



Neutral Citation Number: [2020] EWHC 1300 (QB)

Appeal Ref: QA-2019-000292

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM MASTER ROWLEY, COSTS JUDGE
THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22 May 2020

Before:

MR JUSTICE MORRIS
MASTER HAWORTH (ASSESSOR)

Between:

MEF
(A Protected Party, by his Mother and Litigation
Friend, FEM)

Respondent/
Claimant

- and -

St George's Healthcare NHS Trust

Appellant/
Defendant

Alexander Hutton QC (instructed by **Acumension Ltd**) for the **Appellant /Defendant**
Roger Mallalieu QC (instructed by **Stewarts Law Solicitors**) for the **Respondent/Claimant**

Hearing date: 7 May 2020
(Remote hearing by Skype)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Mr Justice Morris:****Introduction**

1. This is an appeal by St George's Healthcare NHS Trust ("the Defendant") from an order of Costs Judge Master Rowley ("the Judge") dated 19 September 2019 ("the Order") made in favour of MEF, (a protected party by his mother and litigation friend FEM) ("the Claimant"). By the Order, the Judge declared that the Claimant's letter dated 18 September 2019 was a valid acceptance of the Defendant's offer dated 19 August 2019, thereby compromising the detailed assessment of the Claimant's costs of the action. At the same time, the Judge granted permission to appeal.
2. The question at the heart of this appeal is whether a "Calderbank" offer to settle (without express time limit) can be accepted once the relevant substantive hearing (and in particular here, a detailed assessment hearing) has commenced or whether such an offer lapses at the commencement of the hearing.
3. In summary, following a series of offers and counter-offers over the previous 16 months, on 19 August 2019, the Defendant offered to settle the Claimant's claim for costs at a figure of £440,000 on condition that the Claimant paid certain of the Defendant's costs of the assessment ("the August 2019 Offer"). The hearing of the detailed assessment, due to last three days, commenced on 17 September 2019 before Master Brown. Just before the end of the second day, the Claimant's solicitors, Stewarts Law, sent an email purporting to accept the August 2019 Offer. By that stage of the assessment hearing, it was the case that, if the assessment continued to a conclusion, the Claimant would recover less than £440,000. The dispute as to the effect of the purported acceptance was transferred to the Judge, who, after argument the next day, held that it constituted a valid settlement of the Claimant's claim.

Factual background

4. The Claimant brought a clinical negligence claim in relation to a severe hypoxic brain injury at around his birth. The claim in relation to liability settled in March 2017 and was approved by the court on 25 April 2017 with an order that the Claimant's liability costs be assessed forthwith. The total liability costs claimed in the Claimant's bill of costs was £621,455.57. Detailed assessment proceedings were commenced on 6 April 2018.

The April 2018 Offer

5. On 25 April 2018 the Defendant made a "without prejudice save as to costs" offer of £425,000 in full and final settlement. The offer expressly excluded "*any entitlement to interest and costs of assessment*" ("the April 2018 Offer"). The offer letter specifically provided for the offer to be open for a period of 21 days from its date and further stated:

"Acceptance after that period is conditional on agreement being reached that the paying party is entitled to recover reasonable costs of assessment incurred after the final date of acceptance."

Approved Judgment

We reserve the right to bring this letter to the attention of the Costs Judge when the costs of Detailed Assessment proceedings are to be decided pursuant to CPR 44.2 (4)."

The stated exclusion of interest and costs of assessment meant that the Defendant would pay these amounts to the Claimant on top of the £425,000.

6. By email dated 16 May 2018 the Claimant indicated that it would not be accepting the April 2018 Offer. The Defendant served Points of Dispute on 18 May 2018.
7. On 27 September 2018 the Claimant wrote to the Defendant stating again that it would not be accepting the April 2018 Offer. Instead the Claimant made a Part 36 offer of £517,000 inclusive of interest up to the 21 day expiry of the offer, but with the Claimant's costs of the detailed assessment to be paid on top. If the offer was not accepted, then the Claimant would rely upon CPR 36.17 to seek additional benefits.

