

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 34

PIC-PN2652-19

NOTE BY SHERIFF K J MCGOWAN

in the cause

MAXWELL DAVIDSON

Pursuer

against

CLYDE TRAINING SOLUTIONS LIMITED

Defenders

Pursuer: Swanney, Advocate; Thompsons, Solicitors

Defenders: Richardson, Solicitor; BTO Solicitors

Edinburgh, 3 August 2020

Introduction

[1] This case called before me in respect of the defenders' opposed motion for decree in terms of a pursuer's offer and acceptance.

Chronology

[2] The sequence of events – which I did not understand to be in dispute - was as follows:

- a. 6 April - minute containing pursuer's offer ("PO") in the following terms
intimated by email to defenders agents:

"LINDSAY for the pursuer, in terms of Chapter 27A, hereby offers to settle this action on the basis of payment by the Defenders to the

Pursuer in the sum of SIXTEEN THOUSAND POUNDS (£16,000) STERLING, inclusive of interest to date, net of any liability the defenders may have in terms of the Social Security (Recovery of Benefits) Act 1997, together with expenses of Process in full of the craves of the Writ.”

b. 7 April – defenders’ agents acknowledge receipt of PO and seek further information (including medical evidence relied on).

c. 23 June at 13:12– pursuer’s agents email the court as follows:

“We act on behalf of the Pursuer in the above matter and write to advise that the Minute of Offer lodged on 6th April 2020 is withdrawn. We attach a copy of the offer along with the email sent to the court for the purposes of intimation. The Defenders agent's generic email address and case handler have been cc'd into this email for the purposes of intimation.”

d. 23 June at 13:24 the defenders’ agents email pursuer’s as follows:

“Can you update me on where you are with this case and the information requested?”

e. 23 June at 14:15 the pursuers’ agents email defenders’ agents as follows:

“I have attached the Second Inventory along further the productions referred to. The list of witnesses shall follow shortly.

At this stage, given the terms of the report from Professor Patel, and supplementary opinion of Mr Drury, the Pursuer will require to undergo further diagnostic testing by way of Doppler scan and CT scan to determine the extent of his ongoing issues and to guide his pain management. The experts have formed the opinion that the ongoing pain my client is experiencing is likely to be permanent in nature and he will require to embark upon treatment for pain management.

I note your colleague had previously taken issue with the pursuer seeking to recover the costs of private medical treatment as part of his case. I would draw your attention to S.2 of the Law Reform (Personal Injuries) Act 1948. The Pursuer is able to access services quicker than he would via the NHS and at a time which is convenient to him.

Due to the nature of his employment, and the limited amount of time he spends in the UK, he cannot always guarantee when he is going to be in the UK and that he would be able to attend appointments

provided. As I am sure you will be aware, the courts have explored this issue previously and have been willing to award pursuers in similar circumstances the costs of private treatment.

At this stage, I am instructed to make an offer in the sum of £25,000 to bring the case to a conclusion. I look forward to hearing from you when you have had the opportunity to obtain your client's instructions. I would be grateful if you would revert regarding your availability for the PTM. I note the Minute is due to be lodged by 28th July 2020."

- f. 14:20 – defenders' agents email pursuer's agents as follows:

"Thank you for your e-mail and additional medical reports. From your e-mail the opinions of your experts appear to change the picture significantly. I will need to discuss with my clients but variation of the timetable may be required."

- g. 29 June - defenders' agents email pursuer's agents as follows:

"Please find attached Minute of Acceptance of Pursuer's offer to be lodged in process. The pursuer's agent's generic e-mail address has been copied in to this e-mail."

the enclosed minute being in the following terms:

"RICHARDSON for the Defender accepts to pay the Pursuer the sum of SIXTEEN THOUSAND POUNDS (£16,000) STERLING, inclusive of interest to date, and net of any liability the Defenders might have in terms of Section 6 of the Social Security (Recovery of Benefits) Act 1997; together with the taxed expenses of process, in full satisfaction of the craves of the Initial Writ as offered by the Pursuer in their Minute of Offer no. of process."

- h. 2 July – defenders' agents lodge opposed motion in the following terms:

"The Defender moves the court under Rule 27A.6(4) to grant decree in terms of the Pursuer's Minute of Offer No. of process and the Defender's Minute of Acceptance No. of process."

