Neutral Citation Number: [2023] EWHC 2075 (Ch)

CASE NUMBER PT-2021-000834

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 11 August 2023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
B E T W E E N :

(1) MR ROBERT COLICCI
(2) MS ROSANNA MARIA COLICCI
(3) MS JOSEPHINE COLICCI

Claimants

- and -

(1) MS NORA MIKHAILOVNA GRINBERG
as executrix of the estate of ERNESTO COLICCI deceased
(2) ECSI LIMITED

Defendants

Before Recorder Mark Anderson KC acting as a judge of the High Court pursuant to section 9(1) Senior Courts Act 1981

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Penelope Reed KC (instructed by Charles Russell Speechlys LLP) for the claimants
Angeline Welsh KC (instructed by iLaw Solicitors Limited) for the first defendant

Hearing dates: 13, 14, 15 and 16 March, 18 May 2023

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JUDGMENT ON COSTS

Mark Anderson KC :

1. I handed down judgment on 18 May 2023, following a trial in March which lasted 4 days. This is my reserved judgment on costs after further submissions at a consequentials hearing on 19 July. I will use the terminology set out in paragraphs 3 to 6 the main judgment.

2. The claimants made an offer of settlement on 1 March 2022, the relevant period for acceptance expiring on 23 March 2022. I will first consider the costs up to that date.

Costs to 23 March 2022

3. The claimants' principal claim, based on interpretation of the 2017 Agreement, succeeded. The claimants were therefore the successful parties.

4. The general rule is that the unsuccessful defendant (Ms Grinberg) will be ordered to pay the costs of the successful claimants on the standard basis, but the court may make a different order having regard to all the circumstances, including those set out in CPR 44.2(4).

5. A relevant consideration here is that the claimants brought a claim for rectification in case their claim based on interpretation failed. I found that the alternative rectification claim would have failed. It obviously increased the overall costs for the claimants and for the defendant.

6. I have considered the factors identified in CPR44.2(4) and (5), as well as reminding myself of the various orders open to me as listed in (6).

7. CPR44.2(4)(b) applies where there has been partial success by an otherwise unsuccessful party. Here, the defendant has not enjoyed partial success. Her case was that she beneficially owned the B Shares, and that case completely failed. However the fact that the claimants advanced an alternative rectification claim which was rejected is a feature that I should take into consideration.

8. It is impossible to assess confidently what proportion of the overall costs are attributable to the rectification claim, but I am confident that it was a significant proportion. I agree with Ms Welsh that if there had been no rectification claim,

there would have been limited (if any) cross examination and there would have been no need for Extended Disclosure. Ms Welsh submits that the best approach is to make an issue-based order, whereby the claimants are awarded the costs of the interpretation issue and the defendant the costs of the rectification issue. I do not think that such an order would be workable, because there is significant overlap between the two issues. Some of the evidence was relevant only to rectification, as I was at pains to point out in my judgment. But the entire background evidence was relevant to both, and both claims required careful analysis of the legal effects of the three contracts at the heart of the dispute.

9. I nevertheless accept that the rectification issue contributed heavily to the overall costs and that I should make an order which relieves the defendant of having to pay the claimants' costs to the extent that they were increased by that issue. Doing the best that I can without any detailed analysis by the parties, according to my own perception as the trial judge, I have decided that the claimants should have 40 per cent up of their costs to and including 23 March 2022. Those costs will be assessed on the standard basis.

The period after 23 March 2022

Was it a Part 36 offer?

10. The claimants contend that their offer of 1 March 2022 was a Part 36 offer and that the main judgment is more advantageous to the claimants than the proposal contained in the offer. They therefore say that CPR 36.17(1)(b) applies and they are entitled to the additional amounts provided for in CPR36.17(4) with effect from 24 March 2022. These contentions are disputed by the defendant, Ms Grinberg.

11. The first issue I have to decide is whether the offer of settlement was effective as a Part 36 offer. The offer read as follows:

> ***The offer***
> *Our clients will pay to your client the sum of £150,000 by telegraphic transfer to your firm's client account in full and final settlement of this claim to include your client's claim to any interest (whether*

directly or as residuary beneficiary of the estate of Ernesto Colicci deceased (the Estate)) in the 40 shares in ECSI Limited contained within the Estate (the Shares), and your client will simultaneously transfer the Shares in equal parts to Robert Colicci and Rosanna Colicci. There is no counterclaim to be taken into account. For the avoidance of doubt, this is a claimant's Part 36 offer.

