Neutral Citation Number: [2023] EWHC 1512 (Comm)

Case No: CL-2022-000391

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
SHORTER TRIALS SCHEME

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/06/2023

Before :

STEPHEN HOUSEMAN KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

YIELDPOINT STABLE VALUE FUND, LP	**Claimant**
- and -	
KIMURA COMMODITY TRADE FINANCE FUND LIMITED	**Defendant**

- -
- -

Fionn Pilbrow KC (instructed by **Katten Muchin Rosenman UK LLP**) for the **Claimant**
Nathan Searle & **George Harnett** of **Hogan Lovells International LLP** for the **Defendant**

Hearing date: 20 June 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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STEPHEN HOUSEMAN KC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down remotely at 1400 on 20 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Stephen Houseman KC :

1. This judgment deals with an issue which arose at the consequentials hearing in this action earlier today. It concerns an offer made by the Claimant (Yieldpoint) on 9 January 2023 pursuant to CPR Part 36 ("Part 36 Offer").

2. The issue is whether the Part 36 Offer was a "*genuine attempt to settle the proceedings*" against the Defendant (Kimura) within the meaning of CPR 36.17(5)(e). If not, this in turn may render it "*unjust*" to award a successful claimant such as Yieldpoint any of the post-judgment enhancements set out in CPR 36.17(4)(a)-(d).

3. The consequentials hearing was listed pursuant to an Order made on 24 May 2023 following handing down of my Approved Judgment [2023] EWHC 1212 (Comm) two days earlier ("Trial Judgment"). The Trial Judgment dealt with all issues for final determination at a one day trial the previous week. Yieldpoint succeeded in its claim for repayment of US$5 million plus interest accrued as from 31 March 2022. Definitions are adopted from the Trial Judgment for convenience.

4. My post-judgment order made provision for the listing of this consequentials hearing with a 90 minute estimate to deal with issues of costs and interest so far as not agreed (which very little has been) in the meantime. It also extended time for Kimura to file an Appellant's Notice following my determination, contained in Form N460 sent on 26 May, refusing permission to appeal. No further directions were needed. PD57AB contains a default regime for detailed statements of costs to be filed by both parties following trial under the Shorter Trials Scheme.

5. Yieldpoint invoked the Part 36 Offer and served its statement of costs on Thursday 8 June. Further details as to work done and time spent on documents was provided on 14 June and additional post-trial costs were submitted the following day. Yieldpoint's trial costs totalled US$448,183 with a further US$72,065 now claimed in the post-trial phase.

6. Kimura's solicitors responded by letter on Friday 16 June. Amongst other things, and despite the fact that Yieldpoint had obtained a monetary judgment more favourable than the terms of the Part 36 Offer, they objected to the applicability of CPR 36.17(4)(a)-(d) in favour of Yieldpoint. Kimura contended that such enhancements would be "*unjust*" in the present case, including because the Part 36 Offer was not a genuine attempt to settle the dispute.

7. Yieldpoint served witness evidence at 1501 yesterday, Mr Pilbrow KC having trailed it in his skeleton argument lodged at noon. This 29-paragraph witness statement was served without permission. Kimura objected to it by email. I ruled separately before the hearing this morning that it was inadmissible given the absence of permission and the late stage of its service. I concluded that I was unlikely to be assisted by witness evidence in a consequentials hearing conducted under PD57AB or when determining the specific dispute between the parties by reference to CPR 36.17(5).

8. I dealt with all issues arising at the consequentials hearing. I indicated, in light of citation of authority on the point, that I would produce a short judgment dealing with the status of the Part 36 Offer.

9. Turning then to the Part 36 Offer:

   (i) Yieldpoint sought the sum of US$4,950,000 (defined as the "*Settlement Sum*") inclusive of interest. This represented 99% of the principal claim.

   (ii) When accrued interest - calculated at the expiry of the 21 day acceptance period (30 January 2023) - is factored in, this proportion drops a few percentage points. Quite how far it drops depends on whether (and, if so, how) interest at the contractual rate in clause 11.5 of the MPA should be compounded. That was one of the disputed matters resolved - in favour of Kimura, as it happens - at the consequentials hearing. On this basis, the Part 36 Offer represented about 96% of the claim value as at 30 January 2023.

   (iii) The Part 36 Offer stated as follows in the second paragraph:

   "*Our client is confident that it has a strong case against your client, and is entitled to substantial damages, as set out in the Particulars of Claim.*"

   (iv) The fourth and final bullet point under the heading "***Terms of the Offer***" stated:

   "*The Settlement Sum is inclusive of interest*".