Defenders' submissions

[3] The proposition underlying the defenders' motion for decree was that a pursuer's offer made in terms of Ordinary Cause Rules ("OCR") Chapter 27A could not be withdrawn

impliedly even by a material change of circumstances. This was a question of statutory interpretation.

[4] The common law applied unless otherwise stated. According to ordinary contractual principles, an offer falls when it is rejected or a counter offer is made: *Tenbey v Stolt Comex Seway Limited* 2001 S.C. 280.

[5] But the offer in this case was a formal one made in terms of the OCR. The types of action in which pursuers' offers could be made was restricted. At common law, it remained open for acceptance unless rejected or a counter-offer was made.

[6] Pursuers' offers were different from tenders. A tender could be made at any time up until judgment. In contrast, a pursuer's offer could be made only up until the time the court made *avizandum* or the jury gave its verdict.

[7] There was a specific rule which dealt with withdrawal of pursuers' offers.

[8] All of this amounted to a comprehensive code. The draughtsman could have included in the rules something about implied withdrawal where there was a change of circumstances, but did not do so.

[9] The present rules and the interpretation suggested by the defenders provided certainty.

[10] The only competent way to withdraw a pursuer's offer was by minute. That had not been done in the present case and accordingly the offer remained open for acceptance and the defenders' motion for decree should be granted.

[11] If the court was not with the defenders on this point, the date for the pre-trial meeting should be varied to 14 August.

[12] The question of expenses should be reserved.

Submissions for pursuer

[13] There was a presumption against alteration of the common law unless there was an express statement to that effect.

[14] OCR 27A.3(3) did not use the word “only” or “must”. Accordingly, it was not mandatory and could be contrasted with the use of the word “is” in OCR 27A.3 (1).

Likewise, OCR 27A.6 (1) uses the word “may”.

[15] The Explanatory Notes to the Act of Sederunt which brought in Chapter 27A is of assistance in relation to what is mandatory and what is not. Withdrawal of offers is not discussed but it was clear that rules did not say that a minute “must” be lodged.

[16] It was also instructive to look at Chapter 8 of the Scottish Civil Courts Review which set out the proposals leading to the introduction of pursuers’ offers. The purpose was said to have been to produce symmetry and equality of arms. It was aimed at dealing with a perceived unfairness between pursuers and defenders and was intended to be an equivalent to a tender.

[17] The defenders said that there was no parity between pursuers’ offers and tenders but that did not reflect the intention behind the introduction of the former.

[18] It was appropriate also to consider the consequences of the defenders’ argument. It was clear in this case that there was no consensus and that the parties both understood that the offer previously made was no longer being relied upon. The email from the pursuer’s agent indicating that the tender was to be withdrawn had been acknowledged by the defenders’ agent who had then reported the matter to his client.

[19] There was no risk of the floodgates being opened to all sorts of disputes about pursuers’ offers and withdrawal of them. In any case where such an issue arose application

of common law principles would determine whether there had been an explicit or implied withdrawal of the offer.

[20] Cases like *Scobie v Dumfries and Galloway Regional Council* 1991 SLT (Sh Ct) 33 were distinguishable. *Scobie* concerned interpretation of the Debtors (Scotland) Act 1987 which had contained an entirely new system in relation to arrestment. The old principles were swept away.

[21] A change in the common law required a clear and explicit intention to do so. That was absent in the present case.

[22] If the court was against the pursuer, the fall-back position was that the failure to lodge a minute was an excusable oversight or mistake: OCR 2.1. It was clear that there had been a significant change of circumstances and if the defenders' motion were to succeed, the pursuer would be significantly prejudiced.

[23] The pursuer did not oppose the defenders' alternative motion to vary the date for the pre-trial meeting.

Reply for defenders

[24] The rule introducing pursuers' offers amounted to a departure from the common law. The defenders' interpretation should be preferred.

[25] If the court found that there had been no withdrawal and therefore a legitimate acceptance of the pursuers' offer, there would be nothing to relieve the pursuer's agent from and any such motion should be refused.

[26] The wording of the correspondence passing between parties at the relevant time was carefully chosen. No concession was ever made on behalf of the defenders.

