JUDGEMENT : Waller J sitting with Master Berkely & Mr R Winstanley as assessors. 16th May 1991

1. This is an application to review the decision of the chief clerk of the Supreme Court Taxing Office, Mr Burroughs, and Master P Hurst, and raises for consideration the exercise of the discretion of the taxing master in the light of what is termed a '*Calderbank* offer' made pursuant to RSC Ord 26, r 27(3) (see ***Calderbank v Calderbank*** [1975] 3 All ER 333, [1976] Fam 93). There is, I am told, no previous authority considering this matter, and it is for that reason that I have given leave for this judgment to be reported. I have sat on this matter with Master Berkeley and Mr Winstanley and am very grateful for the assistance that I have received from them.

2. The proceedings to which this matter relates arose out of an action in negligence against a firm of solicitors for failure to apply for a new lease under the Landlord and Tenant Act 1954. The plaintiffs were in effect successful in the action in that by an order made on 14 May 1990 the defendants were ordered to pay in addition to a sum of £19,500 paid into court on 19 April 1990 a further sum of £15,500 and were further ordered to pay the costs of the plaintiffs, including the costs of the application of 14 May to be taxed on the standard basis if not agreed. The costs were not agreed and a reference to tax was taken out on 31 May 1990. The matter came before Mr Burroughs, the chief clerk of the Supreme Court Taxing Office, who taxed the bill on 10 July 1990. At the end of the taxation the defendants revealed that a ***Calderbank*** offer had been made. The bill of costs excluding item 5 and the taxation fee had been taxed at £8,609.00. The ***Calderbank*** offer had been made on 20 June 1990 in the sum of £8,750 plus value added tax as applicable. In the event no value added tax was payable. The taxing officer was then asked by the defendants to disallow the costs of taxation, that is the taxation item and the taxing fee of £442.05. They did not, as I understand it, make any request to Mr Burroughs for an order in relation to their own costs.

3. Mr Burroughs looked at the *Calderbank* offer and the ensuing correspondence. The terms of the *Calderbank* offer by letter dated 20 June 1990 were as follows: *'We, Ince & Co., Solicitors for the Defendants, are authorised to offer to you the sum of £8,750, plus VAT as applicable, without prejudice, save as to the costs of taxation, in full and final settlement of your clients' costs of the action pursuant to the Order dated 14th May 1990. In the event that this offer is not accepted we reserve the right to draw the Taxing Master's notice to this offer pursuant to Order 62 Rule 27(3).'*

4. The response to that letter by letter dated 21 June 1990 was as follows: *'We thank you for your letter dated the 20th June 1990 the contents of which we have noted. We calculate that our costs as drawn amount to £7,474 and that our disbursements as set out in our bill amount to £3,707.50 making a total of £11,181.50. It would appear that you are offering us £8,750 in settlement of this claim. We find it very difficult to consider your offer without a further breakdown as to how the sum is calculated. Our bill includes Counsel's fees of £2,070. We have paid our expert £1,087.50. Are these sums admitted by you? We would be grateful if you could break down your offer of £8,750 into profit costs, Counsel's fees, expert's fees and other disbursements and we will then be able to consider the position further. We would also be grateful to receive confirmation that your clients will pay VAT on the whole of our profit costs. We await to hear from you.'*

5. In their reply dated 26 June 1990 Ince & Co refused to give a breakdown, stating that they had 'no wish to enter into a taxation by correspondence', but set out two matters of concern to them in relation to the assessment of the plaintiffs' costs.

6. According to Master Hurst in his reasons, it was common ground before him between the parties that the reason why Mr Burroughs refused to disallow the costs of taxation was that the defendants when requested by the plaintiffs had not broken down their *Calderbank* offer between profit costs and disbursement. This was challenged before me by Mrs Simon, who appeared for the plaintiffs. She asserted there were other reasons why Mr Burroughs refused to disallow the costs and I will return to that below. But, so far as Master Hurst was concerned, the sole consideration as to why Mr Burroughs refused to disallow the costs was that the defendants had refused the breakdown.

