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Calderbank Offers Still Play A Role In English Litigation

By **Afzalah Sarwar** (June 30, 2020, 3:32 PM EDT)


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The recent decision by England's High Court in MEF v. St. George's Healthcare NHS Trust [1], discussed further below, highlights one of the advantages of making a Calderbank offer rather than an offer under Part 36 of the Civil Procedure Rules. This article will explore the scenarios in which Calderbank offers might be more appropriate and advantageous to a party wishing to pursue settlement options.

A Calderbank offer is a settlement offer made either before or during legal proceedings on a "without prejudice save as to costs," or WPSATC, basis. This means that if the offer is not accepted, it cannot be referred to during the course of the proceedings relating to the claim itself, but it can be shown to the court on the question of costs once the proceedings have concluded.

The concept of Calderbank offers was established by the Court of Appeal's 1976 decision in Calderbank v. Calderbank,[2] which approved the practice of permitting reference to such offers in costs applications in matrimonial proceedings. In 1984, Cutts v. Head[3] subsequently confirmed that this practice was available in all civil litigation, which was then codified in the former Rules of the Supreme Court.

A lot has changed since 1984. The Rules of the Supreme Court have largely been replaced by the Civil Procedure Rules, or CPR, which contain the Part 36 settlement offer regime. While Calderbank and Part 36 settlement offers represent the two main WPSATC settlement strategies, the advent of the Part 36 regime has substantially diminished the use of Calderbank offers.[4]

This is largely due to two reasons: (1) the removal in 2007 of the requirement to accompany a Part 36 offer with a payment into court; and (2) the certainty that a Part 36 offer has in terms of costs consequences in contrast to the wide discretion that a court has in determining costs following a Calderbank offer.

Provided that a settlement offer complies with the requirements set out in CPR Part 36, the offeror should be able to predict with some degree of certainty what the cost consequences are likely to be if the offer is accepted or rejected by the offeree, since these are prescribed by the CPR. In all other cases, however, such as where a Calderbank offer has been made, CPR 44.2(4) provides that the court will have "regard to all the circumstances" in deciding what costs order to make.

Such discretion makes it difficult for a Calderbank offeror to predict the outcome, and this uncertainty remains notwithstanding the Court of Appeal's confirmation in Capita (Banstead 2011) Ltd. & Anor v. RFIB Group Ltd.[5] that such discretion entitles a judge to treat a Calderbank offer as having the same effect as a Part 36 offer, since it is still within the judge's discretion.

Calderbank offers still perform an important role in civil litigation as there are certain situations in which they are more appropriate than a Part 36 offer and so they should be part of every litigator's toolkit.

A Calderbank offer can be used as a mechanism for including settlement terms which are not permitted under the Part 36 regime or to provide for a different outcome on costs compared to the Part 36 rules. As long as the offer is made with the aim of genuinely attempting to settle a dispute, and is an offer that is capable of being accepted, a Calderbank offer provides a party with much more flexibility than that which is offered by the rigid code contained in Part 36. Furthermore, since the Part 36 rules do not apply to claims allocated to the small claims track or to arbitration proceedings, a Calderbank offer is the only WPSATC settlement strategy available to a party in these circumstances.

So, when might a party wish to make a Calderbank offer? A Calderbank offer will be more appropriate where a party wants to make an offer which is inclusive of costs or on a "drop hands" basis whereby the parties mutually agree to withdraw their respective claims and bear their own costs of the dispute. Addressing the issue of costs in this way will achieve a level of certainty for the offeror as it will know in advance what it has to pay if the offer is accepted. On the other hand, a Part 36 offer must not include terms as to costs that contradict what is stated in Part 36 of the CPR, which means that they cannot be inclusive of costs. Instead, under the Part 36 regime, costs will need to be assessed if not agreed.

A Calderbank offer can also be used by a party to make an offer which is subject to more detailed terms being agreed between the parties on matters such as confidentiality and potential future liabilities. As long as the offer is capable of being accepted on its stated terms, this feature of Calderbank offers gives them a significant advantage over the Part 36 rules, which do not permit this.

Another scenario in which a Calderbank offer is likely to be more suitable is where a defendant wants to settle but considers the merits of the claim against it to be weak and therefore does not want the claimant to recover the amount of costs prescribed by the Part 36 rules, particularly if substantial costs have been incurred to that point. Rather than putting forward a Part 36 offer which, if accepted within the relevant period, would make it liable for all of the claimant's costs of the proceedings (including its recoverable pre-action costs) up to the date on which notice of acceptance was served by the claimant[6], the defendant could instead make a Calderbank offer which contains a low, inclusive of costs, settlement offer.

