Neutral Citation Number: [2024] EWHC 2019 (Ch)

Case No: CR-2019-LDS-000783

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF TRANSWASTE RECYCLING AND AGGREGATES LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BG

Date: 31/07/2024

Before :

MR JUSTICE ADAM JOHNSON

Between :

STUART WELLS

Petitioner

- and -

(1) PAUL HORNSHAW
(2) MARK HORNSHAW
(3) TRANSWASTE RECYCLING AND AGGREGATES LIMITED

Respondents

Martin Budworth (instructed by Ward Hadaway LLP) for the Petitioner
Gabriella McNicholas (instructed by Milners Solicitors) for the Respondents

Hearing date: 30 July 2024

Approved Judgment

This judgment was handed down remotely at 2pm on Wednesday 31st July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson:

The Issue and My Conclusion

1. The issue on this application is whether the Respondents' Part 36 Offer, made on 4 August 2023, was still open for acceptance when the Petitioner sought to accept it on 22 April 2024. Answering this question depends on the proper analysis of CPR rule 36.12, which is headed "*Acceptance of a Part 36 Offer in a split-trial case*".

2. I have come to the view that the Part 36 Offer was no longer open for acceptance by 22 April 2024, because by then all the issues in the case had been determined and the case had been decided, even though a valuation process is still ongoing in relation to the Petitioner's shares. I will explain my detailed reasons below.

The Petition and Counterclaim

3. The proceedings take the form of an unfair prejudice Petition under s.994 of the Companies Act 2006. The Petitioner, Mr Wells, is a minority shareholder in a company called Transwaste Aggregates and Recycling Limited ("*TRAL*"). The Respondents, Paul and Mark Hornshaw ("*the Hornshaws*"), are the majority shareholders.

4. Early in the proceedings, on 17 August 2021, DJ Jackson (as she then was) gave directions for the disposal of the Petition. These contemplated a trial of the allegations in the Petition and of the Respondent's Counterclaim, and possibly a further trial. Thus, the Order of DJ Jackson directed that:

> *"... so far as relevant, and depending on the outcome of the first trial ordered above, there will thereafter be a further trial to ascertain the price to be paid for the Petitioner's shareholding and the other terms of that purchase, in accordance with the decisions of the court in the first trial."*

5. To summarise the background briefly, the parties had a Shareholders Agreement ("*SHA*"), which included an agreed mechanism for valuing Mr Wells' shares on exit. This involved a valuation carried out by an accountant acting as expert. A valuation had in fact been carried out following Mr Wells' departure from the business, which in 2016 produced a figure for his shareholding of roughly £550,000. Mr Wells was unhappy with that figure, however, and so commenced his Petition proceedings. Part of his case was that he was not bound by the valuation mechanism in the SHA, because the conditions for its operation had not been satisfied, and/or because the parties had agreed to override it, and/or because it did not operate fairly. Mr Wells made a number of other allegations, some of them of serious wrongdoing by the Hornshaws, which if successful would have had the effect of boosting the value of his shareholding. The Hornshaws' Counterclaim, meanwhile, sought to hold Mr Wells to the original 2016 valuation.

The Part 36 Offer

6. That brings me to the terms of the Part 36 Offer, which are set out in a letter from Mr Wells' solicitors dated 4 August 2023. That was about 6 weeks before the start of the trial of the allegations in the Petition and of the Respondents' Counterclaim. That trial took place in September and October 2023.

7. The terms of the Part 36 Offer related both to the price to be paid for Mr Wells' shareholding, and to costs. As regards the former, in the version of the Part 36 Offer supplied to the Court for the purposes of this application, the relevant figure has been redacted by agreement. That is to allow the point of principle which arises at the present stage to be dealt with, but without the Court being told the precise financial terms of the Part 36 Offer. Depending on the outcome of the present application, that may be relevant when the Court comes to determine the costs of the proceedings; but I am not asked to do so yet. The parties have agreed that such matters should await the outcome of the valuation which is now being carried out.

8. Bearing all that in mind, the terms of the Part 36 Offer can be set out as follows:

> *"Our client is willing to settle the Proceedings (under reference CR-2019-LDS- 000783) on a full and final basis and on the basis that each party releases and forever discharges all and any actions, claims, rights, demands and set offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that is any of them ever had, or may have or hereby can, shall or may have against the other party arising out of or connected with the Proceedings, to include any actual or proposed counterclaims, on the following terms:*
>
> 1. *Our clients to pay to your client in return for the transfer of his entire shareholding in TRAL, within 14 days of accepting this Offer, the sum of [REDACTED] ('the Settlement Sum')*
>
> 2. *In addition, our clients will be liable to pay your client's costs (save for those ordered to be paid by your client to our clients pursuant to the order of Judge Jackson dated 11 November 2020) on the standard basis, to be assessed if not agreed, up to the date of service of the notice of acceptance, if this offer is accepted by your client within the Relevant Period.*
>
> 3. *The Settlement Sum is inclusive of interest until the expiry of the Relevant Period."*

9. The "*Relevant Period*" referred to was a period of 21 days from the date of the Part 36 Offer, namely the period up to and including 25 August 2023. The Part 36 Offer was of course not accepted during that period.