Grounds of decision

The rules

[27] The parts of the applicable OCR relevant to this case are in the following terms:

“Pursuers’ offers

27A.2. (1) A pursuer’s offer may be made in any cause where the initial writ includes a crave for an order for payment of a sum or sums of money, other than an order—

- (a) which the sheriff may not make without evidence; or
- (b) the making of which is dependent on the making of another order which the sheriff may not make without evidence.

(2) This Chapter has no effect as regards any other form of offer to settle.

Making of offer

27A.3. (1) A pursuer’s offer is made by lodging in process an offer in the terms specified in rule 27A.4.

(2) A pursuer’s offer may be made at any time before—

- (a) the sheriff makes avizandum or, if the sheriff does not make avizandum, gives judgment; or
- (b) in a jury trial, the jury retires to consider the verdict.

(3) A pursuer’s offer may be withdrawn at any time before it is accepted by lodging in process a minute of withdrawal...

Acceptance of offers

27A.6. (1) A pursuer’s offer may be accepted any time before—

- (a) the offer is withdrawn;
- (b) the sheriff makes avizandum or, if the sheriff does not make avizandum, gives judgment; or
- (c) in the case of a jury trial, the jury retires to consider its verdict.

- (2) A pursuer's offer is accepted by lodging in process an acceptance of the offer in the form of a minute of acceptance...".

[28] The foregoing rule also has to be considered in the light of the requirements of OCR 11.6 which, read short, requires any party lodging a step of process to intimate it to every other party. In the present case, no minute of withdrawal has ever been lodged or intimated. So leaving aside for the moment any issues of interpretation, it is clear that there is no withdrawal of the pursuer's offer which complied with OCR 27A.3 (3).

Does Ch. 27A create a complete code which changes the pre-existing common law?

[29] I agree with Mr Swanney's submission that the use of the word "may" in OCR 27A.3 (3) is not the language of mandate. For my part, I think that the word "may" is concerned with timing ("A pursuer's offer may be withdrawn at any time before it is accepted...") rather than mechanism ("... by lodging in process a minute of withdrawal"), but whichever approach may be correct, the mechanism is not subject to qualification by words or phrases such as "must" or "can only".

[30] There is a presumption against the common law being changed by statute: *Leach v R* [1912] AC 305 per Lord Atkinson at 311. That principle applies with equal force to changes to established rules of practice and procedure: *Kinnear and Brymer v Whyte* (1868) 6 M 804 per Lord Ardmillan at 807.

[31] It is true that Ch 27A introduced something that did not exist before. But pursuers' offers were considered and recommended in the context of methods to facilitate settlement and redressing the "balance" as between pursuers and defender.¹ The innovation brought

¹ The proposal was for judicial tenders to be replaced by a rule regulating the making of formal offers by any party: Scottish Civil Courts Review, Ch. 18, para. 86.

about by their introduction was to create by rule of court a “judicial offer”² system for pursuers which already existed for defenders by reason of established practice and procedure.

[32] The characteristics of pursuers’ offers and the way in which they are designed to operate is immediately recognisable as closely akin to tenders.

[33] The law and practice of the court was supplemented by introducing an additional mechanism, but there was no “sweeping away” of an existing regime and replacement of it with something entirely new as in cases like *Scobie*.

[34] Accordingly, I have concluded that apart from the changes expressly wrought by the express terms of Ch 27, the common law is not amended and remains applicable.

[35] Nevertheless, there remains a problem. Given that pursuers’ offers are a (relatively) new phenomenon, what is the law in relation to them? While there is no pre-existing body of law relating to pursuers’ offers *per se*, there is such a body of law applicable to judicial offers, of which tenders and pursuers’ offers are different types. The OCR stated above are derived from and substantially mirror the pre-existing rules applicable to tenders: *Sheriff Court Practice*, MacPhail, 3rd ed. paras. 14.46 and 14.47. On that basis, I consider that it is open to the court to take account of the law and practice as it applies to tenders in deciding the present case.

[36] However, as it has been doubted whether there is a body of law and practice applicable to the system of judicial tenders, distinct from the ordinary law of contract,³ I consider it helpful to look at both separately.

