CA on appeal from His Honour Judge Latham and Mr Justice Wright before Waller LJ, Mance LJ, Sir Christopher Staughton. 15th October 2004.

Lord Justice Waller :

1. These two appeals have been argued together because both involve considering the effect of "offers to settle" made in cases involving money claims where payments into court have not been made in accordance with Part 36.3 CPR. No point was taken in the courts below as to the admissibility of the offers on the issues before the courts although as I shall explain, the basis on which they were admissible or on which they could be taken into account may be of relevance. In one appeal (the Crouch appeal) the facts were that the claimant (Mr Crouch) won the case but failed to beat the offer. The judge held that the defendants had not successfully protected their position on costs because they had not paid money into court under Part 36, resulting in the defendants being ordered to pay all the costs. In the other (the Murry appeal) the question is whether by agreement the provisions of Part 36 which would have applied if there had been a payment in, applied and if so, whether the judge exercised his discretion properly by refusing to allow the withdrawal of the offer.

2. The defendants and appellants in both appeals are NHS Health Care Trusts who because of the implications for them of paying into court substantial sums of money, have developed a practice of sending an "offer of settlement" by reference to which they hope to persuade courts to make the same orders for costs in their favour as if they had made a payment into court. The form of what has become a standard letter has changed from time to time. The Appeals relate to different stages in the development of the standard letter. In the Murry appeal the letter expressed itself as being an "offer …pursuant to Part 36" without reference to Part 44. In the Crouch appeal the letter states that "This offer is made ..under the provisions of Part 36 and 44 of the Civil Procedure rules".

3. Both letters then contained paragraphs in almost identical wording save as to the dates for acceptance of the offer. I can take the words from the Crouch letter.

   "This offer is open for 21 days from the date you receive this letter which we calculate as until close of business on 29 August 2003. 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 29 August 2003 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. With regard to the Court's power to exercise discretion on the matter of costs in these circumstances we respectfully refer you to ***Amber v Stacey*** *[2001] 2 All ER.*

   Please acknowledge safe receipt of this letter."

4. In later versions of the standard letter it seems from statements put in on behalf of the NHS Trust which we have read without prejudice to their admissibility at the appeal stage, it is intended that the following words should appear in place of the final main paragraph, which I quote now because they reflect to some extent the submissions of Mr Havers QC for the NHS Trusts, and reflect reliance on ***The Maersk Coloumbo*** [2001] 2 Lloyds Rep 275 in place of ***Amber v Stacey*** for reasons which will become apparent. *"Please note that for the following reasons the Defendant does not intend to pay the amount of its offer into Court:*

   1. the Defendant is an NHS public authority. You should therefore be in no doubt that its offer is a genuine one that it will pay promptly if the Claimant accepts it in accordance with the terms on which we make the offer; and

   2. as an NHS public authority the Defendant respectfully submits that rather than paying NHS funds into Court, it is preferable for the amount of its offer (which would be paid out of NHS funds) to continue to be available for provision of patient services pending resolution of this case either by agreed terms of settlement or Court Order.

3. as an NHS body, there is no doubt that the Defendant will be able to pay the amount of its offer. We respectfully refer you to the National Health Service (Residual Liabilities) Act 1996 which by Section 1 provides that:

(1) If a National Health Service trust, a Health Authority or a Special Health Authority ceases to exist, the Secretary of State must exercise his statutory powers to transfer property, rights and liabilities of the body so as to secure that all of its liabilities are dealt with.

(2) For the purposes of subsection (1), a liability is dealt with by being transferred to:

The Secretary of State

(a) a National Health Service trust

(b) a Health Authority; or

(c) a Special Health Authority

You will appreciate that the Court has the power to exercise discretion on the matter of costs in these circumstances and we respectfully refer you to ***Southampton Container Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" MGH & Co (The MV "Maersk Colombo")*** *(2001) 2 Lloyd's Rep 275.*

Please acknowledge safe receipt of this letter."

5. The object of the appeals apart from seeking to reverse the judges' exercise of discretion in the particular cases, is to obtain the approval of the Court of Appeal for the practice of sending such offer letters as opposed to making payments into court, so that for the future an NHS Trust can feel confident first that such "offers" will have the desired effect of placing claimants at risk for costs from 21 days from the date of the offers, and second that such offers will effectively be treated as having the consequences envisaged by Part 36 for payments into court, particularly the presumption in favour of an order for costs being made in favour of the NHS Trust where such offers are not bettered provided under Part 36.20 where there has been a payment in.

The provisions of Part 36 and Part 44

6. The relevant provisions of Part 36 and Part 44.3 are the following:-

"36.1 (1) This Part contains rules about –

(a)offers to settle and payments into court; and

(b)the consequence where an offer to settle or payment into court is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders.

