MR JUSTICE COULSON

Approved Judgment

Sampla v. Rushmoor Borough Council and another

Neutral Citation Number: [2008] EWHC 2616 (TCC)

Case No: HT-07-300

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 22/10/2008

Before:

MR. JUSTICE COULSON

- -

Between:

MR. ROOP SAMPLA and Others **Clai**

- and -

(1) **RUSHMOOR BOROUGH COUNCIL**

(2) MR. TIMOTHY CROWLEY **Defe**

- -

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The Claimants did not appear and were not represented

Mr Paul Darling QC (instructed by **Wansbroughs**) for the **First Defendant**

Mr Michael Davie (instructed by **CIP Solicitors)** for the **Second Defendant**

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Judgment

MR. JUSTICE COULSON:

A. Introduction

1.
This is an application by the first defendant, Rushmoor Borough Council ("RBC"), for permission to accept a Part 36 offer (made in respect of contribution) by the second defendant, Mr. Timothy Crowley

("Mr. Crowley"). The claimants' claim has been settled and the trial on the issue of contribution as between RBC and Mr Crowley is almost complete.

2.
The application raises four issues, at least the first of which is of some general interest. The issues are:

(a) Does the rejection of a Part 36 offer mean that it cannot subsequently be accepted?

(b) If the offer can still be accepted after an earlier rejection, can it be accepted after the trial has started?

(c) If so, are RBC estopped by convention from purporting to accept the Part 36 offer in this case?

(d) If RBC are not estopped, should the court exercise its discretion in favour of allowing them to accept the Part 36 offer at this stage of the trial?

3.
I set out briefly the background to this dispute at section B below. I then consider the authorities relevant to these issues in section C although, as we shall see, there appears to be no case directly on point. Thereafter, at sections D, E, F and G, I analyze each of the four issues. There is a brief summary of my conclusions at section H below.

4.
Counsel have had to prepare for this hearing in a very short time but managed to provide full skeleton arguments (which identified the relevant cases), and succinct oral submissions. I am very grateful to both of them for their assistance in dealing with this application.

B. Background

5.
The claimants' claim arises out of paving works carried out by Mr. Crowley on behalf of RBC. The foundations of the claimants' property were exposed and undermined by these works and considerable damage was caused. The claimants subsequently issued proceedings in the TCC against both RBC and Mr. Crowley.

6.
A trial was fixed for October 2008. Some time in August, Mr. Crowley settled with the claimants in the sum of £384,500, although the Tomlin order recording that agreement was not finalized until September. Unfortunately, RBC and Mr. Crowley could not agree on their respective contributions to that figure.

7.
On 15th July 2008 Mr. Crowley's solicitors wrote to RBC's solicitors in the following terms:

^"We refer to our earlier telephone conversation and confirm that we clarified our client's instructions.

Our client Mr. Crowley wishes to facilitate a settlement of the claim brought by the claimants (Mr. Sampla and the other claimants) against him and your client (Rushmoor Borough Council).

Our client hereby makes a Part 36 offer.

Our client offers to contribute towards settlement of the claimants' claims against our respective clients on the basis that it will pay 75% of the settlement sum plus a proportionate share (75%) of the claimants' costs (such costs to be subject to a detailed assessment and assessed on a standard basis if not agreed).

If our client's offer is accepted this will mean that your client will be required to contribute towards settlement of the claimants' claims against our respective clients 25% of the settlement sum plus a proportionate share (25%) of the claimants' costs (such costs to be subject to a detailed assessment and assessed on the standard basis).

We consider that your client should accept the proposed apportionment so that both our respective clients can enter into a settlement with the claimants on those terms.

This offer is intended to have the consequences of Part 36 CPR. We make it without prejudice to our client's case in the proceedings; but reserving the right to refer the court to the fact or details of it, if and in so far as appropriate, on any issue as to costs pursuant to CPR Part 36 and/or **Calderbank v. Calderbank**[1976] Fam. 93 and subsequent authority.

In particular but without limitation of the above, if your clients do not accept the offer and subsequently your clients are held liable or agree to an apportionment exceeding 25% of the total liability to the claimants or are held liable or agree to payment by way of settlement of a sum which amounts to more than a 25% apportionment of the total liability to the claimants or settlement sum paid to the claimants, we will submit to the court that your client should pay the whole of the costs of the claimants and our clients from 21 days after the date of this letter.

