

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
2003/CLE/gen/01563**

Between

**EZEKIEL SMITH
Plaintiff**

And

**AQUAPURE WATER LIMITED
Defendant**

Before: Tabitha Cumberbatch, Deputy Registrar

Appearances: Mr. Jason Maynard for the Plaintiff
Mr. Dywan Rodgers for the Defendant

21st January 2004, 3rd March 2004 and 29th September 2004.

DECISION

1. On 25 September 2003 the plaintiff filed a specially indorsed writ claiming severance pay in the sum of \$40,526.88 together with damages, interest and costs. The defendant entered an appearance on 7 October 2003. The default judgment prematurely entered on 22 October 2003 was set aside by consent on 21 January 2004, and a defence was filed on 24 October 2003.
2. On 3 March 2004 I ordered that the sum of \$40,526.88 paid into court on 5 February 2004 and accepted on 19 February 2004 be paid out to the plaintiff.
3. The plaintiff filed a statement of parties on 12 November 2003, and filed its bill of costs, notice of taxation and another statement of parties on 17 March 2004.
4. On the date fixed for taxation the defendant objected to the bill of costs being taxed. Mr. Rodgers submitted that prior to the filing of the writ the parties were in negotiation and had agreed to the payment of \$40,526.88 to settle the plaintiff's claim, but could not agree on a payment schedule or on costs.
5. Both parties have exhibited letters to their affidavits filed 30 March and 16 April 2004, and have made written submissions.

6. From the evidence it is clear that the parties communicated with a view to settling the issue. The plaintiff's letters show that his attorneys negotiated directly with the defendant company from 17 June to 1 August 2003, and continued negotiations with its attorneys thereafter.

7. In a letter dated 2 July 2003 [Maynard/McSweeney] Aquapure explained that its inability to make a lump sum payment was as a result of "the adverse effects of the difficult economic times that the Bahamas has been experiencing since September 11 2001".

8. Aquapure offered the plaintiff the exact sum eventually paid into court, but in several installments commencing 8 September 2003 and ending 16 January 2004.

9. The Seligman/Maynard letter dated 11 September 2003 (exhibited to the affidavit of Edward Seligman) refers to an agreed sum representing severance pay, and to a schedule of those payments, stating clearly that the letter is an open "Calderbank" letter which the plaintiff reserves the right to produce to the Court should the need arise.

10. At paragraph 11 of his affidavit the plaintiff denies arriving at an agreement with the defendant. Mr. Maynard has submitted that the defendant's letters cannot be called "Calderbank" letters since they refer to an agreement between the parties that was never reached.

11. Neither party has exhibited responses to the letters of 11 and 16 September 2003, but it is clear from reading the correspondence between the parties that the installment payments were not agreed upon during the period of negotiation. In his letters the plaintiff refused the offer of payment in installments. There is no evidence that the parties ever arrived at an agreement.

12. The plaintiff is not obliged to accept the offer of payment commencing 8 September 2003 and ending 16 January 2004 if that manner of payment did not suit him. Of course, while he is entitled to take this position his counsel, having knowledge of the realistic time frame for matters to be brought on before the Supreme Court, may have advised him otherwise. In any event, the plaintiff chose not to accept payment in installments or take advantage of any conciliation or other proceedings available in the Industrial Court, and filed the writ on 25 September 2003.

13. Mr. Rodgers has objected to the award of costs to the plaintiff and submits that the plaintiff is not entitled to receive his costs since Calderbank letters proffering the identical sum paid into court were exchanged between the parties prior to the filing of the writ. He contended that if Mr. Smith had accepted the payments in installments as offered, the final payment would have been made to him some six weeks before he eventually received it on acceptance of the payment in.

14. Mr. Maynard contended that Calderbank letters are offers to settle legal proceedings and thus cannot logically be issued until after legal proceedings have commenced, and in addition such letters will not be taken into account if at the time the party ... could not have protected his position by making a payment into court. He submitted that in the cases of **Calderbank v Calderbank [1975 3 All E.R. 333]**, **Cutts v Head and another [1984 1 All E.R. 597]** and **Computer Machinery Co. Ltd. V Drescher and others [1983 3 All E.R. 153]** the offers were made in letters written after proceedings had commenced.