² Made after the action is raised by a separate minute which must be lodged in process so that there is a record of when the offer was made and the terms of it: *Macrae v Edinburgh Tramways Company* (1885) 13 R 265.

³ *Tenbey*, paragraph 8.

Law and practice relating to judicial offers

[37] If I am correct in saying that reference to the common law is legitimate and that there is a body of law and practice particular to judicial tenders, it appears to be beyond doubt that a tender may lapse and therefore be treated as no longer open for acceptance by reason of any important change of circumstances, without any formal withdrawal of it being made: MacPhail, para. 14.48.

[38] In *Macrae v Edinburgh Tramways Company* (1885) 13 R 265, the defenders tendered £565 in May. In June, the parties referred the cause to a judicial referee who in due course issued a note of his proposed award, in which he found the defenders were due to the pursuer the sum of £467. In October, the pursuer lodged a note in process, accepting the tender made in May. Decree was granted in terms of the tender and acceptance and the defenders reclaimed. The Inner House reversed that decision, the Lord President saying:

“I do not think the pursuer was entitled to accept that tender at the time he did. It may, in my opinion, as a general rule in the law of offer and acceptance, be stated that, when an offer is made without a limit of time being stated within which it must be accepted, it may become inoperative by reason of any important change of circumstances, without any formal withdrawal of the offer being made. It may have been made in such circumstances as to be a reasonable offer as between both parties, but after it is made circumstances may so alter as to make it utterly unsuitable and absurd, and I do not suppose that it can be disputed that when the change of circumstances is so important the offer would not remain binding.”

[39] In *Bright v Low* 1940 SC 280, the pursuer sought damages and in November 1939 a minute of tender for £400 was lodged in settlement of the claim. The tender was not accepted and after proof, £100 of damages was awarded. The pursuer reclaimed in January 1940 and shortly thereafter a minute of acceptance of the tender of £400 made in November 1939 was lodged.

[40] Following *Macrae*, the Second Division of the Inner House held that the judgment of a Court of first instance involved so material a change of circumstances that a tender made

before the judgment could not be regarded as operative thereafter and that accordingly the pursuer's acceptance in the present case was ineffectual.

[41] In *Sommerville v National Coal Board* 1963 SC 66, a retired colliery worker brought an action of damages for personal injuries against his former employers. A material element in his claim was loss of future earnings. The employers lodged a minute of tender. The worker died before acceptance of this tender and left a will appointing his widow executrix. The widow, as executrix, lodged a minute of acceptance of the tender. A motion for, *inter alia*, decree in terms of the minutes of tender and acceptance was enrolled, but was not moved, as the widow's confirmation as executrix had not been lodged in process and, before it was possible to move the motion, the employers lodged a minute withdrawing the tender. The executrix thereafter moved for decree for the sum of damages tendered. On appeal, it was held that since it extinguished any further loss of earnings which was a material element in his claim, the death of the worker brought about a material change of circumstances, in consequence of which the tender no longer remained operative. The Lord President (Clyde) specifically referencing the decisions in *Macrae and Bright* and saying, at p. 670

“... the principle applied and stated in them, in my opinion, covers the present case. It follows therefore that, consequent upon the death of (the initial pursuer), such a change in the situation has taken place that the offer contained in the tender is no longer open for acceptance.”

[42] In *Bond v British Railways Board* 1972 SC 219, the defenders lodged a tender for £450 before the proof, which the pursuer refused. The Lord Ordinary having awarded him £200, the pursuer reclaimed, and the award was increased to £400. It was conceded that, so far as the Outer House expenses are concerned, the defenders were entitled to expenses as from the date of the tender.

[43] In a question as to the expenses in the Inner House, in which it was common ground that the tender fell automatically when the Lord Ordinary made his award, the court, having regard to the fact that the tender had fallen and that no new one had been lodged, and also to the pursuer's conduct in refusing the tender and to the divided success in the reclaiming motion, found no expenses due to or by either party in the Inner House.⁴

[44] In *Leask v City of Glasgow District Council* 1993 S.L.T. 674, the pursuer sought, once the proof in his claim for damages was under way, to lodge a minute of acceptance of a tender lodged by the defenders and to obtain decree in respect thereof. The defenders' opposed that motion and the court held that a tender could be withdrawn effectively by a formal minute to that effect or by a material change in circumstances and that the latter was satisfied because (a) it had been made subject to a time limit which had expired; (b) the solicitors for the pursuer had informed the defenders' solicitors that the tender was inadequate; (c) before the commencement of the proof the pursuer's counsel had been informed that no offer was being made; and (d) the tender had been withdrawn from process. These factors combined to make plain to the understanding of both sides that there was now no tender capable of acceptance.