7. In Master Hurst's reasons in which he upheld Mr Burroughs's exercise of his discretion, he put the matter in the following way: *'In reaching my decision on these objections I formed the view that the defendants had acted in accordance with Ord 62, r 27 and had acted reasonably in not providing further details of their* **Calderbank** *offer to the plaintiffs' solicitors. I was not persuaded that the plaintiffs' solicitors were entitled to the information which they sought, since it is part of the nature of litigation that opposing sides make offers in the hope of settling disputes and*

will do so both in order to disguise weaknesses in their own case as well to point up weaknesses in the opponents' case. Thus, whilst it would have been useful for the plaintiffs to know the information which they sought, I formed the view that they were not entitled to it. It was at one point suggested that it was necessary to go to taxation in any event to resolve the value added tax position but this did not appear to me to do so, since the value added tax position was conceded at the outset of the taxation. It was argued by Mr Boyd for the defendants that Mr Burroughs did not have all the correspondence before him and therefore was not in a position to make a proper decision. In my view Mr Burroughs was fully apprised of the situation and the fact that he did not have sight of all the correspondence did not in fact impair his ability to reach a decision. No evidence was put before me that Mr Burroughs had exercised his discretion otherwise than judicially and in those circumstances, although had the original taxation taken place before me I might have come to the opposite view, I saw no reason to overturn Mr Burroughs's perfectly proper exercise of his discretion.'

8. I have to say that I, on any view, do not find this process of reasoning very satisfactory. Having demolished, as it seems to me rightly, the main plank of Mr Burroughs's reasoning for exercising his discretion in the way he did, it seems to me difficult to state in the same breath that there was no evidence before Master Hurst that Mr Burroughs had exercised his discretion otherwise than judicially. On any view, having taken away the main plank of Mr Burroughs's reasoning, there was called for a fresh exercise of the discretion.

9. The two competing submissions before us can be summarised as follows. Mr Moor, on behalf of the defendants, submitted that a ***Calderbank*** offer under Ord 62, r 27(3) should be treated by a taxing master just like a payment in ordinary litigation. He submitted that, if a defendant beats a payment in, then, in the absence of special circumstances, he should not be ordered to pay the costs following the payment in and indeed should obtain his costs since that time.

10. Mrs Simon, on behalf of the plaintiffs, on the other hand, submitted that in taxation proceedings the procedure is different. She submitted that, on a proper construction of the rules, a ***Calderbank*** offer is simply one factor that a taxing master *may* take into account and that he has an unfettered discretion. She submitted that Mr Burroughs had all the files and the details of the underlying case before him and that all those matters plus the factor that the defendants had refused to give a breakdown of their ***Calderbank*** offer were taken into account by Mr Burroughs, and that thus Master Hurst was right not to interfere with Mr Burroughs' order.

11. Before considering Ord 62, r 27(3) in the taxation context, it is right to consider the correct approach to a ***Calderbank*** offer generally. A number of authorities relating to ***Calderbank*** offers and/or their equivalent were cited. My view is that the authorities are helpful as a matter of background to the construction of the rules which now expressly deal with such offers. But there is no need to go further than the Court of Appeal decision in ***Cutts v Head*** [1984] 1 All ER 597, [1984] Ch 290, where a full review of all authorities is carried out and where there are full citations from those passages in the authorities to which Mr Moor directed our attention. He for example placed great reliance on the passage quoted by Oliver LJ in ***Cutts v Head*** [1984] 1 All ER 597 at 601–602, [1984] Ch 290 at 300–301 from Cairns LJ's judgment in ***Calderbank v Calderbank*** [1975] 3 All ER 333 at 342, [1976] Fam 93 at 105, particularly the passage where Cairns LJ said: *'Another example is in the Admiralty Division where there is commonly a dispute between the owners of two vessels that have been in collision as to the apportionment of blame between them. It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in.'*

