[2023] EWHC 2429 (Ch)

No. CR-2021-000435

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 19 September 2023

Before:

SIR ANTHONY MANN
(Sitting as a Judge of the High Court)

IN THE MATTER OF **GREENSILL CAPITAL (UK) LIMITED (IN ADMINISTRATION)**
AND IN THE MATTER OF **THE INSOLVENCY ACT 1986**

B E T W E E N :

(1) CHRISTINE MARY LAVERTY
(2) RUSSELL SIMPSON
(3) WILLIAM STAGG
(as the joint administrators of the above-named company)

Applicants/Respondents

-and-

(1) GREENSILL BANK AG
(subject to insolvency proceedings in the District Courts of Bremen)
(2) DR MICHAEL FREGE
(solely in his capacity as insolvency administrator of the First Respondent)

Respondents/Applicants

MR R PERKINS (instructed by Allen & Overy LLP) appeared on behalf of the Applicants/Respondents.

MISS R STUBBS KC and MISS R FOSKETT (instructed by Enyo Law LLP) for the Respondents/Applicants.

A P P R O V E D   J U D G M E N T

SIR ANTHONY MANN:

1 These are two applications, which, principally, concern the applicability of CPR 36 to insolvency applications made by administrators or other officeholders in the course of their administration. The parties involved are, on the one hand, the English administrators of an English company, whom I will call "Greensill UK" or just "UK", and, on the other, a German company in the same group which is also in administration proceedings in Germany, together with, by recent addition to the proceedings, its German administrator.

2 Each side has made an application for a ruling as to whether or not a compliant Part 36 offer has been made by the German company, whom I will call "Greensill AG" or just "AG", and accepted by Greensill UK. In the case of Greensill AG, other matters are raised.

3 There are various issues which may arise as a result of my decision on what I may call the "main points". These concern issues such as costs and interest, and AG also raises questions of mistake and the application of the rule in *Ex Parte James.* There is not time to deal with those issues in the present application to the court and it seemed that the most economical use of time was to park those other issues for determination on a separate occasion.

4 Mr Ryan Perkins appeared for UK and Miss Rebecca Stubbs KC led for Greensill AG. It is right that I should record that they both argued their respective cases with conspicuous economy.

5 The present application is made within the scope of a wider application made by the administrators in Greensill UK for a determination as to whether or not Greensill UK or Greensill AG is the beneficial owner of certain funds which had come into the hands of UK as a result of certain foreign exchange transactions. The detail of that dispute does not matter and that generalised description will suffice. The form of the overall application made on 8

December 2021 within overall administration proceedings, is that the applicant administrators:

> "Seek directions as to:
>
> (a) whether [UK] is the legal and beneficial owner of the Funds; and
>
> (b) what rights if any [Greensill AG] has against [Greensill UK] in relation to the Funds".

6 Despite that formulation, what is important to note is that this litigation is a substantive dispute as to whether or not the English company is entitled to the funds or whether the German company had beneficial ownership of the funds. There were no other parties or claims to the proceedings or claims to the funds. Both companies are now in administration. The administrator of the German company has been more recently joined as a respondent to the overall application, but. in my view that makes no difference to the claim or the issues involved on the more limited application before me.

7 That that is the substance of the overall dispute is apparent not only from looking at the nature of the dispute, it also emerges quite clearly from two position statements, one provided by each side in the litigation, each of which positively asserts a claim to the funds. This is litigation in which each side is asserting an adverse claim against the other. There are no other parties to the litigation. It is not the kind of application in which administrators seek directions as to the various possible courses open to them in the administration in relation to which they are essentially neutral. This is, in substance, hostile litigation. As observed by Mr Perkins, it might just as well have been brought by a Part 7 and a Part 8 claim.

8 Miss Stubbs asserted otherwise, because of the form of the application, which was an application for directions, but form cannot trump substance for these purposes. In substance, as I have said, this is hostile litigation in the technical sense and in a real sense.

