank was issued 20 years ago, and in the intervening years many provinces adopted Rules of Court relating to compromise using court process, which may have blurred the effect of **Calderbank**. Therefore, it would be useful to repeat here some of that decision's main features:

> (A letter offering substantially more than was eventually recovered was not referred to by the trial judge in denying costs.) Immediately after the hearing before [the trial judge] it was discovered that that was a 'without prejudice' letter and very properly at the opening of this part of the appeal Mr.

> Hordern asked for the court's guidance as to whether in those circumstances he was entitled to rely upon that letter. We formed the opinion that he was not. The letter was written without prejudice. The 'without prejudice' bar had not been withdrawn and therefore we took the view that it was a letter which could not be relied upon either before the judge at first instance or before this court. Mr. Hordern then indicated the difficulty that a party might be in in proceedings of this kind when he or she was willing to accede to some extent to an application that was made and desired to obtain the advantages that could be obtained in an ordinary action for debt or damages by a payment into court, that not being a course which would be appropriate in proceedings of this kind.
>
> . . . .
>
> It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in.
>
> I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances as we have been concerned with.

The English Court of Appeal later extended this principle to some types of "without prejudice" correspondence, and to other types of situations: **Cutts**. That case involved access over land to a fishery. The head note of that case reads, in part, as follows:

> . . . an offer to settle an action, made 'without prejudice' but subject to a clearly expressed reservation of the right to refer to it on the issue of costs, was admissible for that purpose in all cases where the issue was more than a simple money claim so that a payment into court was not an appropriate way of proceeding; and that when the plaintiff's offer to settle was taken into consideration on the question of costs the right order would be to award the plaintiff all his costs from

the date when his offer ought reasonably to have been accepted by the defendant.

Stevenson & Cote make the following comments about the **Calderbank/Cutts** approach:

> That was recognized in other types of litigation, with a general discussion in **Computer Machy Co. v Drescher** [1983] 1 W.L.R. 1379. . . But an offer expressed to be 'without prejudice' (**simpliciter** with no reference to costs) cannot be referred to later as to costs: **Ja Ron Constr. Co. v Murphy** (NS CC 1979) 10 C.P.C. 220 and cases cited; . . . . **contra, Leffen v Leffen** (Ont 1986) 9 CPC (2d) 1249. The **Leffen** case must be wrong in principle and many of the cases on **Calderbank** letters above are authorities to the contrary. It is not honest for a party to say that his discussion is entirely off the record and then later refer to it in court, which is what the **Leffen** case would allow.

In summary, although we now have Rules establishing a framework for the compromise of actions without paying money in, where the existing Rules do not deal with a particular situation, a litigant is entitled to use a **Calderbank/Cutts** letter to achieve a costs benefit.

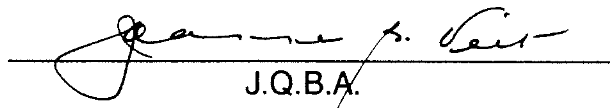
3. Applying the principles

Here, the parties agree that there was no **Calderbank/Cutts** letter going from Polar Parkas to Inkit, and no attempt by Polar Parkas to use the rules to obtain a costs benefit. However, Polar Parkas submits that because one lawyer was acting for both parties at the time in question, the normal rules don't apply.

With respect, I do not understand why that should be.

The key to making an offer that will have a costs effect is to notify the other side of that intention. Whether the notification is done by use of the Rules, or by saying so in correspondence, is immaterial. Although an offer in writing may not, strictly, be required, it is obvious that writing will prevent subsequent misunderstandings about the terms of the offer. If a lawyer is sufficiently willing to act for a client as to make an offer of settlement on behalf of that client, I do not see why the standards relating to the content and effect of the offer should not apply.

In summary, the settlement offer here does not comply either with the Rules or with the **Calderbank/Cutts** requirements; it therefore has no costs effect The fact that it was made by a solicitor then acting for both parties does not change that result.



J.Q.B.A.

DATED at the City of Edmonton
this 12th day of December, 1995.

Action No: CV 2525

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NORTHWEST TERRITORIES

BETWEEN:

INKIT LTD.

Plain

- and -

POLAR PARKAS LTD.

Defend

REASONS FOR DECISION
of the
HONOURABLE MADAM JUSTICE J.B. VEIT