12. Mr Moor also referred to a passage in the judgment of Megarry V-C in ***Computer Machinery Co Ltd v Drescher*** [1983] 3 All ER 153 at 156, [1983] 1 WLR 1379 at 1382–1383 quoted by Oliver LJ in ***Cutts v Head*** [1984] 1 All ER 597 at 608–609, [1984] Ch 290 at 310–311 emphasising the following passage: *'In my view, the principle in question is one of perfectly general application which is in no way confined to matrimonial cases. Whether an offer is made "without prejudice" or "without prejudice save as to costs", the courts ought to enforce the terms on which the offer was made as tending to encourage compromises and shorten litigation; and the latter form of offer has*

the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs.'

13. ***Cutts v Head*** [1984] 1 All ER 597 at 610, [1984] Ch 290 at 312 thus laid down, in the words of Oliver LJ— *'that it must now be taken to be established that the* Calderbank *formula suggested by Cairns LJ is not restricted to matrimonial proceedings but is available in all cases where what is in issue is something more than a simple money claim in respect of which a payment into court would be the appropriate way of proceeding.'*

14. At the end of his judgment Oliver LJ sounded what he termed as *'one word of caution'*. He said ([1984] 1 All ER 597 at 610, [1984] Ch 290 at 312): *'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.'*

15. With those observations Fox LJ also agreed (see [1984] 1 All ER 597 at 613, [1984] Ch 290 at 317).

16. The decision in ***Cutts v Head*** is now reflected in the provisions of the Rules of the Supreme Court. By Ord 22, r 14 it is expressly provided that a party may make a written offer without prejudice save as to costs, and it is further expressly provided that the court should not take such an offer into account if, at the time it is made, the party could have protected his position as to costs by means of a payment into court. Order 22, r 14(2) refers to Ord 62, r 9(1)*(d)*. Order 62, r 9(1) provides: *'The Court in exercising its discretion as to costs* shall *take into account …* (b) *any payment of money into court and the amount of such payment …* (d) *any written offer made under Order 22, rule 14, provided that the Court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22.'*

17. Mr Moor submitted that under Ord 62, r 9 it was in effect mandatory to award a party his costs if either there had been a payment of money into court which equaled or exceeded the money awarded at the end of the trial or if what had been achieved at the trial was equal to or more than had been offered by virtue of a *Calderbank* offer.

18. In relation to payment in he relied on ***Findlay v Railway Executive*** [1950] 2 All ER 969 at 971. There Somervell LJ referred to the principle adumbrated by Viscount Cave LC in ***Donald Campbell & Co Ltd v Pollak*** [1927] AC 732 at 811–812 in the following terms: *'A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.'*

19. The judgment of Somervell LJ then continued: *'The first point to be decided here is whether a defendant who has paid money into court which has not been taken out and exceeds the sum awarded to the plaintiff is a successful litigant or a successful party within those two statements of the law. I hold that he is, and that the principles there laid down apply. The main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs. Once, therefore, the money has been paid in, the* lis *between the parties simply is: Is that sum sufficient to cover the damage which has been suffered.* Prima facie, *therefore, the defendants in the present case are entitled to be paid their costs as from the date of payment in, but, of course, as in other cases, there may be circumstances connected with the case which entitled the judge to make some order other than that of giving the successful litigant his costs, and counsel for the plaintiff submitted that there were such circumstances in this case.'*

20. The facts were then gone into and it was decided that there were no circumstances entitling the judge to deprive the successful defendants of their costs in that particular case.

21. The above principle is applied even if the payment in precisely equals the sum ultimately awarded at the trial: see ***King v Weston-Howell*** [1989] 2 All ER 375, [1989] 1 WLR 579. This authority was not referred to by Mr Moor, but it demonstrates the fact that in relation to a payment-in situation the real issue between the parties after payment in is whether or not that is the right sum.