The 27 September 2018 Offer

8. On the same date, 27 September 2018, the Defendant responded by letter "without prejudice save as to costs", rejecting the Claimant's Part 36 offer and going on to offer to pay £440,000 in full and final settlement ("the 27 September 2018 Offer"). Again that offer "*excludes any entitlement to interest and costs of assessment*". As in the April 2018 Offer, the letter stated:

"We reserve the right to bring this letter to the attention of the Costs Judge when the costs of Detailed Assessment proceedings are to be decided pursuant to CPR 44.2 (4)."

However, unlike the previous offer, this offer did not set any time for acceptance nor include any express condition that the Claimant would be responsible for the Defendant's costs of the detailed assessment after a date for acceptance of the offer. The Claimant contends however that such a term is to be implied into the 27 September 2018 Offer.

9. In response, by letter dated 11 October 2018, the Claimant stated that it "*will not be accepting the Defendant's offer*". That letter went on to make a further Part 36 Offer in the sum of £490,000 on the same basis as the first Part 36 offer.

The 22 October 2018 Offer

10. By email dated 22 October 2018, Mr Stott for the Defendant wrote to the Claimant, confirming rejection of the Claimant's most recent Part 36 offer. The email continued as follows:

"The current offer of £440,000 is averred to be very competitive and we would urge reconsideration of same."

Thus at that point the Defendant considered that the 27 September 2018 Offer remained open. However, whilst Mr Stott believed that it remained open, it is common ground that, in fact, since that offer had been rejected by the Claimant on 11 October, his email of 22 October amounted to a fresh re-instated offer ("the October 2018 Offer").

Approved Judgment

11. The Claimant responded by email dated 15 November 2018, acknowledging the Defendant's confirmation of rejection of the Claimant's Part 36 Offer and stating that the Claimant "*will be applying for Detailed Assessment as our last offer was a considered offer and we consider it to be realistic and reasonable.*" There was no express rejection of the October 2018 Offer. However it is implicit from this that the Claimant was not accepting that offer.
12. The Claimant's Replies to the Defendant's Points of Dispute were served on 24 January 2019.

The January 2019 Offer

13. By email dated 30 January 2019, Mr Stott for the Defendant wrote to the Claimant, noting that the Claimant had made concessions in its Replies, reducing the bill by over £100,000. The email continued:

"... this only serves to reinforce our current offer of £440,000 as being very competitive against this Bill.

We are not inclined to withdraw this offer, but would urge your reconsideration of same. For this offer to be successful on Assessment would require little more than a further 15% reduction on profit costs (beyond the concessions already made in your Replies). This is eminently achievable and thus we are of the firm view that this offer will in fact be upheld by the Court."

In writing this email, Mr Stott, once again, assumed that an earlier offer of £440,000 remained in place and had not lapsed or been withdrawn: see the words "current offer" and also the fact that it appears that the Defendant had considered withdrawing the pre-existing offer but had decided not to do so. However, again, it is common ground that, as a matter of law, the effect of this email was to "re-instate" the offer(s) of £440,000 (made in September and in October 2018) ("the January 2019 Offer"). In this email, the Defendant also recognised that it had the ability to withdraw the offer. The Defendant did not consider that the prior offer(s) had lapsed by the expiry of a reasonable time. That might have been the case if it had expressly stated "we are here by re-instating our previous offer".

14. The Claimant did not respond to that email. Rather on 18 March 2019 he applied for a detailed assessment hearing which was set down by notice dated 27 March 2019 for hearing in September by Master Brown on 17, 18 and 19 September 2019. A directions hearing took place on 11 June 2019.

The August 2019 Offer

15. Then by email dated 19 August 2019, and 29 days before the detailed assessment hearing was due to start, Mr Stott for the Defendant wrote to the Claimant, enclosing the annex to their Points of Dispute alongside an analysis of the documents schedule, which the Defendant had filed with the court that day. The email continued, making an offer in the following terms (- the August 2019 Offer):

Approved Judgment

“We shall now proceed to the Detailed Assessment in September.

“The Defendant’s offer dated 27/09/18 is only capable of acceptance subject to the agreement of the Defendant’s costs of Detailed Assessment incurred since that date.”