9 These applications have been brought on as a matter of some urgency, because, if the administrators of UK are correct, there has been a settlement of the litigation which requires a stay of these proceedings under the terms of the settlement. Directions have been given for the conduct of the overall application, ending with a trial next year and which, if there has been no settlement, will require the parties to start spending even more money on this litigation. The English administrators wish to know where they stand in relation to that as a matter of urgency.

10 At the outset of the application, Miss Stubbs made an application that these matters be heard in private because they involve without prejudice negotiations. She was concerned that without prejudice settlement offers would be referred to and somehow come to the attention of a trial judge. It appears that there is some press interest in this application. I determined I would not sit in private, because it was unnecessary to do so and inappropriate, but would make a reporting restrictions order preventing any reporting of the contents of any without prejudice offers (including Part 36 offers) made in this matter. So far as necessary, I will provide for redactions from this judgment to restrict the availability of any relevant terms of without prejudice offers, though in fact it will be necessary to refer only to the one Part 36 offer which is in issue in this application.[1]

11 The offer in question in this matter was made in a letter from solicitors to AG, Enyo Law, to Allen & Overy LLP, solicitors to the English administrators, and dated 14 September 2022. The letter is headed "Without prejudice save as to costs" and it contains an offer set out under that well-known rubric, but that is not particularly relevant to the question I have to decide.

[1] Since the judgment was originally prepared and handed down the need for redaction and reporting restrictions has gone. This judgment is therefore the unredacted version and no reporting restrictions apply to any of its contents."

The only point to observe about that offer is that it had a time limit for acceptance of 20 September 2022.

12 The letter also contains what purports to be a Part 36 offer. At the beginning of the letter, there is a series of bullet points preceded by the words:

> "Although your clients have purported to make them a more recent offer dated 10 August 2022, under CPR Part 36, they expressly recognise the possibility that the court would not apply and could not apply a Part 36. They were right to do so".

13 Various points are then made concerning an observation that for the court to apply Part 36 would be both oppressive and unfair and saying:

> "In any event, the nature of the [application] is such that there is no claim or counterclaim within the meaning of Part 36.2(3)(a)".

14 The text of the part of the letter that makes the offer is in the following terms".

> **"CPR PART 36 OFFER**
>
> Without prejudice as to the applicability of CPR Part 36 to the FX Application, and in order to reserve our client's rights in the best way possible in the event that, notwithstanding our position and the points made above, the Court determines that CPR Part 36 does apply to the FX Application, we are instructed to make an offer in the alternative pursuant to CPR Part 36. That offer ('**GBAG Part 36 Offer'**) is as follows:
>
> > a. GCUK will pay, and GBAG will accept, 60% of the Funds (as defined by paragraph 1 of GBAG's position paper) (the "**Settlement Sum**") in full and final settlement of GBAG's claim to a proprietary interest in the Funds; and
> >
> > b. GBAG will be entitled (as a part of its wider provable claim) to an unsecured claim against GCUK for the balance of the sums due to it pursuant to or in connection with the FX Arrangement (that is to say, for the total sum due from GCUK to GBAG under the FX Arrangement minus the Settlement Sum)

> If the GBAG Part 36 Offer is accepted within 21 days of the date of service of this letter upon you (the '**Relevant Period**'), your clients will be liable for GBAG's costs of the FX Application up to the date on which notice of acceptance is served on our client, in accordance with Part 36.13 (subject to any contrary order that the court may make). If the Offer is accepted, please let us know by serving written notice of acceptance pursuant to CPR 36.11.
>
> If the outcome of the proceedings is at least as advantageous to GBAG as this GBAG Part 36 Offer, our client will invite the Court to apply the usual Part 36 cost consequences, pursuant to CPR 36.17.
>
> As required by CPR 36.5(4), the Settlement Sum is inclusive of interest up until the expiry of the Relevant Period (as defined above). In the event that the GBAG Offer is accepted after the expiry of the Relevant Period, interest at the rate set by law shall accrue from the end of the Relevant Period to the date of acceptance of the GBAG Offer.
>
> For the avoidance of doubt, our client makes this offer as a claimant's offer under Part 36. Your clients have previously sought to make a claimant's offer under Part 36 on the basis (per your letter of 24 August 2022) that your clients '*are the applicants'* and '[a]*n applicant is* […] *clearly equivalent to a claimant'*. We disagree with that analysis, on the basis that it ignores the legal principles to be applied when deciding whether to construe a Part 36 offer as a claimant's or defendant's offer."

