B e f o r e : LORD JUSTICE AULD, and LORD JUSTICE DYSON : C.A. 11th July 2005.

LORD JUSTICE DYSON :

1. This is an appeal, with the permission of Tuckey LJ, against the decision of His Honour Judge Roach dated 21 December 2004, whereby he ordered the defendant to pay half the claimants' costs of these proceedings. The principal questions that arise are (a) to what extent a defendant who makes an offer to settle a money claim which the claimant fails to better at trial should be in the same position in relation to costs as he would have been if he had made an equivalent payment into court in accordance with CPR 36, and (b) whether it makes any difference that the defendant withdraws the offer after the time for its acceptance has passed.

2. The facts can be stated quite briefly. The defendant is a substantial power distribution company. The claimants are trustees of a pension fund. In October 2000, the contractors employed by the defendant trespassed on the claimants' land and felled approximately 400 trees which were growing under the defendant's power lines. On 26 February 2002 the defendant wrote to the claimants a letter marked "*without prejudice save as to costs*". It included the following:

   "As promised I set out below the terms of a Part 36 offer now made to you in this matter in accordance with Rule 36.10 of the Civil Procedure Rules (CPR).

   Part 36 of the CPR will apply to this offer and is made in relation to the whole of the claim. It is open for acceptance within 21 days from the date of this letter, which is by 4.00pm on 19 March 2002. If after this time you decide you would like to accept the offer, you may only do so if we can agree liability for costs or the court gives permission.

   …….

   However, we are prepared to take a commercial view of this matter and in the interests of saving time and expense and reaching an amicable settlement we are prepared to agree full and final settlement on the following basis:

   1. Your claim be discontinued.

   2. WPD pay Stokes Personal Pension Fund £27,000 in respect of replanting the trees.

   3. WPD pay Stokes Personal Pension Fund an additional goodwill payment in the sum of £8,000 in respect of all and any losses you may have suffered in relation to this dispute (the liability for which is not accepted by WPD as mentioned above). For the avoidance of doubt, the sum of £8,000 is inclusive of interest.

   4. Stokes Personal Pension Fund grant WPD the easement detailed in the letter of 24 September 2001, (a copy of which is enclosed for your information).

   5. WPD pay your costs (but we understand none have been incurred to date).

   In the event of non-acceptance of this offer and subsequent issuing of proceedings the adverse cost consequences set out in CPR 36.20 will apply should you fail to obtain a judgment that is more advantageous than the offer at trial."

3. The offer was not accepted. The claimants' solicitors wrote to the defendant on 25 April 2002 saying that they had obtained an expert opinion and that the initial costs of supplying, planting, supporting and feeding the replacement trees was £505,000. By a letter dated 1 November 2002, the solicitors notified the defendant that the claim was now quantified at £757,500 plus VAT.

4. Proceedings were issued on 17 December 2002. The schedule of loss quantified the claim in a sum of approximately £780,000 including VAT. The defendant did not make a payment into court after the issue of proceedings pursuant to CPR36.10(3).

5. On 20 June 2003, the solicitors acting for the defendant wrote "without prejudice save as to costs" offering to settle on terms that the claimants discontinued the proceedings, the defendant paid £1445.40 for a permanent easement over the land and the claimant paid £18,530 in respect of its costs. On 1 July 2003, the claimants' solicitors offered to settle on terms including that the defendant paid £42,500 plus costs. This offer was rejected. On 13 August, the defendant paid £20,000 into court in settlement of the claim including interest. On 14 August, the claimants' solicitors asked whether by serving notice of the payment into court, the defendant had withdrawn the offer of 26 February 2002, or whether that offer was still open for acceptance. The defendant replied on 14 August that, as the

claimants had not accepted the offer of 26 February 2002 within 21 days, it had lapsed and for the avoidance of doubt it was no longer open for acceptance.

6. The trial began on 22 September 2004. On 8 November, the judge awarded the claimants damages in the sum of £25,600.

The relevant provisions of the CPR

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.

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".

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.

36.5(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

(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.

