JUDGEMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q.C. TCC. 28th November 2000

Introduction

1. There are before the Court two appeals, one by each of the parties, from an Interim Award on costs ("the Award") dated 19 May 2000 made by Mr. Bernard Jupp as arbitrator appointed to decide various disputes between Lindner Ceilings Floors Partitions PLC ("Lindner") and How Engineering Services Limited ("How") arising out of the undertaking by Lindner for How of the installation of suspended ceilings and other works in the Atrium Building and the Linear Building at Cannon Bridge, Cannon Street Railway Station, London. In the Award Mr. Jupp considered, as he had been invited to do, the effect of two letters, each written on behalf of How by its solicitors, Messrs. Martin Amey & Co. The first of these letters was dated 23 December 1992 and was headed *"SEALED OFFER"*. It is common ground between Lindner and How that the letter contained an offer to settle the disputes the subject of the arbitration proceedings and I shall refer to the offer made in the letter as "*the 1992 Offer"*. The second letter was dated 22 October 1997 and was headed "*WITHOUT PREJUDICE SAVE AS TO COSTS"*. I think that it is common ground between the parties that the second letter also contained, or was intended to contain, an offer, and I shall refer to that intended offer as "the 1997 Offer", but it was vigorously asserted by Mr. Robert Kirk, who appeared as Counsel on behalf of Lindner, that, for reasons which I shall explain, the 1997 Offer was not an offer which it was right for Mr. Jupp to take into account in exercising his discretion as to the costs of the reference to him.

The 1992 Offer

2. The operative part of the letter dated 23 December 1992 was in the following terms:-

"The Arbitration proceedings have now reached the stage where both parties stand on the threshhold [sic] of committing themselves to an expenditure of very large sums of money that will have to be expended in costs to get the matter ready for hearing and for the eharing [sic] itself. In view of this we are instructed to write to you to offer without any admission of liability to pay the sum of £342,780.00 to bring matters to a conclusion.

"This offer is made in full and final settlement of all claims against our clients (other than claims for costs) and includes Value Added Tax, interest and any counterclaims by our cleints [sic] in these proceedings.

" In addition, our clients are prepared to pay to your clients their costs of the Arbitration on the standard basis (to be taxed if not agreed) as already ordered and to date, together with the costs and expenses of the Arbitrator up to the 15th January 1993 or acceptance by your clients of this offer, whichever is sooner."

The 1997 Offer

3. The 1997 Offer, so it was submitted on behalf of How by Mr. Tackaberry Q.C., was in substance contained in the following passage from the letter dated 22 October 1997:-

" 9. Without prejudice to the validity of the previous Calderbank offers, How hereby makes a further offer to dispose of this case. This offer is the sum of £800,000 in respect of all and any entitlement raised by Lindner in the present arbitration proceedings, whether or not the arbitrator has jurisdiction to deal with it. This sum includes the entitlements of Lindner in respect of the final accounts. The sum is exclusive of VAT which shall be paid by How as applicable. It is also exclusive of interest accruing to the monies in the stakeholder account which it is agreed by this letter (if the offer made by this letter is accepted) shall also be to the benefit of Lindner. Accordingly, in any evaluation of this offer, that interest also falls to be taken into account…

"14. It is a condition of this offer that all issues as to costs in the arbitration fall to be determined by the arbitrator as part of the arbitration if this offer is accepted.

"15. It is also a condition of this offer that only one of the offers made by How can be accepted. If this one is accepted, the others are thereby no longer available for acceptance, although they remain alive and relevant, in so far as necessary, for the purposes of the discussion and disposition of costs. The same situation applies, mutatis mutandis, if one of the prior offers by How is now accepted…

"17. It is also a condition of this offer that no moneys, save for the monies in the stakeholder account, are paid over to Lindner until costs are determined, or a bond is provided to ensure that any net balance of costs which is ultimately found to be in How's favour is paid by, or recovered from sums otherwise due to. Lindner. As you will know, the Courts recognise the situation where a Defendant or Respondent makes a Calderbank offer in a case brought by a party wholly lacking in finances and otherwise liable to provide security for costs. The courts take the view that such a Defendant/Respondent "can secure itself" against the risk of non recovery of costs. This condition is intended to achieve this type of security. This principle is of course reflected in the current arrangements in respect of the stakeholder account."