15 The letter then goes on to make various points in support of its proposition that AG should properly be regarded as the claimants for the purposes of Part 36. Enyo Law ended by saying,

> "We are firmly of the view that, if CPR Part 36 applies, the Court will construe that [this offer] is a claimant's Part 36 offer. For the avoidance of doubt [this offer] is only open for acceptance on the basis that it is a claimant's offer.
>
> If you are not entirely clear about any terms of [this offer] please notify us in writing within 7 days, setting out clearly which points you believe to be ambiguous or unclear.
>
> If you consider that [this offer] to be in any way defective or non-compliant with Part 36, please let us know by return.
>
> As set out above, we are of the view that CPR Part 36 does not apply to the [main] application. However, our client continues to reserve its position in that regard and reserves its right to advance further arguments should that be appropriate in due course".

16 On 30 September 2022, Allen & Overy said their clients were considering their response and on 22 December 2022, they sent a letter rejecting the offer. That letter went on to aver that:

> "If Part 36 has any application at all to these proceedings, (i) that offer is not properly characterised as a Claimant's Part 36 offer; and (ii) it would in any event be unjust for the consequences of such an offer to be imposed on an officeholder acting, on advice, and in accordance with their duty to maximise funds available for creditors".

17 Notwithstanding that, almost a year after the offer was first made, on 23 August 2022, Allen & Overy wrote a letter explaining that, in order to avoid further legal costs, their clients had decided to accept the Part 36 offer, going on to say:

> "In accordance with Part 36.11(1), therefore, our clients accept the [offer] and this letter constitutes our clients' written notice of acceptance".

On 24 August 2023, Enyo Law withdrew or purported to withdraw the offer.

18 It is the case of Greensill AG that that offer is no longer open for acceptance because Part 36 does not apply and its rejection by UK means that it was not thereafter available for acceptance on normal contractual principles. It is the case of Greensill UK that Part 36 does apply and, since the offer was not withdrawn before the acceptance, it remains available for acceptance and it has now been accepted. The result, UK maintains, is that the claim proceedings should be stayed.

19 The case of UK in these applications is that Part 36 does indeed apply to the present proceedings. That flows from the words within Part 36 itself, which Mr Perkins submits do apply to these proceedings. He submits that it applies to the proceedings simply from the application of Insolvency Rule 12.1, which reads:

> "12.1 (1) The provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under Parts A1 to

> 11 of the Act with any necessary modifications, except so far as disapplied by or inconsistent with these Rules".

20 Mr Perkins submits that there is nothing in the Insolvency Rules which is inconsistent with the application of Part 36, so the rule applies. That is what the parties and the judge assumed to be the case in various cases and, in particular, in the case of *Grant v FR Acquisitions Corporation (Europe) Ltd* [2022] EWHC 3366 (Ch): the judge in that case being the experienced insolvency judge, Hildyard J.

21 Miss Stubbs challenges that reasoning on the footing that costs are dealt with separately in Insolvency Rules. Rule 12.4(1), provides: "(1) This chapter applies to costs following the intervention of insolvency proceedings". Various provisions in that rule then follow. She points out that Part 36 and its costs consequences are not referred to in that rule which she submits is not surprising, bearing in mind that officeholder applications for directions are often not the same as other types of litigation because they involve a class remedy in which the desire to incentivise settlement, which exists in traditional litigation and which underpins Part 36, is not present.

22 Miss Stubbs' initial submission was that Part 36 had no application at all to directions applications in insolvency proceedings made by officeholders. However, she did accept in argument that, if one has a directions application by administrators, with the real contest being between various respondents in what was essentially hostile litigation between those respondents, then Part 36 could apply as between them. That entirely correct concession means that her primary submission could not succeed. That forced her into an alternative submission based on the form of the overall application as being an application for directions by administrators which was not the same as hostile litigation to which Part 36 would otherwise apply. She said that in their original application (set out above), the administrators merely sought directions as to whether UK was the legal and beneficial owner of the funds

and as to what rights AG had in relation to them. It was inappropriate to have Part 36 apply to such an application, because it would be wrong to introduce the threat of Part 36 into a situation in which the administrators were doing their best to administer an overall fund to the benefit of those entitled to it, a point which she said that Allen & Overy had themselves made in correspondence.