We ask your clients to respond to this offer within 21 days from the date of this letter, i.e. by 4 pm on Tuesday, 15th August 2008. Our clients intend in as far as necessary to contend that that period should be treated or determined as the relevant period for the purposes of CPR 36.3(1)(c) and in any event reserve the right to withdraw the offer or change its terms after that period.

For the avoidance of doubt this offer does not include an offer to pay any costs that your client has incurred as against our client."

8.
On 12th August 2008 the solicitors acting for Mr. Crowley wrote again. This time they said:

^"We refer to our recent telephone discussions and confirm that we have now received our client's instructions to make a revised formal Part 36 offer.

We confirm that the only revision to our client's offer of 15th July 2008 is that our clients are now prepared to contribute towards settlement of the claimants' claim against our respective clients on the basis that it will pay 80% of the settlement sum plus a proportionate share (80%) of the claimants' costs (such costs to be subject to a detailed assessment and assessed on the standard basis if not agreed).

The remainder of the terms of our client's Part 36 offer are as set out in our letter of 15th July 200 and we will refrain from repeating the same hereunder.

We ask your clients to respond to this revised offer within 21 days of your receipt of this letter.

For the avoidance of any doubt this offer does not include any offer to pay any costs that your client has incurred as against our client."

9.
On 14th August 2008 RBC responded in trenchant terms. Their reply said this:

^"Thank you for your two letters dated 12th August 2008.

We can confirm that your Part 36 offer in relation to liability is rejected.

We can also confirm that our clients are not prepared to make any contribution to the settlement of the claimants' claim for damages."

10.
The trial duly commenced before His Honour Judge Thornton QC, limited to the contribution issues between the two defendants. I understand that there were two full days of evidence, 7th and 9th October 2008. The following day, 10th October 2008, during the attempts to compromise the contribution dispute to which I refer below, Mr. Davie on behalf of Mr. Crowley provided and filed his final submissions in the case. Accordingly, all that is left in this trial is the production by Mr. Darling QC of his final submissions on behalf of RBC, the production of any further submissions by Mr Davie (if thought necessary) on behalf of Mr Crowley, and the judgment of His Honour Judge Thornton QC.

11.
During the discussions on Friday, 10th October it is common ground that:

(a) RBC's solicitor's original enquiry was to see if they could take the Part 36 offer of 12th August, as they put it, "out of time";

(b) When that was rejected, RBC's solicitors offered to contribute 33.3%, a position that was obviously worse for RBC than if they had accepted Mr. Crowley's original offers;

(c) That offer too was rejected, and Mr. Crowley's solicitors made it plain that they would not accept an offer of less than 40% contribution from RBC.

12.
I should make clear that, throughout these discussions, and as part of the application now made by RBC, it was and is accepted on their behalf that they must pay Mr. Crowley's costs of the contribution proceedings from 3rd September 2008, which is 21 days after the offer of 12th August was made.

C. The relevant principles

C1. Pre-CPR

13.
Prior to the CPR, there were two principal ways in which an action might be settled: by the making and acceptance of a payment into court under RSC O.22, r.1, or by the making and acceptance of a 'without prejudice' offer, commonly known as a Calderbank offer after the family case of **Calderbank v. Calderbank** referred to in the correspondence above. Generally speaking, a Calderbank offer was considered inappropriate and inadmissible if a defendant could protect its position by making a payment into court.

14.
It was repeatedly said that "there is nothing contractual about payment into court": see Goddard LJ (as he then was) in **Cumper v Pothecary** [1941] 2 KB 56 at page 67. It was, as he put it, an entirely procedural matter which bore "no relation to a settlement arranged between the parties out of court, which, of course, does constitute a contract". A payment into court could be accepted without the

leave of the court within 21 days of the payment in (RSC O.22, r.3(1)). If it was not accepted within that time, the money in court could be paid out subsequently by an order of the court "made at any time before at or after the trial". Such an order would, however, be refused if it was made after the final speeches but before judgment: see **Millar v. Building Contractors (Luton) Limited**[1953] 2 All ER 339.