15. The law relating to Calderbank Letters is succinctly stated in Halsbury's Laws of England [4th Ed.] as follows:

“a party to proceedings may **at any time** write a letter making an offer to any other party to those proceedings which is expressed to be “without prejudice save as to costs” and which relates to any issue in those proceedings. Such a letter is referred to as a “Calderbank letter” and the offer is commonly called a “Calderbank offer”. **This procedure is not available where a party can protect his position by making a payment into court.** [Emphasis mine].

16. As such, I find that it is immaterial whether the letters were written before or after the proceedings were instituted. Indeed, the headnote of **Cutts v Head and another** reads thus:

“an offer of settlement made **before the trial** of an action and contained in a letter written ‘without prejudice’ but expressly reserving the right to bring the letter to the notice of the Judge on the issue of costs after judgment in the action if the offer is refused is admissible on the question of costs..... **in all cases where what is in issue is something more than a simple money claim in respect of which a payment into court would be the appropriate way of proceeding. Such a letter should not be used as a substitute for payment into court where a payment in is appropriate, and if so used should not be treated as carrying the same consequences as a payment in.**” [Emphasis mine]

17. Mr. Rodgers submitted that at the time the letters were written, payment in was inappropriate because the writ was not yet filed, and impossible since the economic climate prevented a lump sum payment.

18. In **Calderbank v Calderbank** Cairns L.J. made references [*obiter*] to the instances where these letters, now called Calderbank Letters, may be used,

“to ensure that negotiations could be conducted without prejudice to the issue at the trial, but nevertheless be referred to after judgment when the question of costs came to be considered”.

He gave examples of these letters possibly being used in proceedings before the Lands Tribunal, and in the Admiralty Division. In the **Calderbank** case the wife made the offer on affidavit, proposing to settle the litigation by transferring property to her husband, something which was also impossible to achieve by making a payment into court.

19. In the cases of **Computer Machinery Co. Ltd. v Drescher and others** and **Cutts v Head and another** the Honourable Justices Megarry

V.C. and Oliver L.J. stated that Calderbank letters were applicable if the claim was not solely a money claim. In his judgment Megarry J stated (*obiter*)

“If the claim is purely a money claim, this causes no difficulty; the defendant may pay into court under RSC Ord 22 the sum that he is offering, andthe fact of payment in is admissible, and usually highly relevant, in deciding what order for costs should be made. If, however, the claim is not solely a money claim, but some other relief is sought, such as an injunction, there was formerly no comparable procedure. What was needed was some procedure whereby the defendant could make an offer to submit to an injunction, give an undertaking or afford other relief on the footing that the offer would be without prejudice until the case was decided but with prejudice when it came to costs. It was a procedure of this type which was suggested by Cairns L.J. in **Calderbank v Calderbank**....”

20. It is the finding of this court that the letters exchanged between the parties are not Calderbank letters. I am of the view that the cases submitted by Mr. Maynard show that the letters exchanged in the instant case cannot be called Calderbank letters since this is a money claim and the defendant could have avoided his liability for further costs by paying money into court. I accept Mr. Maynard’s submission that the “Calderbank” procedure is not applicable to the instant monetary claim.

21. While Mr. Rodgers is correct in pointing out that the defendant could not have made a payment into court at the time suggested by Mr. Maynard since litigation had not commenced, the company was able to pay the entire sum claimed into court some seven months after stating that the economic climate prevented it from making a lump sum payment, and some four months after the writ was filed.

22. I accept the principles stated by Strachan J in **Seymour v Norwich Union Fire Insurance Society Ltd.** [1993] BHS J. No. 101, and find in accordance with Order 22 of the rules of the Supreme Court that the plaintiff would be entitled to tax his costs incurred up to the time payment into court. Since the payment in was accepted within 21 days, he is entitled to his reasonable costs up to that point.

23. Unless these costs are agreed between the parties, the bill of costs filed 17 March 2004 will be taxed on Monday 4 May 2009 at 2:30 in the afternoon, and on that occasion I will consider items 9 to 15 of Mr. Maynard's written submissions.

Dated the 10th day of March 2009

Tabitha Cumberbatch
Deputy Registrar