The costs position

If this offer is accepted within 21 days (the relevant period), our clients will be entitled to be paid their costs of the proceedings (including recoverable pre-action costs) up to the date on which you serve written notice of acceptance of this offer in accordance with CPR 36.13(1), such costs to be assessed on the standard basis if not agreed.

12. Ms Welsh KC argues that that was not an effective Part 36 offer. She says that the defendant had no claim to a payment of money from the claimants unless and until an order for costs was made in her favour. Therefore an offer to pay her money must be interpreted as an offer to pay costs. She submits that an offer which includes terms as to costs, including an offer to pay a global sum inclusive of costs, is inconsistent with the scheme of Part 36 and so ineffective. She cites *Knight & Another v Knight & Others* [2019] Costs LR 1459.

13. Ms Welsh accepts that a Part 36 offer must be interpreted according to ordinary objective principles, i.e. as it would be interpreted by a reasonable person in the position of the offeree with knowledge of the relevant background. Ms Welsh also accepts that an offer of settlement which is expressed to be made under Part 36 would normally be interpreted by a reasonable person consistently with Part 36.

14. The relevant background is that the adult children claimed to be the beneficial owners of the B Shares, seeking a declaration and an order for their transfer. That claim was resisted by the defendant, but the parties were agreed that if the defendant succeeded, the claimants nevertheless had a right to acquire the shares for full value. The point of the litigation was to decide whether the claimants had to pay for the shares or not.

15. In my judgment the offer to pay £150,000 for the shares was an offer to compromise that issue. No reasonable person would have seen it as an offer to pay £150,000 by way of a contribution to the defendant's costs. The offer made clear that the usual Part 36 consequences as to costs would apply: the defendant would pay the claimant's costs. There was no mention of the defendant's own costs being paid by the claimant. No reasonable person would have found themselves even pondering whether this was an offer to pay the defendant's costs. The fact that it referred to itself as a Part 36 offer would have put paid to any ambiguity, though I find there was none anyway.

16. Moreover the offer clearly related to the claim, as is required by CPR36.5(d). The claim was that the defendant be ordered to transfer the shares to the adult children without payment in return. The offer to make a payment for the transfer of the shares clearly related to, and sought to compromise, that claim. The fact that the claimants could not have been ordered to make a monetary payment to the defendant except by way of costs does not alter this reasoning. An offer can take effect under Part 36 even if it proposes an outcome which the court could not order after a trial: *Jockey Club Racecourse Limited v Willmott Dixon Construction Limited* [2016] EWHC 167 (TCC) at [29-37].

17. I therefore conclude that the offer of 1 March 2022 was a Part 36 offer.

Was the outcome at least as advantageous to the claimants as the proposals contained in the offer?

18. The outcome of the litigation is that the defendant must transfer the B Shares to the adult children without being paid for them, and must pay 40% of the claimants' costs up to 23 March 2022. Those costs are said by the claimant to be just over £125,000, so the defendant will have to pay just over £50,000, subject to detailed assessment. That is more advantageous to the claimants than the proposals contained in the Part 36 offer, under which the claimants would have received a figure approaching £125,000 in costs, subject to detailed assessment, but would have paid £150,000 for the B Shares.

19. CPR 36.17(1)(b) therefore applies.

Is it unjust to award the CPR 36.17(4) sums?

20. Under CPR 36.17(4), unless I consider it unjust to do so, I must make an order that the defendant pays the claimants' costs on the indemnity basis from 24 March 2022, together with interest on those costs at a rate not exceeding 10% above base rate, and an additional amount calculated in accordance with CPR 36.17(4)(d)(ii). In considering whether it would be unjust to make such an order, I am obliged to consider all the circumstances of the case, including the matters specified in CPR 36.17(5)(a) to (e).

The defendant's submissions

21. Ms Welsh submits that it would be unjust to make such an order, largely because of the factor specified in CPR 36.17(5)(e): she says that the offer of 1 March 2022 was not a genuine attempt to settle the proceedings. She points to the fact that the B Shares are worth between £1.6m (according to a valuation obtained on behalf of the claimants) and £4.8m (according to a valuation obtained on behalf of the defendant). On those figures, the claimants' offer of £150,000 represented between 3.1 and 9.4 per cent of the value of the shares. The claimants' case was that the adult children should have the shares without paying anything, so the offer can fairly be seen as proposing to settle for between 91 to 97 per cent of the value of the claim. Ms Welsh submits that I am not in a position to decide between the rival valuations, but submits that the offer to settle at that level involved no genuine element of concession.

