CA before Roch LJ, Swinton Thomas LJ, Schiemann LJ. 3rd December 1998.

**JUDGMENT LORD JUSTICE ROCH:**

1. On the 13th March 1989 the plaintiff was injured in a car accident in which the back of her stationery car was run into by the defendant's car. The plaintiff suffered a whip-lash injury.

2. The plaintiff commenced proceedings against the defendant and on the 22nd January 1992 obtained an interlocutory judgment against the defendant for damages to be assessed. On the 1st August 1997 Colman J awarded the plaintiff damages in the sum of £277,650 and interest of £58,177 making in all £335,827. The various sums making up the total judgment debt were set out in the Schedule of Damages attached to the judgment.

3. On that day the judge made the following orders in respect of costs:
   *"(2) The defendant to pay the plaintiff her costs of the action until the 10th July 1997 to be taxed if not agreed;*
   *(3) The plaintiff to pay the defendant her costs of the action from the 10th July 1997 limited to the issue of quantification of the claim for losses with leave to the plaintiff to appeal;*
   *(4) The defendant's costs since the 10th July 1997 as aforesaid may be set off against the plaintiff's costs as aforesaid and* that execution do issue for the balance only."

4. There were further orders namely that the sums paid into court by the defendant totalling some £47,500 were to be paid to the plaintiff's solicitors in part satisfaction of the judgment debt and any interest thereon was to be paid to the defendant's solicitors and a stay of execution of the judgment debt limited to £270,000 pending the determination of any appeal by the defendant.

5. The assessment of damages was dealt with in two stages by the judge. The first, which culminated in a judgment dated the 14th February 1997 by Colman J followed the hearing of evidence and argument over some 15 days in July 1996 and October 1996 at Manchester and Liverpool respectively. In that stage the judge had to assess and determine the effects of the accident on the plaintiff both physically and psychologically. In addition the judge had to decide whether the plaintiff's decision to close down her business was attributable to the accident and if it was whether it was a reasonable or unreasonable decision. As it was common ground that the plaintiff would have suffered physical and psychological difficulties which would have caused her to give up her business at some time, even if the accident had not occurred, the judge had to resolve the question whether the accident had led to an acceleration of the plaintiff's decision to give up business, and if so the period of time by which that event had been accelerated.

6. The second phase involved the judge arriving at figures for each of the heads of damage to which the plaintiff was entitled. The judge concluded his judgment of the 14th February 1997 by saying: *"I have not heard argument in relation to the precise quantification of the claim for loss of past and future earnings, although the plaintiff has put in evidence a report by accountants, Frenkel Topping, which advances alternative bases for quantification. If in the light of the conclusions arrived at in this judgment, the parties are unable to arrive at an agreed loss of earnings figure I shall hear further argument or receive further written submissions on the point and determine the matter. Hopefully, in view of the immense costs already incurred in this trial, a figure can be agreed, both for that head of damage and for general damages for pain and suffering and for medical expenses."*

7. There was a further hearing before Colman J on the 1st July 1997 in which he gave the following directions:
   *"1. A further hearing to take place before Colman J on the 1st August 1997 with a strict time limit estimate of half a day.*
   *2. The defendant to serve a counter schedule of special damage together with a skeleton argument for the hearing on the 1st August 1997 by 4 p.m. on the 25th July 1997. (A schedule of special damage based on the judge's findings in his judgment of the 14th February had been submitted on behalf of the plaintiff on the 27th June 1997).*
   *3. The plaintiff to serve any reply to the defendant's counter schedule of special damage and a skeleton argument in relation to the 1st August 1997 hearing by midday on 31st July 1997."*

8. On the 3rd July 1997 the plaintiff's solicitor's wrote to the defendant's solicitors hoping that a hearing on the 1st August 1997 would not be necessary because "quantification of damages should now be able to be settled by agreement between the parties."

*9.* On the 10th July 1997 the defendant's solicitors wrote a letter headed ***"Without Prejudice save as to Costs"*** *""Further to the above matter, in an effort to avoid the costs of the resumed hearing to conclude the assessment of damages, we are instructed to offer to agree damages in the sum of £350,000. However, it should be clearly understood that this offer is based upon the findings of Colman J in the written judgment recently handed down, but is otherwise strictly without prejudice to the defendant's right to appeal against those findings. For the avoidance of doubt, in the event that those findings are successfully challenged on appeal, the above offer would not preclude or prejudice any consequential reassessment of damages. We reserve the right to draw this letter to the attention of the court, if necessary, on the question of costs."*