   (v) No indication was given as to the amount of accrued interest at such date or the daily rate of accruing interest or whether/how interest was claimed to be compounded pursuant to clause 11.5 of the MPA.

10. The stated rationale for the Part 36 Offer was not entirely straightforward, in my judgment. The pleaded claim was for repayment of US$5m said to have become unconditionally due upon the Maturity Date, i.e. a debt claim. Damages were sought as an alternative in the usual way. However, the claim was 'all or nothing' as made clear in the Trial Judgment and discussed with counsel at trial: see transcript p.84 (lines 9-20); p.86 (lines 6-11). Yieldpoint's written opening submissions for trial acknowledged that the Court had to choose between two opposing positions. No issues of causation or quantum arose. No alternative claim was advanced for an amount below US$5m plus interest. Yieldpoint's approach was described as 'US$5m or bust'.

11. The terms of the Part 36 Offer ("*entitled to substantial damages*") therefore give me some cause for concern: CPR 36.17(5)(a). It might also be said that Yieldpoint failed to provide sufficient information as to calculation of accrued interest at the relevant date: CPR 36.17(5)(c).

12. The real concern for me, however, is whether the Part 36 Offer was a genuine attempt to settle the claim given the starkly binary nature of this dispute and its far from obvious substantive prognosis in January 2023 or indeed at trial itself.

13. I am satisfied that the Part 36 Offer was not a genuine attempt to settle the proceedings when analysed in its proper context. On this basis, and in all the circumstances including those outlined in paragraphs 10-11 above and the fact that I summarily assessed Yieldpoint's trial costs at a figure representing 70% of the total

claimed, I conclude that it would be "*unjust*" to grant Yieldpoint any of the enhancements in CPR 36.17(4)(a)-(d).

14. CPR 36.17(5)(e) itself was inserted by rule amendment taking effect in April 2015, as explained in *White Book 2023* at 36.17.6. This provision is not confined to so-called '100% offers' made by claimants seeking to avail themselves of CPR 36.17(4) when they obtain a monetary judgment "*at least as advantageous*" as their own prior offer: CPR 36.17(1)(b). Nor is it necessary to show that an offer is being used as a "*tactical step*" in this context; cf. *Huck v. Robson* [2002] EWCA 398; [2003] 1 WLR 1340. As has been observed, all Part 36 offers are made for tactical purposes - such procedural behaviour is both encouraged and supported in the interests of promoting settlement of disputes. That said, an offer which is a cynical attempt to manipulate the Part 36 regime and apply pressure on an adversary is unlikely to be effective for such purposes.

15. The burden of proof or persuasion under CPR 36.17(5)(e) rests upon the offeree. Proof of injustice under CPR 36.17(4) is a "*formidable obstacle*" to an offeree who finds themselves on the wrong side of a judgment: see *Webb v. Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 WLR 3899.

16. The cases decided under CPR 36.17(5)(e) invariably concern what may be described as a 'very high claimant offer', i.e. an offer involving a very small or negligible discount against the gross value of the claim and/or waiver of accrued interest: see *Telefónica UK Ltd. v. The Office of Communications* [2020] EWCA Civ 1374; [2020] Costs L.R. 1461 *per* Phillips LJ at [49]. I was referred to authorities in which judges have concluded that a very high claimant offer was a genuine attempt to settle the proceedings in the specific circumstances of a case.

17. There is a danger in glossing the words of the rule itself, not least the risk of circularity by reference to whether or not the consequential enhancements in CPR 36.17(4)(a)-(d) will or will not become available in the event that such offer is not accepted and the claimant equals or betters it at trial. Stepping back, however, it is clear that the Part 36 regime incentivises the making (and acceptance) of constructive offers of settlement, i.e. those which can be said to have a meaningful impact upon the chances of avoiding a trial or further consuming curial resources towards trial.

18. The summary in the White Book at 36.17.6 is helpful. I adopt the "*broad brush*" approach endorsed in that commentary. A trial judge is uniquely placed to operate within such evaluative margin: they will have a feel for how strong the claim was, especially in an 'all or nothing' situation like the present case, and (therefore) how close the successful claimant was to 'losing' or failing to equal or better its own offer.

19. The fact that a judge in another case upheld a 99.7% offer (*Rawbank SA v. Travelex Banknotes Ltd.* [2020] EWHC 1619 (Ch); [2020] Costs L.R. 781) or a 95% offer (*Jockey Club Racecourse Ltd. v. Willmott Dixon Construction Ltd.* [2016] EWHC 167 (TCC); [2016] 4 WLR 43) or a 90% offer (*JMX v. Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB); [2018] 1 Costs L.R. 81) does not inform, still less dictate, how I should approach my evaluation of the Part 36 Offer in the present case. These decided cases provide illustrative guidance, no more.