22. Ms Welsh points out that the claimants had been shown an opinion from leading counsel, obtained on behalf of the defendant, which supported the interpretation of the 2017 Agreement for which the defendant contended. That opinion was disclosed in response to an opinion the other way from Ms Reed KC, which had been disclosed to the defendant.

23. Ms Welsh cites three cases:

    Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd [2016] EWHC 167 (TCC) where an offer that the claimant recover 95 per cent of its claim was held to

be a genuine attempt to settle, but only (argues Ms Welsh) because the case was open and shut.

JMX v Norfolk & Norwich Hospitals NHS Foundation Trust [2018] 185 (QB) where an offer to settle at a 10% discount was held to be a genuine attempt at settlement, but only (argues Ms Welsh) because of the very high value of the claim.

Yieldpoint Stable Value Fund v Kimura Commodity Trade Finance Fund [2023] EWHC 1512 (Comm), where the claimant had offered to settle for a "meaningless" discount of 1 per cent (see [24-25] - the offer also involved foregoing a six-figure sum of interest, but that is not how the Part 36 offer was pitched). Mr Stephen Houseman KC, sitting as a judge of the High Court, found that that was not a genuine attempt to settle.

Decision

24. I am not persuaded of the relevance of the valuation of the B Shares at £4.8m, because it was not in existence at the time of the offer in March 2022. The only valuation then in existence was the one for £1.6m, and indeed that was the value for probate purposes applied by the defendant as executor. I therefore think that the claimants, when making their offer, were entitled to take £1.6m as the value of the B Shares and are now entitled to have their offer evaluated on that basis.

25. The offer was therefore to accept 90.6% success, plus 100% costs to the date of acceptance.

26. I accept that the claimants' case was not open and shut. However the claimants were entitled to have confidence in its success. The fact that they brought a rectification claim as a second string to their bow does not justify the conclusion that they lacked confidence in the interpretation argument. On the contrary, the claimants were entitled to think that the availability of an arguable rectification claim added strength to their overall position.

27. As to the opinion from the defendant's leading counsel, the claimants were entitled to prefer the opinion of Ms Reed KC, which was supportive of their case.

28. I agree with Mr Houseman KC in *Yieldpoint* (at [19]) that decided cases provide only illustrative guidance. Looking at the cases cited to me on that basis:

    a. I note that in *Jockey Club* (see [37]) Edwards-Stuart J would have regarded a discount of £20,000 from a claim for £400,000 to be sufficiently meaningful as to amount to a genuine attempt at settlement. Although the claim in that case appears to have been open and shut (liability was eventually conceded), the strength of the claimant's case did not feature prominently in Edwards-Stuart J's reasoning.

    b. I also note that Mr Houseman KC in *Yieldpoint* would have regarded an offer to forego a six-figure sum of interest as "potentially meaningful" (in contrast to the "meaningless" offer to discount a $5m claim by just 1 per cent), even though an offer pitched in that way would still have been for 96 per cent of the claim (see paragraphs 9(ii) and 25 of the judgment).

    c. Foskett J in *JMX* rejected the contention that an offer to settle for 90 per cent was not a genuine attempt at settlement.

29. I accept that, in general terms, the stronger a claimant's case, the less likely it is that an offer to settle at a small discount will be stigmatised as non-genuine. Mr Houseman KC in *Yieldpoint* said, at [21], that "A marked disconnect between the discount element of an offer, on the one hand, and the offeror's reasonable contemporary perception of the strength of their case, so far as discernible, on the other hand, may well be telling against it being a genuine attempt at settlement." In that case, the outcome of the dispute "remained up for grabs to the end", so Mr Houseman KC had no difficulty in discerning a marked disconnect between the offer and the claimant's prospects when the offer was made. In that case the defendant's argument that it was unjust to award the claimant the benefits provided by CPR36.17 was therefore very strong.

30. This is not such a case. The discount offered was 9.4 per cent and although the case was not open and shut, I do not discern a marked disconnect between the claimants' prospects and the offer they made. As Foskett J pointed out in *JMX* at [12] (where the claimant's offer was to accept a discount of 10 per cent), it is not usually possible or desirable to attempt "to determine how the case should have

looked to the offeror before the offer was made". It is usually unrealistic for the court to embark on an assessment of how a party should have regarded its prospects of success when pitching the level of an offer to settle. Offers usually reflect a range of considerations, of which an assessment of prospects is only one.