Whilst Mr Stott again assumed that the 27 September 2018 Offer was still in place, it is common ground that the email amounted to a re-instatement of the earlier offer, but subject to a variation that the Claimant was to pay the Defendant’s costs of the detailed assessment from 27 September 2018 (and not from any later date) (“that date” refers to 27 September 2018). In its Amended Grounds of Appeal, the Defendant has raised a point as to the meaning of “the agreement of the Defendant’s costs”, suggesting it required prior agreement as to the precise figure of those costs, regardless of reasonableness: see Ground (2) below. There was no response to the August 2019 Offer.

The detailed assessment hearing before Master Brown: 17 and 18 September 2019

16. The detailed assessment hearing commenced on 17 September 2019 before Master Brown. By the end of the second day, 18 September 2019, according to the Defendant’s representatives, the Claimant’s bill had been reduced to below £440,000. This arose from reductions made in the course of the hearing by the Master and in the light of concessions already made in the Claimant’s Replies. There is a dispute between the parties about the precise figures, but it is not disputed that by that stage (and indeed by lunchtime on the second day), the Claimant would recover less than £440,000. As regards the Claimant’s state of mind, by lunchtime the Claimant had known that things were not going well for him.

The “acceptance”: 18 September 2019

17. In the meantime, by letter dated 18 September 2019 and sent by email at 1611 (before the second day of hearing finished), the Claimant wrote to the Defendant in the following terms:

“We write further to the offer in your letter of 27 September 2018 and to Danny Stott’s email to Alexandra Bennett of 18 August 2019, reaffirming the offer, to confirm that the Claimant will accept that offer and will pay the Defendant’s reasonable costs of Detailed Assessment.”

The Claimant says that his solicitors did not know the result of the afternoon’s proceedings when they sent the letter. That this letter had been sent was not known to either of the party’s representatives at the assessment hearing itself. When they were informed, they went back to Master Brown. The Claimant claimed, but the Defendant did not accept, that the Claimant’s letter constituted a valid settlement of the proceedings. That dispute was then listed to be heard before a different Cost Judge, Master Rowley, on the morning of 19 September 2019.

Approved Judgment***The hearing before Master Rowley on 19 September 2019***

18. At the hearing, the Defendant contended that the offer was no longer open for acceptance once the detailed assessment had commenced. The Defendant argued that CPR 47.20(4) imported the provisions of CPR Part 36 into detailed assessment proceedings and that, reading across CPR 36.11(3) into such proceedings, effectively the court's permission was required to allow the Claimant to accept the offer in this case. The principles were the same whether the offer was made under Part 36 or by way of a Calderbank letter. Once the detailed assessment had commenced then "all bets are off and it is too late to accept an offer". The Claimant contended that the August 2019 Offer, reopening the 27 September 2018 Offer (albeit subject to the modification concerning payment of costs since 27 September) was not time-limited, was not withdrawn, was not a Part 36 offer and was therefore open for acceptance at the end of the second day of the detailed assessment hearing.

Master Rowley's judgment

19. In his judgment, the Judge commented (paragraph 7) that he was sceptical of the Claimant's claim that this was simply a commercial settlement without an indication of how the detailed assessment had been going generally. However that did not matter for the purposes of his decision. After citing §11 of the judgment of Morgan J in *Houghton v PB Donoghue (Haulage & Plant Hire Ltd)* [2017] EWHC 1738 Ch, at paragraph 10 he commented that, even in the case of Part 36 offers, there is still a discretion to allow an offer to be accepted after the trial has started, despite the provisions of CPR 36.11(3). At paragraph 11, he took the view that Part 36 did not apply to the present case, because this was not a Part 36 offer case. The Defendant had decided to make Part 44 offers as it was entitled to do. Having done so, the offers were common law offers rather than based on Part 36. He continued:

"Based on that, all that is required is common law offer and acceptance, unlike the situation in Part 36 where offers may still continue even if they have been rejected."

He continued (at paragraphs 12 and 13):

"It does not seem to me that such offers can be assumed to stop at the court door. It does not seem to me that it is an abuse of the court's process. The defendant could have made Part 36 offers and would then have had the protection of the claimant having to require the court's permission to accept an offer. The defendant could have made a time-limited offer that was only acceptable prior to the hearing. It was said to me that those offers were never made. That is not my experience. I have seen offers made in exactly those terms where they are acceptable only prior to the hearing, and then regularly parties make "time bomb" offers for limited periods."