⁴ In this case, it was the pursuer (not the defenders) who argued, under reference to *Bright*, that the tender became inoperative on a material change of circumstances (the issuing of the Lord Ordinary's judgment). The defenders argued that it was necessary to distinguish between the question of the life of the tender and the question of the effect on expenses of the historical fact that the tender had been made and refused. In *Bright* the court was concerned with whether the tender remained open for acceptance. ("On the Lord Ordinary giving judgment, the tender automatically fell and ceased to be a live tender, inasmuch as the judgment of the Lord Ordinary involved so material a change of circumstances that the tender could no longer be regarded as an offer which it was open to the pursuer to accept." Lord Justice Clerk (Aitchison), p. 281. [Emphasis added]) See also *Macrae*, above. I respectfully suggest, as the defenders argued, that that is different, from whether the tender should be treated as having no effect in relation to expenses where it is refused.

[45] So the law here is clear: where there is a material change of circumstances known to both parties, then a tender will be treated as having lapsed and no longer be open for acceptance.

[46] In the present case, according to the undisputed timeline, on 23 June at 13:12 the pursuer's agents emailed the court purporting to withdraw the offer of 6 April 2020. That was intimated to the defenders' agents.

[47] At 13:24, the defenders' agents responded seeking an update.

[48] At 14:15 the pursuers' agents emailed the defenders' agents *inter alia*, attaching a second inventory of productions; indicating that a list of witnesses was to follow; intimating that in light of the medical evidence, the pursuer was to undergo further testing to determine the extent of his ongoing issues and to guide his pain management; and that the expert's opinion was that the pursuer's ongoing pain was likely to be permanent would require treatment for pain management; putting forward a revised proposal for settlement (an offer to accept £25,000 - expenses were not mentioned); and inviting the defenders' agents to seek their clients' instructions.

[49] The question then is whether there was a material change of circumstances which meant that the pursuer's formal offer, previously made, had lapsed and was no longer open for acceptance.

[50] In my view, that is what can be taken from the pursuer's agents two emails. They had purported to withdraw the offer. That was technically deficient and thus not valid as a withdrawal *per se*, but is indicative of their state of mind (that the offer was no longer being relied upon), which was then emphasised by the second email which included not only information which had a bearing on the valuation of various elements of it, but included an expressly stated revised offer to settle for a larger sum.

[51] Accordingly, following *Macrae*, I hold that there was a material change in circumstances, known to the defenders' agents, which meant that the pursuer's offer is to be treated as having lapsed and no longer open for acceptance. It follows that the defenders motion for decree falls to be refused.

The law of contract

[52] If I am wrong in the foregoing analysis, what would be the position under the law applicable to contract?

[53] Under reference to *Tenbey*, Mr Richardson submitted that according to ordinary contractual principles, an offer falls when it is rejected or a counter offer is made.

[54] In that case, in October 2000, the pursuer's agents intimated to the defenders' agents a "minute"⁵ offering to settle the action in return for a payment of the sum of £15,000 sterling, inclusive of interest and subject to certain stated conditions. Shortly thereafter, the minute was lodged in process. The defenders' solicitors wrote to the pursuer's solicitors saying that their clients were not prepared to offer the pursuer £15,000, but making a counter-proposal to settle at £12,000 plus expenses. The defenders then lodged a minute of tender in the usual form containing an offer to settle at £12,000.

[55] In November 2000, in the course of correspondence between the pursuers' agents and the defenders' agents about certain other matters, the former observed, in connection with the possible settlement of the action that: "It might be that something over £20,000 would be of interest but we cannot even say that at the present moment".

⁵ This was done at a time when there were no court rules regulating the use of such.