A further reason for making a Calderbank offer is to provide a defendant with more flexible payment terms. The Part 36 rules are strict with regard to how and when a defendant has to make payment. Under the CPR, a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money[7] no later than 14 days following the date of acceptance.[8] A defendant who wants to settle but who is not in a position to make a lump sum payment within 14 days of acceptance of an offer should consider using a Calderbank offer instead so that it has greater flexibility as to when payment will be made.

Another potential advantage of Calderbank offers is that the period for acceptance can be shorter. Under the CPR, a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs.[9] This is known as the "relevant period." If the offer is accepted

within the relevant period, the claimant will be entitled to its costs of the proceedings up to the date of acceptance. Calderbank offers are not subject to these requirements and may be open for a much shorter period of time. This can be used as an effective litigation tactic.

For instance, if a party expects a claim to settle at a particular amount, it could make a Calderbank offer for an amount that is a little higher but with a tight time frame for acceptance, and notify the offeree that, if it is not accepted within that short time frame, it will be withdrawn and replaced with a Part 36 offer for the lower amount. This should in theory incentivize the offeree to accept the Calderbank offer so as to avoid the risk of adverse Part 36 cost consequences.

Calderbank offers are also not subject to the strict rules contained in CPR Part 36 about withdrawal and acceptance of offers. A Part 36 offer can only be withdrawn or its terms changed to be less advantageous to the offeree once the "relevant period" has expired.[10]

If the Part 36 offer has been accepted before the expiry of the relevant period, that acceptance will be binding unless the offeror applies to the court for permission to withdraw the offer or to change it terms to be less advantageous.[11] The court may give permission if it is satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to do so.[12] The court's permission is also required to accept a Part 36 offer once a trial is in progress.[13] However, if an offeree is not doing well during trial, permission will rarely be granted.[14]

In contrast, Calderbank offers are subject to common law contractual principles of offer and acceptance, as was recently confirmed in MEF v. St George's Healthcare. The general rule is that an offer may be withdrawn at any time before it is accepted. This rule applies even if the offeror has indicated that it will keep the Calderbank offer open for a specified time, since such an indication is unsupported by consideration and is therefore not binding. Furthermore, a party does not need the court's permission to accept a Calderbank offer once the trial has started as they are not regulated by the Part 36 regime.[15]

For the above mentioned reasons, and notwithstanding the advantages associated with making a Part 36 offer, a Calderbank offer remains an invaluable litigation tool which can provide a much more flexible alternative to the Part 36 regime. Calderbank offers should always be considered as part of any settlement strategy.

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[1] MEF v. St. George's Healthcare NHS Trust [2020] EWHC 1300 (QB)

[2] Calderbank v. Calderbank [1976] Fam. 93

[3] Cutts v. Head [1984] 1 Ch. 290

[4] Colin Passmore, Privilege (4th edn Sweet & Maxwell, 2019) 10-251.

[5] Capita (Banstead 2011) Ltd. & Anor v. RFIB Group Ltd. [2017] EWCA Civ 1032

[6] CPR 36.13(1).

[7] CPR 36.6(1). This rule is subject to the rules relating to personal injury claims for future pecuniary loss (see CPR 36.18(3)) and offers to settle a claim for provisional damages (see CPR 36.19(1)).

[8] CPR 36.6(2): "A defendant's offer that includes an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer."

[9] CPR 36.5(1)(c).

[10] CPR 36.10(2)(a).

[11] CPR 36.10(2)(b).

[12] CPR 36.10(3).

[13] CPR 36.11(3)(d).

[14] MEF v. St. George's Healthcare NHS Trust [2020] EWHC 1300 (QB) at [26], citing, among others, Houghton v. PB Donoghue (Haulage & Plant Hire Ltd.) [2017] EWHC 1738 Ch where Morgan J refused to give permission to the claimant to accept a Part 36 offer during trial. Having considered the relevant authorities, Morgan J stated:"I am particularly struck by the approach and the comments of the judges in the two TCC cases. They indicated in strong and, I have to say, persuasive terms that if an offeree, when he sees the way the wind is blowing in the trial, changes his attitude and wants to accept an offer that he previously did not want to accept, that is a change of circumstances which means that it may no longer be appropriate to allow the offeree to accept the offer which is still on the table subject to the court's permission."

[15] MEF v. St. George's Healthcare NHS Trust [2020] EWHC 1300 (QB) at [32].