36.10(1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.

(2) The offer must-
(a) be expressed to be open for at least 21 days after the date it was made;
(b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; and
(c) otherwise comply with this Part.

(3) Subject to paragraph (3A), if the offeror is a defendant to a money claim-
(a) he must make a Part 36 Payment within 14 days of service of the claim form; and
(b) the amount of the payment must not be less than the sum offered before proceedings began.

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.

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 judge's decision on costs

7. The judge said that he took into account CPR 44.3. Since the claimants had beaten the payment into court, they had succeeded in the action. In the absence of an effective payment into court, it was just to order the defendant to pay a proportion of the claimants' costs. The claimants were not entitled to all of their costs because their approach to the litigation in claiming £757,000 plus VAT had been unreasonable. This was not a realistic sum to claim. Of this sum the judge said:

"22……It was founded on an estimate provided by a tree expert who was not called as an expert witness in the case but simply as an expert as to fact. The expert made it clear that he provided the estimate to specifications provided by Mr Crocker, the claimant's principal beneficiary. The expert gave no evidence in the case beyond the scope of the estimate.

23 Thus the estimate and the sum of money it claimed had no expert foundation. Moreover it was not confirmed by other expert evidence from tree experts called by the claimant. In my judgment therefore it was a precarious sum to claim and its lack of solidity is supported by Mr Crocker's own evidence when he was cross examined about it at trial. His response to the claim at that level being queried was to say that he thought that this element of the claim had been abandoned. In fact however the high claim was not abandoned until closing submissions were made by the claimant and none of its remaining submissions ever sought a judgment sum of anything like that magnitude"

8. The unreasonable approach of the claimants should be reflected in a reduction in costs. He held that one half of their costs would be a "proportionate and just order in the circumstances of this case."

9. He then turned to consider whether the offer to settle made by the letter of 26 February 2002 should affect the order for costs that he should make. He said that the offer afforded the defendant no protection, because (i) it was not followed by a payment into court as contemplated by CPR 36.10, and (ii) it was later withdrawn. In the judge's view, the CPR makes a clear distinction between offers made pursuant to CPR 36.10 which are followed by a payment into court and those where a simple offer to settle is made on a basis without prejudice as to costs. He distinguished ***"The Maersk Colombo"*** [2001] 2 Lloyd's Rep 275 and ***Crouch v King's Healthcare NHS Trust*** [2004] EWCA Civ 1332, [2005] 1 WLR 2015. In the present case, the defendant had no "practical or good reason" not to pay the money into court: it stood in a very different position from an NHS Trust whose position was considered in the *Crouch* case. By contrast with the defendant in ***The Maersk Colombo***, the defendant was not "of foreign identity such that it did not know the rules of court". He also said that he rejected the submission that *Bristol and West Building Society v Evans and Bullock* (unreported, Court of Appeal, 5 February 1996) established the principle that offers to settle "retain their costs consequences despite being time limited or despite being subsequently withdrawn": that case was peculiar to its facts.

10. In the result, the offer of 26 February 2002 had no effect on the incidence of costs. But for the reasons already mentioned, the claimants were only entitled to half of their costs.

The issues

11. Two issues arise on this appeal. The first is whether the judge was right to take no account of the defendant's offer dated 26 February 2002 on the grounds that (i) it was not followed by a payment into court, and (ii) it was withdrawn. The second is whether the judge was justified in reducing the claimants' costs on the grounds that the claim had been exaggerated.

Should the offer have been taken into account?

Background and previous authority

12. There is no doubt that an offer by a defendant to settle a money claim will not automatically have the cost consequences set out in CPR 36.20(2) unless it is made by way of a Part 36 payment. This is expressly provided by CPR 36.3(1). Neither CPR 36.5(5) nor CPR 36.23 (the two exceptions to CPR

36.3(1)) has any application in the present case. But the court can exercise its discretion to order that an offer which is not made in accordance with Part 36 (including, therefore, an offer made before the commencement of proceedings which is not followed by a payment into court pursuant to CPR 36.10(3)(a) within 14 days of the service of the claim form) shall have the costs consequences specified in CPR 36.20(2): that is expressly provided by CPR 36.1(2) and CPR 44.3(4)(c).