"It does not seem to me that the defendant's position is quite as difficult as Ms McDonald for the defendant put forward. It seems to me that the defendant could have protected its position if it had wanted to do so. The fact that it has not done so is no reason

Approved Judgment

for me to say that the offer has not been validly accepted in accordance with ordinary common law principles.”

He decided that the assessment proceedings were therefore concluded.

20. The Judge went on to grant permission to appeal. Whilst he did not think necessarily that there was a reasonable prospect of success, permission should be granted for “some other compelling reason”, namely an important point of principle; the point being that with the advent of electronic bills, the present situation may occur more easily in the future since it will be obvious to everybody exactly where the figures are as the hearing progresses.

The Parties' submissions***The Defendant's case on appeal***

21. By its Amended Grounds of Appeal and in argument before me, the Defendant contends as follows:
- (1) Whilst the Master was correct to apply common law principles of offer and acceptance to the present case rather than applying CPR Part 36, his application of those principles was wrong in law. He ought to have found that the August 2019 Offer came to an end after the lapse of a reasonable time which was no later than the start of the detailed assessment hearing and/or that there was an implied term of that Offer that it would lapse on the start of the detailed assessment hearing. Once the detailed assessment hearing started on the morning of 17 September 2019, the August 2019 Offer came to an end at that point and was no longer open for acceptance.
 - (2) In any event, on its true construction, the August 2019 Offer was conditional upon the Claimant agreeing not only to pay the Defendant's costs of detailed assessment since 27 September 2018, but agreeing to pay the specific amount of those costs. The Claimant's purported acceptance of the August 2019 Offer in his letter of 18 September 2019, stating only that it would pay “the defendant's reasonable costs of Detailed Assessment” did not constitute acceptance of the Defendant's offer, since it did not amount to agreement as to the specific amount of the Defendant's costs. There was no meeting of minds and thus no binding compromise of the detailed assessment proceedings.

The Claimant's case on appeal

22. The Claimant submits as follows:
- (1) Since it is accepted that common law principles of offer and acceptance apply, the appeal raises no issue of legal principle. This is an appeal only against the Master's conclusion on the specific facts that the offer had not lapsed. This is simply a case of the application of law to the facts.
 - (2) As regards ground (1), the Defendant no longer contends specifically that the point in time at which the offer lapsed was the point during the hearing at which the bill had been assessed at a figure below the level of the offer. Rather the

Approved Judgment

Defendant's case now is that that point in time is the commencement of the assessment hearing. The Defendant deliberately chose to repeat or renew the offer setting an express condition which, on a continuing basis, protected against the effect of late acceptance in costs, even if such acceptance occurred after the start of the hearing. In this way there is no need to imply a term that the offer was only open for a limited period. Secondly, the Defendant on two occasions when stating the offer made clear that the option of withdrawal of the offer was open to it but was not being exercised. Further or alternatively it was the mutual understanding of the parties and inherent in the offer that it remained open unless and until withdrawn. This was a case where the option of making the offer time-limited or of withdrawing it at any given time had plainly been considered by the Defendant and not utilised.

- (3) As regards ground (2), the Defendant's construction of the August 2019 Offer is not tenable. This point was not made before the Judge. In any event, it would be an extremely unusual term to be imposed in such circumstances and there is no obvious reason for its imposition. The plain and obvious construction of the August 2019 Offer is that what was being referred to, and what all parties understood as being referred to, was that the offer could only be accepted if the Claimant agreed, in principle, to pay the Defendant's costs after 27 September 2018. The August 2019 Offer adopted a similar approach to the earlier offers.

The Legal Background

Relevant Civil Procedure Rules

23. CPR 44.2, which applies equally to the costs of detailed assessment proceedings, sets out the court's discretion as to costs. CPR 44.2(4) provides that, in deciding what order to make about costs, the court will have regard to all the circumstances, including "(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which the costs consequences under Part 36 apply". Thus, a "Calderbank letter" (an offer made without prejudice save as to costs) which has not been accepted will be taken into account when the court exercises its discretion as to the costs of the proceedings.
24. CPR 47.20 addresses "Liability for costs of detailed assessment proceedings". The receiving party is, generally, entitled to those costs: CPR 47.20(1). The court has a discretion to make some other order; relevant factors being set out at CPR 47.20(3). CPR 47.20(4) expressly provides that the CPR Part 36 provisions apply to the costs of detailed assessment proceedings, with certain modifications, including in particular:

"(b) "trial" refers to "detailed assessment hearing"

(c) a detailed assessment hearing is "in progress" from the time when it starts until the bill of costs has been assessed or agreed

...