*10.* The plaintiff's solicitors replied on the 11th July in these terms: *"Unfortunately, we feel unable to respond to the offer contained therein in its present form. We have served a detailed schedule of special damages and enclose herewith a further copy revised to the 1st August 1997. It is impossible to determine the merits of your offer without it being broken down in a similar way and this becomes particularly important when the reservation of your rights to appeal against the judgment of Colman J is considered. It will also be of great benefit to us in determining the areas of disagreement between us if you set out your offer in more detail. We are, however, pleased that you have opened a line of dialogue and we will be pleased to discuss these matters further. ....."*

*11.* On the 15th July the defendant's solicitors wrote: *"We disagree with your inability to respond to the offer put forward. We are not obliged to break down the basis upon which the offer is made. The Calderbank offer was not an intention to open a line of dialogue but if you do have any observations, we will take instructions."*

*12.* To that letter the plaintiff's solicitors replied the same day in what they declared to be an open letter. *"The trial in this case proceeded on the agreed basis that following the determination by the judge of issues of causation and their quantitative effect on damages the parties would resolve the necessary figures for general and special damages and interest. Your proposal of a global figure after judgment is contrary to the way in which the trial was conducted by your counsel, and leaves the plaintiff, the trial judge, and in the event of an appeal (which you have now raised) the Court of Appeal in a position of not knowing the basis of your calculations, or the sum arrived at for each relevant head of damage."*

*13.* The letter then went on to draw the defendant's solicitors attention to two cases: ***Bennett v Chemical Construction (GB Ltd)*** [1971] 3All ER 822 and ***George v Pinnock*** [1973] 1 All ER 926. Both of those were decisions of the Court of Appeal criticising global awards of damages in personal injury cases. The letter went on: *"In our view the present situation is not analogous to the making of a payment into court, or a* ***Calderbank*** *offer because you have raised the spectre of an appeal, whilst at the same time failing to state in clear terms how any global figure is arrived at ....."*

*14.* On the 21st July the defendant's solicitors wrote again a letter headed "Without Prejudice" which contained this paragraph: *"In an attempt to assist, we would indicate that, if you were to accept the global figure on offer, we would gladly discuss with you an appropriate compromise basis of calculation."*

*15.* On the 24th July the defendant's solicitors sent their counter schedule together with the defendant's outline submissions on quantum. On the same day the defendant's solicitors wrote, again the letter is headed ***"Without Prejudice":*** *"We have instructions to appeal the judgment of Colman J. Time does not run for the appeal until damages are finally assessed. However, not withstanding our client's intention to appeal, they would be prepared to pay your client £100,000 and the costs to be taxed if not agreed. This offer can be accepted only until notice of appeal is lodged. Please note this offer is entirely distinct from the Calderbank offer."*

16. On the 1st August 1997 the judge made the costs orders which are set out earlier in this judgment. Colman J accepted the submission made by Mr Turner on behalf of the defendant that the letter of the 10th July was a letter served pursuant to the provisions of Order 22 Rule 14; a letter to protect the defendant in costs where the defendant was unable to protect herself by way of a payment in. The letter had been sent more than three weeks before the date of the hearing on the 1st August and the figure at which the defendant had offered to compromise had been greater than the figure finally agreed between the parties which the judge had awarded. Mr Turner enlarged on this submission by saying that payment in was not available to the defendant in the situation which had arisen because had the defendant paid into court £350,000 the plaintiff could have taken that money out of court and the defendant would have lost the option of appealing. Mr Turner anticipated the argument foreshadowed in the defendant's solicitor's letter of the

15th July by pointing out that if the sum had to be broken down into its constituent parts, there would probably be some ten such parts, and ten separate figures and if the defendant lost on one of those ten figures, it would be submitted on behalf of the plaintiff that she should recover all the costs leading up to and included in the hearing on the 1st August. Mr Turner pointed out that a payment in would also have been a round figure.

17. Mr Hamer before the judge countered by submitting that because it was clear there was going to be an appeal to the Court of Appeal it was not appropriate, this being a personal injury case to have a global figure. A breakdown of the figures would be required by the Court of Appeal, so that if the appeal succeeded in overturning any of the judge's findings in his judgment of the 14th February, the Court of Appeal could adjust the damages according to the findings the Court of Appeal had made. Consequently, submitted Mr Hamer, the letter of the 10th July was a defective offer. It did not come within Order 22 Rule 14. The judge was told that the plaintiff's advisors had made two attempts to obtain a breakdown of the sum of £350,000, although Mr Hamer had told us that the judge was not shown any of the correspondence between the party's solicitors in July 1997 except the defendant's solicitor's letter of the 10th July and the Plaintiff's solicitor's response of the 15th July.

18. The judge put to Mr Hamer that as the defendant had not forgone the right to appeal the judgment of the 14th February, the offer that had been made was not one which could be accepted or alternatively was not one which the plaintiff could reasonably be expected to accept because it did not contain any breakdown of the global figure.