The Award

4. In various awards Mr. Jupp awarded Lindner sums totalling £339,965.74 in respect of its claims in the arbitration proceedings before him. He also awarded a sum of £153,238 by way of interest on the other sums which he found to be due to Lindner. Interest was calculated at an agreed rate of 8% per annum simple. It was left to Mr. Jupp to determine the date from which interest should run, and, in the event, he decided that interest should run from 1 January 1993. As at that date the 1992 Offer was, in accordance with its terms, still open for acceptance. In the hearing which took place before Mr. Jupp made the Award, it was submitted to him that, he having awarded Lindner a total sum of £339,965.74 in respect of Lindner's claims other than for interest, and he having decided that interest should only start to run from a date later than the date of the 1992 Offer, Lindner had failed to recover more than How had offered in the 1992 Offer and so should pay How's costs of the arbitration proceedings since the date of the 1992 Offer. It was, apparently, common ground before the arbitrator, and it

was certainly common ground before me, that, in considering whether Lindner had recovered more in the arbitration proceedings than How had offered in the 1992 Offer it was necessary for the arbitrator to adjust the amount of the 1992 Offer so as to be able to compare it with the total sums eventually awarded to Lindner in one of the ways indicated by Donaldson J. in ***Tramountana Armadora S.A. v Atlantic Shipping Co. S.A.*** [1978] 1 Lloyd's Rep.391 at page 398:- *"In order that like should be compared with like, the interest element must be recalculated as if the award had been made on the same date as the offer. Alternatively, interest for the period between offer and award must notionally be added to the amount of the sealed offer."*

As matters turned out, at the hearing before me it was accepted by Mr. Kirk on behalf of Lindner that Mr. Jupp had not properly done that, and that in consequence the appeal of How must be allowed and the Award must be remitted to the arbitrator with the opinion of the Court as to the manner in which Mr. Jupp should have adjusted the amount of the 1992 Offer so as to make it comparable with the total amount of the awards in favour of Lindner.

5. Mr. Jupp dealt with the question of adjustment of the 1992 Offer at paragraphs 28 to 30 inclusive of the Award as follows:-

"28. To compare like with like, the period over which interest on the offer would run must equate with the period from the date for acceptance of the offer (15 January 1993) to the date of my recent Award (17 December 1999, the interest Award).

"29. Regarding the interest rate to apply to this period, I prefer the actual interest rates available to and contended by Lindner, rather than the Judgment Act rate contended by How. The Judgment Act rate is an artificial rate, higher at the moment than market rates for reasons of no concern to this arbitration, different from the rate that was in force at the date of the offer, and not relevant to the practical assessment of the offer's subsequent value.

"30. Taking only these two factors (period and interest rate) into account, a calculation, based on Lindner's interest calculation but substituting the offer in its entirety instead of the offer less Value Added Tax, indicates that the equivalent of the offer at 17 December 1999 was £481 986, which is lower than the various Awards which total £493 203. If interest already accruing to Lindner is taken into account, the gap between up-dated offer and Awards grows larger."

6. It is, I think, plain from the passage from the Award which I have quoted in the preceding paragraph, that Mr. Jupp misunderstood the nature of the adjustment which it was necessary to make to the amount of the 1992 Offer in order to make it comparable with the total amount of his awards in favour of Lindner. There is no question of the need for some consideration of what Lindner would or might have done with the sum which How offered by the 1992 Offer to pay, had Lindner accepted that offer, or some consideration of market rates of interest over the period to which the assessment of interest related. What Mr. Jupp had to do was either to gross up the amount of the 1992 Offer by adding to it interest at the same rate and over the same period as he allowed on the sums which he had awarded, or he had to leave interest out of account altogether. Theoretically, of course, the nature of the exercise is either to add to the amount of the offer interest from the date of the offer at the same rate as that allowed on the amount found to be due, or to reduce the amount of the interest actually awarded to the equivalent of what would have been awarded if interest had only been allowed to the date of the making of the offer. However, in the present case, Mr. Jupp has decided that no interest should be awarded in respect of the period prior to the date of the 1992 Offer, so perhaps the easiest way of making the necessary comparison is simply to compare the amount of the 1992 Offer with the total of the sums awarded by Mr. Jupp without taking any account of interest at all. Nonetheless, if Mr. Jupp wishes to retain the method which he seemed to prefer in the Award, what he has to do is to calculate interest on the amount of the 1992 Offer at the agreed rate of 8% per annum simple from 1 January 1993.