(e) a reference to "judgment being entered" is to the completion of the detailed assessment and references to a "judgment" being

Approved Judgment

advantageous or otherwise are to the outcome of the detailed assessment.”

25. As to CPR Part 36 itself, the regime for offers under CPR Part 36 is a self-contained code; general contract principles of offer and acceptance do not apply: see *Gibbon v Manchester City Council* [2010] EWCA Civ 726 at §§4 to 6. Whilst at common law a rejected offer cannot be accepted, under Part 36 there is no doctrine of implied withdrawal and the onus is on the offeror to withdraw an offer. Further a Part 36 offer may be accepted even if offeree had made a counter offer: see *The White Book Service 2020* Vol 1§36.11.1.
26. CPR 36.11 addresses acceptance of a Part 36 offer. CPR 36.11(2) provides that, subject to sub-paragraphs (3) and (4), a Part 36 offer may be accepted at any time, unless it has already been withdrawn. However CPR 36.11(3) provides that

“The court’s permission is required to accept a Part 36 offer where - ...(d) a trial is in progress”

Where the offeree is doing badly mid-trial, permission under CPR 36.11(3)(d) will rarely be granted: see *Houghton*, supra at §§10 and 11 and other cases cited in *The White Book Service 2020* Vol 1§36.11.3.

27. Thus, in view of the modifications in CPR 47.20(4)(b) and (c), where a *Part 36 offer* is made in respect of the costs of detailed assessment, the court’s permission is required to accept such an offer, once the detailed assessment hearing has started and until the bill has been finally assessed or agreed.

Relevant contract law principles of offer and acceptance

28. As regards these principles, I have been referred to *Chitty on Contracts* (33rd edn). An offer which is rejected is no longer valid. An offer can be withdrawn by the offeror at any time prior to acceptance by the offeree. *Chitty* §2-102 provides that an offer which expressly states that it will last only for a specified time cannot be accepted after that time. §2-103 then continues:

“Where the duration of an offer is not limited in one of the ways described in para 2-101¹ above, the offer comes to an end after the lapse of a reasonable time. What is a reasonable time depends on all the circumstances; for example, on the nature of the subject matter and on the means of communication...”

29. I have been referred to cases cited in that passage: *Ramsgate Victoria Hotel Co v Montefiore* (1866) LR 1 Ex 107; *Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 WLR 241 at 247E-249C; *Chemco Leasing SpA v Rediffusion PLC* [1987] 1 FTLR 201 (CA); *L.J.Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB). From those cases, the following further propositions are derived:

¹ This is a typographical error: it is intended to be a reference to para 2-102.

Approved Judgment

- (1) The principle of lapse arise either as a matter of law or on the basis of an implied term of the offer.
- (2) What constitutes a “reasonable time” is a question of fact, to be determined by reference to the circumstances of the particular case, and the contractual context in which the offer was made.
- (3) It is not clear whether what is reasonable falls to be determined as at the time of the offer or whether the subsequent conduct of the parties is also relevant to the question.

However, in my judgment, in either event it is an objective assessment based on all the facts and surrounding circumstances, and not just on an assessment of the inferred intention of the offeror alone.

Principles of construction of contracts

30. The principles of construction of contracts are well established: see *Arnold v Britton* [2015] AC 1619 per Lord Neuberger at §§16-22 and per Lord Hodge at §§76-77. In summary, the exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader. I refer also to §21 of judgment of Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 where he sets out the position succinctly in the following terms:

“... the court must ... ascertain what a reasonable person would have understood the parties to have meant” by the language used, taking account of all the available background knowledge, relevant surrounding circumstances and business common sense.”