19. Mr Hamer's response was that the offer of the 10th July placed the plaintiff in a difficult situation in the light of the decisions of the Court of Appeal. Mr Hamer in effect was saying that it was an offer that the plaintiff could not reasonably be expected to accept. The judge pointed out that the counter schedule served by the defendant's solicitors on the 25th July was not a response to the plaintiff's solicitors request for a breakdown of the global figure; the counter schedule did not total £350,000 and was quite different from the offer made on the 10th July. There simply had not been a response to a request for the breakdown of the £350,000 figure.

20. Mr Turner when asked by the judge for his response to the points made by Mr Hamer, submitted that the two authorities on which Mr Hamer relied had no relevance to settlement offers at all. Mr Turner recognised that if the plaintiff accepted the global figure as the correct quantification of the plaintiff's claim on the basis of the judge's judgment dated the 14th February and an appeal to the Court of Appeal against that judgment were to be successful, the Court of Appeal might have to send the quantification of the claim back for a retrial. Mr Turner submitted that that situation was not unknown in the Court of Appeal. Whether the Court of Appeal would have to send this case back for a retrial on quantification, would depend upon how radical the departure of the Court of Appeal's views on causation, if any, was from those contained in the judgment of the 14th February.

21. Mr Hamer replied to that point by submitting that *"a Calderbank offer is a full and final settlement of the litigation. It is intended to bring the litigation to a complete close."* Mr Hamer, before us, accepted that that was not correct, but submitted that a *Calderbank* offer, if accepted, should bring one or more issues in the litigation to a final determination.

22. The judge in the end ordered that the defendant should have the costs of the hearing on the 1st August and the costs from the 10th July onwards. The judge gave no separate ruling, but his reasoning emerges from exchanges between the judge and counsel. The judge started by saying that a *Calderbank* offer did not have to involve the bringing to an end of the action, it was sufficient if it concluded one or more issues in the action. Such an offer had the advantage of being infinitely flexible. In this case the letter of the 10th July made an offer which, had it been accepted by the plaintiff, would have rendered the hearing of the 1st August unnecessary. The fact that the defendant intended to appeal the judgment of the 14th February did not upset that. If the Court of Appeal upheld that judgment the plaintiff would receive compensation of £350,000. If the Court of Appeal did not uphold that judgment then damages would have to be reassessed. In either event the costs leading up to and of the 1st August would have been saved.

*23.* Order 22 Rule 14 (1) provides: *"A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings."*

24. The first question is whether the letter of the 10th July 1997 from the defendant's solicitors was a written offer within that rule. In my judgment it clearly was. It related to an issue in the action namely the amount of compensation to which the plaintiff was entitled on the basis of the judge's judgment dated the 14th February. The proceedings to which the sub-rule applies are not confined to any particular type or types of action.

25. The second question is whether the judge should have disregarded that letter because of the provision of Order 62 Rule 9(1) of the Rules of the Supreme Court. That rule provides:
*"The court in exercising its discretion as to costs shall take into account .....*
*(d) any written offer made under Order 22 Rule 14, provided that except in a case to which paragraph (2) applies, the court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under order 22."*

Sub-paragraph (2) refers to Schedule 4 of the Social Security Act 1989 and has no relevance to this appeal.

*26.* In ***Singh v Parkfield Group plc*** [1996] PIQR Q 110, this court held that the effect of this rule is clear and mandatory and a *Calderbank* offer should not be taken into account by a court deciding on an appropriate costs order if, at the time the offer is made, the party making it could make a payment into court. In the only judgment in that case at page Q 113 Stuart Smith LJ said: *"In the ordinary way when a defendant is facing a money claim which he wishes to settle he should do so by payment into court and he should do so in sufficient time for the plaintiff to have a reasonable opportunity to consider it, even if that is less than 21 days before trial."*

*27.* A little earlier in his judgment Stuart Smith LJ had rejected counsel's first submission that the deletion of the proviso to Order 22 Rule 14 and the reference in that rule to Order 62 Rule 9(1)(d) was to give effect to the general policy indicated by this court in cases such as ***Cutts v Head*** [1984] Ch 290 to take reasonable offers to settle into account when deciding what orders as to costs should be made in order to encourage settlement and discourage obstinacy and unreasonableness on the part of litigants. Stuart Smith LJ said: *"I cannot accept that submission because it seems to me that the effect of Order 62 Rule 9(1)(d) is still clear. I can only conclude that the Rule Committee considered that it was unnecessary to have belt and braces if the belt alone would do. And accordingly they decided to tidy up the rules by deleting the reference to Order 62 and the proviso in Order 22 Rule 14. This makes good sense because Order 22 is concerned with the machinery of payment into court and written offers. Order 62 deals with the consequences as to costs resulting from payment into court and offers."*

