JUDGMENT 2 The Hon. Mr Justice Dyson : Case No: 1998/TCC/590 Friday 19th May 2000

1. I am asked to rule on the question whether this action has been compromised. Pitchmastic contends that a contract of settlement was made when its solicitors, Messrs Masons, sent a fax dated 3 April 2000 to Birse's solicitors, Messrs Nabarro Nathanson, purporting to accept an offer contained in Masons' fax dated 6 March 2000. The facts are as follows.

2. On 18 February, Masons sent to Nabarros a fax headed "without prejudice save as to costs". The fax contained an offer to accept £50,000 in full and final settlement of all issues arising in the action. The offer was expressed to be pursuant to Part 36 of the CPR. By a fax dated 21 February, this offer was rejected, On 6 March (the day before the trial was due to start), Masons sent another fax marked "without prejudice save as to costs". This time they offered to settle on the basis that the action be stayed on terms that each side bore its own costs. By a fax of the same date, this offer too was rejected: a counter offer was made to accept £198,000 plus interest and costs in settlement of all claims and counterclaims.

3. The trial duly commenced on 7 March. On 8 March, Mr Goddard made an open offer in court on behalf of Birse to settle on the basis that the claim and counterclaim should be dismissed, and each side bear its own costs. Mr Harding indicated that a similar offer had been recently rejected by his client, and he implied (to put it no higher) that it was still unacceptable. By an open fax dated 9 March, Birse repeated the offer that Mr Goddard had made in court the previous day. The response, also dated 9 March, was headed "without prejudice as to costs". It acknowledged receipt of Birse's offer (but did not expressly reject it). It made a counter offer to settle all claims for £108,338.50, with the issue of liability for costs to be determined by the judge.

4. The trial proceeded. I circulated a draft judgment which showed that the claim succeeded to the extent of £108,338 46, and the counterclaim to the extent of £178,796.62. Both of these figures excluded interest. On 30 March, and following receipt of the draft judgment, Masons sent an open fax to Nabarros saying: "for the avoidance of doubt, all previous offers to settle this action are withdrawn." Later the same day, they sent Nabarros a second open fax in which they said: "we should clarify that "all previous offers" is a reference to open offers to settle". On 31 March, Birse served their written submissions on costs. On 3 April, Pitchmastic served their written submissions on the draft judgment and on costs. In his submissions on costs and in support of the argument that Pitchmastic should pay costs on an indemnity basis, Mr Goddard to some extent relied on the rejection of Birse's offers to settle, including the offer contained in the letter of 6 March.

5. Finally, at 19.00 hours on 3 April, Nabarros sent a fax to Masons headed "without prejudice". Having referred to the second fax of 30 March, they wrote:
"We take it from this letter that only "open offers" are no longer open for acceptance, and as such, "without prejudice save as to costs" offers are still open for acceptance. On that basis we are instructed to, and by this letter, accept your without prejudice save as to costs letter dated 6 March 2000".

Mr Harding's submissions

6. Mr Harding accepts that it is trite contract law that an offer, once rejected, is extinguished and is no longer open for acceptance: see Chitty on Contracts 28th edition paragraph 2-084. He submits, however, that the position in respect of proposals for the settlement of proceedings is different. Such proposals are made for two purposes. One is the immediate compromise of the action. The other is to provide protection in relation to costs. It is this second feature which makes offers to settle different from other contractual offers. If an offer to settle is to be relied on in relation to the issue of costs, it has to remain available for acceptance. An offer which conforms with the requirements of CPR Part 36 is open for acceptance for 21 days. After that time, it is not withdrawn, but remains open for acceptance if the court gives permission: see Part 36.11. Part 36 offers cannot be withdrawn without the permission of the court: see Part 36.6(5). This emphasises that for an offer to be taken into consideration in relation to costs, it must remain open for acceptance, even if acceptance is to be on terms as to costs.

7. Birse has sought to rely on the offer contained in the letter of 6 March in relation to the question of costs. Birse cannot both rely on that offer in claiming an entitlement to costs, and at the same time allege that the offer was extinguished by Pitchmastic's rejection of it. Birse has elected to rely on the existence of the offer, and must therefore accept all the consequences which flow from that. Mr Harding also relies on the two letters of 30 March. He submits that, taken together, the clear intention of Birse was to withdraw only the open offers to settle: all offers to settle without prejudice as to costs remained open for acceptance. Finally, he contends that by 3 April the offer of 6 March had not lapsed by the effluxion of a reasonable time

Mr Goddard's submissions

8. Mr Goddard submits that the question of whether the action has been settled on the terms of Birse's without prejudice letter of 6 March should be resolved by the application of the ordinary principles which govern the formation of contracts. There is no special and distinct set of principles that are to be applied in relation to contracts to settle litigation. He contends that the offer of 6 March lapsed on Pitchmastic's rejection of that date. The first letter of 30 March was probably unnecessary and written out of an abundance of caution. The position as at that date was that there had been two previous *open* offers to settle, that made by counsel in open court, and that made by letter dated 9 March. The offer made in court had not been formally responded to, and the offer of 9 March had not been expressly rejected. The position with regard to the open offers was not, therefore, quite as clear as that in relation to the offers without prejudice as to costs. That is why, out of an abundance of caution, the letters dated 30 March were written in the terms in which they were written.

9. Alternatively, Mr Goddard submits that, if the offer of 6 March did not cease to be capable of acceptance following its rejection, then it had lapsed by effluxion of time before Pitchmastic's purported acceptance of it on 3 April. It is trite law that where the duration of an offer is not limited by its express terms, it comes to an end after the expiry of a reasonable time. What is a reasonable time depends on all the circumstances of the case. Mr Goddard contends that a reasonable time expired at the commencement of the trial, or, at the very latest, upon receipt of the draft judgment on 29 March.

Discussion

10. I do not accept Mr Harding's submission that there are special principles for determining whether a contract of compromise has been made in the context of existing litigation. The question falls to be decided by the application of the ordinary rules of offer and acceptance._ It is true that offers to settle that satisfy the requirements of CPR Part 36 have the consequences specified in Part 36. But CPR 36. 1(2) provides that nothing in Part 36 prevents a party making an offer to settle in whatever way he chooses. Mr Harding's reliance on Part 36.6(5) is misplaced: Part 36.6 is concerned with Part 36 payments, not Part 36 offers. CPR 36.5(8) expressly contemplates that a Part 36 offer may be withdrawn. It states that if a Part 36 offer is withdrawn, it will not have the consequences set out in Part 36. There is no requirement that a party who has made a Part 36 offer must seek the permission of the court before withdrawing it.

11. The short answer to Mr Harding's submission is that the offer of 6 March was terminated upon its rejection on the same day, and could no longer be accepted thereafter. Mr Harding does not contend that the offer was revived by the letters of 30 March. Nor do I accept the argument that the offer of 6 March continued to be capable of acceptance because Birse relied on it in its submissions in relation to costs. As I understand it, this is advanced as an independent argument. But if the offer terminated upon its rejection, and if it was not subsequently revived by the letters of 30 March, I do not see how life can be breathed into the offer merely because it was relied on when it came to the question of costs. The relevance of the offer at the stage of the arguments as to costs was that the offer had been made and rejected. That was a historical fact, and Birse was entitled to rely on it in arguing issues as to costs. It did not mean that in some unexplained way the rejected offer was still capable of acceptance. In **Bristol and West Building Society v Evans Bullock & Co,** an unreported decision of the Court of Appeal dated 5 February 1996, a **Calderbank** offer had been made , and subsequently withdrawn. It was held

that the offer should have been accepted. The question that arose was how that impacted on the question of costs. It was held that, although the offer was no longer operative in the sense of being capable of acceptance, the effect of the letter still remained in relation to costs. So too here. Although the offer of 6 March was not withdrawn, it ceased to be capable of acceptance once it had been rejected by Pitchmastic.

12. Mr Harding also relies on the letters of 30 March as evidence that the only offers that had been withdrawn were the opera offers. But I agree with Mr Goddard that, viewed objectively, these letters were written out of an abundance of caution. A reasonable explanation for treating the open offers differently is that the solicitors wanted to ensure that they did not do anything that might undermine the ability to rely on the offer of 6 March in relation to costs. In fact, as a matter of law, the earlier offer ceased to be capable of acceptance once it had been rejected on the same day. That position could not be affected by a subsequent withdrawal of offers, unless it could be shown that the subsequent letters reinstated the offer of 6 March. As I have said, Mr Harding does not contend that they did.

13. Finally, even if the offer of 6 March was not terminated by its rejection on the same day, it is common ground that the offer would lapse after a reasonable time. What is a reasonable time is a question of fact in the light of all the surrounding circumstances. There may be room for argument as to when a reasonable time had expired. But I am in no doubt that it had expired at the very latest by the time that the parties had received my draft judgment. Mr Harding submits that it would have been apparent on considering the draft judgment that there was at least a real risk that it would be revised to an extent which would result in Pitchmastic recovering more than Birse. I regard this as fanciful. I accept, of course, that the judgment was in draft, and that it was open to either party to point out errors. In a case of this complexity, which was conducted at considerable speed, it was quite likely that I would be persuaded that there were some errors in the draft. But this was a reserved draft judgment, and it was unlikely that I would be persuaded of the existence of errors of such a magnitude as that suggested by Mr Harding, In my judgment, if the offer of b March was still capable of acceptance on 7 March, it had ceased to be capable of being accepted by the time the parties received the draft judgment.

14. For all these reasons, I reject the submission that this dispute was settled by the sending of the fax dated 3 April 2000.

Richard HARDING (instructed by Messrs Nabarro Nathanson for the Claimants) Andrew GODDARD (instructed by Messrs Masons for the Defendants) Case No: 1998/TCC/590 Friday 19th May 2000

JUDGMENT 2 The Hon. Mr Justice Dyson : I direct pursuant to CPR Part 39 PD 6. l that no official shorthand note shall be taken of this judgment and that copies of this version, subject to editorial corrections, may be treated as authentic.