Discussion

31. As regards the correct approach on this appeal, it is limited to review of the decision of the Judge, (as I do not consider it would be in the interests of justice to hold a rehearing): *Senior Court Costs Office Guide* §30.5. The provisions of CPR 52.21 apply. The question is whether the Judge’s decision was “wrong” - in law, in fact or in the exercise of discretion. The correct approach to review on issues of fact is summarised in *The White Book Service 2020* Vol 1 §52.21.5. The appeal court will correct material errors of facts on various grounds, including insufficient evidence or mistake. The degree to which the appeal court will show deference to the lower court will depend upon the nature of the issues determined by the court below. see *Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)* [2002] EWCA Civ 1642 at §§14 and 15.

Ground (1): did the August 2019 Offer lapse “at the door of the court”?

32. The Judge, correctly, approached the issue by reference to common law principles of offer and acceptance, and not by reference to CPR Part 36. However he did not expressly apply the contractual principle of lapse after a reasonable time. To that extent, he could be said to have erred in law. In the light of the foregoing legal analysis, the issue is whether the “reasonable time” for acceptance of the August 2019 Offer expired at the point of the commencement of hearing on 17 September 2019 or rather continued

Approved Judgment

during that hearing. That issue falls for consideration by this Court; it is a question of fact. The Claimant accepts that the reasonable time expired at the point where the assessment was concluded and a final figure had been assessed or agreed by the parties.

33. The factual and contractual context (relevant to the issue of reasonable time), and known or available to the parties – both at the time of the August 2019 Offer and as at commencement of the hearing - is as follows.
34. First, the August 2019 Offer is an offer to settle proceedings; more particularly to settle detailed assessment proceedings. In a detailed assessment hearing, each party will almost certainly know, as the hearing progresses, how well or badly the hearing is going. They will be able to re-calculate the bill from time to time as the costs judge makes “mini-decisions” on individual issues. In this way they might ascertain that the receiving party will recover more or less than an offer. Whilst the advent of use of electronic bills to re-calculate on an ongoing basis makes this easier, my understanding is that even without such electronic assistance, it is, and has always been, common for parties to re-calculate as the hearing goes along and decisions are made. In my judgment, this feature of detailed assessment makes the position distinct from that pertaining in other types of proceeding, where a party might well perceive that the hearing is not going well, but is less likely to know whether or not the ultimate outcome will be better or worse than an offer which has been made.
35. Secondly, the Part 36 procedure is available to be used in such proceedings; it was available to the Defendant, which chose instead to use the different “Calderbank” offer approach. Part 36 is a statutory code with its own specific provisions. In particular, by express provision, a Part 36 offer can only be accepted once a hearing has commenced with the court’s permission. However Part 36 does not provide that the offer lapses at the door of the court nor impose an absolute bar on acceptance post-commencement. It is not possible to rely on this position under Part 36 to support the (stricter) contention that a Calderbank offer lapses at the door of the court. There can be no direct “read across” from Part 36 procedure to the contractual position of a Calderbank offer.
36. Thirdly, the course and content of the Defendant’s prior offers since April 2018 is highly relevant context. First, none of the earlier offers had an absolute time limit. Rather the initial April 2018 Offer was subject to a time condition with costs consequences. In my judgment, in view of the terms of the April 2018 Offer, it is a reasonable inference that the subsequent offers (September, October and January) were subject to the condition that if they were not accepted within a reasonable time, the Claimant would be responsible for the Defendant’s costs. Thus, an ability to accept the offer(s) late but subject to that costs condition is inconsistent with an absolute time limit upon acceptance. Secondly, the Defendant was aware throughout that it could withdraw the offer made, but consciously decided not to do so; see paragraph 13 above. In fact, Mr Stott was working on the assumption (and was indicating to the Claimant) that the 27 September 2018 Offer remained open throughout, and all the way until August 2019 – even if, as a matter of contract law, his reminders amounted to reinstatement of offers which had been rejected. Thirdly, the fact that the £440,000 offer remained “open” and at the same level, despite the continuing weakening of the Claimant’s claim following service of the Replies to the Points of Dispute indicates the Defendant was not necessarily concerned with the precise amount of the likely outcome.

