

Part 36 and costs

the gift that keeps on giving

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Why does this matter?

- **CPR 36.17** – get one you get the lot - **Telefonica UK Ltd v Office of Communications** [2020] EWCA Civ 1374
 - Enhanced interest
 - Indemnity costs
 - Enhanced interest on those costs
 - An additional amount up to £75k (so long as there has not been a previous order under CPR 36.17(4)(d) – so if there was an award in the substantive proceedings can't get another one in the detailed assessment)
 - “unless the court considers it unjust to do so”

I've said it before



Get it right the first time



There's even a form - N242A

- Most reported cases about Part 36 concern whether the Part 36 offer was valid
- Most challenges to validity are because the person making the offer has tried to be clever and modify the form (or knows nothing about the form but has a vague understanding of the Rule!)

Part 36 vs Calderbank

- **McKeown v Langer** [2021] EWCA Civ 1792 (26 November 2021) – a Calderbank offer may be admissible at a time when a Part 36 offer will not be
- It is a matter for the Court's discretion, under CPR 44.2(4)(c), whether a 'without prejudice save as to costs' offer is admissible and to be taken into account when costs determined (and if so how).
- In **Coward v Phaestos Ltd** [2014] EWCA Civ 1256, the Court of Appeal rejected a submission that as a matter of principle the effect of a Calderbank offer is to be assessed by analogy with the terms of CPR 36.17(2). The Court of Appeal explained that CPR 36 and CPR 44 are separate regimes with separate purposes

When a Calderbank may be better

- Time bomb offers – less than 21 days with Part 36 offer along side for higher/lower amount
- When running fundamental dishonesty arguments - **Summers v Fairclough Homes** [2012] UKSC 26
- Greater flexibility in terms offered
- Costs inclusive or bespoke terms re costs
- where you're offering something more than money

More than one offer

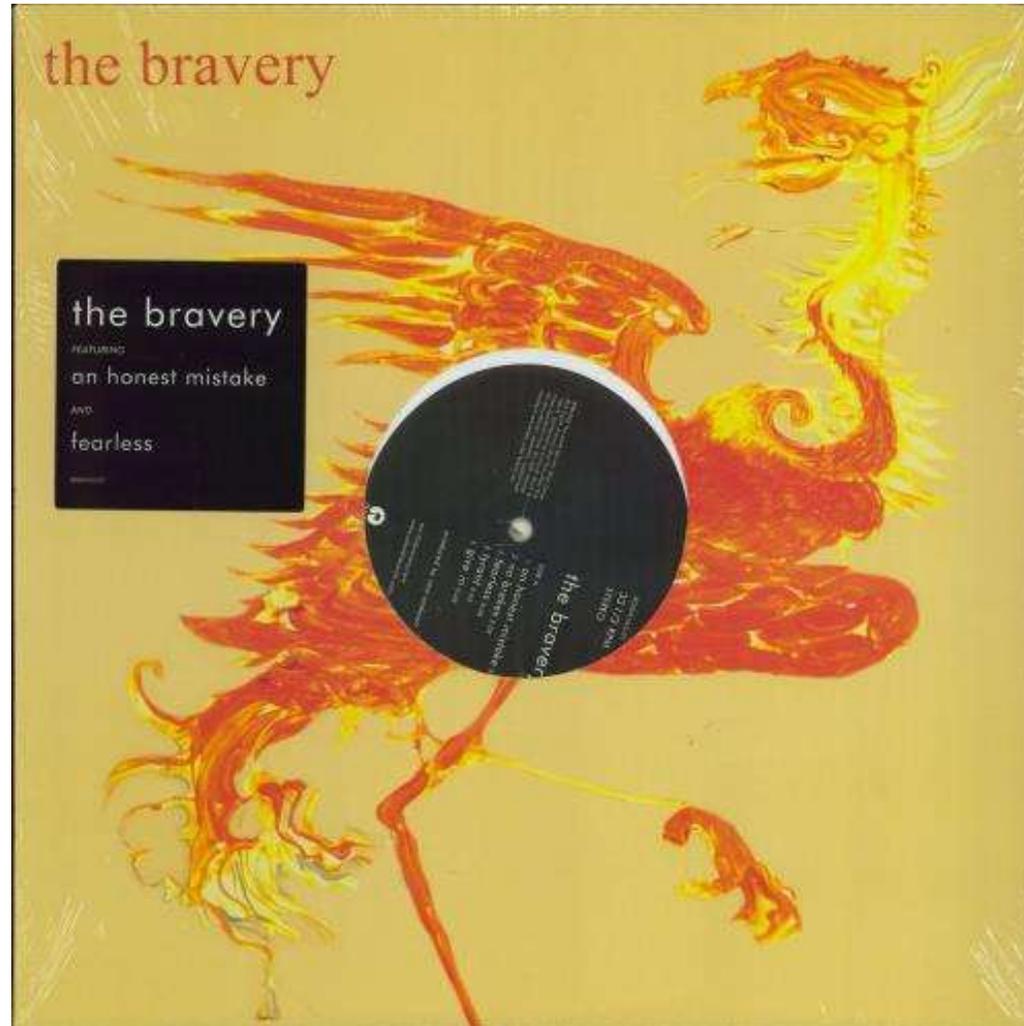
- A subsequent Part 36 offer does not supersede an earlier offer
- Consider providing for an offer not to be capable of being accepted without written agreement after a certain point (obviously must be later than the relevant period)

