Editor's Note

CPR 36 offers

Introduction

One of the first decisions that a prudent litigant must consider as soon as litigation has commenced is whether to make a settlement offer under CPR 36 or to accept such offer, where one has been made. Not only is this one of the first decisions but in many cases, especially in serious litigation, it could also turn out to be one of the most important decisions because a CPR 36 settlement offer can have far-reaching consequences in liability for costs.

The prominence of CPR 36 settlement offers is a direct consequence of the indemnity rule and the high cost of legal services. The combined effect of these two factors is that a litigant runs the risk of being ordered to pay his opponent's costs (as well as having to pay his own lawyers) in the event that the final decision goes against him. How much an unsuccessful litigant would have to pay cannot be predicted in advance. Consequently, litigants carry a risk of costs that is unlimited in amount, which of course makes litigation very dangerous, particularly for litigants of modest means. The risk to defendants has an added dimension because a claimant will be considered to be the successful party and will normally be awarded his costs even if he has recovered only a small proportion of the amount claimed.

The CPR 36 procedure enables litigants to obtain some protection from the risk of unlimited costs liability. Under this procedure, a defendant may make a settlement offer, normally by making payment into court. If the claimant accepts it, the claimant would also be entitled to his costs up to that point. If the claimant declines, the claimant would have to pay the defendant's costs from the time of acceptance, unless the claimant obtains a judgment that is more favourable than the offer. Prior to the CPR, settlement offers of this kind could be made only by defendants (RSC Ord.22). This is because, as already noted, defendants are particularly vulnerable. In the absence of the possibility of obtaining some protection from costs, claimants who were confident in recovering something could put an unrealistically high value on their claim safe in the knowledge that they would recover their entire costs even if they recovered only a small proportion of their claim. Thus, defendants could find themselves in the invidious position of having to decide whether to resist an exaggerated claim at the risk of having to pay their claimant's costs even where

the latter recovered very little, which could greatly add to their final bill, or paying off the amount claimed. Although the Rules of the Supreme Court made no provision for claimants, an informal method developed whereby claimants (and defendants) could make a *Calderbank settlement offer* (which was a "without prejudice" offer save as to costs) and obtain analogous costs protection.

CPR 36 allows both defendants and claimants to make settlement offers in accordance with the rules laid down for the purpose. In money claims, defendants' offers must generally be by way of payment into court. In non-money claims, defendant may make CPR 36 offers with similar consequences. Claimants may make CPR 36 offers in any claim. A claimant may make an offer to settle for less than the amount claimed. If the defendant accepts the offer, the claimant is entitled to his costs on the standard basis. If the defendant declines the offer and the claimant recovers more than his offer, the latter will normally be entitled to recover costs on the indemnity basis and to enhanced interest on costs.

Given the far-reaching implications of a decision to make or refrain from making a CPR 36 settlement offer, or of a decision to accept or to decline such an offer, it is crucial that the system should be easily understood and that the consequences of offers should be clear-cut and predictable. If the consequences of CPR 36 became unpredictable, parties would find it difficult to assess the benefits of offers made under this rule and they would be less likely to settle without litigation. Failure to apply the consequences stipulated may disappoint legitimate expectation and undermine the entire system.

Unfortunately, recent development is this area have the tendency of increasing complexity and reducing predictability. Detailed knowledge of the case law is now required to work out the consequences of settlement offers. Worse still, considerable uncertainty now surrounds the consequences of settlement offers. This is due not only to the ever more complex interpretation of CPR 36 but also to the ever-increasing judicial discretion that is brought to bear on the application of this rule. So much so that a litigant who has complied with the rules cannot be completely sure that he would reap the stipulated benefit. Non-compliance need not result in failing to obtain protection from costs, or losing it, since litigants may still derive the benefits of an offer to settle under the CPR 36 or its equivalent as a result of the exercise of discretionary powers. Inevitably, uncertainty and complexity increase the scope for disputes over costs, for expensive satellite litigation and for wasted court resources.

Any discussion of CPR Pt 36 is beset by a confusing terminology. The rule distinguishes between offers to settle and payments into court ("Part 36 payment" and "Part 36 offer" (CPR r.36.2(1)). Yet, both consist of an offer extended by one party to another to settle the dispute; in both there is an offeror and an offeree. As a result, the term "Part 36 offer" is sometimes used generically to describe any offer under CPR 36, whether by means of payment into court or otherwise. To avoid confusion Pt 36 offer (or CPR 36 offer) will be used exclusively to describe offers under the rule other than by means of Pt

36 payment (or CPR 36 payment). The expressions "CPR 36 settlement offers" will be used to refer to both.

What follows is a discussion of recent decisions that illustrate the problems generated by the current judicial approach to CPR 36.

Defendant applying to withdraw payment within 21 days and claimant purporting to accept it

Once the claimant has been notified that the defendant has made a payment in, he has 21 days within which to accept the payment as of right (CPR r.36.11(1)). After the 21-day period, the claimant may accept the offer and take the money out of court only with the permission of the court, unless the parties have agreed amongst themselves the liability to costs (CPR r.36.11(2)). Not only is the claimant's acceptance out of time dependent on court permission, but the defendant himself loses control over his offer and his money once he has paid money into court. This is because CPR r.36.6(5) states that payment in "may be withdrawn or reduced only with the permission of the court". Thus, there is some symmetry between the positions of claimants and defendants once the 21-day period for unilateral acceptance has expired, seeing that each has to apply to court to get his way. However, their positions are different during the 21-day period, because the claimant is entitled to accept without court permission, but the defendant requires permission to withdraw the offer.