15.
Although the rules governing the circumstances in which a payment into court might be taken after the expiry of the 21 days were the same whether the trial had started or not, it was more difficult for a claimant to obtain such an order after the trial had started, because it was easier in such circumstances for a defendant to show a material change in circumstances. The court recognized that a sum was paid into court in the light of a defendant's perception of the case at the time of payment in, and that it should not extend the time laid down by the rules for acceptance of the payment if, in the meantime, the risks of the case had changed adversely to the claimant. One of the best known authorities for this principle was the decision of the Court of Appeal in **Proetta v. Times Newspapers** [1991] 1 WLR 337 in which the court refused to allow the claimant in a libel case to accept a payment in when, following her cross-examination on the first day of the trial, it had become clear that she had a somewhat murky background.

16.
The jurisprudence in respect of Calderbank offers concentrated largely on how and when such offers might be admissible. Such offers were treated as analogous to a contractual offer, since that is effectively what they were. Indeed, there was no other way in which such offers could be said to affect the rights and obligations of the parties, because there was no mechanism or rule within the rules of the Supreme Court which governed such offers. The only exception to that was RSC O.16, r.10, which dealt with written offers of contribution.

C.2. The Original CPR Part 36

17.
The position changed when the Civil Procedure Rules were introduced in 1999. Although the original CPR Part 36 encompassed payments into court, for the first time it also provided a separate set of procedural rules dealing with the consequences of the making, acceptance and withdrawal of without prejudice offers. It also made plain that such offers could be made by both claimants and defendants. CPR 36.5 dealt with the form and content of a Part 36 offer. Such an offer could be accepted within 21 days without the permission of the court: CPR 36.11(1). Thereafter the permission of the court was still not required if the parties agreed the liability for costs, but in the absence of such agreement, permission was required: CPR 36.11(2).

18.
There were a number of cases in which a claimant sought to accept an offer very late in the proceedings. In **Pitchmastic Plc v. Birse Construction Limited**, (19th May 2000, The Times 21st June 2000) a decision of Dyson J (as he then was), there had been a Calderbank offer which had been rejected by Pitchmastic on the same day it was made. The judge found that the claimant could not subsequently purport to accept that offer. He adopted the contractual analysis that a Calderbank offer, having been rejected, could not be accepted thereafter. I would respectfully suggest that the judge's approach was unsurprising, given that the offer was a Calderbank offer and therefore entirely contractual. Although the judge went on to make some references to the operation of Part 36, it appears from the judgment that this was to deal with (and reject) a particular argument raised before

him by Pitchmastic. Dyson J did not say expressly that a Part 36 offer, if rejected, could not subsequently be accepted, because that point did not arise on the facts before him.

19.
In **Scammell v. Dicker** [2001] 1 WLR 631 the Court of Appeal was concerned with the withdrawal of an offer, not its rejection and a subsequent attempt at acceptance. The Court of Appeal said that a Part 36 offer could be withdrawn at any time prior to acceptance. Aldous LJ analyzed the argument by reference to the contractual consequences of offer, withdrawal and acceptance. He did not conclude that the Part 36 mechanism was entirely contractual in effect; the highest that he put it, at paragraph 20 of his judgment, was that Part 36 did not “seek to exclude the general law of contract that an unaccepted offer can be withdrawn". He also noted that Dyson J's comments on Part 36 in **Pitchmastic** were obiter, and he said that he preferred "to express no view on the effect of rejection of a Part 36 offer".

20.
Flynn v Scougall[2004] 1 WLR 3069 was another Court of Appeal case concerned with withdrawal and acceptance, this time in respect of payments into court. May LJ noted that the analogy with contract was closer for Part 36 offers than payments into court. He also summarized the authorities dealing with the court's exercise of its discretion to allow a defendant to withdraw or reduce a payment into court, or to allow a claimant to accept a payment in out of time, observing that the same considerations applied to each. He concluded that, as per **Cumper v Pothecary**, the test was whether there was "a sufficient change of circumstances since the money was paid in to make it just that the defendant should have an opportunity of withdrawing or reducing his payment” (or, as the case may be, a sufficient change of circumstances to make it just that the claimant should not be permitted to accept it out of time). May LJ made it plain that such a test had now to be operated so as to be consistent with the overriding objective. In formulating this test he relied on the decision of Garland J in **MRW Technologies v Cecil Holdings** (unreported, 22nd June 2001).

