

# Offers, Part 36 and fixed costs

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# It really shouldn't be so difficult

- **Is the case a fixed costs case?**

- CPR 45.10 – the 'rump' RTAs;

*"Subject to CPR 45.13...the only costs which are to be allowed are...FRC."*

- CPR 45.17 – PAP Claims;

*"The only costs allowed are...FRC."*

- CPR 45.29B – Ex Protocol Claims post July 2013;

*"Subject to rules... and for as long as the case is not allocated to the multi track...the only costs allowed are ...FRC."*

# So far, so simple

- **Express or implied exceptions**

- Multi track allocation for ex Protocol claims – CPR 45.29B;
- Exceptional circumstances – CPR 45.14 & CPR 45.29J?
- Claimants bettering own Part 36 offer at trial – *Broadhurst v Tan* [2016] EWCA Civ 94;

CPR 36.17(4) trumps CPR 37.21;

But not (usually) for late acceptance cases – *Hislop v Perde* [2018] EWCA Civ 1726

# Broadhurst – pulling at the threads

*“The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately. This conceptual difference was accepted in the Solomon case...”*

- Not a problem in Broadhurst. The Court was not, then, construing an agreement or order for ‘costs to be assessed’ (the relevant rule referred to ‘costs on the indemnity basis’);
- Opens up the argument that any reference to ‘assessment’ is incompatible with fixed costs.

# So what?

- If the rules specify when costs are fixed and when they are not, why does it matter?
- 'Contracting Out';
  - *Solomon v Cromwell* [2011] EWCA Civ 1584;

Parties are unable to recover more by way of costs than FCT "...subject to any agreement between the parties to the contrary";
  - Approved by Court of Appeal in context of new FRC in *Adelekun v Ho* [2019] EWCA Civ 1988 (and then in *Doyle v M & D Foundations Building Services Ltd* [2022] EWCA Civ 927);
  - Moot point as to why so readily approved. Why should parties be able to contract out of a prescriptive costs regime?

# The Part 36 point

- Part 36 provides for fixed costs where appropriate – see CPR 36.13 and 36.20;
  - 36.20 applies the fixed costs, subject only to limited exceptions – see Broadhurst and Hislop;
  - So – if Part 36 is used, the answer should be obvious and binary – FRC either will or will not apply to any given period;
- However, this does not resolve two issues;
  - Non Part 36 settlements.
  - The argument over whether an apparent Part 36 offer is in fact a Part 36 offer.

# Is it a Part 36 offer at all?

- Not the main focus of the talk;
- The general principle of validation;

*“Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36.”* Stanley Burnton LJ, *C v D* [2011] EWCA Civ 646

- However, some terms are incompatible with Part 36. For example a term as to costs which provides for costs consequences other than those Part 36 provides for – *Mitchell v James* [2002] EWCA Civ 997, affirmed in *Ho* [2019];

# Adelekun v Ho [2019] EWCA Civ 1988

- Ex protocol RTA Claim;
- 'Part 36' offer;

*"If the offer is accepted within 21 days, our client will pay your legal costs in accordance with Part 36 Rule 13...such costs to be subject to detailed assessment if not agreed."*

- Usual principles of construction apply;
- The principle of validation - see Solomon - applied;
- The reference to CPR 36.13 and not 36.20 was not conclusive, since if Part 36 applied, only FRC would be recoverable;
- The reference to 'detailed assessment' was 'far from ideal' - but outweighed by other indications that the offer was not intended to disapply FRC.

# Doyle v M & D [2022] EWCA Civ 927?

- Ex Protocol EL claim;
- Part 36 offer by D in conventional terms 3 days before trial;
- Response from C;
  - *"Our client is not accepting the offer..."*
  - Tomlin order providing for settlement in same sum, but with D to pay C's costs *"...to be subject to detailed assessment if not agreed"*
- Issue - was C intending to make a Calderbank, taking the case outside FRC, or was C just seeking the formality of a Tomlin order due to impending trial;
- Answer - the former.

# Doyle v Adelekun – the key differences

- Both referred to 'detailed assessment';
  - Detailed assessment is a technical term meaning assessment on the standard (or indemnity) basis (Doyle (44));
  - But that clear meaning can be overridden if the circumstances indicate that was not intended or was a mistake;
  - In particular, if the offer is clearly intended to be a Part 36 offer, then a reference to detailed assessment alone will probably not override the fact that Part 36 leads to FRC;
  - But if the offer is outside Part 36, a reference to detailed assessment will be a powerful and probably decisive indicator that FRC do not apply.

# It keeps happening - make it stop!

- *Soares v Wilson* (HHJ Luba, on appeal, 27/5/22)
- Ex portal RTA claim - allocated to the Multi Track;
  - D made Calderbank offer including FRC. C accepted, but asked for a 'notice of Part 36 offer' (?)
  - D responded with a Part 36 offer, referring to paying 'FRC in accordance with CPR 36.13 to be subject to detailed assessment if not agreed' (???)
  - C accepted.
- Issue - FRC or not for post multi track allocation period (CPR 45.29B)?
- Decision - on a proper construction, the accepted offer was the Calderbank offer, which offered FRC only - the subsequent correspondence was merely giving effect to the agreed settlement.

# What lessons can be learnt?

- In an FRC case, assume FRC apply - that's what the rules say;
- If - on either side - you don't want FRC to apply;
  - Don't use Part 36 - don't make or accept Part 36 offers;
    - Even if qualified with references to detailed assessment;
    - Even if you make a Part 36 offer which is clearly expressed to depart from 36.20, the net effect if successful will probably be that it is not a Part 36 offer.
  - If making non Part 36 offers, make explicitly clear what costs terms apply - not just a reference to '*detailed assessment*', but expressly saying '*fixed costs will not apply*'.
- If you do want FRC to apply - say so. And don't mention detailed assessment!

# Thank You

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