22. In relation to a *Calderbank* offer Mr Moor relies on the language of Cairns LJ quoted with approval by Oliver LJ, where he says in the Admiralty context that a party 'will' be awarded his costs (see the passage quoted above). I think Mr Moor recognised that the position was not an absolute one in relation to a *Calderbank* offer any more than it is in relation to a payment into court. There may be circumstances where the court in its discretion will not order costs, but the reasons for not so doing will have to be special ones. In relation to a *Calderbank* offer it furthermore seems to me there must be in any event further room for flexibility. If the case is suitable for a payment into court then the payment-in provisions will apply. A *Calderbank* offer will only be made where the payment-in provisions do not apply. A *Calderbank* offer may be capable of being reasonably black or white, as for instance it is in the Admiralty context to which Cairns LJ was referring. A ***Calderbank*** offer may also however be utilised in a situation where one is not dealing with a monetary sum or an apportionment and in those circumstances a further degree of flexibility will be necessary. The right test in relation to a *Calderbank* offer is probably best expressed in the words of Ormrod LJ in ***McDonnell v McDonnell*** [1977] 1 All ER 766 at 770, [1977] 1 WLR 34 at 38 quoted by Oliver LJ in ***Cutts v Head*** [1984] 1 All ER 597 at 602, [1984] Ch 290 at 302 in the following words: *'Clearly this is a very important consideration in exercising the court's discretion with regard to costs. It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A* ***Calderbank v Calderbank*** *offer should influence but not govern the exercise of the discretion. The question to my mind is whether, on the basis of the facts known to the wife and her advisers and without the advantage of hindsight, she ought reasonably to have accepted the proposals in the letter of 16th December, bearing always in mind the difficulty of making accurate forecasts in cases such as this. On the other hand, parties who are exposed to the full impact of costs need some protection against those who can continue to litigate with impunity under a civil aid certificate.'*

23. Obviously he is there referring to matrimonial proceedings but it will almost invariably, as it seems to me, be the correct test to consider in relation to a *Calderbank* offer whether the party 'ought reasonably to have accepted the proposals in the letter'. If the answer to that question is Yes, then as it seems to me, taking the fact that a *Calderbank* offer is now placed in the same position as a payment in under Ord 62, r 9, the party who has not reasonably accepted a *Calderbank* offer will be liable to pay the costs from the date at which that acceptance should have been made.

24. Thus I can summarise the position as it seems to me in the normal litigation context as follows.
    (1) Where a payment in has been made and accepted under Ord 22, rr 1 and 3, a party is absolutely entitled to its costs (see Ord 62, r 5(4)).
    (2) Where there has been a payment in not accepted, then, if that payment in is equal to or beaten by the defendants, the defendants are entitled to their costs as the successful party unless there are special reasons for depriving the defendants thereof.
    (3) A *Calderbank* offer can only be used where the payment-in provisions are inapplicable, but where it is properly deployed, if the party to whom the offer is made has unreasonably failed to accept that offer, then the offering party will be entitled to costs post the time at which that offer should have been accepted unless there are special reasons for depriving the defendants thereof.

25. The basis for the above approach is that the successful party in litigation is entitled to have his costs unless there are special reasons.

26. I must now turn to Ord 62, r 27. The note to Ord 62, r 27(3) and (4) in *The Supreme Court Practice 1991* para 62/27/1 states that the rule has been extended ***'to Calderbank letters'*** (see also para 62/9/1) in taxation proceedings and the procedure is explained in Note 21 of the Masters' Practice Notes 1986, para 62/A2/32. That note reads as follows: *'A party liable to pay costs to a party other than an assisted person may make a "Calderbank" offer under the provisions of Order 62 Rule 27(3) at any time after the order for costs is made. If no offer has been made before the reference is taken, the party taking the reference should comply strictly with Order 62 Rule*

30(3) and deliver a copy of the bill to the paying party within 7 days of taking the reference. If such an offer is made the party whose bill it is should at once inform the Chief Clerk who will thereupon stay the progress of the taxation for a period of 7 days from the date upon which the offer was made. If the offer is accepted within that time, the party whose bill it is may apply for the bill to be withdrawn and for the taxing fee to be abated in whole or in part. The existence of a "Calderbank offer" must not be made known personally to the taxing officer to whom the taxation has been referred.'

