

# My Word Is My Payment In

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Jeremy Heywood, January 2009

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The recent case of **Cole - v - Chief Officer of the States of Jersey Police** [2008] JRC 191 held that the courts in Jersey ought to attach weight to an offer of settlement when deciding the issue of costs, even if such offer was not fortified by a payment in.

The Plaintiff had sought temporary employment with Jersey Post over the Christmas period in 2001. He was provisionally offered employment, subject to a police check, but following that check the offer was withdrawn. The Plaintiff sued both Jersey Post and Jersey Police. After a strike out application, he was forced to amend his claim.

On 13<sup>th</sup> June 2007 the Defendant wrote to the Plaintiff offering £2,500 in full and final settlement of the damages element of his claim. The offer was stated to be open until close of business on 22<sup>nd</sup> June 2007 (the last working day before the trial was due to start). The offer was not accepted. At trial Mr. Cole abandoned his claim for all damages, save general damages, and was ultimately awarded £750.

## COSTS HEARING

There followed a further hearing over costs. The Royal Court found, in **Watkins and Connell - v - Eglishaw and others** [2002] JLR 1, that Jersey has generally followed English principles when deciding how its wide discretion to award costs ought to be exercised and that there was every reason to continue that practice following the impact of the Civil Procedure Rules (“CPR”).

## IMPACT OF THE CPR

The Royal Court, in **Sim - v - Thomas** [2001] JLR 204 stated that the position in Jersey in respect of **Calderbank** offers was that of the pre-Woolf, English position that a **Calderbank** offer should not be used as a substitute for a payment into court where such a payment in would be appropriate (**Cutts - v - Head** [1984] Ch. 290). The court held that if, as **Watkins** held, Jersey courts should ordinarily follow English principles on costs, even if those principles followed the impact of the CPR, then it would be inconsistent for the Jersey courts not to follow English practice.

As such, the court adopted and (slightly) adapted the principles set out by the English Court of Appeal in the case of **Trustees of Stokes Pension Fund - v - Western Power Distribution (South West) plc** [2005] EWCA Civ 854. This case stated that “*an offer should usually be treated as having the same effect as a payment into court*” so long as the following conditions were satisfied:

1. The offer should be expressed in clear terms, setting out those parts of the claim to which it applies, whether it takes account of any counterclaim and whether it is inclusive of interest;
2. The offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a **Calderbank** offer;
3. The offer should be genuine and not a ‘sham’; and
4. The defendant should clearly have the funds at the time when the offer was made.

Should any of the above conditions not be satisfied, the court in **Trustees of Stokes** further held, that did not negate the effect of the **Calderbank** offer in its entirety, but merely that less weight ought to be given by the court to the offer when deciding the issue of costs.

Where none of the conditions was satisfied it was held likely that the court would find that the offer afforded the defendant no costs protection at all.

## **NO COSTS PROTECTION**

In **Cole** the offer was stated only to be open for a period of 9 days. The court stated that there was no requirement for an offer to be open for 21 days under the Royal Court Rules (Rule 6/33) and as such, in Jersey, such an offer only had to be open for a reasonable period. The court found that the

conditions in **Stokes** were satisfied in this case and in the circumstances asked that there be no order as to costs.

If one adopts the court’s logic that Jersey ought to follow the practice of the English courts, then it seems from **Stokes** that everyone’s word would be good enough. Dyson LJ held that it would be very difficult for a claimant who refused an offer of settlement to contend after the trial that the offer was not genuine, or that the defendant was not good for the money, unless such arguments were raised at the time the offer was refused.

## **DOUBTS AS TO GENUINENESS**

If no such arguments were raised it was likely that a court would take the view that the claimant had rejected the offer, not for any doubts as to its genuineness, but because the claimant thought the offer was too low. It appears, therefore, as though payments in to fortify offers have become unnecessary in Jersey, save as a psychological weapon, and that any offer will afford protection as to costs provided it is clear, genuine and open for a reasonable period of time.

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