Approved Judgment

37. In my judgment, the foregoing context supports the Judge's conclusion (at paragraph 12) that the August 2019 Offer did not lapse at the door of the court, but remained open for acceptance.
38. Mr Hutton QC for the Defendant makes two particular points, which he contends apply to all such offers in detailed assessment proceedings. First, he submits that if the offer were to remain open during the hearing, it would provide no costs protection for the Defendant and moreover would have put the Claimant at no risk at all (and thus gave him no incentive to accept the offer). The Claimant would be able to accept the offer if and when it became clear that he was going to recover less than the offer, and the Defendant would not get the chance to show the costs judge the letter in relation to the costs of the detailed assessment under CPR 44.2(4).
39. However, as regards costs, the Defendant remains fully protected. If the Claimant accepts the offer, during the assessment, he is bound to pay the Defendant's costs incurred since as far back as September 2018, and including its costs of the detailed assessment hearing. On the other hand, if the Claimant does not accept the offer, then the Defendant will be able to refer the costs judge to the offer on the issue of the costs of the assessment under CPR 44.2(4). As regards risk and incentive for the Claimant, the Claimant remains at risk of an ever increasing penalty in costs, if he does not accept the offer either before or during the assessment. With the offer in place, and whether or not he accepts, he is at substantial risk that whatever happens, he will be responsible for not only the Defendant's costs, but also his own costs. The longer the proceedings go on, the more those costs will be, particularly once the hearing commences. That increasing costs exposure provides an incentive for the Claimant to accept the offer.
40. Secondly, Mr Hutton submits that if the offer remained open during the hearing, such an offer provided a "perverse incentive". The Defendant has ended up in a worse position than if it had not made the offer at all, because the amount of the assessment would have been very significantly lower than the offer of £440,000 and that amount substantially outweighs any benefit derived from the costs protection provided by the offer. If the offer is accepted, the Defendant would never get the benefit of the actual assessment by the Court of costs lower than the offer. The offer put a floor in the costs liability (as long as the Claimant did the calculation as the assessment was going on) and provided no opportunity for the Defendant to achieve a lower figure at the assessment.
41. I do not accept this submission. First, the situation falls to be considered at the time that the offer is made, or at the very latest, at the door of the court prior to commencement of the hearing. (The Defendant's case on appeal is that the offer is impliedly withdrawn at that point in time; not that the offer lapses only once it becomes clear that the Claimant would recover less than the offer.) It may be that, with the benefit of hindsight, it turns out that the Defendant is likely to be worse off than if the offer had not been made – although even that is hypothetical, since the final assessment and the parties' costs are not actually known. But that is not the question. Looking at the matter prospectively, there are a variety of possible outcomes. It is not known that the Claimant will do worse than the offer, let alone much worse. Thus, at that point in time, the continuation of the offer does not provide a "free hit" for the Claimant. If the offer is not accepted at any time, then the Defendant will be better off for having made the offer – it can refer to the letter on the issue of costs. If the offer is accepted, then it might turn out that the Defendant is worse off, but that is not necessarily the case. The

Approved Judgment

only situation where it might turn out that the Defendant is worse off for having made the offer, is if the offer is accepted during the hearing and the amount by which the offer exceeds the (likely) outcome of the assessment is greater than the sum of the Claimant's costs and twice the Defendant's costs. This is only likely to be the case if it turns out that the Claimant would have recovered very substantially less than the offer. But, in such a situation, the offer is made at a level that the offeror thinks the offeree is likely to recover or at least at a level which balances the risks involved in a range of possible outcomes. The offeror is prepared to forego the possible advantage of a lower recovery to buy off the risk of a higher recovery which remains possible at the door of the court, together with costs advantage. In this way, the offer cannot be said to be "commercially nonsensical" (as suggested by Mr Hutton). Here, when the offer is made, and at the door of the court, the Defendant's assessment is that the Claimant will recover a sum at or close to the level of the offer. If at that point the Defendant's assessment was that the Claimant was going to recover substantially less than the offer, then he would not have made the offer or would or could have withdrawn it or reduced it. In this regard, on the facts here, it is noticeable that the Defendant did not reduce the level of the offer, despite the fact that the value of the claim appeared to reduce by at least £100,000.