27. The above procedures were complied with in the instant case.

28. It is now important to set out the provisions of Ord 62, r 27 in extenso:

'(1) Subject to the provisions of any Act and this Order, the party whose bill is being taxed shall be entitled to his costs of the taxation proceedings.

(2) Where it appears to the taxing officer that in the circumstances of the case some other order should be made as to the whole or any part of the costs the taxing officer shall have, in relation to the costs of taxation proceedings, the same powers as the Court has in relation to the costs of proceedings.

(3) Subject to paragraph (5), the party liable to pay the costs of the proceedings which gave rise to the taxation proceedings may make a written offer to pay a specific sum in satisfaction of those costs which is expressed to be "without prejudice save as to the costs of taxation" at any time before the expiration of 14 days after the delivery to him of a copy of the bill of costs under rule 30(3) and, where such an offer is made, the fact that it has been made shall not be communicated to the taxing officer until the question of the costs of the taxation proceedings falls to be decided.

(4)The taxing officer may take into account any offer made under paragraph (3) which has been brought to his attention.

(5) No offer to pay a specific sum in satisfaction of costs may be made in a case where the person entitled to recover his costs is an assisted person within the meaning of the statutory provisions relating to legal aid.

(6) In this rule any reference to the costs of taxation proceedings shall be construed as including a reference to any fee which is prescribed by the Orders as to Court fees for the taxation of a bill of costs.'

29. There are, as it seems to me, two matters of distinction in relation to these rules as compared to ordinary litigation. First, and the matter primarily relied on by Mrs Simon, the language of Ord 62, r 27(4). There the word 'may' is used in contrast to the language of Ord 62, r 9. Secondly, the starting point in relation to taxation seems not to be the same starting point as in litigation generally. Under Ord 62, r 27(1) the party whose bill is being taxed shall be entitled to his costs of the taxation proceedings in all normal circumstances. In other words there is not the expectation at the conclusion of taxation proceedings that the 'winner' will obtain an order for costs and that the 'loser' will obtain no order. By the time costs are being taxed under Ord 62, r 27, the 'winner' is the person claiming the costs having to go through the taxation process and is prima facie entitled to the costs of so doing. In order for that party to be deprived of his costs, never mind having to pay the costs of the other party, it has to appear to the taxing officer, pursuant to Ord 62, r 27(2), that in the circumstances of the case some other order should be made as to the whole or any part of the costs. It is in that context that the taxing officer 'may' take into account an offer made described as a *Calderbank* offer. I should say that at one time I felt that the word 'may' was purely permissive in the sense of allowing a without prejudice offer to be referred to. But, on reflection, it seems to me that the contrast between the language of Ord 62, r 27(4) and Ord 62, r 9 is clear, as is the fact that the starting point will be that the party having his bill taxed should be entitled to his costs.

30. All that said, however, it must be clear that it was intended that a person who might otherwise have to pay costs should have a method by which he could put the other side on risk. In other words the policy considerations behind allowing a *Calderbank* offer in general litigation as described by Megarry V-C in ***Computer Machinery Co Ltd v Drescher*** [1983] 3 All ER 153 at 156, [1983] 1 WLR 1379 at 1382–1383 in the passage which I have cited, would seem equally applicable in the taxation context. It would thus seem to me that if the *Calderbank* offer is not to be taken into account there must be some circumstances relating to that offer or the taxation which make it one which should be ignored. It may for example have been made too late. Alternatively, there may have been a failure by the paying party to give notice of some special objection which would enable the receiving party to be aware of a reason which he would not otherwise appreciate why his bill might be taxed down. This last sort of point again demonstrates the difference between taxation and ordinary litigation. Very often a paying party will have given no notice at all prior to the first taxation as to points that are going to be taken.

31. As I see it, it is difficult to improve on the test of whether 'the offer should reasonably have been accepted' by the offeree party, but that has to be transferred to the taxation context. Indeed, I suspect that it was something like that test which was in fact applied by Mr Burroughs, and which he answered in the negative because he thought that the defendants should have broken down their offer.