28. In my judgment Order 62 Rule 9(1)(d) is mandatory and a written offer should not be taken into account when considering what costs order should be made, where a payment in would be effective to protect the paying-in party's position as to costs. In the present case the defendant could have made a payment into court. Indeed the defendant had on two occasions made payments into court totalling some £47,500. The defendant was to make a further payment into court having commenced an appeal against the judgment of the 14th February. Nevertheless a payment into court could not protect the defendant against having to pay the costs of the hearing of the 1st August 1997 because no payment into court which was realistic on the basis of the judge's findings in the judgment dated the 14th February 1997 could be made without the defendant in effect losing her opportunity to appeal that judgment. In the particular circumstances of this case which faced the defendant in July 1997, the defendant could not protect her position as to costs on the quantification issues by way of a payment into court. In those circumstances Order 62 Rule 9(1)(d) did not prevent Colman J taking into account the letter of the 10th July.

*29.* The significance of written offers which come within Order 22 Rule 14 is best expressed in a passage from the judgment of Ormrod LJ in ***McDonnell v McDonnell*** [1977] 1 WLR 34 at page 38*: "Clearly this is a very important consideration in exercising the court's discretion with regard to costs. It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these 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. The question to my mind is whether, on the basis of the facts known to the wife and her advisors and without the advantage of*

*hindsight, she ought reasonably to have accepted the proposals in the letter of the 16th December, bearing always in mind the difficulty of making accurate forecasts in cases such as this. On the other hand, parties who are exposed to the full impact of costs need some protection against those who can continue to litigate within impunity under a Civil Aid Certificate."*

30. That passage was cited with approval by Oliver LJ in ***Cutts v Head*** [supra] at page 302 and by Sir Thomas Bingham MR in ***The Maria*** [1993] QB 780 at 790 H.

31. Mr Hamer's submissions are first, that the judge did not exercise his discretion in this case. The judge simply decided that the letter came within Order 22 Rule 14 and consequently the defendant should have the costs after the date of the letter. Alternatively, Mr Hamer submits that the exercise by the judge of his discretion is defective in that the judge did not see all the correspondence between the party's solicitors following the letter of the 10th July, and had he done so he would have reached the conclusion that this was not a case where the plaintiff ought reasonably to have accepted the proposal in the letter of the 10th July.

32. I have no doubt that the judge did exercise his discretion. It was the judge during the exchanges between the judge and the plaintiff's counsel who drew attention to the issues whether the offer was one which could be accepted or could reasonably be expected to be accepted by the plaintiff. Later the judge pointed out that if the defendant's proposed appeal against the February judgment failed, as in the event it has done, the plaintiff, had she accepted the offer, would have had £350,000 and the costs of the hearing of the 1st August would have been avoided.

33. In my judgment a reading of the other letters in the correspondence would not have changed the judge's view when it came to the exercise of his discretion. We have heard no reason why the judge's attention was not drawn to those further letters. That could have been done. What those further letters make clear is that the defendant's solicitors were perfectly willing to work with the plaintiff's solicitors in producing figures within the global sum of £350,000 to represent the various heads of compensation. That would have removed one of the objections, in reality the only objection of substance, the plaintiff had to the defendant's offer. The fact remains that the sum offered was realistic and in the outcome more generous compensation than the plaintiff has achieved.

34. Since the hearing of the submissions on the orders for costs made by the judge on the 1st August 1997, the case of ***Butcher v Wolfe and Wolfe*** has been reported in the Times. The case was decided on the 30th October of this year by a Division of this court consisting of Simon Brown, Mummery and Mantell LJJ. In that case the plaintiff sued the defendants who were her brothers concerning farm land which the three of them held as beneficial tenants in common in equal shares. The land had been farmed by a partnership of which the plaintiff and her husband and her brothers and her parents had been partners. Two sets of proceedings were commenced: first, the plaintiff by originating summons sought an order that the farmland should be sold or alternatively that her brothers should purchase her share of the beneficial interest. In those proceedings the plaintiff claimed that the land should be valued on the basis of vacant possession, whilst the defendant's case was that the farmland should be valued on the basis that it was tenanted. The second proceeding was an action for the winding up of the partnership. Solicitors for the defendants wrote a *Calderbank* letter. That letter offered £200,000 for the plaintiff's interest in the land on the basis that a court would be unlikely to order a sale of the land and that the proper basis for the ascertainment of the value of the farmland was that it was tenanted. The plaintiff instructed her solicitors to reject that offer.

35. During the course of counsel's final submissions, following an intervention by the judge, the plaintiff's claim was compromised on the basis that the plaintiff should receive her 1/3rd share of the current tenanted value of the land. Under the compromise the plaintiff sold her 1/3rd beneficial interest in the freehold reversion for a total price of £295,833 payable in two instalments. Consequently the plaintiff in money terms did substantially better than the sum offered in the *Calderbank* letter, but compromised on the basis which had always been asserted as the correct basis by the defendants. The compromised agreement left the question of costs to the court. The judge ordered the plaintiff to pay costs because it seemed to him, in the circumstances, that the proceedings need not and 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. That order was appealed to this court. In that appeal counsel for the plaintiff relied upon the fact the plaintiff had achieved a figure substantially higher than the £200,000 offered in the *Calderbank* letter. Next counsel argued that an acceptance of the *Calderbank* offer would have precluded the plaintiff from pursuing a claim with regard to the land in the separate partnership action which still remained outstanding. Counsel criticised the approach of the judge, where the judge had referred to the plaintiff meeting the *Calderbank* offer with a flat refusal rather than making an attempt to negotiate further on the figures for the relevant valuation. Counsel submitted that a plaintiff 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.

*36.* Those arguments were rejected in both of the judgments given in the Court of Appeal by Mummery LJ and Simon Brown LJ. Simon Brown LJ rejected them in these terms: *"For my part I would reject these arguments. They involve altogether too narrow and inflexible approach to this valuable means of protecting parties to litigation against unreasonable opponents."*

*37.* Simon Brown LJ went on to cite passages from the judgments in the cases of ***Roache v News Group Newspapers Ltd*** decided on the 19th November 1992, a case where a plaintiff in a libel action recovered damages which were equal to the sum paid into court and in which the judge awarded the plaintiff his costs on the basis that he had in addition to the damages obtained an injunction against further publication of the libel. Although that was a *"payment in"* case Simon Brown LJ clearly considered that passages in the judgments from that case were relevant to offers made in *Calderbank* letters. In the passage from the judgment of Sir Thomas Bingham MR, as he then was, this passage appears: *"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?"*

*38.* In the passages that Simon Brown LJ cited from his own judgment in that case these sentences appear: *"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."*

*39.* In dealing with the particular appeal at the end of his judgment Simon Brown LJ said: *"In reality therefore she (the plaintiff) 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)."*

40. I respectfully agree with the approach of the members of this court in that case to *Calderbank* offers. In my judgment the plaintiff in this case cannot show that she obtained at the hearing of the 1st August something of value which she could not otherwise have expected to get. The question posed by the Master of the Rolls *"Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish?"* is equally to be asked where the hearing, the costs of which are under consideration by the judge, is the hearing of part of the action dealing with a discrete issue or discrete issues. An offeree is not entitled to take a Calderbank offer at face value; there is, in an appropriate case, an obligation to explore the offer made, if some modification or addition to the terms of the offer could produce a settlement of this issue or issues involved. In the circumstances of this case and in the light of the encouragement that this court is giving to the increasing use of *Calderbank* offers to mitigate the rising costs of litigation, I would dismiss this appeal against the costs order made by the judge.

**JUDGMENT : LORD JUSTICE SWINTON THOMAS:**

41. The letter on which the Defendant relies to protect her against an order as to costs is in these terms:

*"Further to the above matter, in an effort to avoid the costs of the resumed hearing to conclude the assessment of damages, we are instructed to offer to agree damages in the sum of £350,000.*

*However it should be clearly understood that this offer is based upon the findings of Colman, J. in the written judgment recently handed down, but is otherwise strictly without prejudice to the Defendant's right to appeal against those findings. For the avoidance of doubt, in the event that those findings are successfully challenged on appeal, the above offer would not preclude or prejudice any consequential reassessment of damages.*

*We reserve the right to draw this letter to the attention of the court, if necessary, on the question of costs."*

42. The Defendants wished to protect their position as to costs on the issue as to damages, and to save the additional costs incurred by a hearing on that issue.

43. The Judge had given his judgment on causation on the 14th February, 1997, adjourned the hearing as to damages and made his award of damages on the 1st August, 1997.

44. The Judge did not give a reasoned judgment on the issue as to costs, and no one could possibly criticise him for not doing so, but the general tenor of the discussion that took place between the Judge and Counsel on this point, and the submissions made, tend to show that the Judge took the view that as the Plaintiff had recovered less than the sum offered in the letter of 10th July and that the Defendant was entitled to recover costs as from that date.

45. Mr. Hamer's primary submission is that where there is a money claim the only option available to a defendant is to make a payment into court, and for that proposition he relies upon the provisions of Order 62 Rule 9(1).

46. Rule 9(1) provides insofar as is relevant:
*"The Court in exercising its discretion as to costs shall take into account:*
*(b) any payment of money into Court and the amount of such payment*
*(d) any written offer made under Order 22 Rule 14, provided that except in a case to which paragraph (2) applies, the Court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into Court under Order 22."*

47. The question arises as to whether the Defendant could in the circumstances of this case have protected her position by a payment into Court.

*48.* Order 22 Rule 14(1) provides: *"A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be 'without prejudice save as to costs' and which relates to any issue in the proceedings."*

The rule makes no specific provision as to how such an offer should be viewed on a subsequent issue as to costs.

*49.* Mr. Hamer relied on the decision of this Court in **Singh v Parkfield Group plc** which raised the point as to the apparent tension between Order 22 rule 14 and Order 62 Rule 9. In that case Stuart-Smith, L.J. said: *"In the ordinary way when a Defendant is facing a money claim which he wishes to settle he should do so by payment into Court and he should do so in sufficient time for the Plaintiff to have a reasonable opportunity to consider it, even if that is less than 21 days before trial....."*

*50.* Stuart-Smith, L.J. continued by saying that there may be cases where it is not possible to make a payment into Court and continued: *"If such a case arises it must be considered on its own facts; that is not this case. I agree with Mr. Matthews that the policy of the law should be to encourage settlement of actions wherever possible and Calderbank offers are useful too in achieving such settlements because the recipient of the letter knows that he will be at risk if he does not do better than the offer in the litigation. The machinery of payment into court where a money claim alone is made is simple and well understood. In all save exceptional cases an example of which I have just given, the Defendant can protect his position on costs, and the Plaintiff knows the consequences if he recovers less than the money in court. There may be some advantages in giving the court a wider discretion than that at present given by Order 62 Rule 1(d); but equally there are advantages certainly in these, but in any event it is not a matter for the court, but one for those who make the rules whether there should be any change or not."*

51. A personal injury claim is, of course, a money claim and, in ordinary circumstances, the appropriate course for a Defendant who wishes to settle the claim is to make a payment into Court pursuant to Order 69 Rule 9(1). If that is done, a Plaintiff knows exactly where he stands. That should always be the objective if a Defendant wishes to protect himself as to costs, whether by a payment in or by an offer of settlement under Order 22 Rule 14(1). With a payment into Court the Plaintiff knows that he can accept the money, and that will be the end of the litigation, or he can refuse it in which case he is at risk as to costs. That was not the position with regard to the offer made by the Defendant in this case by the letter of 10th July, 1997. No aspect of the case and no issue in the case was finally resolved by the offer contained in that letter, as the Plaintiff certainly did not know where she stood.

52. A personal injury claim may have three issues to be resolved:
    (1) liability;
    (2) causation; and
    (3) quantum of damage.

53. Usually, but by no means always, the live issues are liability and quantum of damage. Often those issues are tried separately. The issue as to liability may involve a short hearing only, whereas the trial on damages may be complicated, lengthy and expensive. At the conclusion of the trial on liability in, say, a road accident case or a medical negligence case where the Judge finds the Defendant liable, he may wish to appeal.

54. In a case where no issue of causation arises, it is a simple exercise for the Defendant to make an overall offer as to damages, and the Plaintiff knows exactly where he stands if he accepts the offer. If the appeal fails he will recover that sum. If the appeal is successful he gets nothing. There would be no further hearing on damages. That was not the position in this case. If Mr. Hamer's first submission is correct, the Defendant could not, unless the hearing as to damages was adjourned pending the decision of the Court of Appeal, protect himself as to costs. In such circumstances, if a realistic payment into Court was made in satisfaction of the damages the Plaintiff would accept that money, the litigation would come to an end, and the Defendant would be prevented from pursuing his appeal. In this case the Plaintiff would, if sensibly advised as she would have been, have taken the sum of £350,000 if it had been paid into Court, and the Defendant would then have been deprived of what was, undoubtedly, a genuine appeal. The Defendant would not have been able to protect her position as envisaged by Rule 9(1)(d). Such a situation is not covered, in my judgment, by Stuart-Smith, LJ's phrase "in the ordinary way". The policy of the law must be to encourage settlements, and to encourage the resolution of issues that arise before the determination of the proceedings with a view to saving costs. In my judgment a Defendant in this particular situation is not required to make a payment into Court in order to protect her position but may make an offer under Order 22 Rule 14(1). Once that position is arrived at the Court must take the offer into account under Order 62 Rule 9(1)(d)

55. I turn then to the present case. It is very important that the Court should not fetter a Judge's discretion by laying down general principles which are readily applicable to the facts of the case under consideration, but would be inapt to the facts of a different case. Nevertheless, in the ordinary way, an offer made under Order 22 Rule 14(1) should be one which disposes of the proceedings or an issue in the proceedings. This procedure is designed to be an alternative to a payment into Court and Order 22 Rule 1 provides that *"in any action for a debt or damages any defendant may at any time pay into Court a sum of money* ***in satisfaction of the cause of action****"*. In most cases a similar principle should be applied to an offer under Order 22 Rule 14(1). The offer should be one which disposes of the proceedings or an issue in the proceedings. For example, an offer to meet the claim without making an offer as to costs when the Plaintiff would be otherwise entitled to costs would be unlikely to afford the offer or the protection as to costs that he seeks.

56. In the present case the offer made by the Defendant to the Plaintiff was to agree a notional figure of £350,000 subject to her appeal on the issues relating to causation. That offer related to an issue in the case within the meaning of Order 22 Rule 14(1) and fell to be considered by the Judge as such but it did not dipose of that issue. Colman, J. tried the issue on causation over a period of 16 days in July, 1996. There were a number of issues, amongst them the extent of the injuries sustained by the Plaintiff, what, if any, were the sequelae, the period of time over which the Plaintiff suffered from the personal injuries, whether she sustained psychological or psychiatric injuries as a result of the accident, if so, for how long, whether the injuries had an adverse effect on the profitability of her business, and, if so, over what period. Having completed the hearing of the evidence in July, 1996, the Judge gave judgment on the causation issues on 14th February, 1997. He gave judgment on quantum on 1st August, 1997. This Court gave judgment on the appeal on 19th October, 1998.

57. If the Plaintiff wished to accept the offer made in the letter of 10th July, 1997, she had two alternatives. The first would have been to ask Colman, J. to adjourn the hearing as to damages. That application would certainly and rightly have been refused. The Judge's assessment of damages on a number of issues was based on his assessment of the witnesses, in particular his assessment of the Plaintiff.

58. Her alternative and only realistic course would be to accept the offer and await the outcome of the appeal. If she lost on any issue in the appeal, and there were a number of issues, and it was certainly not impossible by any means that she might have failed on one or more, that would have meant that the offer of £350,000 was no longer available to her and the Judge would have had to embark on an assessment of damages. That would probably take place at some date in 1999. The Judge would have to rely on his recollection of evidence given in 1996. If there was an appeal on the question of damages, as, indeed, there was before us, then the appeal would be unlikely to be heard until the year 2000 and the Plaintiff would not recover her compensation until 4 years after the trial. That, to my mind, is not acceptable, and is certainly not a situation which a successful Plaintiff should be bound to accept or be placed at risk of paying the costs of a hearing to assess damages. This was a case in which the Defendant's case was that the Plaintiff suffered a comparatively minor whiplash injury from which she recovered in a matter of months involving compensation of a few thousand pounds, whereas the Plaintiff's case, to a substantial extent successful, was that she had suffered much more serious injuries with substantial consequential loss.

59. I accept that it is difficult for a Defendant in these circumstances to make an effective offer under Order 22 Rule 14(1). However it is not by any means impossible. I am not unduly disturbed by that, bearing in mind that the Plaintiff has been successful in the proceedings and the Defendant wishes to appeal against the judgment. The fact that it is certainly not impossible for the Defendant to break down the offer in component parts and make an offer accordingly is shown by Mr. Turner's Skeleton Argument at paragraph 3.7 whereas he does precisely that. However Mr. Turner goes on to argue that the Defendant should not be required to make any such breakdown. In a letter dated 11th July, 1997, the Plaintiff's Solicitors did indeed ask the Defendant's Solicitors to break down the offer into its component parts. This offer was refused. Calderbank letters are an extremely useful tool in litigation to be used with a view to saving costs and bringing litigation, or an issue in litigation, to an end. As was said in **Butcher v Wolfe** (Transcript 30th October, 1998) it is a tool which provides flexibility and the Courts should not adopt a mechanistic approach to them when considering an issue as to costs. The facts in Butcher and Wolfe were very different to the facts of the present case, and the offer that was made by the Defendants in that case not only concluded an issue in the case but concluded the totality of the proceedings. In the present case, in the absence of a breakdown of the figures, the offer made by the Defendant did no such thing. It is quite true that in the result, following the dismissal of the Defendant's appeal on causation in this court on the 19th October, 1998, the Plaintiff would have done better if she had accepted the Defendant's offer and the hearing as to damages which took place before Colman, J. on the 1st August, 1997, would have been avoided, However, that arises only with the benefit of hindsight and with the knowledge of the decision made by this Court. It is only with that knowledge that it can be said that an issue in the proceedings would be resolved by the acceptance of the offer. In my view, a Plaintiff should not, in ordinary circumstances, be required to gaze into a crystal ball, or be blessed with notional hindsight, as to the result of an appeal and then, in the light of that result, have a finding made against her that she should have accepted an offer of settlement. The offer made by the Defendant was made subject to the outcome of the appeal and, as such, did not finally resolve anything.