This asymmetry gave rise to the issue that was considered by the Court of Appeal in *Flynn v Scougall* [2004] EWCA Civ 873; [2005] C.P. Rep. 15; [2004] 3 All E.R. 609. The defendants to a claim for damages for personal injuries accepted liability and paid £24,500 into court. Soon afterwards, they received a report from their own expert on the claimant's injuries and applied to court for permission to reduce the offer to £10,000 and withdraw the balance. As soon as the claimant learnt of this, he gave notice of acceptance, still within the 21-day period. What should the position be? The matter was analysed by May L.J. He noted that if contract law alone governed payments in under CPR 36, the defendant would be free to withdraw it at any time before acceptance. But the matter is not the exclusive province of contract. May L.J. explained:

> "[27] . . . A defendant who wishes to make a Pt 36 payment has to make an offer to which the relevant provisions of Pt 36 are attached. One of these is that a Pt 36 payment may be withdrawn or reduced only with the permission of the court (r.36.6(5)). In my judgment, this provision is clear and it relates to the offer which the Pt 36 payment comprises. I reject the submission that the offer and the payment into court are separate and that r.36.6(5) relates to the latter but not to the former. On the contrary, the defendant has chosen to make an offer by means of a Pt 36 payment with an attribute that it may be withdrawn or reduced only with the court's permission."

This undoubtedly valid assumption still leaves to be resolved the conflict between CPR r.36.11, which entitles the claimant to accept payment within 21 days without court permission, and CPR r.36.6(5), which enables the defendant to apply for permission to withdraw payment. Of course, if the claimant accepts before the defendant has applied for permission to withdraw, the acceptance if valid. But what if the claimant purports to accept after he has learnt that the defendant has applied to withdraw? May L.J. thought that in such a case the court should hold the ring. He went on:

> "The stage is then set for the court to decide the defendant's application in the light of the claimant's notice of acceptance. Since to allow the defendant's application would deprive the claimant of an otherwise unfettered right, the fact that the claimant had given notice of acceptance would be . . . an important consideration to be taken into account in deciding whether the defendant should be given permission. It would be an additional consideration to those which may arise if a defendant's application is made after the 21 days has [*sic*] expired. If the court gives the defendant permission, there is power to make any necessary order or direction to achieve its consequences" (at [33]).

The main issue at such a hearing would be whether it is just to allow the claimant to accept and take out the money, which will principally turn on question of whether there has been such a change of circumstances since the date of the payment in that it is no longer just to hold the defendant to his offer. Since this is what defendants who seek permission to withdraw have to show if they apply for permission to withdraw after the 21-day period, it follows that there will be little difference between applications to withdraw before and after the cut-off time for taking money out unilaterally.

In the case before him, May L.J. concluded that there was no justification for the withdrawal of the offer because the defendants chose to make the payment in before receiving their expert's report and that in doing so, they secured the advantage of an earlier payment into court and took the risk that the report might improve their evidential position.

As the law stands, both the reasoning and the conclusion are unassailable. But it is appropriate to ask whether it is necessary or desirable to involve the court in such disputes. Might it not be better to allow parties to withdraw their offers at will after an initial period allowed for acceptance? Should not the parties be free to take whatever course they wished to take subject to incurring the consequences? However, before addressing these questions it is necessary to consider other recent decisions.

Withdrawing a CPR 36 offer within 21 days

As already mentioned, the withdrawal of CPR 36 offer (as distinguished from payment) is not subject to a limitation of court approval. CPR r.36.5(8) states:

> "If a Part 36 offer is withdrawn it will not have the consequences set out in this Part"

Since it is obvious that a claimant who has withdrawn his CPR offer cannot continue to claim the costs protection of CPR Pt 36, the only point of this provision is to establish that a claimant who wishes to withdraw the offer does not require court permission. But CPR r.36.5(6) states:

> "A Part 36 offer made not less than 21 days before the start of the trial must—
>
> (a) be expressed to remain open for acceptance for 21 days from the date it is made; and
>
> (b) provide that after 21 days the offeree may only accept it if—
>
> (i) the parties agree the liability for costs; or
>
> (ii) the court gives permission."

This rule means to establish a 21-day period for unilateral acceptance similar to that existing in the case of an offer by payment in under CPR r.36.11(1). The question therefore arises whether a claimant is totally free to withdraw a Pt 36 offer even within the 21-day period. In the *Flynn* case, discussed above, May L.J. assumed that unlike the position of a defendant who has paid money into court, and who cannot withdraw his offer and his money without court permission, a claimant may withdraw his Pt 36 offer at any time, even within the 21-day period. In making this assumption May L.J. followed the decision in *Scammell v Dicker* [2001] 1 W.L.R. 631 (CA).