7. Mr Jupp considered the 1997 Offer at paragraphs 33 to 40 inclusive of the Award. He referred to two conditions of the 1997 Offer, the first of which he identified as that:- *"all issues as to costs in the arbitration fall to be determined by the arbitrator as part of the arbitration if this offer is accepted."*, and the second of which was the requirement that only one offer made by How could be accepted. He went on in the Award:-

"38. Regarding the first condition, it is significant because it was one of the reasons given by Lindner at the time for refusing the offer, and the main one on which it now relies, contending that, had the offer been accepted, I would not have known, and would have been precluded from knowing, which Party had won, because at that time the loss and expense issues had not been heard. My not knowing which Party had won would result in my being unable to decide liability for Costs. Lindner also quoted Parkfield Group v Singh as to why an offer that excludes costs cannot be regarded as the equivalent of a payment into court.

"39. The reasoning of Lindner when it refused the offer was that How could have argued that any costs award in favour of Lindner, had the offer been accepted, would have been based on an assumption that Lindner would have beaten the 1992 offer, which assumption could not have been sustained. I find it difficult to follow this reasoning, as the 1997 offer was clearly better than the 1992 offer, even allowing for the date difference, and for that reason Lindner could have claimed that the 1992 offer had been beaten, and been awarded its costs. This accords with the second provision mentioned in How's offer, namely that the previous offers "remain alive and relevant in so far as necessary, for the purposes of the discussion and disposition of costs".

"40. Similarly, the authority quoted by Lindner is of no assistance, as it concerned whether or not a Calderbank offer rather than payment into court could be taken into account on questions of costs. This has no bearing on the

current argument as to whether or not exclusion of costs from an offer is a prerequisite to its being considered as an offer."

Lindner's Appeal

8. Lindner's appeal was founded, principally, upon the proposition that, as a matter of law, the arbitrator was wrong to take into account in considering what award to make about costs the 1997 Offer. The point advanced on behalf of Lindner by Mr. Kirk depended entirely upon what, in Mr. Kirk's submission, was the effect of the decision of Donaldson J. in Tramountana Armadora S.A. v Atlantic Shipping Co. S.A., to which I have already referred. In that case a sealed offer, which was said to be in full and final settlement, was made in an arbitration. When clarification was sought as to whether that figure included interest and costs, the reply was that the offeror did not contemplate any payment in respect of interest or costs. Thus, as in the present case, at least so far as the 1997 Offer is concerned, the offer was not to pay a sum plus costs, but, unlike in the present case, there was no suggestion that costs were to be dealt with separately – what seems to have been contemplated was that nothing at all would be done about costs. For practical purposes, therefore, the sum offered included costs. At page 398 in the judgment Donaldson J. said:- *"Mr. Gatehouse's other criticism is more substantial. The offer in this case excluded the payment of interest or costs in addition. So the comparison is between US $6000 to include interest and costs and US $2710.94 plus interest for 3 1/4 years at 8 ½ per cent. (Nov. 2, 1972 to Feb.3, 1976) plus costs to Feb. 3,1976. But these costs calculated to a date in the middle of the arbitration are a completely unknown factor which the arbitrator is not in a position to assess, even with the evidence which I now have that the claimant's untaxed bill of costs would have amounted to £4000. The arbitrator is therefore unable to make the vital comparison. On the only figures known to him, the arbitrator is being asked to compare like with unlike. An offer of a lump sum to include costs is not and should never be treated as the equivalent of a payment into Court. If a party wishes to make a "sealed offer" and to have it considered in the context of an order for costs, he must offer to settle the action for £X plus costs."*

Mr Kirk submitted that in that passage Donaldson J. was laying down a principle of general application, such that if a purported "sealed offer" did not include an offer to pay the costs of the offeree it could not take effect as a valid offer which the arbitrator could or should properly take into account in deciding what award to make as to costs. If Mr. Kirk's submission is well-founded it is clear that the arbitrator fell into error.