[56] In January 2001, a “minute of acceptance” for the defenders of minute of offer to settle for the pursuer was lodged in process, by which the defenders purported to accept the offer by the pursuer to compromise the present action by payment by the defenders to the pursuer of £15,000, inclusive of interest to 9 October 2000, on the conditions set forth in that offer.

[57] Very shortly thereafter, a “minute of withdrawal of minute for the pursuer”, was lodged, purporting to withdraw the minute and hence the offer to settle for £15,000.

[58] The defenders enrolled a motion for decree in terms of the pursuer's minute and the acceptance thereof. The pursuer enrolled a motion to allow the minute of withdrawal of the pursuer's minute of offer to settle.

[59] The defenders accepted that, under the ordinary law of contract, if an offer was refused, it fell but argued that the ordinary law of contract did not apply to judicial tenders, which were the subject of custom and usage peculiar to them.

[60] A tender remained open for acceptance at any time until decree was pronounced in the action concerned, unless it had been expressly or impliedly withdrawn. Implied withdrawal might occur in consequence of actions by the offeror, or a material change of circumstances, or if it had been made subject to a time limit which had expired. Although the present motion did not concern a tender, but a pursuer's offer to settle, the custom and usage applicable to tenders fell to be applied to a pursuer's offer to settle.

[61] Although the attempt to introduce pursuers' offers in the Rules of Court had turned out to be ill-fated (the then Rule of Court 34A.6(2) having been held to be *ultra vires*), minutes containing pursuers' offers to settle were not incompetent.⁶

⁶ *Cameron v Kvaerner Govan Ltd* 1999 SLT 638

[62] A tender could be withdrawn at any time prior to acceptance, but might also become inoperative by reason of any important change of circumstances, without any formal withdrawal of the tender having been made but in the present case there had been no important change of circumstances which would have rendered the pursuer's minute of offer to settle inoperative. The letter of the defenders' solicitors containing the statement that the defenders were not prepared to offer £15,000 to the pursuer was not sufficient on its own to constitute an important change of circumstances.

[63] The step of lodging a document in process was determinative, as opposed to the intimation of that step: *McMillan v Meiklham* 1934 S.L.T. 357. The defenders' minute of acceptance of the pursuer's offer had been lodged in process prior to the lodging of the pursuer's minute of withdrawal.

[64] Counsel for the pursuer submitted that the analogy sought to be drawn between tenders and pursuers' offers of the kind made here was flawed. The situation in the present case was to be resolved by the application of the ordinary law of contract and in any event, there had been a material change of circumstances before the defenders had purported to accept the pursuer's offer. The result was that the offer had not been available for acceptance when the defenders had purported to accept it.

[65] Rules in relation to judicial tenders and the acceptance thereof, which derived from custom and practice might differ from the ordinary law of contract, were inapplicable to a pursuer's offer of the kind involved in this case, which required to be treated according to the ordinary law of contract.

[66] Following repeal in 1996 of the Act of Sederunt which had brought in pursuers' offers to settle, such an offer had no standing conferred by the rules of court. Although they had continued to be used to a limited extent, if a pursuer's offer were to be made and

accepted, the resulting situation was to be considered according to the ordinary law of contract.

[67] The pursuer's offer in this case had been rejected by the letter of 10 October 2000 which contained a counter proposal. The sum offered had been formally tendered. The defenders' repudiation of the pursuer's offer to settle had been made clear in further correspondence.

[68] So when the defenders had purported to accept the pursuer's offer to settle, that offer had not been available for acceptance.

[69] *Lawrence v Knight* 1972 SC 26 showed the correct approach which had to be taken to an offer to settle, which was not a tender. In that case, the court had held that an extrajudicial offer, made prior to the calling of a summons, had fallen because (1) the pursuer by calling the summons had impliedly intimated to the defender that it was rejected and by continuing with the various steps in the action had continued to intimate to the defender that it was unaccepted; (2) the pursuer had not accepted within a reasonable time; and (3) it would be unjust, as a matter of fair dealing, to hold that the defender was bound by it in the state of affairs existing at the date of the purported acceptance, which had been shortly before a proof in the action concerned. That was consistent with the opinion expressed in *Gloag, Contract* at p 37, to the effect that an offer falls if it is refused.

[70] The offer to settle had not been available for acceptance when the defenders had purported to do so.

