



# A matter of time

Masood Ahmed outlines the potential consequences of accepting *Calderbank* offers during substantive hearings

## IN BRIEF

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Can a *Calderbank* (*Calderbank v Calderbank* [1975] 3 All ER 333) offer to settle (without an express time limit) be accepted once the relevant substantive hearing has commenced, or does such an offer lapse at the commencement of the hearing? That was the question at the heart of the appeal in *MEF v St George's Healthcare NHS Trust* [2020] EWHC 1300 (QB), [2020] Costs LR 583. The court considered the application of the relevant Civil Procedure Rules on costs and the common law principles of offer and acceptance.

## CPR & common law

CPR 44.2(4) provides that, in deciding what order to make about costs, the court will have regard to all the circumstances, including '(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which the costs consequences under Pt 36 apply'. Thus, a *Calderbank* letter which has not been accepted will be considered when the court exercises its discretion on costs. Pursuant to CPR 47.20, the receiving party in detailed assessment proceedings is, generally, entitled to those costs, although the court has a discretion to make another order. CPR 47.20(4) expressly provides that the CPR Pt 36 (Offers to Settle) provisions apply to the costs of detailed assessment proceedings, with certain modifications. The court's permission is required to accept a Pt 36 offer where a trial is in progress (CPR 36.11(3)) and where the offeree is doing badly mid-trial, permission will rarely be granted.

An offer can be withdrawn by the offeror at any time prior to acceptance by the offeree and an offer which expressly states that it will last only for a specified time cannot be accepted after that time. The following principles can be taken from the authorities on the issue of lapse of time:

- The principle of lapse arises either as a matter of law or on the basis of an implied term of the offer.
- What constitutes a 'reasonable time' is a question of fact, to be determined by reference to the circumstances of the particular case, and the contractual context in which the offer was made.
- It is not clear whether what is reasonable falls to be determined as at the time of the offer or whether the subsequent conduct of the parties is also relevant to the question. However, Mr Justice Morris in *MEF* held that what is reasonable was an objective assessment based on all the facts and surrounding circumstances, and not just on an assessment of the inferred intention of the offeror alone.

## Background

The matter concerned a clinical negligence claim against the defendant NHS Trust. Following a series of offers and counter-offers, the defendant offered to settle the claimant's claim for costs at a figure of £440,000 on condition that the claimant would pay certain of the defendant's costs of the assessment (the August 2019 offer). The hearing of the detailed assessment began on 17 September 2019. Just before the end of the second day of the hearing, the claimant's solicitors sent an email purporting to accept the August 2019 offer. By that stage of the assessment hearing it was the case that, if the assessment continued to a conclusion, the claimant would recover less than £440,000. The

dispute as to the effect of the purported acceptance was transferred to the judge who applied common law principles of offer and acceptance rather than the rules under Pt 36 and concluded that the claimant's acceptance of the defendant's offer constituted a valid settlement of the claim. He also held that the defendant's offer did not lapse at the door of the court. The defendant appealed.

## Parties' submission on appeal

The defendant argued that, while the judge at first instance was correct to apply common law principles of offer and acceptance rather than applying CPR Pt 36, his application of those principles was wrong in law. He ought to have found that the August 2019 offer came to an end after the lapse of a reasonable time which was no later than the start of the detailed assessment hearing and/or that it was an implied term of that offer that it would lapse on the start of the detailed assessment hearing. Once the detailed assessment hearing started, the August 2019 offer came to an end and was no longer open for acceptance.

The defendant also argued that, on its true construction, the August 2019 offer was conditional upon the claimant agreeing not only to pay the defendant's costs of detailed assessment but agreeing to pay the specific amount of those costs. The claimant's purported acceptance of the August 2019 offer stating only that it would pay 'the defendant's reasonable costs of Detailed Assessment' did not constitute acceptance of the defendant's offer, since it did not amount to agreement as to the specific amount of the defendant's costs.