32. As I have already indicated, it seems to me (and I have been assisted in coming to this view by the views of Master Berkeley and Mr Winstanley), where a *Calderbank* offer is made Master Hurst is right in saying that the offeror is not bound in ordinary circumstances to give details or the breakdown of how he reaches his offer. The whole purpose of an offer in effect of compromise is that it may reflect strengths and weaknesses in a variety of different areas. It may be different if there is a point which the paying party intends to take which would take the payee party by surprise. In this case I asked Mrs Simon whether she suggested there was any such factor, and she did not so suggest. I thus think that the decision of Master Hurst on this aspect was right. As already stated, it also seems to me that an essential plank of Mr Burroughs's reasoning is removed and that the discretion must thus be exercised afresh.

33. Exercising that discretion afresh, in my view the right question is: should the plaintiffs reasonably have accepted the offer? Putting the matter in a slightly different way: was there something that happened on the taxation which could not reasonably have been foreseen by the plaintiffs when considering the defendants' offer? As I have said, Mrs Simon did not suggest there was any matter which might have taken her by surprise. She did suggest that the matter was complex and that Mr Burroughs had the full details of the file, but that does not seem to us to amount to any special circumstance. She also relied on the fact that her bill had been miscalculated by her costs' draftsman. That again does not seem to be a circumstance on which the plaintiffs should be entitled to rely. Accordingly, since there was nothing on the taxation leading to a taxation at £8,609, other than simply a taxing down of various items, that demonstrates, as it seems to me, that the offer of £8,750 should reasonably have been accepted.

34. This brings me to the final aspect. On this review there is a claim not only to have the costs of the taxation disallowed including the taxation fee, but for the defendants to have their costs. From the reasons of Master Hurst, it does not seem that any application for costs was in fact ever made before Mr Burroughs. But certainly such an application was being made by virtue of the objections before Master Hurst. It is in this area that the distinction between taxation and ordinary litigation is once again important. The expectation at the conclusion of a taxation is that normally the party whose bill is being taxed will be entitled to his costs and there is not an expectation that the 'winner' will receive an order for costs, ie that someone who succeeds in taxing the bill down will necessarily be entitled to his costs of attending the taxation. There may well be circumstances in which the failure to accept a *Calderbank* offer is so unreasonable that an order for costs will be made under Ord 62, r 27(2) in favour of the party who has successfully obtained a lowering of the bill as presented. But in circumstances such as the present, where the *Calderbank* offer has been beaten by only a very small amount, I do not think that the principle of ***King v Weston-Howell*** [1989] 2 All ER 375, [1989] 1 WLR 579, as applied in litigation generally, should apply to taxation proceedings.

35. In the circumstances of a case such as this, it seems to me that a proper exercise of the discretion would be to disentitle the plaintiffs from the costs of the taxation proceedings including the fee as from a date when they should reasonably have accepted the *Calderbank* offer, ie seven days after 20 July 1990. No point has been made that the taxation fee here would only have been abated. In those circumstances the appropriate exercise of the discretion would have been, and should be, to disallow the costs of the taxation proceedings including the taxation fee. No order is made that the plaintiffs should pay the defendants costs of the taxation.

Note After preparation of this judgment, I noted reported in The Times of 1 May 1991 ***Gojkovic v Gojkovic*** (sub nom ***Gojkovic v Gojkovic (No 2)*** [1992] 1 All ER 267, [1991] 3 WLR 621), where the Court of Appeal has evidently commented again on *Calderbank* offers in the context of matrimonial proceedings. I hope that my formulation of the appropriate approach in the general litigation context does not differ in the result from what appears to be the views of Butler-Sloss LJ and the Court of Appeal in that case.

Order accordingly.

Philip Moor (instructed by Ince & Co) for the defendants.
Sara Simon, solicitor (of Burton Woolf & Turk) for the plaintiffs.