31. I take into account that the offer of 1 March 2022 required the defendant not only to accept a modest fraction of the value of the disputed shares, but also required her to pay the claimants' costs (as well as bearing her own). The claimant's costs as at March 2022 are said to have been £125,000. I do not know what the defendant's costs were to the relevant date, but it seems likely that acceptance of the offer in March 2022 would have left the defendant in a worse position than if she had capitulated when the claimants first asserted their claim. However that does not persuade me that it was not a genuine offer to settle. The financial landscape had shifted since the claim was first asserted. In particular, the claimants had incurred £125,000 costs as a result of the defendant's decision to resist it, wrongly as I have decided. So although it was not a generous offer, that does not equate to its not being a genuine attempt at settlement. Indeed it would not have been unrealistic or non-genuine, in my view, if the claimants had merely offered capitulation with no payment for the shares, but with no order as to costs (which would have been a less favourable offer than the one in fact made).

32. I therefore reject the contention that this was not a genuine attempt at settlement.

33. Ms Welsh did not press any of the other considerations specified in CPR36.17(5)(a) to (d), but I have considered them. I consider that the terms of the offer were clear. If the defendant did not understand those terms, it was open to her to seek clarification. She did not. There was no deficiency in the information available to the defendant and she did not ask for any information from the claimants. The offer was made well before trial, when there were still large savings to be made in terms of costs.

34. I have considered whether my decision in respect of the period up to 23 March 2022 is inconsistent with my decision that it is not unjust to make an order under CPR37.17(4) for the period after that date. There is a striking difference between the outcomes for the two periods: 40 per cent on the standard basis for the earlier period, 110 per cent indemnity costs, with a high rate of interest, for the latter

period. Does this contrast suggest that the order made in respect of the latter period is unjust? I think not. As explained in the White Book at 36.17.5, the Part 36 regime is designed to rigorously and robustly promote settlement, and I must not first ask what I would have decided as a matter of discretion and then check that against the Part 36 outcome. It is not my function to assess the fairness of the Part 36 regime, but to ask whether there is anything particular to the present case which would take it out of the norm. The fact that the claimants failed on a secondary issue does not do so. It is a frequently encountered feature.

35. In these circumstances I do not consider it unjust to make the order referred to in CPR36.17(4) and I must therefore make such an order.

36. I have a discretion as to the rate of interest under CPR36.17(4)(c). Ms Reed suggests 4 per cent over base and that strikes me as reasonable. Ms Welsh has not suggested a lower figure.

Payment on account of costs

37. I next have to decide whether to make an order for an interim payment on account of costs. The claimants seek a payment of £200,000, which is 51 per cent of their costs schedule (£389,029).

38. CPR 44.2(8) provides

> *(8) Where the court orders a party to pay costs subject to detailed assessment it will order that party to pay a reasonable sum on account of costs unless there is good reason not to do so.*

39. Ms Welsh's skeleton says that it is the defendant's position that no such payment should be ordered, but she advances no arguments in support of that position. All her arguments go only to the alternative submissions that any order for payment on account should be stayed, and in any event should be for less than the amount suggested by the claimants.

40. The basis for the suggested stay is that Mr Colicci's estate includes his interest in a warehouse jointly owned with the third claimant. It appears to be common ground that the warehouse would have to be sold unless, more likely, the third

claimant buys out the estate's interest. This would yield more than enough cash for the estate to meet whatever order is made for payment on account of costs. The defendant says that the estate is otherwise unable to meet any order for payment on account.

41. Ms Reed submits that it is not a reason to refuse to make an order for payment on account that the paying party does not have the means to meet it. I accept that submission as far as it goes, but here the paying party would have the means to meet the order, were those means not tied up in an illiquid asset owned jointly with one of the claimants. It seems to me oppressive to order the defendant to make a payment to the claimants which she cannot afford, whilst the claimants retain the benefit of an asset which belongs partly to her, the sale of which would enable her to afford the payment. I therefore think it just to order a stay.

42. The claimants will be at liberty to apply to lift the stay at any time upon evidence that the considerations which I have identified in the preceding paragraph no longer obtain.

43. As to the amount of the interim payment, I have a schedule of the claimant's costs which totals £389,029. There will be deducted from that 60 per cent of the costs incurred before 23 March 2022, reducing the overall claim to about £313,000. I accept Ms Welsh's point that the schedule is very light on detail, but it was prepared by solicitors who are under a duty to assist the court, albeit that they have in mind the interests of their client. I take into account, of course, that the costs incurred after March 2022 will be assessed on the indemnity basis, and will bear interest as well as an additional payment under CPR 36.17(4)(d). In light of all these considerations I order that the defendant makes an interim payment on account of costs in the sum of £165,000. That will be stayed for the reasons already explained.