The claimant countered by arguing that, *inter alia*, the defendant deliberately chose to repeat or renew the offer setting an

express condition which, on a continuing basis, protected against the effect of late acceptance in costs, even if such acceptance occurred after the start of the hearing. Therefore, there was no need to imply a term that the offer was only open for a limited period. Further, the defendant on two occasions made clear that the option of withdrawal of the offer was open to it but was not being exercised. In any event, it was the mutual understanding of the parties and inherent in the offer that it remained open unless and until withdrawn.

### Decision

Morris J (sitting with Master Haworth as assessor) held that, although the judge correctly approached the issue by reference to common law principles of offer and acceptance, and not by reference to CPR Pt 36, he did not expressly apply the contractual principle of lapse after a reasonable time and, to that extent, he could be said to have erred in law. Thus, the issue on appeal was whether the 'reasonable time' for acceptance of the August 2019 offer expired at the point of the commencement of hearing or rather continued during that hearing.

Morris J made a number of findings of fact which supported the judge's conclusion that the offer did not lapse at the door of the court. The fact that the hearing was a detailed assessment hearing was relevant because it was common practice for the parties to re-calculate during the hearing and when decisions are made. This feature of a detailed assessment hearing made the position distinct from other types of hearings, where a party might well perceive that the hearing is not going well but is less likely to know whether or not the ultimate outcome will be better or worse than an offer which has been made. Further, although the Pt 36 procedure was

available, the defendant chose to use the *Calderbank* offer approach.

The defendant's prior offers were highly relevant:

- ▶ First, none of the earlier offers had an absolute time limit and were subject to the condition that if they were not accepted within a reasonable time, the claimant would be responsible for the defendant's costs; an ability to accept the offers late but subject to that costs condition was inconsistent with an absolute time limit upon acceptance.
- ▶ Second, the defendant was aware throughout that it could withdraw the offer, but consciously decided not to do so.
- ▶ Third, the fact that the £440,000 offer remained 'open' and at the same level despite the claimant's weakening position in the hearing indicated the defendant was not necessarily concerned with the precise amount of the likely outcome.

Morris J also considered and rejected two additional arguments raised by the defendant. The first was that if the offer were to remain open during the hearing, it would provide no costs protection for the defendant and moreover would have put the claimant at no risk and thus gave him no incentive to accept the offer. However, Morris J held that the defendant would remain fully protected. If the claimant accepted the offer, during the assessment, he would be bound to pay the defendant's costs incurred, including its costs of the detailed assessment hearing. If the claimant did not accept the offer, then the defendant would be able to refer the costs judge to the offer on the issue of the costs of the assessment under CPR 44.2(4).

The defendant's second argument was that if the offer remained open during the hearing, such an offer provided a 'perverse incentive' because the defendant would be in a worse position than if it had not made

the offer at all. This would be so because the amount of the assessment would have been significantly lower than the offer of £440,000 and that amount substantially outweighed any benefit derived from the costs protection provided by the offer. If the offer is accepted, the defendant would never get the benefit of the actual assessment by the court of costs lower than the offer. In rejecting this argument, Morris J said that 'at the time that the offer is made and then at the door of the court, there remain incentives, respectively, to make and retain the offer, even if it is capable of acceptance in the course of the hearing. I do not accept the proposition that the making of an offer to settle necessarily means that, if accepted, the offeror cannot turn out to be worse off than if the offer had not been made at all.'

### Comment

The decision not only confirms that *Calderbank* offers can be accepted once substantive hearings have commenced, it also highlights the risks and dangers that the offeror may be exposed to in circumstances where the offer does not explicitly provide for a time limit for acceptance. The risks and dangers are particularly acute in detailed assessment proceedings because, as Morris J explained, it is common practice for parties to re-calculate during the hearing and when decisions are made by the judge. The decision also helpfully reinforces the distinction between *Calderbank* offers and the self-contained regime of Pt 36. It will be for the party wishing to make a settlement offer to choose the most appropriate method to make such offers, and to follow the formal requirements in order to ensure that the offer is valid and provides the offeror with the necessary costs protections. **NLJ**

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