23 I reject all of Miss Stubbs' lines of arguments. In my view, Part 36 is available in insolvency directions proceedings through rule 12.1 and I do not consider that rule 12.4(1) is any more inconsistent with the importation of Part 36 via rule 12.1 than it is inconsistent with Part 36 itself. If anything, rule 12.4(1) reinforces a consistency. If the overall costs rules are the same, then why should Part 36 not be the same? The point is made even plainer by the fact that various provisions of Part 44, which overall is imported into insolvency applications, actually refer to Part 36 (for example, see 44.9). True it is in many forms of directions applications there is not the same level of adversarial contest as in relation to other proceedings to which Part 36 would naturally apply as being adversarial claims, but that is not a reason for a blanket exemption. A directions application often frequently involves adverse claims and hostile litigation either as between the officeholder and other parties or as between respondents with competing claims. While it might be difficult in many cases to formulate Part 36 offers in some of those non-adversarial situations, that is no reason for a blanket disapplication. If Part 36 offers are made but the nature of the proceedings makes a the full rigours of its application inappropriate, there is enough flexibility in the operation of Part 36 to provide the necessary adjustments. That was acknowledged by Hildyard J in his case. True it is that in that case the applicability of Part 36 was not in issue. It was assumed that it was capable of applying. However, in my view, that assumption was plainly correct.

24 In support of her arguments, Miss Stubbs submitted that in non-adversarial applications Part 36 had no role to play because there was no "claim" within the meaning of Part 36, so one

could not formulate an offer, or it might be difficult to work out whether one result is more advantageous than another. Again, that may be right in some of those applications, but that is no reason to say that Part 36 had no application at all in relation to any of other applications or in relation to those in which an officeholder is in substance making a hostile claim. I can see no reason why a Part 36 offer should not be available in claims which can be seen to be "adverse" and in which a "claim" can be seen to be made. That is this case.

25 Miss Stubbs' alternative case involved looking at the form of the matter and determining that it was not an adversarial matter to which Part 36 was capable of applying in that form. On this line of argument, it would seem that the applicability of Part 36 would depend applying a label "adversarial" or "non-adversarial". That is a very unsatisfactory basis on which to determine the applicability of Part 36. Furthermore, and in any event, as I have pointed out, while the application notice seemed to be phrased in a "seeking directions" type manner without adopting a stance, there is no doubt that the English administrators were adopting a stance and the German administrator a contrary, hostile stance. This is in substance hostile litigation which might equally have been brought under the CPR, in which case there would be no doubt about the applicability of Part 36. There is no case for removing the availability of Part 36 merely because of the form in which the administrators have decided to bring the matter before the court.

26 I therefore consider that Part 36 is capable of applying to the overall proceedings and the first claim in UK's present application succeeds. By the same token, the claim in para.2A of AG's cross-application fails.

27 The next matter which falls to be dealt with is a claim by AG that its offer was subject to a condition precedent in the form of a determination by a court that Part 36 applies to these proceedings. If this point succeeds, then Greensill AG argues that the Part 36 offer is no

longer capable of acceptance because it was withdrawn on 11 August 2023 before a court made any such determination.

28 This is a question of construction of the Part 36 offer. That question falls to be determined on normal principles of construction. That is common ground. The question is how the offer would be viewed by a reasonable solicitor – see *C v. D* [2011] 5 Costs Law Reports 775 at para.45.