Late acceptance of offers

- **Pallett v MGN Ltd** [2021] EWHC 73 (Ch)
- A defendant which accepted a claimant's Part 36 offer outside the specified period for acceptance was entitled to invite the court to consider its liability for the costs under CPR r.36.13(4), in contrast to the position that would have applied had it accepted within the period, where it would have been bound to pay the costs pursuant to r.36.13(5).
- Important decision? – may be better off accepting an offer outside the 21 days – but **Briggs v CEF Holdings Ltd** [2017] EWCA 2363

Call that an offer?

- **London Trocadero (2015) LLP v Picturehouse Cinemas Ltd & Ors** [2021] EWHC 3103 (Ch) (19 November 2021)
- Several issues re Part 36 – whether service valid
- The offer to accept 99% of the claimed sum was a ‘genuine attempt to settle’, a valid offer and accordingly, the offeror was entitled to indemnity costs.



Mistakes

- **O'Grady v B15 Group Limited** [2022] EWHC 67 (QB) - CPR Part 36 was "entirely compatible with a procedural code that is intended to have clear and binding effect but not at the expense of obvious injustice [...] the Overriding Objective still has application". Clear & obvious mistake.
- But DJs can be tougher!
- **SPF v Sykes Seafoods Limited and Subsidiary Co** [2020] (Liverpool County Court, 2020, District Judge Metcalf, unreported)
- **Atiba-Davies v William Hill Organisation Limited** (Clerkenwell and Shoreditch County Court, 2019, Deputy District Judge Smith, unreported)

Part 36 in detailed assessment proceedings

- CPR 47.20(4) The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications ...
- Obvious tactical advantages
- Once a Part 36 offer is accepted the assessment is stayed and the agreed sum is payable within 14 days. If payment is not made, the receiving party may apply for a final costs certificate for the unpaid sum (CPR 47.20 (4)(d)).
- See SCCO Guide

Part 36 and the costs of the costs

- **Best v Luton and Dunstable Hospital NHS Foundation Trust [2021]** EWHC B2 (Costs), - Master Leonard held that a Claimant is unable to obtain the benefits of a Part 36 offer in relation to the costs of detailed assessment. He concluded that the costs of detailed assessment proceedings do not, for the purposes of CPR 36.17(4), fall within “any issue that arises in the claim”, therefore the Claimant could not claim any uplift.
- Followed his own decision in **Bourne v West Middlesex University Hospital NHS Trust** - because CPR 47.20(7) “does not provide that the determination of the costs of detailed assessment proceedings is itself to be regarded as an independent claim.”

Part 36 offers must include interest

- **King v City of London Corp**[2019] EWCA Civ 2266
- NB concerned a Part 36 offer made in detailed assessment proceedings – offer excluded interest
- a Part 36 offer in detailed assessment proceedings could not exclude interest which therefore included Judgments Act interest
- PD47 Para 19 could not control the interpretation of Part 36
- In **Calonne Construction Ltd v Dawnus Southern Ltd** [2019] EWCA Civ 754 the Court of Appeal held that including a term as to interest after the end of the relevant period did not affect the validity of a Part 36 offer

For more reading on the subject ...

“Part 36 offers in Part 47 assessments: all clear now so no reason still to be confused” ... and on that note ...



Thank you!

Any questions?

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