21.
Capital Bank Plc v. Stickland[2005] 1 WLR 3914 was an extraordinary case in which the defendant sought to accept the claimant’s Part 36 offer at the start of the trial, once it had become apparent that, in truth, he had no defence to the claim. Both the judge and the Court of Appeal rejected his application. At paragraph 15 of his judgment in that case Longmore LJ dealt with the lateness of the application:

^"In this context I do not see why the judge should not have taken into account in deciding whether Mr. Stickland was to be entitled to accept the bank's offer the fact that the application was made on the morning of the trial and thus so late in the day that the court's normal wish to encourage settlements (so that other litigants can have their cases more speedily decided) had been effectively discounted."

22.
Finally, I should mention **Hawley v Luminar Leisure Plc**[2006] EWCA Civ 30, in which the Court of Appeal rejected an attempt to accept an offer made during the appeal itself. That offer had originally been rejected. Brooke LJ said:

"25. If the ordinary rules of offer and acceptance apply in the present context, the first defendants' counter-offer (which would normally be interpreted as meaning 'We reject your 50-50 offer but we offer you a 1:2 split of liability instead') would be readily interpreted as a rejection of the third defendants' offer (see **Hyde v Wrench** (1840) 3 Beav 334, 337 ...

26. Similarly, it is so well known that the risks inherent on litigation may alter significantly, particularly if an appeal court has pre-read the papers, as soon as a hearing starts and the judge or judges start to get engaged with the issues, that there would be a strong case for saying that there was an implied term of the offer that it was only open for acceptance (so long as one or other of the conditions in CPR 36.12(2) were fulfilled) until the time when the appeal was opened in court at the hearing.

27. But in our judgment it is unnecessary to decide this application on either of these grounds, strong though each of them appears to be. It would be better to postpone any decision on these matters until a case in which they do arise for decision, and to give the Rules Committee a chance to consider them without being constrained by a definitive ruling of the court in either regard."

23.
The court went on to refuse the application on the grounds that the offer had been expressly withdrawn. At paragraph 30 of his judgment Brooke LJ said:

"30. One reason why we are not deciding this application on the ground that the counter-offer represented a rejection of the original offer (as it would in a straightforward contractual context) is that it might be considered unjust for one party's late offer to be susceptible of acceptance (so long as one of the conditions in CPR 36.12(2) was fulfilled) right up to the time of the hearing whereas the other party's late offer was not susceptible of acceptance from the time of the counter-offer simply because it was made first in time. The making of both offers could convey with them adverse costs consequences to the side which did not accept, and in those circumstances it might appear just for each of them to be theoretically open for acceptance until the hearing starts. It would, as we have said, be far better if the Rules Committee reviewed this matter and came to a clear conclusion on how the scheme should operate in these circumstances."

C3. The Current CPR Part 36

24.
The current Part 36 came into effect on April 6th, 2007. It did away with the mechanism of payments into court altogether. The only thing that now matters under Part 36 is the making of a Part 36 offer in accordance with rule 36.2(1). If the offeror wishes to reduce the amount of the offer within 21 days of making it, he requires the court's permission (rule 36.3(5)), but after the 21 days, if the offer has not been accepted, it can be withdrawn or reduced without the permission of the court.

25.
CPR 36.9 deals with acceptance. It provides:

"(1) A Part 36 offer is accepted by serving written notice of the acceptance on the offeror.

(2) Subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree.

(3) The court's permission is required to accept a Part 36 offer where –

…(d) the trial has started

(4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court will make an order dealing with costs, and may order that the costs consequences set out in rule 36.10 will apply."

26.
It is to be noted that, save for the words in brackets in CPR 36.9(2), nowhere does the new Part 36 deal with counter-offers, and nowhere at all does it deal with the status or effect of an offer which has previously been rejected. Thus, notwithstanding Brooke LJ's comments in **Hawley**, the rules remain silent on this topic.

D.
Issue 1: DOES THE REJECTION OF A PART 36 OFFER MEAN THAT IT CANNOT SUBSEQUENTLY BE ACCEPTED?

27.
The first issue is whether the offer of 12th August 2008, which was expressly rejected by RBC on 14th August, can subsequently be accepted by RBC. This issue in turn depends on whether Mr. Davie is right to say that the operation of Part 36 is directly analogous to contract and that, since an express rejection ‘kills’ an offer in contract, the rejected offer of 12th August was not therefore open to be accepted on 10th October.