[71] Even if the pursuer's offer to settle was to be equated to a tender, because there had been a material change of circumstances, the offer had not been available for acceptance when the defenders had purported to accept it. By the time of the defenders' purported

acceptance of the pursuer's offer, there could have been no clear understanding on the part of both parties that there existed an offer capable of acceptance.

[72] In reply, the defenders argued that the pursuer's offer to settle and its acceptance amounted to a judicial settlement as the pursuer's offer had been lodged in process, which step made the document a public document cognisable by the court. In any event, it was in the interests of justice that the same rules should apply to pursuers' offers as applied to judicial tenders. While it was true that the correspondence which had passed between the parties indicated that further negotiations had taken place following upon the making of the pursuer's offer to settle, the situation was no different from that which often occurred following upon the making of a judicial tender, which was then subsequently accepted.

[73] Lord Osborne held that a pursuer's offer⁷ cannot properly be equiparated with a tender, as recognised in Scots law and practice. Accordingly, any law and practice which may be specifically applicable to the system of judicial tenders, distinct from the ordinary law of contract, cannot properly be regarded as applying to a pursuer's offer.

[74] Thus, a pursuer's offer, if accepted, could result in a binding contract to settle a litigation on particular terms and is to be treated simply as an offer to which the ordinary law of contract would apply. It was doubted whether there was a body of law and practice applicable to the system of judicial tenders, distinct from the ordinary law of contract, but it was not necessary to decide the question.

[75] There was no doubt about the law as regards the effect of the refusal of an offer: Gloag, *Contract* at p 37. *Lawrence* was an example of the operation of that principle, an extra judicial offer of settlement having been impliedly been rejected by the pursuer.

⁷ One made at common law and not under the rules of court, unlike the present case.

[76] It was clear that the pursuer's offer to settle at £15,000 on the conditions there described, which the defenders have purported to accept, was refused on their behalf by the letter of 10 October 2000, which contained a clear refusal of the pursuer's offer and a counter-offer. The pursuer's solicitors later made it quite clear that they regarded the original pursuer's offer as dead when they said: "It might be that something over £20,000 might be of interest but we cannot even say that at the present moment".

[77] So when the defenders purported to accept the pursuer's offer by lodging their minute of acceptance, that offer was no longer available for acceptance.

[78] If it was wrong not to equiparate the pursuer's offer in this case with a formal judicial tender, there was no doubt about the legal principles which must be applied which could be found in *Macrae, Bright, Sommerville and Leask*.

[79] Prior to the purported acceptance, there had been a material change in circumstances which rendered the pursuer's offer no longer available for acceptance. Accordingly, on this basis also, the defenders' motion was refused.

[80] Returning to the present case, Mr Richardson accepted that the common law applied unless otherwise stated; according to ordinary contractual principles, an offer falls when it is rejected or a counter offer is made: *Tenbey*; and that it remained open for acceptance unless rejected or a counter-offer was made and that there had been no rejection by the defenders' of the pursuer's offer.

[81] All of that is true - but it is not the whole story. The court in *Tenbey* was considering the effect of a refusal of an offer: it did not say that a refusal (or counter offer) were the only circumstances in which an offer fell.

[82] The position is that in Scots law, an offer may lapse and thus no longer be open for acceptance on the occurrence of certain events, including material change of circumstances: *The Law of Contract in Scotland*, McBryde, 3rd edition, para. 6.36.

[83] Thus, it appears that where there is room for the application of the common law, as I have held there is in this case, the principles applicable to what might be called “contractual situations” is the same, irrespective of the mechanism.

[84] Two points flow from that. First, it would be odd if there was to be a special (or more restricted) set of rules applicable to pursuer’s offers which does not apply elsewhere across the spectrum of contracts, including judicial tenders. Second, it highlights the point that if the applicable contractual principles were to be excluded, one would expect to see that stated explicitly.

[85] In the present case, I have already noted the circumstances prevailing prior to the purported acceptance of the pursuer’s offer and given my views thereon. There had been a material change in circumstances and the offer was no longer open for acceptance.

Disposal

[86] I shall refuse the defenders’ motion for decree and vary the timetable by changing the date for the holding of the pre-trial meeting to 12 August 2020.

[87] All questions of expenses are reserved.