It was argued in that case that a claimant was not free to withdraw the offer within the 21-day period. To hold otherwise, it was argued, would be contrary to the idea that lay behind a Pt 36 because CPR r.36.5(6) because the purpose of the 21-day period was to give the offeree a proper opportunity to consider the offer. Aldous L.J., speaking for a two-member Court of Appeal, gave no less than six reasons for rejecting this argument, the principal of which were as follows. There was no express provision prohibiting a withdrawal, in contrast with r.36.6(5), which prevents withdrawal of a payment without permission. Indeed, CPR r.36.5(8) expressly provides that a Pt 36 offer can be withdrawn and places no limitation of time. Further, a requirement that a Pt 36 offer could not be withdrawn could impose hardship in certain circumstances and one would, therefore, have expected that the rule-maker should include a limitation of court permission. But perhaps the most significant reason given by Aldous L.J. was that:

> "a Part 36 offer is an offer to enter into a contract with the offeree. To impose a term that the offer could not be withdrawn would result in an addition to the contractual terms offered by the offeror. That would be possible, but should not be done by implication . . . I do not believe that Part 36 seeks to exclude the general law of contract that an unaccepted offer can be withdrawn. All that it does is to lay down the requirements that are needed to attain the consequences of making a Part 36 offer." (at [19]–[20])

There are good reasons, it is suggested, why the ruling in this case should be reassessed. First and foremost, offers of settlement under CPR 36 are not governed by contract law alone. Dealing with the pre-CPR rules of payment in Goddard L.J. said in *Cumper v Pothecary* [1941] 2 All E.R. 516 at 520 (CA):

> " . . . there is nothing contractual about payment into court. It is wholly a procedural matter, and has no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract. Once the 7 days have expired [the then current period under RSC], the plaintiff cannot get the money unless he can obtain an order, and before the court makes an order, it must consider whether or not it is right to do so."

It is of course true that this view was expressed about payment in, which can be withdrawn only with court permission. But the reasoning is of some application to CPR 36 offers because, as May L.J. explained in the above-quoted dictum, a "defendant who wishes to make a Pt 36 payment has to make an offer to which the relevant provisions of Pt 36 are attached" (*Flynn v Scougall* at [27]). In *Flynn v Scougall*, May L.J. rejected the submission that an offer and the payment into court are separate and that once the defendant has withdrawn the offer there is nothing to accept even if the defendant's money is still in court. We could similarly say that a claimant who makes a CPR 36 offer invokes CPR r.36.5(6) and thereby subjects himself to the regime of this rule, which is intended to allow the defendant 21 days within which to consider its merits and, if he wishes, accept it as of right. To hold otherwise is to inject uncertainty into the process and place unnecessary pressure on offerees, which is bound to be counterproductive. Settlements are much more likely to be reached, and prove satisfactory to all parties, if they are concluded in a calm atmosphere, where litigants have an adequate opportunity to consider the settlement terms. The risk of a CPR 36 being withdrawn at any moment without notice and uninhibited by any judicial supervision, can only intensify the cat-and-mouse aspects of settlement offers, excite suspicion and create scope for resentment.

As already noted, Aldous L.J. assumed that where a claimant, who has made a CPR 36 offer expressed to be open for 21 days, withdraws the offer within this period, contract principles dictate that there is nothing left for the defendant to accept and that the defendant has therefore no recourse. But this may not be necessarily the case.

Suppose that a defendant applies to court, in accordance with CPR r.36.5(6)(b)(ii), for permission to accept the claimant's CPR 36 offer after the 21-day period. Half way through the hearing the claimant withdraws the offer. This is an unlikely scenario, but it is useful nonetheless to test the view that contract alone governs CPR 36 offers. If the matter were exclusively the province of contract, we would be bound to say that the court is powerless to do anything about it, other than order the claimant to pay the costs of the application. It is difficult to imagine that the court would accept that a withdrawal has taken place in such circumstances (see Foskett, *The Law and*

Practice of Compromise (5th ed., 2001), para.17.04, n.11). A claimant behaving in this fashion could justly be accused of abuse of process. Even equitable contract principles may prevent such withdrawal. For it is possible to argue that a claimant who has represented to the defendant that the offer is still open, subject to court permission, intending the defendant to rely on this representation and apply to court, will be estopped from denying that the offer was no longer open, if the defendant has in fact relied on the promise by investing time and money in making the application.[1]

If it is accepted that once an application for permission under CPR r.36.5(6)(b) has been made the claimant is no longer free to withdraw, it is a small step to take to say that he is not free before the 21 days are out either. If reliance on the claimant's representation to keep the offer open for 21 days can become enforceable by reliance, a defendant in receipt of a CPR 36 offer should be able ensure that the promise to keep it open for 21 days will be binding by a simple device. All he need do is write to the claimant stating that he will ask his solicitors to advise on the offer only if the claimant promises to keep it open for 21 days. Claimants may well feel bound to respond positively, for fear that failure to do so could have adverse consequences if the court considers it to be an unco-operative attitude to settlement. If the defendant then incurred expenses in reliance on the promise, the court would be bound to hold the claimant to his promise or, at the very lest, take this fact into account in determining the incidence of costs under CPR r.44.3. Since these points were not argued in *Scammell v Dicker*, the assumption that a claimant is always contractually free to withdraw the offer within 21 days remains to be tested further.

It would be unfortunate, however, if the court had to resort to promissory estoppel in relation to CPR 36 offers. The costs consequences flowing from CPR 36 are proving complex enough as it is. It is suggested that it would be more satisfactory to hold that a party who has chosen to make a CPR 36 offer is bound by his own declaration that the offer will be open for acceptance for 21 days, that after 21 days the offeror is free to withdraw the offer without court permission, unless the offeree has applied for permission to accept, when the matter will then rest with the court, comparable to the position reached in *Capital Bank Plc v Stickland* [2004] EWCA Civ 1677, discussed below. Adopting this position may strain the language of CPR r.36.5, but the present position is hardly more satisfactory, especially in view of the fact that one may now be able to make a virtual CPR 36 payment in money claims (where money is required under CPR r.36.3(1) to be deposited in court) which is subject to the need for court permission to withdraw (see discussion in the next section). If the rule in *Scammell v Dicker* is allowed to stand, we would have a situation whereby an offer contained in a CPR 36 payment without payment

[1] In *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332; [2005] 1 All E.R. 207 at [27], Waller L.J. addressed the situation where a defendant makes an offer to settle a money claim but does not make a CPR 36 payment. He was of the view that if a claimant indicates that he accepts that the defendant need not pay into court on the basis that the CPR 36 machinery will apply, following which the defendant has acted in reliance on that agreement and not paid into court, the court would treat the offer as a CPR 36 payment.

in may not be withdrawn without court permission whereas a CPR 36 offer may be withdrawn without court permission.

It is pertinent to refer here to the point made by Waller L.J. in *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332; [2005] 1 All E.R. 207 at [37] (also discussed below), where he said:

> "Why he [a defendant who has made a CPR 36 payment] should then not be able to withdraw that offer without the permission of the court when a defendant in a non-money claim who makes a Part 36 offer can do so (compare Part 36.5(6) with Part 36.6(5)) seems somewhat harsh and indeed harsher still when it is clear that a claimant can make a Part 36 offer in a case involving a money claim, and be free to withdraw it at any time without permission of the court, where a defendant cannot. But that seems to be the effect of the rules."

It is time that thought was given to removing these perplexing anomalies.

Money offers in lieu of payment in

NHS authorities are subject to many suits nowadays and like any repeat player they seek to devise measures to increase the efficiency of their litigation systems. One of the problems that they face concerns CPR 36 payments. Since NHS authorities are normally sued for damages, they need to make payments into court to protect themselves from costs. But depositing money in court could drain their budgets, which are after all intended for treating the sick, of considerable amounts of money. They have therefore developed a standard-offer form designed to reap the benefits of a CPR payment without actually making any payment. Such offers are expressed to be of money in satisfaction of the claim, stating that the offer is made pursuant to CPR 36 and that:

> "This offer is open for 21 days from the date you receive this letter . . . We also agree to pay the claimant's reasonable costs up until acceptance of it on or before the same date. Should your client decide to accept this offer after . . . [the 21-day period] then we will agree he may do so only on the basis that your client will be responsible both for their own costs and for our reasonable costs thereafter or we otherwise agree liability for costs or with leave of the court. Please note that we do not intend to pay the amount of our offer into court. Please further note that as we are a public authority you should be in no doubt that we will pay the amount of our offer if the claimant accepts it in accordance with the terms on which we make the offer."

The consequences of such offers were considered in *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332; [2005] 1 All E.R. 207. Two NHS authorities, defending two different claims, sought to obtain the approval of the Court of Appeal for the practice of sending offer letters in lieu of making payments into court, so that for the future NHS Trusts could be assured of being treated as if they have made payment into court.

Waller L.J.'s starting point was that:

> "it certainly is not open to any defendant to decree unilaterally that where a money claim is being made against it, it will not make a payment into court but will make a written offer on the basis that Part 36 will apply as though he had made a payment into court. Part 36 is quite clear that in relation to money claims to have the consequences that flow from Part 36, a payment into court is required." (at [26])

However, he thought that parties could by agreement treat an offer in writing as if it were a payment into court so as to bring into play the CPR 36 consequences. But to reach this result, he stressed, there has to be a clear agreement by the claimant that he does accept that the defendant need not pay into court on the basis that the CPR 36 machinery will apply, following which the defendant has acted in reliance on that agreement and not paid into court. Such an agreement, he explained, should include some express reference to the offer being incapable of being withdrawn without the permission of the court. No such agreement existed in this case. However, there was a second way of achieving this result. Waller L.J. explained that an NHS trust could "take an offer letter to the court and seek a direction that it should be treated as a Part 36 payment with the consequences which flow from that being so" (at [28]). He thought that such direction could be given under CPR r.36.1(2). But he noted that the defendant trusts were reluctant to have to incur the expenditure of going down this route if it can be avoided.

Given that neither the agreement route nor the direction route were practical or attractive, the question boiled down to what should be the court's attitude at the conclusion of proceedings when considering the question of costs when it is established that an NHS trust has made the kind of offer described above. On this point Waller L.J. was quite clear that by virtue of CPR r.44.3 an offer to settle a money claim without payment in must be taken into account, along with all the other circumstances. He said:

> "43. I am doubtful whether there is any real difference in exercising the discretion under Part 44.3 as opposed to Part 36.1(2). I say that because the court will not ask first whether Part 36 applies so as to be bound to apply the presumption under Part 36.20. It will have regard to all the circumstances, and ask itself whether it is right to apply the presumption or make some different order depending on the circumstances of the case. This gives proper effect to the fact that a payment into court has not been made, *i.e.* the presumption will not automatically apply, and an order in accordance with the presumption will only be made if in all the circumstances of the case it is a just order to make."