28.
For five separate reasons, I have concluded that Mr. Davie is incorrect to say that there is a direct analogy between contract law and Part 36, at least in relation to offers that were initially rejected. Accordingly, I consider that, in principle at any rate, the offer of 12th August was open for acceptance notwithstanding its earlier rejection.

29.
First, as I have already noted, CPR Part 36 is entirely silent as to offers that are rejected. The regime encompassed in Part 36 only recognizes three kinds of offer: an offer that has been made in accordance with Part 36; an offer that has been withdrawn or reduced in accordance with Part 36; and an offer that the offeree accepts, or asks the court for permission to accept, again in accordance with the rules set out in Part 36. The concept of a rejected offer is not recognized by Part 36. That would suggest to me that the initial rejection of an offer does not preclude its subsequent acceptance in accordance with Part 36, subject of course to agreement or ruling as to the position on costs.

30.
Secondly, CPR 39.1 makes plain that an offer can be accepted "at any time". Those are wide words which are not qualified in any way. If an offer could not be accepted because it had been initially rejected, then I would have expected Part 36 to say so in clear terms. It does not; instead, the rules use wide words to the effect that an offer can be accepted ‘at any time’. Giving those words their natural meaning, ‘at any time’ would include the situation where the offer had been initially rejected.

31.
Thirdly, in express confirmation of those first two points, are the words in brackets in CPR 36.9(2), to the effect that an offeree can accept an offer at any time, even if his original response had been to make a counter-offer. That is the direct opposite of the position in contract, where a counter-offer ‘kills’ an offer just as completely as an express rejection. If an offeree can make a counter-offer and then subsequently accept the original offer, then in principle an offeree must also be able to reject, and subsequently accept, that original offer. There can be no rational distinction between a counter-offer and a rejection in such circumstances.

32.

Conscious as he was of the difficulties created for his submission by the words in brackets in CPR 36.9(2), Mr. Davie referred me back to **Hawley** to make the point that the words in brackets may have been designed to deal with the concern expressed there by Brooke LJ, as to the potential prejudice to the party making the offer second in time. The difficulty with that submission is that there is no obvious link between the concern expressed in **Hawley** and the new CPR 36.9(2). In any event, it seems to me that the words in brackets are so wide that I cannot believe that the draftsman did not intend them to mean exactly what they say: that the making of a counter-offer does not prevent the offeree from subsequently accepting the original offer. Similarly, therefore, I conclude that the rejection of the original offer does not preclude its subsequent acceptance.

33.
Fourthly, given that Part 36 comprises the only settlement mechanism under the CPR it would, I think, be unwise to conclude that the absence of the payment in mechanism meant that the entire regime was now entirely analogous to contract. Pre-CPR, a claimant might write to a defendant to say that the sum paid into court was inadequate, and that he would not be accepting it, but then, some weeks or months later, the claimant might change his mind and decide to take the money in court. There was no question in those circumstances of the claimant's original stance, on its own, preventing him from accepting or seeking permission to accept the money in court. It would, I think, be an odd result if the new CPR Part 36 proved to be less flexible than the position before 1999.

34.
Fifthly, I consider that it would be unjust if, as a matter of principle, an offeree could not subsequently change his mind and accept or endeavour to accept an offer that he had previously rejected. Of course, the offeror's costs position must be protected, but once it is protected it would, I think, be contrary to the overriding principle in CPR 1.1 to say that, in every case, a person who changed his mind and was willing to pay the cost consequences of that change of mind should somehow be prevented from accepting the offer (and thereby settling the case) merely because of an analogy with the position in contract.

35.
I consider that this point has even more force when one considers the offeror's position. For this situation even to arise, the offeror will have made a good offer which the offeree, having wrongly rejected it at the outset, now wants to accept. It would be a curious principle if the offeror could say, on the one hand, that the offeree could not as a matter of law be allowed to change its mind and take the offer (thus potentially locking the parties into a trial) whilst, on the other hand, seek to rely on the mere fact of that offer to argue for severe costs consequences at the end of what might well have been an unnecessary trial.