9. Mr. Tackaberry Q.C. submitted that it was not a correct reading of the judgment of Donaldson J. in ***Tramountana Armadora S.A. v Atlantic Shipping Co. S.A.*** to treat it as laying down a general and inflexible rule. He drew to my attention the comments of Gibson J. concerning the judgment of Donaldson J. in the later case of ***Archital Luxfer Ltd. v Henry Boot Construction Ltd.*** [1981] 1 Lloyd's Rep. 642 at page 654:-

"Mr. Justice Donaldson in his judgment in the Tramountana case was, in my opinion, dealing with the essential substance and purpose of sealed offers and was not intending to lay down any universal requirements as to form. In order for the essential task of the arbitrator to be performed, namely, of deciding the question whether the party to whom the offer is made has achieved more by rejecting the offer and going on with the arbitration, than he would have achieved if he had accepted the offer, the offer must be in such terms as will enable the question to be answered. When the structure of the litigation is such that settlement on the terms offered will entitle the party to whom the offer is made, to payment of his costs to that date, then unless the offer includes an offer to pay the costs the arbitrator cannot in most circumstances know whether this claimant has or has not achieved more.

"If an offer should be made in terms which specifically included a named sum to cover costs, and the arbitrator is satisfied that the amount so offered must without question have covered any costs then incurred, there is no reason why the arbitrator should not give effect to the offer if the sum offered to settle the claim was sufficient. It will always be prudent to offer to pay taxed costs, because of the risk of error, but the sufficiency of an offer is concerned with its demonstrable substance and not with its form.

"A party to whom an offer is made cannot be expected or required to enter upon any detailed investigations as to his position in costs in order to decide whether or not an offer made fairly reflects his prospect of success; nor, in my judgment, should an arbitrator enter upon any such investigation in order to discover whether an offer made was such that a claimant has or has not achieved more by rejecting it. Such offers are required to be plain and self- evident in their terms."

Mr. Tackaberry pointed out that in ***Cutts v Head*** [1984] 1 Ch 290 at page 308 Oliver LJ, having referred to the decision of Donaldson J. in ***Tramountana Armadora S.A. v Atlantic Shipping Co. S.A.,*** then commented:- *"This case was followed and applied by Gibson J. in **Archital Luxfer Ltd. v Henry Boot Construction Ltd.** [1981] 1 Lloyd's Rep. 642,654-655."*

Thus, submitted Mr. Tackaberry, Oliver LJ plainly did not consider that what Gibson J. said in Archital Luxfer Ltd. v Henry Boot Construction Ltd. was inconsistent in principle with what Donaldson J. had said, in the passage which I have quoted above, in Tramountana Armadora S.A. v Atlantic Shipping Co.

10. Mr. Tackaberry also relied upon the decision of the Privy Council in ***Director of Buildings and Lands v Shun Fung Ironworks Ltd.[***1995] 2 AC 111.That case was concerned with a claim in Hong Kong for compensation under the Crown Lands Resumption Ordinance. The Crown made an offer "*without prejudice*" to settle the claim for HK $170 million exclusive of interest and costs. That offer was rejected and the matter was referred to the Lands Tribunal. The Lands Tribunal awarded the claimant HK $ 131 million. The Lands Tribunal took into account, in deciding what order to make as to costs, the offer made by the Crown. One of the issues which arose before the Privy Council was whether it was appropriate for the Lands Tribunal to have taken into account the offer made by the Crown

when, arguably, it was open to the Crown to have paid the money offered into the Lands Tribunal. The advice of the majority of the Privy Council was given by Lord Nicholls of Birkenhead. He said, at pages 140G-141C:-

