Neutral Citation Number: [2023] EWHC 3057 (Ch)

Case No: BL-2021-001116

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane,
London, EC4A 1NL
Date: 28/11/2023

Before :

MR JUSTICE RICHARDS

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Between :

OLD PARK CAPITAL MAESTRO FUND LIMITED (a Cayman Islands company, in liquidation)	**Claimant**
- and -	
(1) OLD PARK CAPITAL LIMITED (in liquidation) **(2) MR. HUGO VAN KUFFELER** **(3) MR. BRUNO PANNETIER**	**Defendants**

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Mr Jonathan Cohen KC (instructed by **Greenberg Traurig LLP**) for the **Claimant**
Mr William Edwards and Ms Pia Dutton (instructed by **Fieldfisher LLP)** for the **Second Defendant**
The **Third Defendant** appeared in person
The **First Defendant** did not appear and was not represented

Hearing date: 10 November 2023

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Approved Judgment

This judgment was handed down remotely on Tuesday 28 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE RICHARDS :

1. This judgment deals with matters consequential on the judgment I handed down on 27 July 2023 (the "Trial Judgment"). This judgment is to be read as one with the Trial Judgment and words and expressions defined in the Trial Judgment bear their defined meanings herein unless I specify otherwise.

2. Following a hearing on 10 November 2023, I gave an oral judgment on most consequential matters that lie between HVK and the Fund. However, consequential matters between the Fund and BP depend on whether the Fund has beaten the terms of a Part 36 offer (the "Offer") that it made on 4 April 2023. In his oral submissions on those consequential matters at the hearing on 10 November 2023, BP raised issues in this regard that he had not trailed in his skeleton argument. To enable those matters to be addressed properly, I reserved judgment and gave the parties the opportunity to make further relevant submissions. This is my reserved judgment.

Whether the Offer was beaten

3. By the Offer, the Fund offered to settle its case for USD4,175,182.99 (expressed in the Offer as the "Settlement Sum"). BP does not suggest that the Offer failed to comply with the requirements of CPR 36 although he does dispute that it was a "genuine attempt to settle" the dispute for the purposes of CPR 36.17(c). The 21-day period specified in CPR 36.5(1)(c) expired on 25 April 2023.

4. In the Trial Judgment handed down on 27 July 2023, I gave judgment for the Fund on its claim in deceit against BP. I did not specify in the Trial Judgment and amount for which BP was liable, but did hold at [204] that "loss that the Fund suffered in connection with the KAM CP was caused by the Investment Strategy Representations". I said nothing in the Trial Judgment about whether pre-judgment interest would be awarded or not.

5. On 1 August 2023, I made an order following hand-down of the Trial Judgment that included the following:

> *1 There shall be judgment for the Claimant against the Third Defendant in fraudulent misrepresentation in the sum of $4,175,182.99 (and the Third Defendant do pay that sum, or the sterling equivalent as at the date of payment, to the Claimant) plus a figure to be determined in accordance with paragraph 3 of this order.*

6. It will be seen that the amount specified in paragraph 1 of my order was precisely the amount of the Settlement Sum (in US dollars). Paragraph 3 of my order dealt with the question of interest as follows:

> *3 The issues of whether there should be any award for pre-judgment interest or consequential loss and, if so, in what sum(s) are adjourned to [what ultimately became the hearing on 10 November 2023].*

7. It is common ground that the relevant question for the purposes of CPR 36.17 is whether the "judgment against [BP]" is "at least as advantageous to the [Fund] as the proposals contained in [the Offer]".

8. BP argues that the answer to this question is "no". He argues that a comparison must be made between the sterling equivalents of $4,175,182.99 as at 4 April 2023 (when the Offer was made) and 27 July 2023 (the date of the Trial Judgment). Fluctuations in the sterling: dollar exchange rate between those two dates mean that the value of $4,175,182.99 in sterling terms on the later date is lower than its sterling value at the earlier date with the result that the Part 36 offer has not been beaten.

9. The notes to the White Book provide some possible support for that argument stating at 36.17.2:

> *The comparison in money terms is made at the date of judgment. Accordingly, a judgment in a foreign currency falls to be converted to sterling at the exchange rate applicable at judgment:* Barnett v Creggy *[2015] EWHC 1316 (Ch) (David Richards J) and* Novus Aviation Ltd v Alubaf Arab International Bank *[2016] EWHC 1937 (Comm); [2016] 4 Costs L.R. 705, Comm (Leggatt J).*

10. There was insufficient time at the hearing on 10 November 2023 to consider the authorities referred to in the White Book (hence this reserved judgment). However, having now considered those authorities and the parties' written submissions, I am satisfied that BP's argument is incorrect.

11. Both *Barnett v Creggy* and *Novus Aviation* involved a situation where a Part 36 offer was made in sterling but judgment was given in a foreign currency (US dollars in both cases) with an option to pay in sterling. In such a situation, the question whether the judgment was "at least as advantageous" as the Part 36 offer could only be answered with some element of currency conversion. In *Novus Aviation* Leggatt J stressed that this question must be answered at the date of judgment rather than at the date of the Part 36 offer. That conclusion of principle caused him to compare the value of his US dollar judgment (converted into sterling at the date of judgment) with the sterling amount offered pursuant to Part 36. The same conclusion of principle caused him to reject the alternative comparison that was before him (namely to convert the sterling value of the Part 36 offer into US dollars at the exchange rate prevailing at the date of the offer and compare it with the US dollars awarded by his judgment). It would appear to follow from Leggatt J's principle, although I express no concluded view since it is not necessary for the purposes of this judgment, that if a Part 36 offer were made in euros, and judgment is given in US dollars, the correct approach when determining whether the judgment is "at least as advantageous" would involve converting the US dollars into euros at the exchange rate applicable at the date of judgment.

12. By contrast, the present case requires no foreign currency conversions to be made in order to determine whether the Fund's judgment is "at least as advantageous" as the Offer. Both the Offer and the judgment are in US dollars albeit BP is given an option to satisfy the judgment by paying a sterling equivalent of the US dollars awarded. It would be economically unreal to convert the US dollar sums into notional sterling equivalents at the time of the Offer and Trial Judgment respectively. As well as being economically

unreal, such a conversion would run contrary to the principle that Leggatt J set out in *Novus Aviation*.

13. It follows that the Fund has obtained judgment that is "at least as advantageous" as the Offer. It has obtained judgment for at least $4,175,182.99 which was the precise amount set out in the Offer.

14. The Fund advanced a fall-back argument to the effect that, even if BP's approach set out above were correct, the award of pre-judgment interest would mean that the Offer was beaten because that pre-judgment interest would more than cancel out the effect of the exchange rate movements on which BP relies.

15. I accept an important premise of this argument, namely that I can consider events after the Trial Judgment in deciding the "at least as advantageous" question (see, for example, paragraph 22 of *Novus Aviation*). However, there is an uncomfortable aspect to the Fund's fall-back argument namely that a decision on the amount, if any, on pre-judgment interest that I was invited to make after being told details of the Offer, would have some bearing on whether my overall judgment was "at least as advantageous" as the Offer. That seems to raise difficult questions as to whether I should have been told about the Offer before deciding on pre-judgment interest. If I should not have been told about the Offer, I would need to consider whether I should recuse myself from deciding the amount of pre-judgment interest.

16. I will not, therefore, deal with the Fund's fall-back argument since it does not arise given my conclusion set out in paragraph 13. above. Nor do I consider that I need to recuse myself from delivering this judgment since I have decided that CPR 36.17 is capable of applying whatever conclusion I reach on the amount (if any) of pre-judgment interest.

Whether it is "unjust" for the consequences in CPR 36.17(4) to apply

17. Given my conclusion set out in paragraph 13., I am obliged to make orders in accordance with CPR 36.17(4) unless I consider that it would be "unjust to do so". BP submits that it would be "unjust" and I will apply the following principles when deciding that question:

    i) I will consider all the circumstances of the case and, in particular, the specific matters raised in CPR 36.17(5).

    ii) Since I am being invited to make an order that departs from the norm set out in CPR 36.17(4), I should not make an exception simply because I consider the CPR 36.17(4) regime harsh or unjust. Rather, there must be something about this particular case which takes it outside the norm (see *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB)).

    iii) Since I am not exercising an unfettered discretion in relation to costs when I consider departing from the CPR 36.17(4) consequences, the question is not whether or not BP had reasonable grounds for declining to accept the Offer but whether the usual order would be unjust (see *Matthews v Metal Improvements* [2007] EWCA Civ 215).

18. In his skeleton argument served prior to the hearing on 10 November 2023, BP did not address CPR 36.17(4) in any detail although he made a number of criticisms of the Fund's conduct of the litigation, emphasised that the Fund had failed in a number of its claims against him and pointed out that a number of the arguments that he made found favour with the Court in the Trial Judgment.

19. However, those points do not satisfy me that it would be "unjust" to make the usual orders under CPR 36.17(4). The whole point of CPR 36 is to incentivise settlement of disputes and impose meaningful consequences on a defendant who fails to accept a Part 36 offer that a claimant ultimately equals or betters. BP's arguments focus on what happened at trial, including the way the case against him was put at trial, as a justification for him being excused the usual consequences of CPR36.17(4). However, that overlooks an important countervailing consideration. Subject at least to the question of whether the Offer was a genuine attempt to settle, which I consider below, the very point of CPR 36 was to incentivise BP to accept the Offer so that there was not a trial at all. I do not, therefore, regard the category of arguments summarised in paragraph 18. as indicating that the usual order under CPR 36.17(4) would be "unjust". I will, however, return to these arguments when considering the question of costs for the period to which CPR 36 does not apply.

20. BP's next strand of argument advanced at the hearing on 10 November 2023 was that it was reasonable for him to reject the Offer and defend the case at trial given that the very serious allegations of fraud were made against him. BP is a professional in the financial services industry and, if those allegations had not been answered, he argues that he would have suffered very serious professional repercussions. However, in my judgment those arguments run directly counter to the principle I have summarised in paragraph17.iii) above. They are not, in my judgment, sufficient to demonstrate that the usual order under CPR 36.17(4) would be "unjust".

21. Perhaps conscious of these difficulties, BP's written submissions following the 10 November 2023 hearing focused on the proposition that the Offer was not a "genuine attempt to settle the proceedings". He argues that the Offer was "tantamount to an offer of total capitulation". Since the Settlement Sum was the total principal amount of the KAM CP that was not paid, he characterises it as an offer to settle at "100% of the maximum recoverable damage".

22. I do not accept those submissions. It is true that the Settlement Sum represented 100% of the principal amount that the Fund lost by investing in KAM CP. However, I agree with the Fund that this was because, given the way that BP was putting his case, the dispute was broadly "all or nothing" from the Fund's perspective. BP was certainly denying the allegations made against him. However, as recorded at [201] of the Trial Judgment, he was saying relatively little about causation and quantum of loss beyond asserting that some claims were statute barred and that the Fund had failed properly to mitigate its loss. The Fund was entitled to regard those as weak arguments in formulating its Offer. It was entitled to proceed on the basis that this was likely to be an "all or nothing" case.

23. Moreover, the Offer included interest up to 25 April 2023. BP does not dispute that the Fund suffered loss, for the purposes of the fraudulent misrepresentation claim, on the dates on which it invested in tranches of KAM CP that were not repaid. The Fund invested some $1.8 million on 10 July 2015, some $2.1 million on 25 September 2015

and some $160,000 on 15 December 2015. For much of the period between 2015 when the investments were made, and 2023, when the Offer was made, interest rates were low. However, if the Fund succeeded in its claim it had at least a realistic prospect of obtaining some interest over this period (even though BP argues that the interest awarded should be nil). When making the Offer, the Fund could realistically expect that, if successful, it might obtain pre-judgment interest at base +2%. Pre-judgment interest at that rate would amount to over $850,000 over the period from 2015 to 2023.

24. The Offer therefore gave up a prospect of pre-judgment interest that could realistically be estimated at over $850,000. Of course, neither the Fund nor BP would have known at the time of the Offer how much interest (if any) the Fund might be giving up. However, it was giving up a realistic prospect of a considerable amount of interest. I reject BP's argument that the Offer was not a genuine attempt to settle.

The orders I will make under CPR 36.17(4)

25. It follows, therefore, that I am obliged to make the following orders under CPR 36.17(4):

    i) interest on the amount of USD4,175,182.99 from 25 April 2023 until today at a rate not exceeding 10% above base rate;

    ii) BP must pay the Fund's costs of the claims against BP (including any recoverable pre-action costs) on the indemnity basis from 25 April 2023;

    iii) interest on those costs at a rate not exceeding 10% above base rate;

    iv) an additional amount of £75,000 (CPR 36.17(4) specifies this to be a maximum, but the arithmetic by which the actual sum is computed means that the maximum is achieved in this case).

26. It is appropriate to exercise my discretion to award some interest under CPR 36.17(4) on both damages and costs. If I declined to make any award of interest then the Fund would be inappropriately left uncompensated for being kept out of its money.

27. I heard very little argument as to the precise rate that I should apply for the purposes of paragraph 25.i). The Fund argues for the maximum of base rate +10% saying that it is for BP to justify any lesser rate. While BP did not expressly label any of the submissions he made as relating specifically to the rate of interest to be ordered under CPR 36.17(4), he has made written and oral submissions that touch on relevant factors specified in *OMV Petrom SA v Glencore* [2017] EWCA Civ 195, namely the extent to which interest on damages would be compensatory for the Fund, the extent to which BP took good or bad points at trial and the general level of disruption caused by his refusal to accept the Offer.

28. BP argues that a truly compensatory rate of interest would be almost nil. He reasons that, at the time the Fund was investing in KAM CP, rates of interest payable on "traditional" liquid money market instruments were virtually nil (see paragraph [178] of the Trial Judgment). He argues that pre-judgment interest should be calculated by reference to these rates.

29. I do not accept that argument. In the first place, it proceeds by reference to the wrong counterfactual. The purpose of the damages awarded to the Fund is to put it in the position it would have been in had the fraudulent misrepresentation never been made. In that case, OPC would never have been appointed as investment manager and so there is no reason to assume that it would have pursued the Maestro strategy (which was proprietary to OPC) and so no reason to assume that it would have invested a large proportion of its assets in money market instruments. I am not, therefore, satisfied that a consideration of the yields on money market instruments would, even on BP's approach, provide an appropriate comparator.

30. In any event (i) the purpose of interest on damages is to compensate the Fund for being kept out of money that should have been paid to it rather than as compensation for damage done; (ii) that question should be approached broadly by considering the position of persons with the Fund's general attributes rather than with regard to its particular attributes or any special position in which it found itself; and (iii) for commercial claimants the general presumption is that they would have borrowed less and so the court typically has regard to the rate at which persons with the general attributes of the Fund could have borrowed (see *Carrasco v Johnson* [2018] EWCA Civ 87).

31. I do understand BP's general point that it seems intuitively odd to calculate interest by reference to an assumed borrowing cost in circumstances where investment funds such as the Fund might be considered unlikely to borrow at all. However, BP's alternative approach does not support the nil rate of interest on damages that he suggests. I will, therefore, have regard to borrowing costs as the Fund argues. In my judgment, a compensatory claim for interest on damages would be base rate +2% for a person in the general position of the Fund.

32. Interest pursuant to CPR 36.17(4)(a) may be more than merely compensatory. As regards other factors specified in *OMV Petrom SA v Glencore*, I conclude that BP has taken some good points and some bad points in the litigation. At trial he was wrongly contesting the factual question of whether there was a pre-existing arrangements to invest in the KAM CP. I do not accept that this was conceded in paragraph 10A(f) of his Re-amended Defence which, by accepting only that there were discussions before the Fund's launch materially understated the true extent of the understanding. That said, BP also took some good points namely as to the absence of a general "Undisclosed Purpose" and as to the true interpretation of the Offering Memorandum. Against that, there has been significant disruption caused by his failure to accept the Offer: there has been an expensive and fact-heavy trial of the case against him that could otherwise have been avoided.

33. Putting all of those factors together, in my judgment an appropriate rate of interest pursuant to CPR 36.17(4)(a) is base +6%. (I note that there was some suggestion in BP's submissions that, since the judgment has been given in US dollars, pre-judgment interest should be computed by reference to US dollar interest rates rather than sterling interest rates. However, I have had no evidence as to what the difference means in practice and so nothing beyond the general suggestion to assist me. In the circumstances I will compute interest by reference to the UK base rate that the Fund requests).

34. As to CPR 36.17(4)(b), I am required to order that all the Fund's costs after 25 April 2023 are to be paid on the indemnity basis. I do not have flexibility to make a percentage-based costs order in relation to costs incurred after 25 April 2023 (see *Webb v Liverpool Women's NHS Trust* [2016] EWCA Civ 365).

35. As to CPR 36.17(4) (c), I will order interest to be payable at base rate +6%. The principles applicable to determining interest on costs are broadly similar to those applicable to determining pre-judgment interest on damages and so it is right that the same rate should be used. This rate is to apply from the date of any payment of costs that takes place after 25 April 2023.

Matters relating to the period before 25 April 2023

36. CPR 36.17 does not apply as regards interest and costs incurred before 25 April 2023 and therefore I approach these questions by reference to general principles.

Costs

37. Both the Fund and BP were agreed on the general principles to be applied:

    i) The Fund was the successful party in its claim against BP and therefore the starting position is that BP should have to pay the Fund's costs of the claims against BP.

    ii) However, the Court has power to make a different order, including a "percentage order" that BP pay the Fund only a proportion of its costs.

    iii) The Fund does not seek indemnity costs for the period before 25 April 2023 and therefore any award should be on the standard basis.

38. Understandably, BP placed significant reliance on aspects of the Trial Judgment on which he enjoyed success. He was found only to have made the Investment Strategy Representations and not the "Maestro Only Representations" and "Liquidity Representations" which the Fund alleged. The Fund failed to demonstrate the existence of the full "Undisclosed Purpose" for which they argued. BP's case on the interpretation of the Offering Memorandum was accepted. The claim against him for procuring OPC's breach of contract and the claim in dishonest assistance failed. Moreover, having alleged that BP obtained a personal benefit from the "Undisclosed Purpose", the Fund chose not to pursue that allegation at trial.

39. These points have some force and I have considered them carefully. I have concluded that they justify a 15% reduction in the costs the Fund can recover from BP for the following reasons:

    i) The various claims that the Fund asserted against BP were largely different ways of putting essentially the same grievance. Even if it had been known in advance that the claims in dishonest assistance and for procuring breach of contract would fail, in my judgment the case would still have been put in broadly the same way. In that case it would still have been alleged that BP's decision to invest in KAM CP was not the disinterested application of ordinary investment management criteria, but rather involved something else including a pre-existing arrangement with Kingsway, not disclosed in the Offering Memorandum, to the effect that

KAM CP would be acquired. Therefore, I attach relatively little weight to the failure of the claims in dishonest assistance and procuring a breach of contract.

ii) The arguments as to the nature of the misrepresentations that he made and as to the meaning of the Offering Memorandum were minor victories on the road to overall defeat on the question of fraudulent misrepresentation. They do not themselves justify any percentage reduction.

iii) The allegation that there was an "Undisclosed Purpose" did not fail altogether since the allegation of a pre-existing arrangement, undisclosed in the Offering Memorandum, to invest in the KAM CP was an aspect of the Undisclosed Purpose which the court accepted to be present. However, material aspects of the case on the Undisclosed Purpose did fail. The attempt to construct what was in effect a conspiracy to use the Fund's money to "cash flow the Consortium" must have incurred significant cost and, since that attempt failed, it would not be right to require BP to meet the full costs associated with it.

iv) A reduction for the costs of the unsuccessful "Undisclosed Purpose" argument is applicable only from the beginning of January 2023 (when the Fund decided to plead fraud) to 25 April 2023 (when indemnity costs take over). That will certainly have been a busy and expensive time, but the period is self-contained. There are also considerations of BP's disclosure. He provided little disclosure indeed. I make no finding that he has withheld documents but it is relevant to point out that the Fund obtained little from him which might quite reasonably have fuelled its concern as to the existence of a wide "Undisclosed Purpose". While I quite accept that the Fund ultimately chose not to pursue its allegation that BP obtained a personal benefit, it probably had little choice given the relatively small amount of disclosure that BP provided. In saying this, I am not, of course, finding that there was a personal benefit. I am simply looking at matters from the Fund's perspective.

40. A 15% reduction in the Fund's recoverable costs is proportionate and reasonable in the light of the considerations set out above.

Pre-judgment interest on costs and damages

41. I will exercise my discretion to award pre-judgment interest on costs and damages as otherwise the Fund would be left uncompensated for being kept out of its money in this regard.

42. A compensatory rate of interest for the Fund would be base plus 2% as discussed above. Therefore, costs paid before 25 April 2023 should attract interest at base plus 2% from payment. Interest on damages should be awarded from the date of each investment in KAM CP to 25 April 2023 at the rate of base plus 2%.

Other matters

Payment on account

43. Obviously some of the Fund's costs were incurred in connection with its claim against HVK and some in connection with the claim against BP. BP is obliged only to pay

costs associated with the claims against him. If necessary, it will be a matter for the costs judge to determine these costs following a detailed assessment.

44. I will, however, order a payment on account on the basis of a rough and ready assumption that half of the Fund's total costs were incurred in connection with the claim against BP. Costs budgeting applies in this case and BP must make a payment on account calculated as follows:

    i) 90% of 85% of 50% of the Fund's approved budgeted costs. (The 90% figure reflects the high degree of likelihood that the Fund will recover its approved budgeted costs. The 85% reflects the reduction to the Fund's recoverable total costs. The 50% reflects the assumption that the Fund spent 50% of its costs on the claim against BP). PLUS

    ii) 70% of 85% of 50% of the Fund's total incurred costs, other than those approved as part of the costs budgeting exercise. (The 70% figure reflects an assumed discount to recovery of those costs following assessment. That figure takes into account that costs after 25 April 2023, which will include the costs of the trial itself, are calculated on the indemnity basis and so is a reasonable pre-estimate of what the Fund will recover, allowing for a discount for uncertainty. The 85% and 50% figures are included for the reasons above). PLUS

    iii) £75,000 (this being the uplift provided for by CPR 36.17.4).

Post-judgment interest

45. The Fund's damages are calculated in US dollars. In those circumstances, the Fund has fairly pointed out that the 8% Judgments Act rate is not necessarily applicable and instead it is appropriate to determine a rate of interest that will compensate the Fund for delayed receipt of a US dollar sum (see [136] of the judgment of Longmore LJ in *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499).

46. I have already concluded that a compensatory rate of interest, at least in sterling terms, is 2% above base rate. I conclude that for a US dollar judgment, the rate is 2% above the analogous Federal Funds rate.

Stays

47. Both the Fund and BP applied to the Court of Appeal for permission to appeal against the Order made following the Trial Judgment.

48. In the light of the application to the Court of Appeal, the Fund seeks a stay of the order to pay HVK's costs pending the Court of Appeal's determination of the applications for permission to appeal.

49. BP has already applied to the Court of Appeal for a stay of my earlier order. He essentially asks me to make an order to the effect that the further orders for payments of costs and interest be stayed until the Court of Appeal's determination and thereafter be stayed, or not stayed, in line with the Court of Appeal's determination.

50. By the time I handed down this judgment, the Court of Appeal had refused BP's application for permission to appeal and a stay of execution. It gave the Fund

permission to appeal on one ground.

51. There is, therefore, no need to consider BP's application for a stay of execution. Nor is there any need to deal with the Fund's application: it only ever sought a stay pending the Court of Appeal's decision on permission to appeal which has now been given. The Fund will need to approach the Court of Appeal for a stay of execution of my order on costs and, to give it time to do so, I have ordered the Fund to pay sums to HVK within 21 days, rather than the usual 14.