*60.* As I have said earlier I do not accept that the Judge was exercising his discretion in relation to his costs order. The argument took the form of the Plaintiff's submission that payment into Court was the only method by which the Defendant could protect herself and the Defendant's submission that that was not correct and that the Defendant made a written offer which exceeded the amount recovered with the result that even with the reservation as to costs the Appellants were entitled to their costs. There was no real analysis in the course of argument as to the actual effect of the offer. In the course of submissions the Judge said*: "The Calderbank letter, the beauty of this kind of offer letter is that it is infinitely flexible. It can be used in all manner of situations where an issue arises between the parties which may be finally determinative of the proceedings or may not. But one thing is certain; if it is not resolved between the parties there will have to be a hearing. The point about the letter is that it offers to do something which, if accepted by the other side, will make a hearing unnecessary. This offer* [was an] sic *offer to do something which, if accepted by your side, would have made the hearing unnecessary."*

61. The Judge did appreciate that there might have to be a reassessment after a hearing in the Court of Appeal but that does not appear to have affected his view as to whether the offer was determinative of an issue in

the case. It is clear, on the totality of the discussion that the Judge effectively accepted Mr. Turner's submission. Certainly he did not say that he was exercising a discretion.

62. Accordingly I do not think that on this appeal we are concerned with the question of interfering with the exercise of the Judge's discretion.

63. The matter has been argued very much more fully before us. However, even if I am wrong about that, I would, for the reasons set out above, come to the conclusion that the Judge did not exercise a discretion on the right principles. In my judgment, the Plaintiff having succeeded in recovering damages and recovered more than the combined payments which had actually been paid into Court was entitled to her costs in the ordinary way. The letter of 10th July, 1997, was not an offer which she was required to accept without placing her at risk as to costs.

**JUDGMENT : LORD JUSTICE SCHIEMANN:**

64. I start by considering the question apart from the Rules.

65. Suppose a case where the offer is to pay £x as damages if the judge makes certain findings as to what damage was caused. In such a case there can be no payment in because anything paid in can be taken out : the defendant wishes to argue causation and so is not willing to pay in. He wishes, however, to avoid the costs of arguing about what amount should be awarded in respect of any damage should he be found to have caused that damage and writes that he is prepared to agree that amount as £x. I see no objection in principle to encouraging a costs regime under which the question as to which party should bear the costs attributable to quantifying the amount of damages is resolved in the light of the letter written by the defendant. The fact that a defendant makes it clear that he may wish to test the correctness of the judge's finding on causation in the Court of Appeal should not, it seems to me, lead to a situation in which the letter must be ignored. However, what weight one gives to the letter seems to me to be a question which will fall to be answered on the facts of a particular case.

66. The present case is like that considered in the previous paragraph save that, at the time the Defendant's letter was written, the judge had already made his findings on causation and the defendants had already indicated their desire to challenge these in the Court of Appeal. In those circumstances, relevant considerations for the judge in the exercise of his discretion as to costs included the desirability of the Court of Appeal having a breakdown as to the make-up of the figures in relation to various heads of damages, the desirability of doing everything to minimise the possibility of a trial on quantification as a result of any decision of the Court of Appeal on that appeal and that he was poised to establish the constituent parts of an award of damages.

67. Like my Lords I find nothing in the Rules which inhibits the Judge from taking the defendant's letter into account. I agree with my Lords that the Defendant's letter fell within O.22 r.10. I consider that the Defendant could not have protected his position as to costs by means of a payment in. I consider that the offer did relate to an issue in the proceedings since there was an issue as to what was the appropriate quantum of damages if the Judge was right on all issues of causation. I agree with Swinton Thomas L.J. that there was a number of unspecified other issues in relation to causative factors concerning each of numerous heads of damages. I consider, in agreement with my Lords that the Judge was bound, by reason of O.62 r.9(1), to take the defendant's letter into account in exercising his discretion.

68. The point on which my Lords part company is whether the Judge exercised his discretion and, if he did, whether he did so in a manner which is plainly wrong. On this matter I agree with the judgment of Swinton Thomas L.J. and that the appeal against the costs order made by the judge ought to be allowed.

69. For the reasons given in the judgment handed down the plaintiff's appeal on the costs below and the order of Mr Justice Holman relating to the costs of appearing on 1 August 1997 will be varied.

MR R D MACHELL QC and MR M TURNER QC (Instructed by Messrs Berrymans Lace Mawer, Manchester, M3 2NU) appeared on behalf of the Appellant.
MR K HAMER and MR T RIGLEY-SMITH (Instructed by Messrs Collins, Watford, Herts, WD1 1AP) appeared on behalf of the Respondent.