Part 36 offers and Part 36 payments – general provisions

36.2 (1) An offer made in accordance with the requirements of this Part is called –

(a) if made by way of a payment into court, "a Part 36 payment";

(b) otherwise "a Part 36 offer"

(2) The party who makes an offer is the "offeror"

(3) The party to whom an offer is made is the "offeree"

(4) A Part 36 offer or a Part 36 payment –

(a) may be made at any time after proceedings have started; and

(b) may be made in appeal proceedings.

(A defendant's offer to settle a money claim requires a Part 36 payment)

"36.3 (1) Subject to rules 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment.

(2) A Part 36 payment may only be made after proceedings have started.

Form and content of a Part 36 offer

36.5 (1) A Part 36 offer must be in writing.

(2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.

(3) A Part 36 offer must-

(a) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue;

(b) state whether it takes into account any counterclaim; and
(c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2).

(4) A defendant may make a Part 36 offer limited to accepting liability up to a specified proportion

(5) A Part 36 offer may be made by reference to an interim payment.

(6) 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.

(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if-

(a) the parties agree the liability for costs; or

(b) the court gives permission.

(8) If a Part 36 offer is withdrawn it will not have the consequences set out in the Part.

Notice of a Part 36 payment

36.6-(1) A Part 36 payment may relate to the whole claim or part of it or to an issue that arises in it.

(2) A defendant who makes a Part 36 payment must file with the court a notice ("Part 36 payment notice") which-

(a) states the amount of the payment;

(b) states whether the payment relates to the whole claim or to part of it or to any issue that arises in it and if so to which part or issue;

(c) states whether it takes into account any counterclaim;

(d) if an interim payment has been made, states that the defendant has taken into account the interim payment; and

(e) if it is expressed not to be inclusive of interest, gives the details relating to interest set out in rule 36.22(2)

(3) The offeror must-

(a) serve the Part 36 payment notice on the offeree; and

(b) file a certificate of service of the notice.

(4) [omitted]

(5) A Part 36 payment may be withdrawn or reduced only with the permission of the court.

Costs consequences where claimant fails to do better than a Part 35 offer or a Part 36 payment

36.20-(1) This rule applies where at trial a claimant-

(a) fails to better a Part 36 payment; or

(b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer.

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court."

7. *There are other provisions of Part 36 which I will not quote, but which are relevant in appreciating the benefits of being within the Part 36 framework e.g. precise identification of the time when an offer is made or accepted (36.8); and the ability to get an offer or payment notice clarified(36.9).*

8. *The relevant provisions of Part 44 are Part 44.3(1) (2),(4),(5)*

*"**Court's discretion and circumstances to be taken into account when exercising its discretion as to costs***

44.3-(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2)If the Court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(4)In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)

(5)The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

THE FACTS OF THE CROUCH APPEAL

9. Mr Crouch is a dentist who brought an action for damages for personal injury claiming that through the defendant Trust's negligence he had suffered loss of dexterity in his left hand. He claimed for past loss of earnings some £73,750, and for future loss of earnings some £91,597.50 plus interest of £12,670. By a letter in the then standard form dated the 8th August 2003 the defendant NHS Trust offered £35,000 in settlement of the whole claim including interest. At the trial the Judge His Honour Judge Latham awarded Mr Crouch £9000 for pain suffering and loss of amenity, and a lump sum of £20,000 for loss of earnings, including a sum for handicap on the open labour market. [Mr Crouch appealed that award and the Court of Appeal by a judgment given on 14th June 2004 dismissed the appeal]. Following judgment before the judge, an application was made by the defendant Trust that since Mr Crouch had not bettered the sum offered by the offer letter not only should they not be ordered to pay Mr Crouch's costs, but he should be ordered to pay the Trust's costs from 21 days of the date of the letter.

10. The judge did not accede to that application and ordered the Trust to pay all Mr Crouch's costs on the basis that he was the successful party reasoning that where a defendant to a money claim wished to obtain the benefit of Part 36, he could only do so by making a payment into court. The criticism of the Judge is that he did not consider whether even if Part 36 was not engaged directly, he did not have a discretion either under Part 36.1(2), or Part 44.3. This court is asked to exercise a discretion afresh and make an order that Mr Crouch pay the costs from 21 days of the date of the letter as if the defendant Trust had made a payment in. A separate point is taken relating to Mr Crouch's conduct of the litigation but having regard to the views I have formed on the main aspect of the appeal, it is unnecessary to go into those points.