29 I consider AG's view to be unsustainable. Miss Stubbs' submission is that the offer was subject to a condition precedent arising out of the words "In the event that … the court determines that Part 36 does apply to" the application. That means that the condition would have to be fulfilled before there could be any settlement if the argument were to succeed. Not only is that a most unlikely construction as a matter of commercial common sense, it is also unworkable in the light of the express provision as to what happens if the offer is accepted within 21 days of service of the letter and the reference to the Relevant Period and the time of the acceptance. The paragraph anticipates an acceptance within that period, as does the paragraph relating to interest. It is inconceivable that the parties can have intended that within that time that they would have mounted, argued and got a decision on whether Part 36 applies at all. The sentence beginning, "If the offer is accepted" could only anticipate no more than acceptance of the offer; it does not anticipate a quick application to the applications court to determine the applicability of Part 36. The words of the opening paragraph of the letter are intended to make clear that the mechanism and consequences of Part 36 would apply insofar as Part 36 applies at all in the proceedings. They do no more than that in the circumstances. This construction argument therefore fails.

30 The consequence of that is that the withdrawal of the offer came too late. It is not disputed that, pursuant to Part 36, the unwithdrawn offer was open for acceptance up to the actual date of acceptance on this basis, because there had been no prior withdrawal.

31 Miss Stubbs' next line of attack was that there was no correspondence of offer and acceptance in this case. In effect, there was a mismatch. This submission relates to the provision for interest after the relevant period. There is a dispute about this interest. It is AG's case that interest was to be payable and its primary case seems to me that it was payable at the judgment rate of 8 per cent, whereas UK's case is that no interest was payable because there is no such thing as "interest at the rate set by law". This latter contention only became apparent after the acceptance of the offer. Miss Stubbs says that there was a mismatch between the intended offer and the intended acceptance. A reasonable recipient of the offer would have understood that interest was to be payable and the particular recipient ought to accept the offer on a different basis. That is said to be the mismatch. Miss Stubbs relied on *The Leonidas D* [1985] 1 WLR 95 at 936.

32 Mr Perkins, for his part, relied on the remarks of Moore-Bick LJ in *Gibbon v. Manchester City Council* [2010] 1 WLR 2081, to the effect that Part 36 was a self-contained code, which excluded much of the rules of contract in relation to offer and acceptance and other matters. He said that these principles excluded the possibility of Miss Stubbs running the sort of argument that she ran under this head. I do not accept that submission. Even though Part 36 is a self-contained code, in accordance with the guidance given in *Gibbon*, there is no reason, in my view, why the sort of principles relied on by Miss Stubbs should not apply in an appropriate case, and she drew my attention to *Rosario v Nadell Patisserie Ltd* [2010] EWHC 1886 (QB) and *O'Grady v B15 Group Ltd* [2022] EWHC 67 (QB), which support her position. I agree that it does support her position, that, in principle, these sort of matters are in principle available to her, notwithstanding the self-contained code of Part 36.

33 However, her argument nonetheless fails. The offer and acceptance each have to be judged objectively. The offer said what it says and the acceptance was unqualified. The personal views of the acceptor do not come into it. Objectively, the offer made was the offer that was

accepted. That is the only possible objective interpretation of what happened. If there was a subjective mismatch of intention of the parties on each side, that is irrelevant. *The Leonidas D* does not assist Miss Stubbs and, in fact, is against her. It emphasises the objective intentions of the parties, not their subjective ones and is based on rather different facts in any event (inconsistent conduct rather than a plain exchange of written offer and acceptance).

34 What has happened here, if anything, is that there is a difference of view as to the proper construction of the offer. That does not lead to a mismatch of offer and acceptance. It means that one or other of the parties is wrong about the proper construction of the offer. The problem, if there is one, is solved by a determination as to who is right about what the offer means. If AG is right, then that is the offer that has been accepted and any different view as to construction which UK might hold is irrelevant. If AG is wrong, then it turns out that UK was right in its views as to the meaning of the offer, but none of this leads to a mismatch of offer and acceptance of the type on which Miss Stubbs relies.

35 This means that, subject to Miss Stubbs' additional points, namely, mistake and the application of the rule in *Ex Parte James*, the position is that there is a Part 36 offer which has been made and accepted and AG are bound by it. The additional points will have to be decided on a later occasion. No doubt an appropriate order can be drawn which reflects the determinations so far.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital