BEFORE LORD JUSTICE SIMON BROWN LORD JUSTICE MUMMERY LORD JUSTICE MANTELL
CA on appeal from High Court (Ch.Div) (MR JUSTICE RATTEE) : 30th October 1998

LORD JUSTICE MUMMERY: This is an appeal against an order of Rattee J of 26th June 1997 that the plaintiff, Mrs Jill Butcher, pay the defendants' costs of proceedings begun by an originating summons issued on 2nd November 1995 and stayed on terms that were agreed, save as to costs. The appeal raises some points of practical importance on the nature and effect of Calderbank offers and on the judicial determination of disputes on costs in cases where all other issues have been compromised by the parties.

In the unusual circumstances of this case, leave to appeal on costs alone was granted by Aldous LJ. The defendants' costs of these proceedings are estimated at £35,000. It is contended by Mr Wonnacott on behalf of Mrs Butcher that the judge's exercise of his discretion on costs was legally flawed. This court is asked to set aside his order, re-exercise the discretion and order Mrs Butcher's costs of the proceedings to be paid by the defendants.

BACKGROUND FACTS

The background to the dispute is that the defendants are brothers of Mrs Butcher. The three of them held farmland in Hampshire as beneficial tenants in common in equal shares. That farmland was tenanted to a family farming partnership carried on under the name B Wolfe & Sons. The partners were Mrs Butcher and her husband, the defendants, and their parents, Benjamin and Zena Wolfe. The partnership was governed by deed dated 17th November 1980.

Mr and Mrs Butcher ceased to be partners on 31st March 1991. The tenancies were and remain assets of the partnership. Between mid-1992 and the autumn of 1995 negotiations took place between solicitors for the parties to settle their differences about the farmland and the dissolution of the farming partnership. Unfortunately the negotiations did not produce a settlement, and two sets of proceedings have started.

The originating summons proceedings, commenced on 2nd November 1995, were concerned with the beneficial interests in the farmland. Mrs Butcher sought an order for sale of the land under s 30 of the Law of Property Act 1935, now s 14 of the Trusts of Land and Appointment of Trustees Act 1996. She also sought a direction that the defendants concur in acts to maximise the value of the property, including a direction that they serve a notice to quit determining any periodic tenancy of the land in which they had any interests. Those are the proceedings that came before Rattee J in June 1997.

A second set of proceedings was started by writ on 10th January 1997 for the winding up of the partnership. Those proceedings were concerned, among other things, with a dispute about the tenancy of the farmland, of which Mrs Butcher and her brothers were entitled to the freehold reversion. The dispute concerned the dissolution value of the tenancies.

That action has not yet been heard. There may even be a preliminary issue to be determined before the action is heard. It is certainly regrettable that these proceedings are so protracted and costly. It may be regrettable that all the proceedings were not heard together, or at least closer together in time.

THE CALDBERBANK OFFER

The important events for present purposes occurred at the end of September 1995 and in October 1995. At the end of September 1995 Mrs Butcher's solicitors sent to the defendants' solicitors a draft originating summons and a draft affidavit, giving 14 days for a positive response. The immediate response of the defendants' solicitors was to ask for more time to enable them to consider the legal position with counsel. Their reply, after consultation with counsel, took the form of a Calderbank letter, sent and answered before any legal proceedings had started. The letter is dated 31st October 1995. It is headed *"Without prejudice save as to costs in future litigation":*

"We write in a final effort to resolve the outstanding dispute between our respective clients as to your client's entitlement to demand a sale of the land referred to in the Schedule to this letter with vacant possession, or the purchase by our clients of your client's interest in the said land valued on the same basis.

We have been advised by Counsel that in the circumstances of this case the court is unlikely to order a sale of the land or to require that the partnership gives notice to quit so that a sale can be effected on a vacant possession basis.

If, contrary to our expectations the court should order a sale it would be on the basis of a sale of the reversion subject to the tenancies.

Our clients as the co-owners of the land referred to above are willing to raise and pay to your client a sum representing the present value of her interest in the land subject to the tenancy in favour of B Wolfe & Sons. This, we are advised, is the best outcome your client can expect of any proceedings brought by her for an order for sale of the land under Section 30 of the Law of Property Act 1925. We wish to save the costs of this litigation, and therefore offer to buy out your client's interest in the land on a tenanted basis.

Vacant possession of the cottage occupied by your client would have to be given on payment of the sum representing your client's interest in the land.

As you are aware, we have sought independent advice as the value of this land subject to the agricultural tenancies in favour of the partnership. In order, however, to achieve a speedy resolution of this matter our clients are prepared to agree to pay a more generous figure, namely £200,000 for your client's interest in the land. Please note that the figure of £200,000 has been carefully considered and is not meant to be just the first figure in a bargaining situation and liable to be increased. If anything, any future proposals are likely to be for a lower sum.

If the figure is not acceptable but the basis of valuation is agreed then there ought to be agreed a procedure for determining an independent valuation. We have in mind the appointment of valuers on both sides, with provision for determining any dispute between these valuers by a third valuer acting as an expert.

If our offer is accepted, our clients would expect to be able to raise the amount due to your client within a short space of time, and as stated above, will be paid on Mr & Mrs Butcher vacating the bungalow. For the avoidance of doubt, we confirm that the sum offered contains no element of legal costs incurred by our clients: we propose that this matter be resolved on the basis that each side should bear their own costs.

This offer will remain open for 28 days from today, and is made in full and final settlement of any claims your client may have in respect of the land described in the Schedule. In the event that it is not accepted, we reserve the right to refer to this letter in any future litigation, either in your client's Section 30 application, or any other proceedings concerning the partnership of B Wolfe & Sons or your client's interest in the land let to the partnership, when the question of costs falls to be determined.

We hope that your client will see fit to accept our offer. We look forward to hearing from you in due course, and in any event within 28 days."

On 1st November 1995 Mrs Butcher's solicitors wrote rejecting the offer. No reasons were given for the refusal. So far as this Court is aware, no further negotiations took place between the parties until the trial before Rattee J in June 1997 was almost over.

THE TRIAL .

Mrs Butcher's case was that she should have her share in the freehold reversion at vacant possession value and that the farmland should be sold. The defendants' case was that the farmland should not be sold and that Mrs Butcher's beneficial interest should be valued on the basis that the land was subject to an agricultural tenancy or tenancies in favour of the partnership. It was also contended that a sale of the land on the open market would endanger the continuation of the farming business.

When the defendants' then counsel was making closing submissions, the judge asked her why he should not make an order for the sale of the land on the tenanted basis. The defendants' counsel asked for time to take instructions whether the defendants would make an offer to buy Mrs Butcher's interest at the current tenanted value of the land. Such an offer was in fact made on behalf of the defendants. The judge said he would treat that offer as remaining open until 10.25 am the next morning. Mrs Butcher accepted that offer before the deadline. The parties settled the action on agreed terms, save as to costs.

The terms of the agreement are contained in a document. Clause 6 of the agreement is relevant:

"The vendor and the purchaser shall apply to the court to stay the proceedings save:

(1) as to such order for costs as the court may think it appropriate to make; and

(2) for the purpose of enforcing the terms of this agreement, for which purpose this agreement shall be treated as a rule of Court."

Counsel asked the judge to decide the issue on costs on the basis that the terms of the agreement were to be treated as the order which the judge would have made had the case proceeded to judgment and he had given judgment for the sum agreed for Mrs Butcher's interest.

Under the compromise Mrs Butcher sold her one third beneficial interest in the freehold reversion for a total price of £295,833, payable in two tranches. In the course of argument on costs, the judge was shown the Calderbank letter. He was also shown a valuation of Mrs Butcher's freehold reversion, prepared on behalf of the defendants in February 1994.

According to that valuation, Mrs Butcher's interest in the freehold was worth £127,580. The document shows the workings to arrive at that figure. It shows that, in relation to each piece of land, the undivided share is given a value from which there is deducted ten percent. The judge gave a short judgment on the issue of costs. He concluded that Mrs Butcher should pay the defendants' costs. The relevant part of his judgment states:

"It seems to me that it is also plain from the way in which the proceedings have been conducted, and in particular what I was told in the course of the trial, that the reason that that letter met with a flat refusal, rather than any attempt to negotiate further on the figures for the relevant valuation, was that, at all stages, the plaintiff had been determined to accept nothing less than being bought out at a figure representing a third of the vacant possession of the land, rather than a third of the valuation on the realistic basis, which was subject to the tenancy.

In those circumstances, it seems to me that the proceedings need or should never have been brought in the face of the offer that was made, at least without an attempt on the part of the plaintiff to negotiate further on the figures, if she was really interested in obtaining what she has now obtained by way of agreement; a valuation of her interest on the tenanted basis. It seems to me appropriate that, in those circumstances, the defendants should not have to bear any part of the costs and they should be paid by the plaintiff on the standard basis."

COSTS ON COMPROMISE

A point of general concern arises on the judicial determination of costs when everything else has been agreed. It is unfortunate that, in compromising these proceedings, the parties were unable to reach an agreement on liability for costs. That led to a situation which settlements are intended to prevent - further litigation between the parties, with the result that substantial additional costs have been incurred in deciding who should pay the substantial costs already incurred.

All lawyers learn from experience that costs are often a stumbling block in negotiating a settlement of proceedings. A judge who is informed by the parties that they have agreed everything except costs may be placed in a difficult position. On the one hand, he may take the view that, if the parties have not agreed everything, including costs, then they have not settled their case: they must either reach an agreement on costs or, failing that, go on with the case. This is a matter for the discretion of the judge. He maybe entitled in some circumstances to adopt that position in the hope that the case will not go on and that a settlement on costs will be achieved. On the other hand, a judge may not wish to risk jeopardising the settlement, and may agree to do what Rattee J did in this case - decide the costs issue for the parties. There can be problems; as the case has not run its full course, the judge has not heard all the evidence and all the argument. He may face difficulty in knowing what materials he should take into account in the exercise of his judicial discretion.

No such problem arose in this case because the parties made it clear to the judge that he was asked to decide the costs issue on the basis that what was agreed would have been awarded by him on a judgment. It was agreed that he should consider the contents of the Calderbank letter. The essential question before Rattee J, who had heard the evidence and most of the argument, was whether, in the light of the Calderbank offer, Mrs Butcher should be ordered to pay the costs.

THE LAW

The relevant law can be summarised in the following nine short propositions.

(1) The general principle is that a successful party is entitled to his costs. Order 62 rule 3(3) of the Rules of the Supreme Court provides:

"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

(2) A party may at any time make a written offer to any other party which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings: Order 22, rule 14(1). That rule was introduced following the decision of the Court of Appeal in Cutts v Hay [1984] 1 Ch 290, in an effort to promote the policy of encouraging settlements in all kind of disputes, and not just matrimonial and financial disputes of the kind considered in Calderbank v Calderbank [1976] Fam 93.

(3) A Calderbank offer is not an open offer. Its existence must not be disclosed to the court until the issue of costs falls to be determined: Order 22 rule 14 (2).

(4) As with a payment into court, a Calderbank offer is a matter which the court must take into account in the exercise of its discretion as to costs: Order 62, rule 9(1)(d).

(5) It is appropriate to adopt the Calderbank procedure where, as here, the defendants could not protect their position by a payment into court. Compare Singh v Parkfield Group Plc [1996] PIQR Q110, where the defendant could have protected himself by a payment into court, in which case a Calderbank offer was not appropriate.

(6) The Court has an overall broad judicial discretion on costs.As Ormrod LJ said in ***McDonnell v McDonnell*** [1977] 1 WLR 34 at 38:

"A Calderbank offer should influence but not govern the exercise of the discretion."

A Calderbank offer is made for the same reason as a payment into court is made; to encourage a settlement and, failing a settlement, to protect the position on costs of the person making the payment in or the Calderbank offer. But a Calderbank offer is not to be treated as, or to be regarded as a substitute for, or to be equated for all purposes with, a payment into Court. As a Calderbank offer is appropriate in a case other than a claim for debt or damages, it requires a greater degree of flexibility. The proper approach of a Calderbank offer, when it is taken into account on a later argument on costs, is to ask whether the party to whom the offer was made "ought reasonably to have accepted the proposal in the letter?" Or, to put it another way, account must be taken of the reasonableness or otherwise of the refusal to accept the offer - see ***Cutts v Head*** [1984] Ch 290 at 302 per Oliver J, and ***Chrulew & Others v Borm Reid & Co*** [1992] 1 WLR 176 at 182A. This approach is to be compared with the payment into court where, in the absence of a special reason for depriving the offering party of his post-offer costs, the simple question is whether the payment in is equal to or is beaten by the defendants at trial.

(8) A Calderbank offer must be made in clear terms so that the party against whom it may be used on the issue on costs knows what he is offered - see C & H En ing eering v F Klucznic & Son Limited [1992] FSR 667 at 671. It may well be reasonable for a party to whom an offer is made to refuse an offer made in ambiguous terms.

(9) The Court of Appeal will not interfere with the trial judge's discretion on costs, unless he erred by disregard of legal principle or he reached a conclusion which is plainly wrong; for example, as a result of a misunderstanding of relevant facts.

CONCLUSION

In my judgment Rattee J was entitled to exercise his discretion in the way that he did. Most of the argument has focused on the terms of the Calderbank letter. The letter of 31st October 1995 was, as already indicated, written before any legal proceedings were commenced. It was couched in clear terms. Miss McAllister, on behalf of the defendants, rightly accepts that, read as a whole, the offer in the concluding paragraphs was to dispose of all the claims that Mrs Butcher might have relating to the farmland, whether based on her beneficial interest in the reversion or her partnership interest, even though most of the earlier part of the latter was concerned with the question of sale and the valuation of the beneficial interest in the freehold reversion. It follows, as also accepted by Miss McAllister, that, if the offer had been accepted, it would have prevented Mrs Butcher from pursuing both the originating summons proceedings for sale and any issue in the partnership proceedings relating to that land.

I reject Mr Wonnacott's contention on behalf of Mrs Butcher that the reference to the "*basis of valuation*" meant the February 1994 valuation. I would also reject his alternative contention that the expression "basis of valuation" was ambiguous and the defendants should not be entitled to rely on that ambiguity to say that Mrs Butcher's refusal of the offer was unreasonable. The purpose of this contention of Mr Wonnacott was to persuade the court that Mrs Butcher had, in the settlement reached at trial, beaten the offer and obtained more than had been offered in the Calderbank letter. It was pointed out that the 1994 valuation produced a lower overall figure than the settlement figure and that that lower figure had been arrived at on the basis of a ten percent deduction, which was claimed to be applicable to the valuation of the beneficial interest on the buy-out. This is not a correct reading of the letter as a whole. The ten percent deduction is not, as Mr Wonnacott contended, the "*basis of valuation*" at all. It is a percentage discount made from a valuation arrived

at upon another basis. The "*basis of the valuation*" in the Calderbank letter refers to the dispute identified earlier in the letter on the conflicting bases of valuation: the vacant possession basis of valuation asserted by Mrs Butcher, and the tenanted basis of valuation asserted by the defendants.

Mr Wonnacott relied on two other points in the letter in support of his contention that the judge had misinterpreted the letter and that it was reasonable for Mrs Butcher to reject the offer. The proceedings settled before Rattee J related only to Mrs Butcher's beneficial interest in the freehold reversion. Miss McAllister claimed, and the court accepts, that the offer in the letter was made on the basis that it was in satisfaction of all claims by her concerning the land, whether via the beneficial interest in the reversion, or by virtue of a share in the partnership. Mr Wonnacott contended that if that global offer had been accepted by Mrs Butcher, she would have to give up her partnership claim concerning the land. Mrs Butcher had thereby been put into the position where she was penalised on costs before it was known, or could be known, whether she was right or not in her partnership claim. The partnership action has yet to be tried. In those circumstances, it was argued, it was premature and erroneous to order her to pay all the costs because she had not accepted an offer in the terms made in relation to all her claims.

It was submitted that, as far as the liquidated monetary sum was concerned, she had been offered only £200,000 in the letter to settle all claims. She had in fact achieved the sum of £295,833 in the settlement solely on the basis of her beneficial interest. How could it be said, Mr Wonnacott asked, before the result of the partnership action was known, that she had not acted reasonably in rejecting the global offer? If she had accepted that offer, he repeated, she could not have gone on with that claim. Further, it was submitted by Mr Wonnacott that the offer was couched in terms that, if the valuation submitted was not agreed by her, it was to be agreed by valuers instructed by each side and, failing agreement between them, it was to be determined by an expert. Mr Wonnacott submitted that this was offering to replace one form of litigation by originating summons with another form of litigation by experts. It was reasonable for her to refuse to go along with that. He painted what was intended to be an alarming picture of all the things that can go wrong with the use of experts on valuation. This was Mr Wonnacott's answer to the observation of the court that the procedure proposed as an alternative to litigation might well have cost all the parties substantially less than the total costs of this litigation, estimated at £70,000.

These points do not persuade me that Mrs Butcher was reasonable to reject the offer. In the letter of rejection on lst November 1995 neither of these points were raised as reasons for rejecting the offer. The refusal was a blank, outright refusal. So the critical question for the determination of the issue of costs is: why did Mrs Butcher reject the offer, pursue the proceedings, and run up legal costs for the defendants as well as for herself? To put it another way: why was this case fought? Was it fought because she did not want to settle all her claims relating to the land? Was it fought because she objected to the proposed expert procedure? The answer to these questions was given by the judge. The case was fought because Mrs Butcher took a position on the basis of the valuation of her share. She wanted vacant possession as opposed to the tenanted basis of valuation. A vacant possession value might have added as much as 40 percent to the estimated tenancy valuation. When she settled it was on the basis for which the defendants had always contended and which she had always opposed. Mrs Butcher fought the case on a point of principle. She ultimately conceded that point in the settlement. If she had accepted that the defendants were correct on this point of principle, the case would probably have been settled. The legal costs of the proceedings would not have been incurred. I agree with the judge that Mrs Butcher should have to pay the costs.

Finally a discrete point was made on behalf of Mrs Butcher. Mr Wonnacott described it as a "procedural mishap". But the alleged mishap is irrelevant to the disposal of the costs issue. Mr Wonnacott argued that the judge should never have been told of the defendants' offer to settle. Having been told that, the judge should not have set a deadline directing that the offer was to remain open for acceptance until 10.25 the next day. The defendants' offer was not an open offer to settle the whole or any part of the claim. It was not an outright admission. It was implicitly made "without prejudice". It was, therefore, inadmissible in evidence. It should not have been disclosed to the judge. This "mishap" caused the settlement. The case would not have been settled if the offer had not been wrongfully revealed to the judge. It was, therefore, wrong to order Mrs Butcher to pay the costs. It would have been more appropriate, Mr Wonnacott argued, to order the

defendants who had made the offer, to pay the costs. Alternatively, no order for costs should have been made.

This is a false point. Whether there was a mishap or not (on which I express no view) the offer was in fact accepted by Mrs Butcher. A binding settlement was reached. The reason the binding settlement was reached was that Mrs Butcher accepted the offer, not because of any procedural mishap or error on the part of the judge.

The judge was asked by the parties to decide the question of costs. In deciding costs, the judge was entitled to take into account the Calderbank letter. There has been no attempt to set aside the settlement or to allege that it is in any way irregular.

To sum up, the judge made no error of legal principle in the exercise of his discretion. He was entitled to take into account the Calderbank offer and to identify and take into account Mrs Butcher's reason for refusing to accept that offer. He was right in concluding that it was not reasonable of her to refuse that offer. She had pursued the proceedings with the objective of obtaining a vacant possession valuation of her interest. She achieved a tenanted basis of valuation of her interest. The case was settled on the same basis of valuation as had been proposed in the Calderbank offer. The judge was entitled to make the order for costs against Mrs Butcher. I would dismiss the appeal.

LORD JUSTICE MANTELL: For the reasons given by my Lord, Lord Justice Mummery, and for those contained in the judgment of my Lord Justice Simon Brown which I had have had the opportunity of reading in draft, I too would dismiss this appeal.

LORD JUSTICE SIMON BROWN: This is another in the long line of cases concerned with the correct approach to Calderbank letters. How flexible is this mechanism for protecting parties against an adverse order for costs? What are the determining considerations? More particularly, does one ask simply whether the plaintiff has achieved more by the litigation than was specifically offered by the letter; or is the enquiry a wider one, encompassing questions as to the overall reasonableness of each party's position and whether the dispute between them could and should have been settled, or at least more cheaply resolved? My Lord has already set out the detailed facts of this appeal and I need not repeat them. I would, however, just note the following important features of the Calderbank letter here.

(1) The cash figure offered for the plaintiffs one-third share in the land (£200,000) was calculated on the basis of the land being subject to the agricultural tenancies.

(2) As an alternative to that cash offer, the plaintiff was offered the opportunity to agree "a procedure for determining an independent valuation" of her share on that "basis of valuation" - ie on the basis that the land was subject to agricultural tenancies and not, as the plaintiff was contending for, on the basis of vacant possession. The procedure suggested was "the appointment of valuers on both sides, with provision for determining any dispute between those valuers by a third valuer acting as an expert."

(3) The offer was made "in full and final settlement of any claims your client may have in respect of the land", by which was expressly envisaged the plaintiffs "s 30 application [which had just been sent in draft to the defendants' solicitors and had plainly prompted the Calderbank letter], or any other proceedings concerning the partnership of B Wolfe & Sons or your client's interest in the land let to the partnership."

The plaintiffs response was immediate, terse and absolute: "your clients' offer is refused". Mr Wonnacott submits, however, that it was a perfectly justifiable response and that the offer ought not properly to have been found sufficient to protect the defendants against an order for costs when, at trial, the plaintiff obtained her judgment. That judgment, he points out, although on a basis less favourable than she was claiming, was more favourable than the defendants were openly acknowledging she was entitled to and, insofar as it translated into cash, substantially exceeded the £200,000 offered in the letter.

As to the alternative offer put forward in the letter, Mr Wonnacott makes two main submissions. First he contends that a claimant is entitled to have his or her claim decided in litigation and ought not to be penalised in costs for refusing to accept some alternative form of dispute resolution - here valuation by experts. Second, he submits that in any event an acceptance of the offer made here would have precluded

the plaintiff from pursuing, as she does, a claim with regard to the land in the separate partnership action that still remains outstanding.

In deciding the costs against her Rattee J found:

. . . that the reason that that letter met with a flat refusal, rather than any attempt to negotiate further on the figures for the relevant valuation, was that, at all stages, the plaintiff had been determined to accept nothing less than being bought out at a figure representing a third of the vacant possession value of the land, rather than a third of the value on the realistic basis, which was subject to the tenancy."

Mr Wonnacott criticises that approach. A plaintiff, he submits, is entitled to take a Calderbank letter at face value and is not bound to explore with the defendant whether something more might be available. The obligation to negotiate placed upon parties by the Court of Appeal in ***Gojkovic v Gojkovic*** (No 2) [1992] 1 AER 267 applies, he submits, only to family proceedings, and that is because RSC order 62 r3(5) disapplies r3(3) - the general rule that costs follows the event - to proceedings in the Family Division. It is, he submits, for a defendant to make a clear and unambiguous offer - see ***C & H Engineering v F Klucznic & Sons Limited*** [1992] FSR 667 - and nothing short of this will provide the protection against costs which is sought.

For my part I would reject these arguments. They involve altogether too narrow and inflexible an approach to this valuable means of protecting parties to litigation against unreasonable opponents. As was said by Ormrod LJ in ***McDonnell v McDonnell*** [1977] 1 WLR 34 at 38, in a passage often since cited:

"It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these [ancillary proceedings following a divorce] precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A Calderbank offer should influence but not govern the exercise of the discretion."

Valuable guidance for a case like the present seems to me to be found in the approach followed by the Court of Appeal in ***Roache v News Group Newspapers Ltd*** (unreported, 19 November 1992), a libel action in which the plaintiff was awarded £50,000 damages, the same sum as had been paid into court. He obtained in addition, however, an injunction against further publication of the libel and on that account was awarded his costs by the judge below. That order was reversed on appeal.

Sir Thomas Bingham MR, having reviewed the earlier authorities, said this:

"The upshot of these cases is in my judgment clear. The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

Later, having considered the detailed facts of the case, the Master of the Rolls concluded:

"Against that background, I return to the central questions. The defendants did not wish to fight this action. If they had wished to do so they would not have paid £50,000 into court. Plainly they wished to settle if they could do so at an acceptable cost. Given that wish, it is in my view incredible that they would have allowed a settlement to founder for want of an undertaking by them not to republish. No reason has been suggested why they should have acted in such an uncommercial way. I do not accept the judge's view that 'the plaintiff had to pursue the matter to judgment in order to obtain an injunction'. The overwhelming probability is, in my view, that if he had chosen to accept the money in court he could have had an undertaking, equivalent in effect to an injunction, for the asking. That he chose to go ahead can only, in my view, have been because he wanted to win a larger sum from the jury than the defendants had offered. There can in my view be no doubt that the defendants emerged from this trial as substantial winners: they had held the award to a sum no greater than was already on offer. The injunction was a matter of no significance to them because they did not intend to republish anyway. It was on this minimalist basis that they resisted the grant of an injunction."

Stuart-Smith LJ said this:

"The power to make a payment into court is a most useful weapon in the hands of a defendant who is faced with a greedy plaintiff who is making unreasonable demands for damages. Indeed it is his only weapon. But that weapon will be completely blunted if, having failed to beat the payment into court, the plaintiff can say, 'Oh well, I'm entitled to an injunction, the defendant didn't offer me that and I have had to come to court to get it so I'm entitled to my costs.' Where there is a substantial payment into court which the plaintiff fails to beat, it cannot be right that, because the defendant omits to make a ritualistic offer of an undertaking not to repeat the libel, he has to pay all the costs after payment in."

Then, a passage I quote with some diffidence from my own judgment:

"(3) The high point of the plaintiffs argument on costs was, and remains, that in obtaining the injunction he had obtained more than was expressly offered to him in the proceedings. There had been no equivalent of a Calderbank letter. Accordingly he should be regarded as the victor and held entitled to recover his costs.

(4) In my judgment, however, that is to take an altogether too simplistic view of success in this litigation. For the plaintiff to be entitled to recover his costs - in this or any other litigation - he must show at least that he has obtained at the hearing something of value which he could not otherwise have expected to get. Only that justifies his proceeding with the action to trial. That I conclude is the test to be applied.

(5) For the reasons given by my Lords, that I believe is something that this plaintiff cannot show. That test he fails. Not because the injunction which he was granted was not something of value - I am prepared to assume that it was. But because an equivalent undertaking was, as the Master of the Rolls puts it, there for the asking."

That decision was later applied by this court in ***Sugar v Venables*** (unreported, 17th October 1997), in which the plaintiff was ordered to pay the defendant's substantial costs incurred during a six-month period, after a large payment into court had been made and before it was accepted whilst a suitable form of undertaking was being considered. It was the basic contention of the unsuccessful plaintiff there that *"in all circumstances it is incumbent upon the defendant seeking protection as to costs to make an unambiguous and unequivocal offer in terms capable of instant acceptance."* Again I quote from my own judgment:

"I would reject that contention. It involves, to my mind, an altogether too mechanistic approach to the issue of costs and is in any event irreconcilable with this court's judgment in Roache. If the argument were sound the plaintiff would be free to ignore an express offer to negotiate an appropriate undertaking and be entitled to litigate on at the defendant's expense until the undertaking came to be in a form which he was prepared to accept. Roache itself, in my judgment, demonstrates this to be wrong. There no offer whatever of an undertaking was made, indeed the application for an injunction was resisted, and yet an injunction having in fact then been granted, the defendants were nevertheless adjudged to have been the substantial winners. The real reason, as this court found, why the plaintiff there had fought on was to try to obtain greater damages than were on offer. In that he failed. That, French J found, was the substantial reason why this plaintiff too was prolonging these proceedings after the payment in."

Returning to the facts of the present case, it seems to me perfectly clear:

(1) that the reason why the Calderbank letter met with a blank refusal was not because the plaintiff disliked the idea of independent valuation by experts, nor because she was concerned to preserve her claim in the separate partnership proceedings, but rather, as the judge found, because she adamantly refused to accept the offered basis of valuation;

(2) that had she been prepared to accept that basis of valuation for her interest in the freehold, the defendants would readily have agreed that she could nonetheless, if she wished, assert her separate claim in the partnership action. That release from the strict terms of the offer as made was "hers for the asking".

(3) in reality, therefore, she obtained nothing from the proceedings that she could not equally and altogether more cheaply have obtained by accepting the offer (modified as it readily would have been to allow her separate claim in the partnership proceedings).

None of this is to say that a defendant could ordinarily escape liability for costs merely by offering in place of litigation some alternative form of dispute resolution. That, however, was not the sticking point here. Essentially all that divided these parties was the basis of valuation. That dispute was resolved in the litigation against the plaintiff. It was appropriate that she should pay the costs.

I too therefore would dismiss this appeal.

ORDER: Appeal dismissed with costs.

MR M WONNACOTT (Instructed by White & Bowker, 19 St Peter Street, Winchester) appeared on behalf of the Appellant

MISS A McALLISTER (Instructed by Blake Lapthom, New Court, Barnes Willis Road, Segersworth, Fareham) appeared on behalf of the Respondent