20. One theme that emerges from the decided cases, however, is that a very high claimant offer may only be vindicated where the claim itself was obviously very strong and could be so characterised at the time of the relevant offer: see *Rawbank* (above) at [30] ("*clearly no defence*" / "*near-certainty*"); *Omya UK Ltd. v. Andrews Excavations Ltd. & another* [2022] EWHC 1882 (TCC); [2022] Costs L.R. 1295 at [19]-[20] ("*the defence put forward lacked credibility*").

21. The approach is necessarily objective and needs to be conducted free from the hindsight gifted by a trial and its known outcome, so far as possible. 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. The trial judge is attuned to this evaluation.

22. The outcome of the present case was far from foregone heading into trial last month, or indeed during 9-30 January 2023. Witness statements were not exchanged until March; both sides sought to rely upon aspects of the witness evidence in light of cross-examination at trial: see Trial Judgment [30]-[32], [38]-[39], [49], [70]-[72].

23. Anyone who reads the Trial Judgment will appreciate that the outcome of this dispute remained up for grabs to the end. In particular:

    (i) The whole claim turned on a single question of construction or characterisation of the MTV Participation in light of and by reference to the (somewhat incongruous and materially superfluous) terms of the MPA. This created an "*awkward interplay*" between two distinct contracts: Trial Judgment [5].

    (ii) Yieldpoint accepted and even averred that this feature of the contractual matrix created "*confusion*" such that "*neither interpretation can be derived 'cleanly' from the contractual documents… Nevertheless, one interpretation must be adopted and another rejected…*" The Court was required to choose between "*binary*" options, as it was put in written opening submissions. This involved a stark choice between "*two imperfect interpretations*" ([89]).

    (iii) Yieldpoint's characterisation involved a hybrid form of sub-participation, the likes of which had not been considered or even mentioned in any decided case found by the parties in this or a comparative jurisdiction ([59]-[61]). Yieldpoint's own analysis had problems on the contractual language, as highlighted in [62]-[68] and summarised in [90].

    (iv) In the event, I reached my conclusion "*not without some discomfort*" ([69]) and was moved to record additional observations in a post-script section at the end of the main analysis ([88]-[91]). Reference to "*common mistake*" in that context reveals the extent to which the parties appeared to differ in how they saw their bargain.

    (v) Kimura now seeks permission to appeal from the Court of Appeal.

24. This was not a case where a very high claimant offer reflected a very strong prospect of the claimant succeeding at trial. The parties were diametrically and evangelically opposed in terms of their characterisation - and, I sensed, subjective understanding -

of the deal they had concluded. A discount of 1% is meaningless in such context. It amounts to saying 'pay up now, accept that you are wrong'.

25. The fact that the offer involved foregoing a six-figure sum of interest was potentially meaningful, but that is not how the Part 36 Offer was pitched. On the contrary, as noted above, the stated rationale was an expectation of "*substantial damages*" whilst the inclusion of interest within the Settlement Sum lacked any context or calculation - it might have assumed interest added to a lower "*damages*" figure for example. Any forfeiture of interest would be set against the prospect of an "*additional amount*" of £75,000 being awarded to Yieldpoint under CPR 36.17(4)(d).

26. Testing the matter this way: how might a mediator or other neutral facilitator regard the Part 36 Offer if presented by Yieldpoint at the outset of or during a mediation or settlement discussion? I am confident that the answer would involve an apprehension that everybody was in for a long day or night ahead.

27. I conclude, therefore, that the Part 36 Offer was not a genuine attempt to settle these proceedings. My conclusion implies no criticism of Yieldpoint or its legal team. The word "*genuine*" may suggest otherwise on the face of things, but that is not the rationale of this provision (see paragraph 21 above). There was no impropriety or disingenuity or cynical manipulation on the part of Yieldpoint or its legal team.

28. Ultimately this is an inquiry as to whether it is "*unjust*" to disallow a claimant's expectation of consequential enhancements provided for in CPR 36.17(4). It is simply the case that Yieldpoint failed to bring itself within that beneficial post-judgment regime. It took a legal risk of Kimura accepting the Part 36 Offer, but did not thereby create a meaningful chance of settling the dispute ahead of trial. Cleansed of hindsight, Kimura was never likely to accept the Part 36 Offer.

29. My conclusion should not be taken as any kind of discouragement to claimants making Part 36 offers. It is, if anything, an encouragement to make offers at a level not so perilously close to the full value of the claim in a case of such adversarial intensity.

30. I am grateful to both side's advocates for their clear submissions on this discrete point.