"The effect of R.S.C. (Hong Kong), Ord.22, r.14 and Ord. 62, r.5 is that Calderbank offers shall be taken into account by the court when exercising its discretion as to costs, but not if the party making the offer could have protected his position as to costs by means of a payment into court under Order 22. Ord. 22, r1 provides for a defendant making a payment into court "In any action for a debt or damages". A claim for compensation is not such an action. Thus on a strict reading of the rules this is not a case to which the bar on taking into account a Calderbank offer applies. Accordingly the Court of Appeal erred in holding that the Calderbank letters could carry no weight on questions of costs in this case.

"Their Lordships recognise this is a strict, even a literal, interpretation of the rules. However, viewing the matter more broadly, it is difficult to see why the Calderbank letters should not have consequences as to costs in this case. Parties are to be encouraged to settle their disputes and assisted in their attempts to do so. By accepting the first offer the claimant would have received a significantly larger sum than it was awarded by the tribunal at the end of an enormously protracted and expensive hearing. Interest would have followed automatically, and there is no reason to doubt the tribunal would have made a costs order in favour of the claimant. Had the Crown made a payment into court, assuming this is possible, the claimant's position would have been much the same, neither better nor worse. It is not as though a payment of money into court would have given the claimant some advantage over and above an offer by the Crown to settle for a like amount."

11. As an additional string to his bow Mr. Tackaberry submitted that in any event, whatever may have been the law prior to the introduction of the Civil Procedure Rules, since 26 April 1999 the traditional approach to costs, exemplified by the decision in ***In re Elgindata (No.2)*** [1992] 1 WLR 1207, has altered and, under the regime established by the Civil Procedure Rules, in particular Part 36 and Part 44.3 (4), any admissible offer to settle should be taken into account. Mr. Tackaberry submitted that, although the present arbitration was commenced prior to the coming into effect of the Civil Procedure Rules, the transitional provisions in Part 51 meant that, if an action had been commenced before the coming into force of the Civil Procedure Rules but a decision as to costs had had to be made after those rules had come into force, the applicable principles would have been the principles set out in the Civil Procedure Rules.

12. In my judgment, a major public policy interest underlying the Civil Procedure Rules is the encouragement of the settlement of disputes by agreement. It does not seem to me that this is a recently discovered public policy interest, but rather one which has always lain close to the heart of the system of civil justice in this country, at any rate since the abolition of the old forms of action in the nineteenth century. I should be extremely loath to feel driven to the conclusion that it has ever been appropriate in recent times for there to be an artificial impediment to parties in dispute seeking, by whatever means seemed to them to be appropriate, to reach a mutually satisfactory resolution of their differences. I do not think that I am driven to that conclusion. Strictly the decision of Donaldson J. in ***Tramountana Armadora S.A. v Atlantic Shipping Co. S.A.*** is not binding upon me in any event, but as it has stood for over 20 years and has been cited in the Court of Appeal without adverse comment, I would not lightly depart from it. In fact I am not persuaded that there is any serious question of my having to adopt a different approach from that of Donaldson J. Properly understood, it seems to me that all Donaldson J. was saying in the passage which I have set out from his judgment was that a party who seeks to have taken into account in his favour an offer of settlement which did not indicate clearly what provision was proposed to be made as to costs presents the person having to make a decision about the award of costs at the conclusion of a hearing with a difficulty in reaching a decision on the important question whether the offeree would in the event have been better off accepting the offer. Where such a difficulty arises obviously the person making the offer cannot be confident that the tribunal having to make a decision as to costs will be persuaded that the person to whom the offer was made ought to have accepted it. Thus it is prudent to avoid the possibility of a problem arising by making it clear exactly what provision as to costs is intended. However, the making of that common sense point, for that is all I think Donaldson J. intended, is a long way short of laying down a rigid and inflexible rule such as that for which Mr. Kirk contended. All that is necessary, in my judgment, if an offer of settlement is to be sufficient to merit the consideration of an arbitrator in the context of the need to make a decision concerning costs, is that, as Gibson J. put it in ***Archital Luxfer Ltd. v Henry Boot Construction Ltd.,*** *"the offer must be in such terms as will enable the question ("whether the party to whom the offer is made has achieved more by rejection the offer and going on with the arbitration, than he would have achieved if he had accepted the offer") to be answered."*