36.
Of course each case will turn on its facts. Sometimes it will be appropriate to allow the offeree to take an offer originally refused, sometimes it will not; but for all the reasons I have set out above, I decline to find a principle of law, analogous to contract law, that would prevent the offeree from ever being allowed to accept an offer that he had initially rejected.

37.
On this first issue, the only remaining question is whether my conclusion is contrary to any of the authorities that I have identified above. I do not think that it is. For the reasons I have given, I expressly agree with the proposition that certain aspects of Part 36 must operate in a way that is analogous to contract: see **Scammell**and **Flynn**. The issue as to the status of a rejected Part 36 offer

was deliberately not decided in either **Scammell** or **Hawley**. Moreover, the one case where the point arose, namely **Pitchmastic,** was a case about Calderbank offers, where the contractual analogy was plainly apt. Furthermore, none of the cases that I have identified arise in respect of the new and very different version of Part 36 that was introduced in April 2007.

38.
For all those reasons I conclude that RBC's initial rejection of the offer of 12th August 2008 does not preclude them from attempting to accept the offer now.

E. Issue 2: IS THERE AN IMPLIED TERM THAT THE OFFER COULD NOT BE ACCEPTED ONCE THE TRIAL HAD STARTED?

39.
I can deal with this issue much more shortly. Mr. Davie argued that there was an implied term of the offer that it could not be accepted one the trial had started. He took that submission directly from paragraph 26 of the judgment of Brooke LJ in **Hawley** to which I have referred at paragraph 22 above.

40.
However, there are two reasons why, in my judgment, this argument cannot be sustained. First, because as Brooke LJ himself pointed out, the Court of Appeal did not make a finding to that effect in **Hawley**. Secondly, and much more importantly I think, the new CPR Part 36, at r.36.9(3), makes plain that the court's permission is required to accept an offer once the trial has started. The express words of that rule therefore presuppose that, subject to the court's permission, an offer is capable of being accepted after the trial has started.

41.
For both those reasons, therefore, I do not consider that there was or could be any such implied term. The offer of 12th August was capable of acceptance, subject to the court's permission, after the trial had commenced.

F. Issue 3; ARE RBC ESTOPPED FROM TAKING THE OFFER?

42.
Mr. Davie submitted that RBC are estopped from taking the offer of 12th August 2008. He maintained that, in trying to accept the offer in circumstances that RBC's solicitors described as ‘out of time’, and with both parties envisaging a percentage in excess of the 20% noted in the offer of 12th August, there was a common assumption that the offer had lapsed and that it was not capable of acceptance unless the parties could reach an express agreement.

43.
I do not accept that submission. The evidence before me does not suggest a common assumption. Indeed, as Mr. Darling QC rightly points out on behalf of RBC, there is no evidence about the parties' assumptions either way. Mr. Darling is right to say that the 20% offer could not be accepted on 10th October because on any view the court's permission was required to allow that to happen. That alone explains why the higher percentages were the subject of subsequent discussion between the solicitors. In addition, I do not believe that there is any significance in RBC’s solicitor’s use of the expression ‘out of time’.

44.

In many ways the estoppel argument advanced by Mr. Davie is another way of putting his principal complaint under both Issues 1 and 4, to the effect that Mr. Crowley does not want to be forced into a settlement by the acceptance of his offer so late in the day. But I do not consider that the estoppel argument is correct in principle and I do not believe that, on the agreed facts of what took place on Friday, 10th October, it could be said that a sustainable estoppel argument can arise.

G.

Issue 4: THE EXERCISE OF THE COURT'S DISCRETION

45.
The remaining matter for me, therefore, is the proper exercise of the court's discretion. If, as I have found, it is open to RBC, subject to the court's permission, to accept the offer as a matter of principle, should the court exercise its discretion in all the circumstances and grant RBC permission to take the offer in accordance CPR 36.9(3)?

46.
It seems to me that the relevant test is that summarized by May LJ in **Flynn v. Scougall** (paragraph 20 above): has there been a sufficient change of circumstances such that it would be just now to refuse to allow the claimant to accept the offer? Moreover, given the very advanced nature of the trial in this case, the points made by Longmore LJ about late acceptance in **Capital Bank v. Stickland** (paragraph 21 above) must apply here with even greater force. Applying that test, and bearing in mind those observations, it seems to me that, in all the circumstances of this case, I should not grant RBC permission to accept the offer of 12th August. Of all the relevant circumstances, there are two principal factors that have led me to that conclusion.