13. These provisions enabling the court to order that an offer should have the costs consequences specified in CPR 36.20(2) had the effect of reversing the pre-CPR practice which was most clearly articulated by this court in ***Cutts v Head*** [1984] Ch 290. In ***Cutts v Head***, Oliver LJ reviewed the history of the ***Calderbank*** offer (***Calderbank v Calderbank*** [1976] Fam 93) and the approach of the law to such an offer outside the matrimonial context. At page 312F, in a passage with which Fox LJ agreed, Oliver LJ cautioned that it should not be thought that a ***Calderbank*** offer could now be regarded as a substitute for a payment into court where a payment into court is appropriate. He continued:
"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."

14. In his interim Access to Justice report dated June 1995, Lord Woolf proposed significant changes to the rules in relation to payments into court and offers to settle "in order to further the policy of encouraging settlement" (chapter 24 para 5). He said that the system of payments into court should be discontinued, and that it should be permissible to use a ***Calderban****k* letter in all cases. He recognised that the offeree would not have the security that is afforded by a payment into court, but as against that he pointed out at para 6 that the party who succeeds at trial has no security for his judgment.

15. At chapter 11 of his final report dated July 1996, Lord Woolf said:
"3. In the interim report, I did not attach importance to the retention of payments into court as a means of achieving the kind of benefits which I believe will flow from my proposed system of offers. However, the Law Society and others who made representations in response to the interim report, while generally supporting my proposals on offers, argued that a payment into court was a useful way of assuring claimants of the substance of an offer. The fact that the money was actually available made it more likely that the offer would be accepted. Up to a point, I accept this reasoning and therefore do not now recommend the abolition of payments into court.

4. Allowing for the fact that my proposals would enable claimants as well as defendants to make offers, it is of course important that rules of court relating to offers and to payments into court respectively should diverge as little as possible. I therefore recommend, in respect of defendants' offers, that the making of the offer itself should be the critical step, while the backing of a payment in will be secondary and optional. This means that Cutts v Head [1984] Ch 290, which prevents the making of a Calderbank offer where a payment into court can be made, will no longer apply under the new rules. When considering the exercise of its discretion as to costs at the end of a case, the court will therefore have to give primary consideration to the terms of the defendant's offer regardless of whether there was also a payment into court. In practice, it should only be in an unusual case that the absence of a payment in should be taken to undermine the reasonableness of an offer."

16. Lord Woolf's recommendations were not, however, adopted by the Civil Procedure Rule Committee without modification. I take the last sentence of para 4 of Lord Woolf's final report to mean that, if a claimant fails to beat a ***Calderbank*** offer, it is only in an unusual case that the defendant should achieve a less favourable order for costs than he would have done if he had made an equivalent payment into court. This strong steer as to the effect of a ***Calderbank*** offer in money claims is not reflected in the CPR. In my judgment, it is unfortunate that, although the rules provide that the court can order that an offer is to have the same costs consequences as a payment into court, they give no guidance as to how the discretion to do so should be exercised.

17. This is not, however, entirely uncharted territory. In ***Amber v Stacey***, [2001] 1 WLR 1225, the claim was for £7579.86, and there was a counterclaim. The defendant made an offer to settle for £4000 which was refused by the claimant. The defendant then paid £2000 into court and a further £1000 a few

months later. Judgment was given in favour of the claimant in the sum of £2321.16 and the counterclaim was dismissed. The judge ordered the claimant to pay the defendant's costs from the date of the offer of £4000. On appeal, Sir Anthony Evans held that it was wrong to treat the offer of £4000 as if it was a payment into court, and the judge had erred in ordering the claimant to pay the defendant's costs, thereby making the same order as he would have done if the defendant (a) had made a payment into court and (b) succeeded on all issues at trial. In agreeing, Simon Brown LJ said:

"I agree. 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 on 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."