Whether any particular offer is in such terms as to enable that question to be addressed depends, it seems to me, upon the proper construction of the offer. However, strictly speaking, rather than treating an offer which did not enable that question to be addressed as somehow invalid, I would regard it as one which has little or no weight because its effect cannot accurately be assessed. It follows, it seems to me, that Mr. Jupp was not precluded as a matter of law from considering the 1997 Offer at all. What he had to do was to consider what, on proper construction, the offer amounted to, and, in the light of his conclusion on that issue, whether as matters, had turned out, Lindner had achieved more by continuing with the arbitration than it would have achieved by accepting the 1997 Offer.

13. Mr Kirk further submitted that the arbitrator in evaluating the 1997 Offer fell into error in that he did not compare the position of Lindner as a result of the outcome of the arbitration with what its position would have been if it had accepted the 1997 Offer. Rather, submitted Mr. Kirk, Mr Jupp compared the position of Lindner if

it had accepted the 1992 Offer with what its position would have been if it had accepted the 1997 Offer. If that is indeed what Mr. Jupp did, then it seems to me that he would have erred in law, for he would have misunderstood the nature of the task which he had to perform in relation to making a decision as to the costs of the arbitration, once the outcome was known, in the light of the making of the 1997 Offer. What he had to consider was simply whether Lindner was better off in the event than it would have been had it accepted the 1997 Offer. In my judgment, on a fair reading of the Award that is exactly what Mr. Jupp did consider. In the context of a submission made to him that he should not consider the 1997 Offer because the condition of that offer that, if it was accepted, all issues as to costs should be determined by him, meant that Lindner was not able to assess the worth of the offer, Mr. Jupp indicated how he would have gone about that task, if he had had to perform it. He said that he would have proceeded on the basis that the 1997 Offer was a better offer than the 1992 Offer and thus that by continuing with the arbitration in those circumstances Lindner had achieved something of value and awarded Lindner its costs had it accepted the 1997 Offer. It was necessary for him to reach a conclusion about that as a foundation for his consideration of the question of what order as to costs to make. Without deciding what he would have done had he had to decide what costs order to make following a notional acceptance of the 1997 Offer he was plainly unable to compare the position of Lindner if it had accepted the 1997 Offer with the position it had achieved as a result of his various awards.

14. As a result of his consideration of what the likely order for costs would have been if Lindner had accepted the 1997 Offer Mr Jupp plainly reached the conclusion that the 1997 Offer was one which was worth £800,000, plus what I was told was about £20,000 of interest earned on money in the stakeholder account, plus Value Added Tax, so far as payable, plus at least a good chance of recovering Lindner's costs of the arbitration. Although, perhaps, it could be said that at the time the 1997 Offer was made Lindner could not know what order for costs Mr. Jupp would make, if it fell to him to dispose finally of the costs of the arbitration, it must have been obvious that Lindner had a serious prospect of an award of costs in its favour. In the event, as I have already recorded, Lindner recovered a total of £493,203.74, inclusive of interest. It is not difficult to see that, with hindsight, Lindner should have accepted the 1997 Offer.

Conclusion

15. For the reasons which I have set out above Lindner's appeal fails. The appeal of How is allowed, effectively by consent, and the Award is remitted to the arbitrator for his reconsideration on the question of the relevance of the 1992 Offer to his determination of the costs of the arbitration in the light of the opinion of the Court.

Robert Kirk for Lindner Ceilings Floors Partitions PLC (Warner Goodman & Streat, Solicitors)
John Tackaberry Q.C. and Karen Gough for How Engineering Services Limited (Martyn Amey & Co., Solicitors)