47.
First, I consider that there has been a material change of circumstance that would make it unjust to grant the permission sought. There has been a clear and significant change in both parties' perceptions of the likely outcome of this trial. Prior to trial, RBC considered that they had no liability to make any contribution whatsoever; now they are prepared to make an offer of contribution as high as one third, and are also prepared to accept an order that they pay Mr Crowley's costs from 3rd September. That is clearly a material change in their position.

48.
Moreover, that change in perception is shared by Mr. Crowley. He was prepared to accept a contribution from RBC of 20% prior to trial. The evidence has led Mr. Crowley to refuse the offer from RBC of contribution of up to one third, and all his costs since the day the offer expired, and instead to seek a contribution of 40%. In other words, he now seeks a contribution that is double the amount that he was prepared to accept in August.

49.
I accept Mr. Davie's submission that the parties' changed positions, following the two days of the hearing, is authoritative evidence of the material change in circumstances. In my judgment, the significantly increased percentages on both sides speak for themselves.

50.
On behalf of RBC, Mr. Darling QC pointed here to the lack of a knockout blow, the absence of a radical shift in position of the sort that can be found, for example, in **Proetta** and **Capital Bank**. In my judgment, it sets the bar too high to say that, in the absence of such extreme facts, it cannot be said that there has been any significant change of position. Although he submitted that the court should be

wary of relying on the parties' stated positions as at October 10th, particularly Mr. Crowley's 40% counter offer (which he said should be regarded as self-serving), he has not demonstrated that the overall change in both of those percentages does not meet the test outlined by May LJ in **Flynn**.

51.
There will always be cases, indeed they may be in the majority, where the individual events during the trial are not particularly dramatic or of themselves determinative of the eventual result, but where, as a result of an accumulation of small things - an unexpected answer here, an admission there, a judicial intervention that might not have been expected - the tide of battle during the days of the hearing flows resolutely one way. It seems to me that this is what has happened here, and it would be unjust now to let RBC avoid the running tide and accept the offer so late.

52.
This analysis is inextricably linked to the second factor to which I have had particular regard, namely the fact that the application is made at or beyond the eleventh hour. Mr. Darling QC properly accepted that the timing of an application of this sort is a matter which the court should bear in mind when exercising its discretion, and that therefore the later it is made, the more difficult it may be to grant. I consider that this concession is properly made.

53.
Plainly, if an application to accept an offer is made early on in a long trial, the opportunity for there to have been a significant change in circumstances may be limited, and the savings to everyone in costs, time and court resources in curtailing the trial process will be obvious. On the other hand, if an application is made, as this is, following the completion of all the evidence, and at a time when only one set of closing submissions is outstanding, such an application is much more likely to face the successful argument that there has been a significant change in circumstances, whilst any savings in allowing the offer now to be accepted would be extremely limited.

54.
As I have indicated, the only remaining steps in this case are the provision of RBC's final submissions (plus any further submissions in response by Mr Crowley) and the provision of the judge's judgment. There would therefore be no savings to Mr. Crowley if, at this late stage, the court granted RBC permission to accept the offer. Any savings to RBC would themselves be modest, because they would simply be the costs of completing the final submissions.

55.
Accordingly, as a result of the significant change in the parties' shared perception of the likely outcome of this case, and the fact that, but for the production of RBC's final submissions, the trial process is complete, it would not be appropriate to grant RBC permission to accept the Part 36 offer.

H. Conclusion

56.
For the reasons set out in sections D, E and F above, I have concluded in favour of RBC that:

(a) There is no reason in principle why the offer of 12th August could not be accepted by RBC despite its earlier rejection;

(b) There is no implied term of the offer to the effect that it could not be accepted once the trial had started;

(c) There was no estoppel by convention.

57.
However, for the reasons set out in section G above, I decline to exercise my discretion in favour of granting RBC permission to accept the offer. The parties' significantly changed perception of the likely outcome of the trial, and the fact that the only outstanding step in the ongoing trial is the provision by RBC of their final submissions, leads me to conclude that it would not be appropriate or just to grant the permission sought.