11. I can say straight away, that in my view the proper exercise of a discretion, whether under part 36.1(2) or under Part 44 .3 in the circumstances of the Crouch appeal, would have been to disallow Mr Crouch's costs as from 21 days after receipt of the offer, and to order Mr Crouch to pay the Trust's costs as from that same date. It is convenient to consider the problem raised by the Murry Appeal before providing my reasons so that consideration of Part 36 and a failure to make a payment into court can be considered in relation to both appeals.

THE MURRY APPEAL

12. In April 1995 Pema Murry suffered severe perinatal injuries. She issued proceedings through her mother as litigation friend against the Blackburn NHS Trust. The trial on liability and quantum was set down for 24 March 2003. On 21 February 2003 the Trust wrote their then standard offer letter, referring as I have indicated only to Part 36 and not Part 44,offering to pay £150,000 inclusive of CRU repayments and interest. The letter stated it was open for 21 days and contained the paragraph expressing the intention of not paying the money into court referring to *Amber v Stacey* as set out above.

13. The offer was initially rejected by telephone on 11 March 2003; it was then accepted on 13 March 2003 i.e. within the 21 days, and the trial date was vacated save for an approval hearing on 24 March 2003. Public Funding was withdrawn and that was subject to appeal at the time of the approval hearing. Counsel for the claimant at the approval hearing stated that he could not advise approval pending the appeal on public funding. The approval hearing was adjourned. Limited public funding was restored; the details of the limitation are unknown.

14. There was thereafter a meeting on 18 June 2003 where the offer of 21 February 2003 was rejected by those advising the claimant, and the Trust's solicitors set out their understanding of what had occurred at the meeting and further stated that their instructions were to "make no further offers". The action was then proceeding again for trial when on 23 January 2004 those advising the claimant wrote stating that they wished to accept the offer of £150,000, and that their client was prepared to seek the court's approval provided that any outstanding monies due in respect of the CRU were also paid, plus costs to date. There is no dispute this was a counteroffer. The Trust responded that as their offer had been rejected on 18 June 2003, there was no offer to accept.

15. On 2 March 2004 the advisers for the claimant wrote to the Trust stating:- *"For the avoidance of doubt we accept the offer of 21st February 2003, which offer has never been withdrawn whether with or without the permission of the court"*

16. The Trust's response was to assert that their offer was not open for acceptance. Those advising the claimant then restored the matter before Wright J seeking to argue first that there was an offer which had in fact been accepted, and in the alternative that the Trust's original offer was to allow the offer made in the letter to be treated as a part 36 payment into court with the consequence that under Part 36.6(5) it could not be withdrawn without the permission of the court. Under the guidance of authorities relating to the withdrawal of payments under that provision, it was submitted that since there was no change in the risk to the defendants as between the date of the offer and the date of the application to withdraw, permission to withdraw the offer should be refused.

17. Before Wright J the NHS Trust maintained its position that there was no offer capable of being accepted and thus that they did not need the permission of the court to withdraw their offer. Mr Maskrey QC had two arguments to counter this submission, one of which was that since there had been an original acceptance of this offer, permission to withdraw was necessary. This found no favour with the judge, but his second argument was that the NHS Trust had agreed to accept that the Part 36 provisions should apply. This argument was accepted by the judge in these terms:- *"The view that I have come to therefore is a situation I regard as a) unusual and b) difficult. By effectively asking for and receiving the indulgence sought in their letter of 21st February, Messrs Hempsons did indeed give an undertaking implicit, if one wishes to put it that way, that they would not withdraw the offer otherwise and in accordance with the terms of Part 36 as though the offer had been converted into a payment into court and that therefore they would not withdraw it otherwise than with permission."*

18. The judge then considered whether the situation was one in which the claimant should be entitled to accept the offer or whether it was one in which the defendant Trust should be entitled to withdraw the offer. The factors recorded by the judge as being relied on by Mr Faulkes QC who at that time represented the defendant Trust were twofold;(1) the stress and distress caused to witnesses who had been ready for trial in March 2003, having been then stood down and were now being asked to be ready again; and (2) the costs incurred in dealing with correspondence since March 2003 and in attending a meeting on 18th June. Those two grounds were rejected by the judge as entitling the Trust to withdraw their offer. The judge then examined the change in the advice that the claimant was receiving as compared with the position in March 2003, and took the view that the claimant should be entitled to accept the offer. Accordingly he allowed the claimant to accept the offer and approved a settlement on those terms subject to making an order that the claimant pay the costs from the 24th March 2003 and there being no order for costs of the hearing dated 5 March 2004.

19. The judge granted permission to appeal by reference to the point as to whether Part 36 applied, but, when the defendant Trust came to put in their notice of appeal, they did not seek to appeal that aspect. They simply sought to argue that the judge had exercised his discretion wrongly in refusing to

allow the NHS Trust to withdraw their offer raising points which found no reference in the judge's judgment. Mr Maskrey was to submit that this was hardly surprising because they had not been canvassed as points before the judge. They were as more fully expanded by Mr Havers in argument (1) that when the offer was made in March 2003 the Trust understood the claimant had public funding, and there was therefore a risk of fighting a trial without hope of recovery of costs;(2) the offer originally made had been rejected (3) further costs had been incurred during the intervening year which would be irrecoverable; (4) the Judge failed to consider whether the Trust were not entitled a year later and in the unknown position on public funding to place a different value on the case.

20. Following a protest as to whether the judge would have granted permission to appeal if the discretion aspect were the only matter to be appealed, clarification was sought by the NHS Trust from Scott Baker LJ as to whether they could pursue the discretion aspect alone and he confirmed that they could.

21. The claimant put in a respondent's notice challenging the order of the judge that the claimant should pay the costs since 24th March 2003 and that there should no order for costs of the hearing of 5th March 2004.

22. For reasons which will appear, I am very doubtful whether the judge's decision that some form of agreement had been reached that Part 36 should apply could be right, but that aspect has not been appealed and it would be unfair on the claimant to decide the appeal by reference to that point. As regards the exercise of discretion the subject of the appeal and cross appeal, again for reasons which will appear, in my view the exercise of the judge's discretion should not be disturbed.

But before giving fuller reasons I should consider the position of letters offering money sums in settlement where those sums could and on one view should have been paid into court to obtain or suffer the consequences envisaged by Part 36.

DISCUSSION ON STATUS OF THE OFFER LETTERS

23. What Mr Havers for his clients desires is that this court should rule that offer letters such as those at present sent by the NHS should have the approval of this court in the sense of binding judges to exercise their discretion in the future as though the letters were Part 36 payments. The decision not to appeal the first point in Murry is dictated by this desire. He on behalf of his clients states that the NHS Trust will allow the letters to be treated as though for all the world they were in fact payments in. This he submits will bring all the consequences of Part 36 into play including the need to obtain permission to withdraw the offer, the right to clarification etc, and although he would not go there quite directly the presumption contained in Part 36.20 that unless it was unjust to do so that costs from the date of the last day for accepting the offer should be paid by the claimant if the offer was not beaten.

24. Despite the fact that Wright J's ruling that Part 36 did apply to the offer in this case has not been appealed, if some general guidance is going to be given, the starting point must be to consider whether offer letters of this sort can be taken as equivalent to payments into court with the consequences of the machinery of Part 36 applying.

25. The appeals raise two quite different points. The question whether an NHS Trust can or has bound itself not to withdraw an offer without the permission of the court, is a very different question from that which arises in the Crouch appeal as to the effect of an offer on the court exercising its discretion in relation to costs. It is the latter point which is of most significance to the defendants, and they only argue the first point to enforce the second.

26. In my view 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. This flows from the words in brackets under Part 36.2(1), the heading above Part 36.3 and the wording of Part 36.3. It is also supported by the provisions of Part 36.10 relating to offers made prior to the commencement of the proceedings, where after commencement in a money claim the offer must be paid into court. I shall explore below in a little detail how this came about, and how what at

first sight may seem illogical that there is in a money claim a requirement to pay into court before the consequences envisaged by Part 36.20 will be presumed, whereas only a Part 36 offer letter is required in any other case including a Part 36 offer made by the claimant in a money claim.

27. Can the parties by agreement treat an offer in writing as if it were a payment into court so as to bring into play the Part 36 consequences? I see no reason in principle why they should not, but I am doubtful about the basis on which the judge in this instance reached the conclusion as a result of non-action by the claimant that such an agreement had been reached. His finding has not been appealed and as I have indicated, it would be unfair in this case to reverse it, but I would say that unless there is clear agreement by the claimant that he does accept that the defendant need not pay into court on the basis that the Part 36 machinery will apply, following which the defendant has acted in reliance on that agreement and not paid into court, the court should be slow to spell out such a contract. It would furthermore seem to me that the terms of the contract must be clear if they are to have the consequences desired by the NHS including some express reference to the offer being incapable of being withdrawn without the permission of the court. Since I understand that the NHS have no desire to go down this route, I will explore the matter no further.

28. Can the court rule that the offer should be treated as a Part 36 payment? It seems that there have been instances where the NHS has sought such a direction from the court during the proceedings as opposed to at the end of the proceedings when the court comes to consider the status of the offer. I can see no reason why under Part 36.1(2) a defendant may not during the currency of proceedings 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. The defendant Trusts are reluctant to have to incur the expenditure of going down this route if it can be avoided. As to whether it can be avoided, that turns on what should be the court's attitude to such offers at the conclusion of proceedings when considering the question of costs, to which question I now turn.

29. .There are two authorities in which consideration has been given to the correct approach to offers of money settlements in money claims where payments into court could have been made; ***Amber v Stacey*** and ***The Maersk Columbo.*** Clarke LJ in ***The Maersk Columbo*** distinguished ***Amber v Stacey*** and I will consider that latter authority first.

30. In ***Amber v Stacey*** a county court summons was issued on 24th September 1997; a written offer was made by the defendant to pay £4,000 on 1st October 1997,the letter saying that the sum would be paid into court if it was not accepted. The offer was rejected. The defendant paid into court £2,000 on 7 August 1998, and a further £1,000 on 20th January 2000. The judge awarded damages amounting to £2,058.52. The Defendant's counterclaim alleging the works were worth no more than £1,500 and for the sum of £675 was dismissed. He ordered the claimant to pay the costs *"from 11th February 2000 and from the date of the defendant's letter dated 1st October 1997"*. Sir Anthony Evans in his judgment felt no difficulty with the judge's ruling disallowing the claimant's costs from 1st October, but found more difficult the order to pay the defendants' costs from that date which put the defendant in the same position *"as he would have done if the defendant had made the payment in and succeeded on all issues at the trial"*. He pointed out that the defendant had said he would pay in the £4000, and did not do so, indeed he paid in a lesser sum much later, and he pointed out that the defendant failed on his counterclaim. He varied the order to one making the claimant pay one half of the defendant's costs from 1st October. Simon Brown LJ agreed with the variation proposed, and it is the principles which appear from his judgment which influenced Judge Latham in refusing to award the NHS Trust its costs against Mr Crouch. The principles which appear from Simon Brown LJ's judgment come from the following paragraphs;

> *"39 . . . Clear though it is that the claimant behaved thoroughly unreasonably from first to last, and tempting though it is therefore to uphold the recorder's order in full measure, I share Sir Anthony Evans's view that it was wrong to treat the letter of 1 October 1997 for all the world as though it constituted a payment into court. There are to my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of CPR Pt 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers.*

41. Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms of which the dispute can be settled. They are clearly to be encouraged, and written offers, although obviously relevant, should not be treated as precise equivalents."

31. In ***The Maersk Columbo*** the defendant made an offer which was effectively **"without prejudice save as to costs"** expressed to be open for 21 days. The claimant had suggested that the defendant needed to make a payment into court to obtain the benefits of Part 36 and the defendant did ultimately make a payment in. David Steele J, who was not referred to *Amber v Stacey* since it had not been decided at the time of his ruling, ordered the claimant to pay the costs from 21 days from the date of the letter.

32. In the Court of Appeal following the decision in *Amber v Stacey* the claimant submitted that Steele J had effectively treated the offer as a Part 36 payment in and that in the light of ***Amber v Stacey*** that was a wrong exercise of his discretion. Clarke LJ explained the circumstances in the following way:-

"81. In order to evaluate that submission it is necessary to consider the facts, the relevant provisions of the CPR, the way in which the Judge exercised his discretion and the decision in Amber v Stacey. The facts may be shortly stated. On May 27 1999 the defendant's solicitors wrote to the claimants' solicitors on behalf of their clients offering £956,867, plus interest at 8 per cent from Feb 19 1995 until the date of payment, plus costs in full and final satisfaction of the claimants' claims. The offer was stated to be open for 21 days which, for the avoidance of doubt, was said to be up to and including June 17 1999. The claimants expressly reserved the right to draw the letter to the attention of the Court on the question of costs. It was thus what we used to call an open offer and what is often known as a Calderbank offer.

82. On June 9 1999 the defendants served a notice to admit the fact that the crane would not have been struck if it had been parked at anchor position 223.5 at the time of the collision. On June 11 the defendants admitted liability subject to an allegation of contributory negligence. On the same day, they wrote saying that their offer would remain open after June 17 1999, but stated that if the claimants wished to accept the offer after that date they could only do so if the parties agreed the liability for costs or if the Court gave permission. That last point was, I think, included because of the provisions of CPR 36.5(6). On June 22 the claimants wrote admitting the fact asserted in the notice to admit.

83. Until then the claimants had not responded in any way to the offer. On the same day, June 22, they wrote saying that under CPR Part 36, in order to have "the costs consequences usually associated with such proposals", the defendants should have made a payment into Court and reserving their clients' position. On July 2 1999, the defendants paid the sum of £956,867 into Court. That sum was stated to be exclusive of interest, but interest of £361,701.72 was offered in addition. No attempt was made by the claimants at any stage either to accept the offer or to take the payment in"

33. Clarke LJ after considering the provisions of Part 36 and Part 44, distinguished ***Amber v Stacey*** on the grounds that it was part of Sir Anthony Evans' reasoning that the circumstances of that case included the fact that the defendant had failed on certain issues including his counterclaim, and the fact that the defendant had not paid in the sum of £4000 when he had said that was what he was going to do. Clarke LJ also referred to the passages in the judgment of Simon Brown LJ quoted above and said this:-

"97. I respectfully agree with Lord Justice Simon Brown that offers should not be treated as precise equivalents of payments into Court and that they have many advantages. In particular the money is then readily available and no question can arise as to whether the offeror can or will pay if the offer is accepted. It should thus be appreciated that offerors who do not make a payment-in do so at their peril in the sense that the Court may not be willing to reflect the offer in its order for costs.

98. However, the Court retains a wide discretion under CPR 36.1(2) to make the same order as it would have made under CPR 36.20 even in the absence of a payment-in. All depends upon the circumstances of the particular case. As I have tried to demonstrate, this is a very different case from Amber v Stacey. The judge had all relevant considerations in mind and, in my opinion, reached the just result. There is in my judgment nothing in that case to lead to the conclusion that he made any error of principle and I would therefore dismiss the appeal on costs."

34. The conclusion of the court of appeal in ***The Maersk Columbo*** was that what used to be called a Calderbank offer even in a simple money claim could have the same effect as a payment into court. It seems to me that it is right first to recognise how that has happened. I will endeavour to trace a brief history of offers to settle and their consequences for costs. Originally the rule was absolute that "without prejudice" offers could not be referred to for any purpose: see ***Walker v Wiltshire*** 23QBD 335. Therefore offers to settle simply could not be taken into account and the exercise of discretion had to be carried out as if they did not exist. ***Calderbank*** offers became recognised in matrimonial proceedings following the decision of the court of appeal of that name, ***Calderbank v Calderbank*** [1976] Fam 93. ***Cutts v Head*** [1984] 1 CH 291 in the judgment of Oliver LJ (as he then was) provides an illuminating history of the way in which the law had approached settlement offers and approved ***Calderbank*** offers outside the matrimonial context. It is of some interest that the only point in the case was whether the offer made in that case, which was not a money claim, was admissible on the question of costs. If it was admissible, the court were clearly of the view that there would be only one view to take on costs and that was that the plaintiff should pay the same because he had not bettered the offer.

35. Part of the reasoning why offers of settlement "*without prejudice save as to costs*" should be admissible was that there were other areas where "*payments in*" could not be made and where "*offers*" could accordingly be made so as to have costs consequences e.g. in arbitrations with sealed bids, in Admiralty cases where for example proportions as to blame were at stake , and indeed under the old RSC Order 16 rule 10 where a third party or a joint tortfeasor could make an offer reserving the right to bring it to the attention of the court after liability has been determined; (page 309). But in both the judgement of Oliver LJ and Fox LJ in ***Cutts v Head*** they stated that in ordinary money payment claims a Calderbank offer should not be used and Oliver LJ in passage with Fox LJ agreed at page 312 put it this way:- *"I would add only one word of caution. The qualification imposed on the without prejudice nature of the **Calderbank** letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a Calderbank offer as carrying the same consequences as payment in."*

36. When Lord Woolf was considering the introduction of the new rules, his view as to whether a payment in should be necessary in a money claim went through changes. At first in his Interim Report Lord Woolf thought that payments in should be abolished altogether and that ***Calderbank*** offers even in money claims should replace them leaving complete flexibility. Such offers would have been able to be withdrawn at any time; the length of time they remained open would be a matter that could be considered in the context of a costs award. In his Final Report after submissions from the Law Society he accepted that offers should be backed by payments in, the payment in being secondary and optional, i.e. the passage in Oliver LJ's judgment quoted above from ***Cutts v Head*** would no longer apply. As regards withdrawal his suggestion was that they should be open for 21 days and that courts should be directed to ignore offers of lesser periods in exercising their costs discretion. He recognised this differed from the payment in provision under the old rules "where the circumstances in which a payment in can be withdrawn are extremely narrow."

37. The recommendations of Lord Woolf have not been accepted in their entirety and in the result we have Part 36 as it is and indeed Part 44 as it is. As I have already indicated it seems to me quite clear that on its terms where the case involves a money claim, the defendant in order to have the protection of the consequences that flow from Part 36 and the presumption in Part 36.20 must pay into court. Why he 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.

38. Consideration in the courts below of the NHS offers has started from the point of view that the offers could be referred to. Does this mean that where the machinery is there for a payment in that the observations of Oliver LJ in ***Cutts v Head*** are not applicable under the CPR ? I recognise that cases under the old rules should not clutter our thinking under the new rules, but at first sight if there is this deliberate distinction drawn between payment in in money claims, and offers of other sorts, the logic of Oliver LJ would still seem applicable, but it is important in my view to recognise what he was deciding.

39. As I have emphasised ***Cutts v Head*** was concerned with admissibility of the without prejudice offer even though the offer was expressed to be "*save as to costs*". Having held the offer which in that case was not in a simple money case, was admissible, the court then held that "*in the ordinary way*" in a simple money claim the offer should be backed by a payment in, and further stated that "as at present advised" the court would not treat a ***Calderbank*** offer as carrying the same consequences. That phraseology seems to me to recognise that ***Calderbank*** offers even in money claims were admissible in evidence but the court was saying in the exercise of the court's discretion in money claims they should ordinarily not be recognised as affecting the discretion to be exercised in relation to costs.

40. Do the new CPR rules give any guidance as to whether the position should be the same? Part 36 recognises the existence of the "*without prejudice*" rule when in Part 36.19 it states that *"(1)A Part 36 offer will be treated as without prejudice save as to costs", and "(2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided"*. Furthermore Part 44.3 recognises the existence of the without prejudice rule when referring to *"all the circumstances" including "any payment into court or* ***admissible*** *offer to settle…".*

41. .The question whether the ***Calderbank*** offer was admissible or should be ignored completely on the basis suggested by Oliver JLJ in ***Cutts v Head*** received little attention in either of the cases before us or so far as I can see in ***The Maersk Columbo***. The "*without prejudice*" argument was referred to in ***Amber v Lacey*** in the Court of Appeal, but as a result of what occurred in the court below was not further argued. It seems to me important to be clear whether an offer of settlement in ***Calderbank*** form but in a money claim can be considered at all because, if it is inadmissible, or if the rule should be that even if admissible in a money claim a payment in is the only offer which can be taken into account, that provides a comprehensible approach. If however the offer is admissible, and it is something to which the court should have regard, it is much less easy to see why, unless it could be shown the offer was sham or non-serious in some way, it should not in normal circumstances have the same result as if the sum had been paid in.

42. It is in this context where it seems to me that Part 36.1(2) has its most important impact. It seems to me that this provision was almost certainly aimed at the views expressed in ***Cutts v Head*** and allows a ***Calderbank*** offer to be made even in money claims. It then provides the court with the power to make orders that such offers should have the consequences specified in Part 36. As regards Part 44.3, in my view the dicta of Oliver LJ and Fox LJ recognised that an offer "without prejudice save as to costs" would be strictly admissible in the context of costs even though they were of the view that in money claims such offers should usually be ignored where no payment in had been made. ***Calderbank*** offers even in money claims are therefore "*admissible"* and by virtue of Part 44.3 can be taken into account amongst all other circumstances in considering the proper order for costs.

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.

THE CROUCH APPEAL CONCLUSION

44. In the Crouch case, the judge took into account the NHS Trust's offer but purporting to follow the principles set out in Simon Brown LJ's judgment in ***Amber v*** **Lacey** ordered the NHS Trust to pay Mr Crouch's costs. He was in effect thinking that Simon Brown LJ was reverting to the dictum of Oliver LJ in ***Cutts v Head***. In holding that view he was in fact wrong, because even in *Amber v Stacey* the claimant did not receive his costs and was ordered to pay part of the defendants' costs, i.e. the offer was not ignored altogether. It seems to me therefore the Judge was plainly wrong in the way he exercised his discretion.

45. In exercising a discretion afresh 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 which are the points which Mr Havers emphasised on their behalf in his submission. 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. On that basis Mr Crouch should be ordered to pay the NHS Trust's costs as from 21 days after the date of the letter.

THE MURRY APPEAL CONCLUSION

46. The offer made was one which in my view the NHS Trust was entitled to withdraw, and I would not have upheld the Judge's finding of a contract, but that finding has not been appealed. We must therefore approach the case on the basis that an application was being made to withdraw a payment in under Part 36. The authorities relating to the exercise of the court's discretion on such applications under Part 36 have adapted what was the approach under the former rules of the Supreme Court as exemplified by Goddard LJ in ***Cumper v Pothecary***[1941] 2 KB 58 . May LJ recently in *Flynn v Scougal* [2004] EWCA(civ) 873 referred to the relevant authorities and set out the correct approach at paragraph 39 in the following terms:-

> *"In* ***MRW Technologies v Cecil Holdings*** *22nd June 2001, Garland J heard an appeal against a Master's order giving a defendant permission under rule 36.6(5) to withdraw a Part 36 payment. He said, in my view correctly, that the same considerations apply to giving permission to withdraw money in court as to refusing permission to take it out. He inclined, with reference to Curtis J's decision in* ***Marsh v Frenchay Healthcare****, to a more flexible approach to take account of the overriding objective. But he also considered that Goddard LJ's phrase "a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing or reducing his payment" was to be adopted as consistent with the overriding objective. I agree."*

47. The question is whether we should interfere with the exercise of the Judge's discretion. So far as the points taken before the judge are concerned in my view the judge's decision cannot be attacked. The distress or stress on witnesses by the change of heart of the claimant or her advisers would not amount to a change of circumstances. So far as costs incurred since the original rejection of the offer are concerned the order of the judge allowed for the recovery of those costs. There is a cross appeal against the judge's order in relation to costs, but I can make clear now that in my view his exercise of discretion in making the orders he did on costs cannot be disturbed.

48. As regards Mr Havers' points additional to those referred to by the judge, since they were not points taken squarely before the judge, it is hardly right that they should be allowed to be taken for the first time in the Court of Appeal. The points on which he placed his greatest emphasis all revolved round the fact that public funding had been withdrawn for the claimant. He argued that the defendant Trust was faced with a quite different prospect once public funding was withdrawn or limited as compared to the situation when the payment in was made. He argued that the defendant Trust had re-evaluated the case by reference to the view it was now clear that the Legal Services Commission had taken.

49. Apart from the fact that these points were not taken before the judge, I am unattracted by them. It is unnecessary to finally to rule whether the arguments should ever succeed and I will simply say this. Logically I can see that the withdrawal of public funding will produce a change of circumstances, but it seems to me that a payment in is intended to reflect an evaluation of the merits of a case, and the

question whether a claimant can now afford to fight the case or the view of the Legal Services Commission should not be a circumstance on which a defendant should be entitled to rely as affecting that evaluation. The circumstances relevant to the question of whether a withdrawal should be allowed ought to be limited to matters that go directly to the evaluation, e.g. some alteration in the condition of the claimant or in the evidence.

Conclusion

50. I would allow the appeal of the defendant NHS Trust in the Crouch appeal and dismiss the appeal of the defendant NHS Trust in the Murry appeal

Lord Justice Mance:

51. I agree, except that, like Sir Christopher Staughton, I prefer not to express any view on the points mentioned in paragraphs 48-49 above.

Sir Christopher Staughton

52. I agree with the judgment of Lord Justice Waller on all points, with one exception. That is the issue whether a change in the claimant's funding (or lack of it) can be regarded as a change in circumstance so as to justify withdrawal of a payment in, or the withdrawal of an offer. This is dealt with in paragraph 49, in relation to Pema Murry's appeal.

53. If the change of circumstance is that the claimant's case will not be so well conducted, perhaps by a litigant in person, it may be that it is not a relevant change. In theory, I suppose, the judge will reach the same conclusion however unskilled the advocate. But if the claimant is likely to fare worse because she has lost her funding, that is no a ground for allowing the defendant to withdraw an offer.

54. I have some doubt about the case which Lord Justice Waller puts, where the defendant has regard to the view of the Legal Services Commission in withdrawing the claimant's support. But a third aspect of the case, which was put forward by Mr Havers QC for the Blackburn Trust, has more force. This is, if I understand it correctly, that a defendant may have increased the amount offered or paid into court, because he would not recover his costs from a legally-aided claimant. The situation may have changed if legal aid is withdrawn. All told, I prefer not to express any view as to when a change of funding can be a relevant change of circumstance to justify withdrawal of an offer of payment in. It is not necessary to reach a conclusion in this case, as Lord Justice Waller explains, because the point was not taken in the court below. A point of this nature ought not to be taken for the first time on appeal.

ORDER: In Crouch appeal is allowed. Application for permission to rely on further evidence allowed. Respondent to pay appellants costs below from 29th August 2003 and appellants costs of this appeal to be assessed if not agreed. Further order as per agreed minute of order.

In Murry appeal dismissed. Cost order to be determined (on paper) at a later date if not agreed.

(Order doe not form part of approved Judgment)

Philip Havers QC (instructed by Kennedys and Hempsons) for the Appellants

Simeon Maskrey QC (instructed by Osborne, Morris & Morgan) for the Respondent in Murry. Mr Maskrey QC also assisted the Court in Crouch