On the question that most exercised the NHS trusts, *i.e.* whether in practice they would be treated like a defendant who has paid in, Waller L.J. said:

> "45. In exercising a discretion . . . it seems to me that the court is entitled to take into account the factors that the NHS Trust will stress in their latest standard letter [that since payment is assured in the event of

> acceptance, it is better that in the meantime the trust should use the money for healthcare rather than payment in] . . . Essentially the Trust is bound to be good for the money. This form of offer from an NHS Trust is as sound as a payment in, and, unless there is some factor special about the circumstances of the case, a court should treat such an offer in the same way as a payment in."

It would therefore appear that some defendants may, after all, refrain from making payment into court in a money claim and still be confident in having the protection normally accorded to those making a CPR 36 payment. This conclusion is inevitable given the combination of CPR r.36.1(2) and CPR r.44.3. The former gives the court the power to direct that an offer to settle outside CPR 36 should have the consequences specified in the rule. The latter requires the court to take into account any offer to settle (even outside CPR 36) when making a costs order.

It must, however, to be recognised that a procedure of "virtual CPR 36 payments" cannot be limited to NHS trusts or even public bodies. It is open to any defendant of sound reputation and ample resources to structure their offers free of the constraints of CPR 36 while at the same maintaining CPR 36-type protection. Insurance companies in personal injury claims would presumably be equally eligible take the benefit of a virtual CPR 36 offer (the fact that they are not normally the nominal defendant could be easily overcome by a change of words in the offer form). If this is the case, then Lord Woolf's recommendation in his *Interim Report on Access to Justice*, to do away with the requirement of payment in, which was rejected by the rule-maker, will have been largely implemented by the back door.

Costs consequences of refusal to allow late acceptance

A defendant who has failed to improve on a CPR 36 offer made by the claimant will normally be ordered to pay indemnity costs and enhanced interest on costs from the time that the offer ceased to be capable of unilateral acceptance. But suppose that the defendant seeks to accept after the 21-day period and the court refuses permission. Such defendant may well feel aggrieved if, having been willing to accept the offer, he is not only forced to go on with the litigation but is also visited with the CPR 36 consequences reserved for those who have failed to accept a CPR 36 offer to settle and have failed to beat the offer. This situation was confronted by the Court of Appeal in *Capital Bank Plc v Stickland* [2004] EWCA Civ 1677, where the issue was whether it is right to order indemnity costs and higher interest on costs against a defendant who wished to accept the claimant's offer out of time but was not allowed to do so.

The claimants in this case sued the defendant for delivery up of a ship or payment of its value. They made a CPR 36 offer for £85,000. The defendant disputed the identity of the ship and did not accept the offer. The claimants

obtained several orders directing the defendant to allow inspection of the ship in order to determine its identity, but they did not comply with the orders. Nevertheless, the claimants' surveyor managed to inspect the ship and provide a report, which proved the identity of the ship. When the defendant saw the report, he applied for permission to accept out of time. The claimants resisted the application. The judge found that the strength of the claim had altered for the better and refused the application for that reason. The defendant's persistent flouting of the court's orders, the absence of any offer of security for payment of the £85,000 in support of the application for permission, and the lateness of the application, which was made on the day of the trial, reinforced his conclusion. In the event, the claimants obtained judgment in excess of their offer and the defendant was ordered to pay indemnity costs and enhanced interest on costs from the end of the acceptance period.

On appeal, the defendant argued that it was illogical for the court to allow a claimant to retain the benefit of a CPR 36 offer while refusing a defendant permission to accept it late. Either the defendant should be allowed to accept the offer late or the claimant should be required to withdraw or reduce it. Longmore L.J. rejected this submission:

> "14. For my part I can see no justification for requiring a claimant making a Part 36 offer to withdraw or reduce his offer (or to be treated as having done so) as a condition of his opposing a defendant's application for late acceptance of the offer. That would be an impermissible gloss on the Rules. Similarly I can see no justification for requiring a defendant who has made a payment into court to make an application that such payment be withdrawn or reduced (or to be treated as having done so) as a condition of his opposing a claimant's application to accept late the payment-in which has been made."

The defendant's argument was clearly flawed because it sought to subject the CPR 36 machinery to contractual constraints. In contract an offeror cannot maintain at one and the same time that the offer is in existence and at the same time maintain that it is not capable of acceptance. However, CPR 36 offers and payments are not just a matter for the law of contract. Sure, contract law will determine whether acceptance has taken place and what obligations have been created by it. Beyond that, offers to settle under CPR 36 are governed by the provisions of this rule. And the rule is clearly intended to allow an offeror to enjoy the costs protection as long as the court has not allowed late acceptance, where such has been applied for.

The next question that the Court of Appeal had to consider was how the court should approach an application to accept a CPR 36 offer out of time that is resisted by the offeror. On this point Longmore L.J. stated:

> "[16] I would not therefore seek to limit in any way the extent of the discretion of a judge who has to consider whether a Part 36 offer or a payment into court can be accepted after the expiry of the period of 21 days. Both the timing of the application and the ready availability of the

> defendant's money may well be relevant considerations. If a change of circumstance has occurred that will also be a relevant consideration."