42. At the time that the offer is made and then at the door of the court, there remain incentives, respectively, to make and retain the offer, even if it is capable of acceptance in the course of the hearing. I do not accept the proposition that the making of an offer to settle necessarily means that, if accepted, the offeror cannot turn out to be worse off than if the offer had not been made at all. For example, a defendant may settle a personal injury claim on the assumption that the claimant's prognosis is particularly bad. If it turns out, after settlement, that the claimant's condition has improved, and future loss is less than anticipated, the settlement remains binding.
43. It was always open to the Defendant to put a time limit on the offer. Equally it was open to it to withdraw the offer at any time. This is so even once the hearing had started. In this regard, the Judge's reasons are essentially sound. His experience of time limited offers has been confirmed to me by Master Haworth's own experience. As regards the feature of ongoing re-calculation in a detailed assessment, the offeror (here the Defendant) is equally in a position to do that calculation, and is free at any time to withdraw the offer, if it is doing much better than the offer. Here, the Defendant could have withdrawn the offer at lunchtime on the second day of the hearing.

Ground (2): construction of the August 2019 Offer

44. As the hearing proceeded, Mr Hutton submitted that there are two constructions of the words "subject to the agreement of the Defendant's costs of Detailed Assessment since that date". The first construction is that the words mean "subject to agreement to pay the Defendant's costs in principle since 27 September 2018 to be subject to detailed assessment, if not agreed". The alternative construction (put forward in the Amended Grounds of Appeal) is that the Claimant was required to agree the precise figure of the Defendant's costs before accepting the August 2019 Offer. Unless and until that figure is agreed, the offer to settle could not be accepted. This meant that further negotiation of the post-27 September costs had to take place before there could be a binding settlement of the underlying detailed assessment proceedings. Whilst by the close of argument, Mr Hutton declined to favour one construction over the other, he had in the course of argument, described the first construction as his "primary construction". He accepted that if that construction is correct, then the Claimant's acceptance on 18

Approved Judgment

September did match the August 2019 Offer, and, subject to ground (1), gave rise to a binding settlement of the proceedings.

45. In my view, Mr Hutton's primary construction is the correct construction of the relevant words. First, the August 2019 Offer has to be construed against the background of the previous offers. The April 2018 Offer expressly stated that the condition for acceptance was entitlement to recovery of "reasonable costs of assessment". I also conclude that a provision in similar terms was to be implied in the offers of September and October 2018 and January 2019. Secondly, to require the accepting party to pay all of the costs of the offering party, without any limitation either as to standard or indemnity basis, would be highly unusual. It would require a claimant, accepting an offer late, to agree something beyond not merely reasonable costs, but beyond even indemnity costs. A reasonable person would not conclude that either party contemplated making or accepting such an exceptional offer. Thirdly, the Defendant's offer was intended to be capable of unilateral and immediate acceptance by the Claimant. Under the alternative construction, there could be no such acceptance, but there would have to be prior discussion (and probably negotiation) of the amount of the Defendant's costs; and indeed acceptance of such an offer would at best give rise to an agreement to negotiate or an agreement to agree. Under general contractual principles, such an agreement is not normally enforceable. In this context, it would be contrary to "business common sense" for the offer to require such further negotiation.
46. In my judgment, taking account of all the available background knowledge and relevant surrounding circumstances, a reasonable person would have understood the Defendant to have meant, by the language used, that the condition of the offer was that the Claimant should accept, in principle, to pay the Defendant's costs of the detailed assessment after 27 September 2018, to be assessed if not agreed.

Conclusion

47. In the light of my conclusions at paragraphs 37, 39, 41 and 46 above, I conclude:
- (1) The August 2019 Offer did not lapse when the detailed assessment hearing commenced on 17 September and remained open for acceptance during that hearing.
 - (2) On its true construction, the August 2019 Offer was subject to the condition that the Claimant should agree to pay the Defendant's costs of the detailed assessment since 27 September 2018 in principle, those costs to be subject to detailed assessment, if not agreed".
 - (3) Thus, the Claimant's email dated 18 September 2019 constituted acceptance of the August 2019 Offer and as a result gave rise to a contractually binding settlement of the detailed assessment proceedings.

Accordingly Grounds (1) and (2) of the appeal fail and this appeal is dismissed.

48. In due course I will hear submissions as to the appropriate orders to be made consequential upon these conclusions. Finally I am grateful to counsel for the assistance they have provided to the Court in the presentation of oral and written arguments in this matter.