18. This decision was analysed by Clarke LJ (with whom Thorpe LJ and Holland J agreed) in ***The Maersk Colombo*****.** He emphasised the fact (as would I) that it was the combined effect of the two factors identified in ***Amber v Stacey*** (the failure to pay £4000 into court and the fact that the counterclaim was dismissed) that led to the conclusion that the judge had erred in ordering the claimant to pay the defendant's costs. Clarke LJ agreed with the observations of Simon Brown LJ that there were many advantages of a payment into court, saying:

"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."

19. Clarke LJ went on to say, however, that 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 on the circumstances."

20. In ***The Maersk Colombo***, the defendant made a ***Calderbank*** offer which was said to be open for acceptance for 21 days. It was not accepted and some time later, an equivalent amount was paid into court. The judge awarded the claimant less than the sum that had been offered to settle the claim. He ordered the claimant to pay the defendant's costs from 21 days from the making of the offer. On appeal, it was submitted on behalf of the claimant that, in the light of ***Amber v Stacey***, this decision was wrong. The defendant relied on the fact that (i) it takes time to arrange a payment into court (the underwriters of the defendants were the Swedish Club and they needed time to collate the significant sum that was required); (ii) the offer could not be regarded as an offer that was lacking in substance; and (iii) it was plain from the fact that the later payment into court was not accepted that, even if a payment into court had been made instead of an offer, it would not have been accepted. In these circumstances, it was contended that the offer should be treated as having the same effect as a payment into court. The defendant's submissions were accepted by the judge, and at para 89 Clarke LJ said that the judge's decision was well within the ambit of his discretion. He continued:

"The courts should encourage settlement. One way of doing so is to make effective orders for costs where claimants could have settled for more than they are ultimately held to be entitled. In the instant case there is to my mind no doubt that, if the claimants had accepted the offer in the letter of 27 May, which was expressly written without prejudice save as to costs, the agreement which would then have come into existence would have been honoured by the defendants' club."

21. Finally, I come to the case of *Crouch*. Waller LJ gave the lead judgment. Mance LJ agreed and Sir Christopher Staughton agreed with the parts of Waller LJ's judgment which are material for present purposes. In fact there were two appeals before the court. In both cases, the defendant had applied the practice which NHS trusts had developed in relation to money claims of making ***Calderbank*** offers. They considered that, rather than making a payment into court, it was preferable for sums which they

were willing to pay to settle money claims to be available for the provision of patient services pending resolution of the case.

22. Having reviewed the authorities, Waller LJ said at para 41 that, if the offer was admissible and was 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."* He then considered the facts of the *Crouch* case. The judge had taken into account the NHS Trust offer, but had purported to apply the principles stated by Simon Brown LJ in *Amber v Stacey* and ordered the NHS Trust to pay the claimant's costs despite the fact that the claimant had been awarded less than the amount that had been offered. Waller LJ was of the opinion that this was based on a misunderstanding of Simon Brown LJ's judgment. In exercising the discretion afresh, he said at para 44:
"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."

Guidance as to the exercise of the discretion.

23. How should the discretion accorded by CPR 36.1(2) and 44.3(4)(c) be exercised in relation to an offer made to settle a money claim where the claimant recovers less than the amount of the offer? In the absence of any guidance in the rules, it falls to the courts to provide it. I emphasise that it is a matter for the discretion of the court. It is clear from CPR 36.3(1) that the offer cannot automatically have the costs consequences specified in Part 36. The question, therefore, is what weight should be given to an offer made to settle a money claim.

24. In my judgment, an offer should usually be treated as having the same effect as a payment into court if the following conditions are satisfied (I consider the effect of a withdrawal at paras 32 to 42 below). First, the offer must be expressed in clear terms so that there is no doubt as to what is being offered. It should 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; whether it takes into account any counterclaim; and if it is expressed not to be inclusive of interest, giving details relating to interest equivalent to those set out in CPR 36.22(2). This condition does no more than reflect the requirements specified in CPR 36.5(2) in relation to payments into court. Secondly, the offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a ***Calderbank*** offer. Thirdly, the offer should be genuine and not, to use the words of Waller LJ "*sham or non-serious in some way*". Fourthly, the defendant should clearly have been good for the money at the time when the offer was made.