He accepted that in this case both the fact that the application to accept was made on the eve of the trial and the fact that it was not supported by security for payment were relevant factors, alongside the change of circumstances. He also agreed that the judge was entitled to take into account that defendant's obstructive attitude to the claimants' attempts to discover the identity of the ship in question.

We could safely assume that a similar approach will be followed in applications for late acceptance of CPR payments. If this were so, then the approach to be taken to a defendant application to withdraw money that has been paid in would be different from the approach to an application by the claimant to accept out of time. In the former, the main, if not the only, factor is change of circumstances. In the latter, other considerations may also be taken into account.

A more troublesome aspect of this decision concerns the calculation of costs where a defendant has been refused permission to accept a CPR 36 offer out of time and the claimant obtains at the trial a more beneficial judgment than his CPR 36 offer. Put differently, were the claimants in the case under consideration entitled to indemnity costs and to interest on costs at 10 per cent above base rate in accordance with CPR r.36.21(3), notwithstanding that the defendant was not allowed to accept the offer and bring proceedings to an end?

On this aspect Longmore L.J. drew help from *Garner v Cleggs* [1983] 1 W.L.R. 862. In an action for negligence the defendants made a payment into court of £25,655 on August 11, 1981, which was not accepted within 21 days. On October 13, 1981 the defendants found new evidence supporting their case and on January 22, 1982 they applied to take the money out of court. They were granted permission to do so on February 25. The new evidence did not live up to expectation and the claimant obtained judgment against the defendant for £24,000. The plaintiff applied for all his costs since there was no money in court at the end of trial; the defendants applied for all their costs since there had been a payment into court which was greater than the sum awarded and could have been, but never was, accepted. The judge rejected the defendants' submission, holding that if a defendant pays a sum of money into court and then takes it out, he nullifies the payment into court and it is then as if it never happened and accordingly the normal order must be that the claimant is entitled to his costs.

The Court of Appeal in *Garner v Cleggs* disagreed. Lawton L.J. considered that the judge had been wrong in disregarding altogether the fact that payment in had been made and was available to the claimant at some stage. In his view the correct approach was that the defendant was entitled to his costs between the date of payment into court and the date when he could have resisted an application by the plaintiff to take the money out of court (*i.e.* when the defendant discovered the new evidence). Robert Goff L.J. agreed, saying that it was "only right . . . that even where notice of the payment into court is

withdrawn by the defendant with leave after the expiry of the 21-day period, the costs previously incurred by the defendant during the period which has elapsed since the payment in, during which the money was in reality available to the plaintiff to be taken out, should ordinarily be borne by the plaintiff". (*Garner v Cleggs (a firm)* [1983] 2 All E.R. 398 at 407). However, the Court of Appeal upheld the judge's order because the defendants never put their case on that basis, not even on the appeal.

In *Capital Bank plc v Stickland* the Court of Appeal chose to follow this approach. Longmore L.J. stated:

> "23. If one applies *Garner v Cleggs* to the case of a claimant's Part 36 offer which the court declines to allow a defendant to accept after the 21-day period, it would become relevant to inquire when the claimant could have successfully opposed an application by the defendant to accept the offer. That would in this case be on or shortly after 11th February 2004, the date on which . . . [the bank received a report about the identity of the ship] and Mr Stickland [the defendant] could, in theory, have submitted that any costs awarded to the claimants should be on an ordinary basis after that date. In fact, however, the Bank did not then (or at any time) withdraw its offer and, on the facts of this case when an unsuccessful application to accept the Part 36 offer was in fact made, I would myself say the critical date would be the date on which the application was, in fact, refused by the court, rather than a notional date a few days earlier. Be that as it may, no application was made to the judge in relation to costs incurred after 11th February and I would not interfere with the judge's exercise of discretion in relation to costs incurred after July 2003 any more than the court was inclined to do in *Garner v Cleggs* itself."

Mance L.J. agreed. He explained that since the claimants in this case never withdrew their offer, they therefore started with a *prima facie* entitlement to all their costs, unless the court considered it "unjust" to make such an order: CPR r.36.21(4). However, he added "the claimants were after 11th February 2004 able to (and did) successfully resist late acceptance of their offer was a factor that the court might, if asked, have taken into account, when deciding whether this was unjust." (at [26]) He went on to conclude:

> "28. By parity of reasoning [to *Garner v Cleggs*] here, if the defendant had raised the point, the judge might have considered it unjust for the defendant to have to pay indemnity costs in respect of all or some part of the period after the claimants on about 11th February 2004 received the report which was, in the judge's view, by itself sufficient to enable them to resist the defendant's late attempt to accept their offer on 27th February 2004, the day of trial. But, since this point was never raised before the judge, it cannot be known for certain what conclusions he would have reached either on the facts (for example, as to the likelihood or otherwise of the claimants in fact objecting to any late acceptance at all times after

> 11th February 2004) or on the justice of the case. In these circumstances, I agree that this appeal fails in its entirety."

It is easy to see why the court may consider it unjust to visit a party with the CPR 36 costs consequences beyond the date on which acceptance was a practical possibility. But applying such an approach is problematic because it requires the court to engage in a hypothetical consideration of whether an application for late acceptance would have been resisted at some point in the past and, if so, whether the objection would have prevailed.

Moreover, if the key consideration in making a costs order in such circumstances is the hypothetical question of whether acceptance could have been successfully resisted, an offeree as well as an offeror, should also be able to advance such an argument even if he has never applied to permission to accept. Suppose that the defendant in this case had not sought permission to accept but argued after judgment that since, in view of the surveyor's report, permission would have been refused in any event, he should not be liable to enhanced costs after the date of the report. He could argue that it would be no more just to order him to pay indemnity costs and enhance interest for the period after the emergence of the report than if he had applied and incurred in vain the costs of the application.

There may be a more fundamental objection to the *Garner v Cleggs*-based approach. It is by no means clear that it is unjust to hold a party liable to costs even though he was refused permission for late acceptance. Suppose that a claimant is refused permission for late acceptance of money paid by the defendant into court. It may be said that the only purpose of such refusal is to put the claimant on notice that he continues to be at the risk of costs should he fail to better the offer. Such a claimant is effectively told that his options are now limited to the following: continuing with the litigation and being at the risk of costs if he fails to better the offer; discontinuing his action; or offering to settle on terms that the defendant would agree. The same must, by parity of reason, apply in a case where a defendant is refused permission for late acceptance of a claimant's CPR 36 offer. Such refusal should be taken to mean that the defendant continues to be at risk of indemnity costs unless he beats the offer, and again there can be nothing unjust about it since this is exactly the point of a refusal.

There is a further difficulty with the *Garner v Cleggs*-based approach. It is by no means clear why an offeror who has been allowed to withdraw his offer should carry with him the benefit of the protection during the offer period after the offer has been withdrawn. There seems to be nothing unjust in saying that a defendant who obtains permission to take out money paid in, foregoes the protection of CPR 36 and will not be entitled to his costs under CPR r.36.20e, as would be a defendant whose money is in court when judgment is given. It would be particularly unjust to apply the *Garner v Cleggs* principle where the defendant has made an early payment in but has obtained permission to withdraw the payment on the eve of the trial, when few further costs are likely to be incurred. The same goes for CPR 36 offers. It is suggested that a

claimant who has withdrawn a CPR 36 should lose the protection for the entire period and not just for the period after the withdrawal. If CPR r.36.5(8) means anything at all, it must mean this at least.

Questioning the justification for requiring court permission to withdraw payment in or for late acceptance

Much of the difficulties discussed above would disappear if the court's involvement with offers to settle under CPR 36 were radically reduced. It is far from obvious why a defendant who has made payment in should be required, as the rules do, to seek court permission to withdraw his offer after the 21-day period (a point made to me by Cyril Glasser). If claimants are free to choose whether to accept or decline an offer, defendants should be equally free to choose whether to keep their offer open. True, as long as the offer is in, it continues to provide claimants with an incentive to settle, but defendants have sufficient incentive to keep the offer open for the sake of costs protection without putting obstacles in the way of a withdrawal. Defendants are likely to withdraw only when there has been a material change of circumstances. Yet, this they can generally do under the present rules with court permission. It is therefore arguable that that the requirement for permission serves little purpose other than forcing litigants to incur further expense. It would be far simpler if defendants were free, after the expiry of the 21-day period for acceptance, to take out their money whenever they wished.

By the same token, claimants should have complete freedom to accept CPR 36 payments after the 21-day period. Defendants who have made payment in would need no protection from late acceptance, since they would be free to withdraw the money if they felt that their litigious position has improved. The same should go for CPR 36 offers. Such offers may already be withdrawn at will. There seems no need for a clause in CPR 36 offers that acceptance after the 21-day period should require court permission. Just as offerors are able to withdraw their offer, offerees should be at liberty to accept while the offer is still open.

If the need for court permission were removed, most of the problems encountered in the cases discussed above would simply disappear, much uncertainty will be removed and a great deal of satellite litigation obviated.

Discretion to override the consequence of CPR 36

The problem with CPR 36 is that difficulties are not confined to interpretation of the rules, which as we have seen are real enough. The difficulty with the application of CPR 36 is that whatever the rule says, the court has discretion

to decide otherwise if justice so requires. The result is that one can never be absolutely confident of the consequences of an offer under CPR 36 until after the event.

Painting v University of Oxford [2005] EWCA Civ 161 illustrates this point. The claimant sued the defendants for damages for personal injuries in excess of £400,000. Liability was admitted. The defendants paid into court £184,442 shortly before the trial. Soon after, they realised that they had video-surveillance evidence damaging to the claimant's case and obtained permission to withdraw all but £10,000 of the payment into court. At the trial of *quantum* the judge found that the claimant had exaggerated her injuries and awarded her £23,331. The judge gave the claimant her costs of the proceedings since she had beaten the then existing amount of payment in. He was of the view that although the claimant had exaggerated the claim, it was not justified to depart from the usual order that costs follow the event.

The Court of Appeal disagreed. It took the view that the issue before the judge was essentially whether the claimant had exaggerated her claim. Therefore, once the judge found that the claim had been exaggerated, the decision was in favor of the defendants, not the claimant. This view, it is suggested, seriously undermines the CPR 36 fabric. There can be only one clear test of whether a claimant has bettered a payment in: comparing the sum of the final award with the amount of the payment in. Once we move away from this test, virtually anything goes, because there is no limit to the criteria of success to be adopted. If a case involves an issue of contributory negligence, there would nothing to prevent the court from deciding that although the claimant beat the payment in, he lost on contributory negligence issue. To abandon in money claims the simple arithmetic test, is to create uncertainty.

The Court of Appeal had a further criticism of the judge's ruling. It considered that the judge had failed to take proper account of the conduct of the parties, as required by CPR r.44.3(iv)(a), and to consider whether the claim had been exaggerated, as required by CPR r.44.3(v)(d). He should therefore have taken into account the probability that if it were not for the exaggerated claim, the matter would have settled at an early stage. The fact that there had been an intentional exaggeration had therefore to be considered in the assessment of costs. Lastly, the judge should have had regard to the fact that the claimant never made any attempt to negotiate or offer to settle or to accept the payments into court.

Accordingly, the costs order was set aside and the Court of Appeal ordered that the defendant should pay the claimant's costs down to the date of the payment into court, and that the claimant should pay all of the defendants' costs thereafter. Since the Court of Appeal regarded that the claimant had exaggerated all along and that she could have brought the proceedings to an early conclusion by being amenable to compromise, it is difficult to see why the defendants were ordered to pay her costs prior to the payment in. The plain fact is that once we move away from the principle that costs follow the event and from the stipulated CPR 36 consequences, the costs outcome becomes wide open and virtually impossible to predict in advance.

The need for changing the CPR 36 system and the costs-shifting rule

The problems discussed above are symptomatic of a deep malaise. On the one hand, high litigation costs drive parties to test every available means of shifting them to others. On the other hand, the courts are increasingly amenable to arguments from justice in making costs orders. The cumulative effect of these two factors has resulted in considerable uncertainty.

The ever-increasing room for court discretion means that even where a claimant has failed to beat a CPR 36 payment, the court may refrain from applying the costs consequences of such failure. Protection from costs may be obtained even where an offer has been outside the CPR 36 system, if the court has concluded that it would be just. In these conditions litigants find it difficult to assess the consequences of offers to settle with any certainty and are exposed not only to an unknowable risk of costs but also to the risk of further and expensive proceedings about costs. On their part the courts have to devote time and energy to disputes about costs with no certainty that such disputes can be finally put to rest without one appeal or more. The question therefore arises whether the CPR 36 procedure continues to serve a useful purpose.

Even if the CPR 36 system were simplified by reducing the court's involvement in it, the underlying reason for the parties' preoccupation with costs will remain due to the generally high and unpredictable of litigation costs in England. It is quite possible that the government will have to step in and address this problem sooner rather than later following the decision of the European Court of Human Rights ("ECtHR") in *Steel and Morris v UK* (Application No.68416/01), February 15, 2005. Although the case was immediately concerned only with the failure by the legal aid system to provide legal assistance to indigent litigants facing defamation proceedings, its implications go well beyond questions of legal aid.

The ECtHR reiterated that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. Therefore, litigants must not be denied the opportunity to present their case effectively before the court, and must enjoy equality of arms with the opposing side (at [59]). The court accepted that a state cannot be expected to bear the burden of placing the applicants in a position of full equality with a rich corporation that is able to spend £10 million in legal costs. But it said that a state had the duty to ensure "each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary" (at [62]). Yet, the English system of cost-shifting sits awkwardly with the notions of practical access and reasonable equality of arms.

Given that the cost of litigation is unlimited and unpredictable, a person embarking on serious litigation has to make an open-ended financial commitment, which few can contemplate without risking the roof over their head. Of course, not every case generates large amounts of costs. But it is difficult to tell

in advance whether one's case will be concluded at reasonable or at exorbitant cost. The chilling effect of going to court operates in inverse proportion to a litigant's financial position; the poorer a litigant, the more he will be discouraged from litigation, everything else being equal.

Paradoxically, however, those who have no financial resources are better able to engage in litigation than those who own a house and have a steady income from employment (see *King v Telegraph Goup Ltd* [2004] EWCA Civ 613, discussed in (2005) 24 C.J.Q. 4). For the former have nothing to lose while the latter may end up having to mortgage or sell their house to pay the combined expenses. It is no coincidence that the two defendants in the *McDonald's* case were impecunious. Had the defendants been more affluent, it is doubtful whether they would have been able to risk the financial consequence to themselves and their families. It is a sobering thought that public bodies, not individuals, nowadays seek protection from unlimited exposure to costs by applying for pre-emptive costs orders (see Zuckerman, *Civil Procedure* (LexisNexis, 2003), 26.208).

It is doubtful whether access to justice or equality of arms are meaningful opportunities when a person cannot take or defend a case in a court of law without facing disastrous financial consequences. Perhaps conscious of this point the ECtHR commented that ECHR Art.6 "leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure . . . " (at [60]). Procedural reforms, in the shape of the CPR, have already simplified civil procedure (though not as far as CPR 36 is concerned), but this has had little effect on costs. It is time that other measures were now considered, such as capping litigation cost or letting each party bear their own costs, so that litigants may contemplate going to court without fear of ruin, and thereby reduce or obviate the need for ever more sophisticated systems of protection against costs and of ever greater judicial occupation with costs.

A.A.Z