25. To the extent that any of these conditions is not satisfied, the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions is satisfied, it is likely that the court will hold that offer affords the defendant no costs protection at all.

26. But if all of the conditions to which I have referred are met, then I can see no reason in principle why the effect of an offer should differ from that of a payment into court. Simon Brown LJ mentioned the need to promote clarity and certainty. I agree. That is why an offer which is unclear and uncertain will usually not carry the same weight as a payment into court. But an offer which satisfies the four conditions should by definition be no less clear or certain than a payment into court. It is important to emphasise that the purpose of a payment into court is not to provide the claimant with security for his judgment if he succeeds at trial. It is to encourage settlement. As Lord Woolf said, a payment into court is *"a useful way of assuring claimants of the substance of an offer"*, and thereby encouraging them to settle by accepting the money that has been paid into court. If a claimant has no less assurance as to the substance of an offer than where a payment into court has been made, there is no reason to treat the offer as providing any less encouragement to settle or to treat it differently from a payment into court.

27. Mr Blohm submits that there is a danger of satellite litigation inherent in the approach that I have suggested. In particular, he says, there may be arguments as to whether the offer was genuine and/or whether the defendant was clearly good for the money at the time it was made, and possibly as to

whether the terms of the offer are sufficiently clear. It is implicit in his judgment in ***Amber v Stacey*** that Simon Brown LJ was concerned about these dangers. But in my view, the risk of such satellite litigation can be overstated. In reality, it would be difficult for a claimant who refused an offer to contend after a trial that the offer was not genuine or that the defendant was not good for the money, unless he said that this was why he was refusing the offer at the time. In the absence of such a statement at that time, the court would be likely to infer that the reason for the refusal of the offer was simply that the claimant considered it to be too low. The best way for a claimant to test the genuineness of an offer and the defendant's ability to pay is to accept the offer (or at least to do so conditionally on payment being forthcoming) and see what happens. If this does not occur, it will be a rare case where a claimant will have any prospects of showing that the offer was not genuine or would not have been honoured.

28. In the present case, the judge gave two reasons (apart from the withdrawal point) for deciding that the offer of 26 February 2002 afforded the defendant no costs protection. The first was that the defendant had no practical or good reason for not making a payment into court. He seems to have been of the view that it was the existence of practical or good reasons for the defendant not making a payment into court that led to the costs orders that were made in *The Maersk Colombo* and *Crouch*. It is true that in ***The Maersk Colombo*** the fact that it would take time to arrange for a payment into court was one of the factors relied on by the trial judge which this court said it was open to him to take into account. But in my judgment it is clear from Clarke LJ's judgment that the principal reason why the judge's decision on costs was upheld in that case was that the defendants would have honoured the offer if it had been accepted by the claimant.

29. In ***Crouch,*** the reason given by this court for its decision was not that the NHS Trust had a good and practical reason for not making a payment into court eg that it was a better use of its money to spend it on patient care, rather than have it tied up in court. It was simply that the offer was genuine and the Trust was bound to be good for the money. There may be circumstances where the existence of a good practical reason for not making a payment into court would be considered to be a sufficient reason for holding that an offer should have the same costs consequences as a payment into court. But the existence of such a reason is certainly not a necessary condition for treating an offer as having such consequences. In my judgment, however, the substance and effect of the offer are more important than the reasons why the defendant did not make a payment into court.

30. The second reason given by the judge was that, unlike the defendants in ***The Maersk Colombo***, the defendant in the present case is not a foreign entity which was ignorant of the rules of court. I doubt whether problems faced by a defendant in getting the money together would, of themselves, be sufficient to justify treating an offer as equivalent to a payment into court for purposes of costs. But I do not see how ignorance of the rules could be a relevant factor.

31. Leaving the effect of the withdrawal of the offer on one side, I would, therefore, hold that the reasons given by the judge for saying that the offer afforded the defendant no costs protection were not good in law. Each of the four conditions identified at para 24 above was satisfied. The offer made on 26 February 2002 was clear. In substance it accorded with the requirements of an effective *Calderbank* letter. It was not (and never has been) suggested that it was not a genuine offer or that the defendant did not have the means to honour it if it was accepted. Subject to the withdrawal point, there were no factors which would justify doing other than treat the offer has having the same effect as if the £35,000 offered had been paid into court.

The effect of the withdrawal

32. I now turn to the effect of the withdrawal of the offer. It is necessary to examine the decision of this court in ***Bristol & West Building Society***. In that case, the defendants made a ***Calderbank*** offer which the claimant beat at a hearing before the district judge. The defendant appealed and on the appeal the claimant failed to beat the defendant's offer. Between the date of the two hearings, the defendants had withdrawn the offer. The judge made no order as to costs. This court allowed the defendants' appeal against the costs order. Neill LJ said: *"What then is the effect of a* ***Calderban****k offer which subsequently is withdrawn? On the facts of this case – it is not necessary to go further than the facts of this case – it seems to me*

that, although the offer was no longer available for acceptance, unless the matter had been renegotiated between the parties, the effect of the offer letter remained. Once the letter had been sent, and it was a letter which the learned Judge decided should have been accepted, the District Judge could have taken account of the ***Calderbank*** *offer. It seems to me that, if the offer in that letter should have been accepted, then Mrs Rosen Peacocke is right in her argument that any subsequent proceedings flowed from the refusal of the offer. There would have been no hearing before Judge Jack in October 1995 had that offer been accepted. For my part, I think it was a misinterpretation of a* ***Calderbank*** *letter of this kind, to treat it as though it was no longer operative. It was not operative in the sense it was open to acceptance, but the effect of it remained."*

33. He added: "*To decide the effect of a* ***Calderbank*** *offer on costs one looks at the date when the offer should have been accepted"*. The judge should, therefore, have ordered the claimant to pay the defendants' costs of both hearings.

34. Ward LJ agreed and added: *"……the principal error in my judgment, was not to distinguish between the question whether the* ***Calderbank*** *letter was still on the negotiating table and the question whether its terms materially related to the result of the appeal. That it had lapsed, whether by rejection, non acceptance within a reasonable time, or its withdrawal, matters not. It remained material as a fact in the history of litigation. Had it been accepted within a reasonable time after it was made, and the learned Judge correctly found that it should have been because the Plaintiff eventually did less well than they had been offered, then there would have been no need for the appeal at all. An appeal became necessary because, without it, the wrong order would have stood uncorrected."*

35. In the present case, the judge distinguished ***Bristol & West Building Society*** on the grounds that (a) the offer to settle in that case was made after a first instance decision by the district judge; and (b) the offer was not one which could have been made by a payment into court. As to (a), what the judge said was factually incorrect: the offer was made earlier than the hearing before the district judge. But whether it was made before or after the hearing before the district judge, I do not see how this could be a proper basis for distinguishing the decision. As to (b), the point in issue was the effect of the withdrawal of the offer, not the nature of the offer. As Mr Simpson points out, the judge seems to have elided the issue of whether a written offer to settle has the same effect as a payment into court with the issue of the effect of an offer being withdrawn.

36. Mr Blohm submits that, in so far as the defendant relies on *Bristol & West Building Society* as establishing a simple "but for" test of causation that requires the trial court to ignore the history of the litigation or subsequent events after the offer, this is too broad a proposition and is inconsistent with the general requirements of the CPR to have regard to all relevant factors in the light of the overriding objective. He further submits that the decision is neither binding authority nor of great persuasive force.

37. I accept that ***Bristol & West Building Society*** should not be taken as authority for a mechanistic application of a principle that, where it is held that a ***Calderbank*** letter should have been accepted by the claimant, and the claimant is awarded less than the amount of the offer at trial, the defendant should automatically be entitled to his costs from the date when the offer should have been accepted without regard to any other considerations. Even if the offer is not withdrawn, there can be no question of automatic consequences: it is a question of what weight should be given to the offer.

38. I also agree that ***Bristol & West Building Society*** is not technically binding since it was a pre-CPR authority. But it is of strong persuasive force. It is true that Neill LJ did preface his remarks with the words "*on the facts of this case*". But it seems to me that neither his reasoning nor that of Ward LJ was *in fact* dependent on anything peculiar to the facts of that case.

39. Mr Blohm submits in any event that there are other reasons why an offer that has been withdrawn should not be taken into account in relation to costs. If an offer that has been withdrawn can have the same effect as a payment into court, then this would allow a defendant to circumvent the effect of the provisions of CPR 36.10, and that would not encourage settlement. The bare assertion that it does not matter whether an offer is withdrawn is contrary to CPR 36.5(8), which makes it clear that the withdrawal of a Part 36 offer (which this was not) means that the offer does not attract the benefits of a

Part 36 offer: this is intended to induce parties to maintain offers if they are to obtain the benefit of making them.

40. I cannot accept Mr Blohm's submission that an offer that has been withdrawn should necessarily not be taken into account. Nor can I accept Mr Blohm's further submission that it should only be in exceptional circumstances that the court will give weight to a pre-action offer made by a defendant to settle a claim where that offer is subsequently withdrawn. Take the present case. As a matter of history, an offer was made on 26 February 2002. If it had been accepted within 21 days, the defendant would have paid the claimants' costs and there would have been no trial: the claimants would have done better than they did in fact by refusing the offer.

41. As Neill LJ said, to decide the effect of an offer on costs, one looks to the date when the offer should have been accepted. If a claimant should have accepted an offer within 21 days, then, on the face of it, the consequence should be that he is entitled to his costs up to the date when the offer should ordinarily have been accepted, and the defendant is entitled to his costs thereafter. Usually the mere fact that an offer is withdrawn after the date when it should have been accepted should not lead to a different result.

42. In the present case, the judge made no finding as to whether, and if so when, the claimants should have accepted the offer of 26 February 2002. On the material that has been placed before this court, I would hold that the claimants should have accepted the offer within 21 days of 26 February. Mr Blohm advanced no submissions in justification of the refusal of the offer. It is clear that the claimants rejected the offer because their assessment of the value of the claim was grossly exaggerated and unreasonable: see paras 7 and 8 above. Moreover, this is not a case where the claimants are saying that they would have accepted the offer (and reached an agreement on costs) after the expiry of the 21 day period if the offer had not been withdrawn. In my judgment, there are no grounds on the facts of this case for holding that the withdrawal of the offer should make any difference.

43. There may be circumstances where the court holds that the claimant acted reasonably in not accepting the offer within the 21 day period and where the offer was withdrawn before the time when the claimant should have accepted it. In that situation, the withdrawal of the offer may have a very real effect on the order that should be made in respect of costs. But that is very different from the present case.

Conclusion on the first issue

44. For the reasons that I have given, in my view the judge should have held that (i) the claimants were liable for the defendant's costs incurred after the expiry of 21 days from 26 February 2002, and (ii) the defendant was liable for the claimants' costs (if any) incurred before that date.

Exaggeration

45. Since the proceedings were not issued until 17 December 2002, the defendant's liability for the claimants' costs (if any) must be minimal. Accordingly, the second issue does not arise, or arises only to an insignificant extent. In so far as it is necessary to deal with the second issue at all, it is sufficient to say that I see no reason to interfere with the judge's assessment of the claimants' conduct and application of CPR 44.3(5)(d).

Overall conclusion

46. I would allow this appeal, and invite counsel to agree a form of order to give effect to this judgment.

Lord Justice Auld:

47. For all the reasons given by Lord Justice Dyson, I agree that the appeal should be allowed.

Mr Mark Simpson (instructed by Messrs Osborne Clarke) for the Appellants
Mr Leslie Blohm (instructed by Messrs Davis Wood) for the Respondent