The Judgment, Order and Other Consequential Matters

10. Judgment following the 2023 trial was handed down in February 2024 (see [2024] EWHC 330 (Ch)). Amongst other matters, I held that Mr Wells *was* bound by the valuation mechanism in the SHA, which *had* been engaged at the relevant time and had not been overridden (see at [116]-[118]). Otherwise, Mr Wells' allegations of wrongdoing were dismissed (see [131]-[169]). The Counterclaim was also however dismissed: I was not satisfied that the valuation had been conducted in accordance with the agreed machinery (see [124]-[128]). I therefore held that there was unfair prejudice, but in the limited sense that Mr Wells's shares had not been valued in the required manner (see at [237]-[240]). That being the nature of the unfair prejudice, the remedy I ordered was a new valuation, to be carried out by an accountant acting as expert not as arbitrator, and following the contractual mechanism in the SHA (see at [243]-[244]). Obviously, that will not require a full second trial, of the type DJ Jackson's original Order thought might be needed, depending on the outcome of the first trial.

11. There was a consequentials hearing on 15 April 2024. The Order following that hearing dealt with a number of matters: (1) it contained a declaration that the valuation mechanism in the SHA had been engaged when Mr Wells left TRAL in September 2015 (para. 2); (2) it dismissed the Counterclaim (para. 3); and (3) it set out directions for the conduct of the fresh valuation (paras 4-10), including (para. 5) that the valuer should proceed on the basis of the findings made in the Judgment. Para. 10 then stated as follows:

> *"The Respondents shall pay the price determined in the expert valuation report and the Petitioner shall provide a duly executed share transfer form and the relevant share certificates within 42 days of the date on which the valuation report is provided to the parties."*

12. Paragraph 11 provided for the parties to have liberty to apply. Paragraph 12 reflected the position as to costs I have already referred to, namely that there should be a further hearing to determine liability for the costs of the proceedings after finalisation of the valuation.

13. Another matter considered at the hearing on 15 April, but not resolved then, was the question whether the Hornshaws should pay quasi-interest to Mr Wells on the price payable for his shareholding, once it is determined by the expert. In a Judgment dated 26 April 2024 ([2024] EWHC 970 (Ch)) I said yes, but only for the period between April 2016 and June 2018. A draft of that judgment was circulated to the parties on 22 April 2024. On the same day, Mr Wells sought to accept the Respondents' Part 36 Offer.

The Present Dispute

14. The present dispute arises because when Mr Wells (via his solicitors) sent his letter of acceptance on 22 April 2024, the Hornshaws (via a letter from their solicitors dated 24 April) disputed the validity of that acceptance.

15. The issue which arises is an important one for the parties. If the Part 36 Offer was *not* open for acceptance and has *not* been accepted, then the value payable for Mr Wells's shares will be whatever value is provided by the ongoing valuation process. On the other hand, if the Part 36 Offer *was* open for acceptance and *was* validly accepted, then Mr Wells will obtain for his shares the value it stipulated, rather than the figure to be identified in due course by the valuer.

16. The issue is also important in costs terms. If the Part 36 Offer was *not* open for acceptance and was *not* validly accepted, then when it comes to assessing costs, and assuming the figure which emerges from the ongoing valuation process is lower than that in the Offer, the Hornshaws will be entitled to seek to rely on the provisions of CPR, rule 36.17 – i.e., they will be able to seek the forms of order which sometimes follow where a Claimant or Petitioner has failed to beat a Part 36 Offer, including orders for the costs of the proceedings overall, with costs payable on the indemnity basis from after expiry of the Relevant Period together with enhanced interest.

17. If, on the other hand, the Part 36 Offer *was* still open for acceptance in April 2024 and *was* accepted, then Mr Wells (having accepted it) will be insulated against the effects of CPR, rule 36.17. In his letter of acceptance, Mr Wells' proposal was that the Respondents should bear the costs of the action on the standard basis up to the end of the Relevant Period (i.e., up to 25 August 2023), but he (Mr Wells) would pay the Respondents' reasonable costs (also on the standard basis) thereafter. As Mr Budworth, counsel for Mr Wells, pointed out during submissions, this structure reflects that mandated by CPR, rule 36.13(5), which applies in all cases where a Part 36 Offer relating to the whole of the claim is accepted after more than 21 days (see rule 36.13(4)(b)), unless the Court determines it is "*unjust*".

Mr Wells' Arguments

18. The arguments for Mr Wells' position relied principally on CPR, rule 36.12. Mr Budworth's basic point was that the present should properly be looked at as a split trial case. That is what the original Order of DJ Jackson contemplated; the Part 36 Offer must have been made on that basis; and there are still matters to be resolved, namely the price to be paid by Mr Wells for his shares and (relatedly) any points that may arise for the Court to resolve in the course of the ongoing valuation exercise. The consequence, said Mr Budworth, is that the case has not "*been decided*" (which is the relevant language in CPR, rule 36.12 (1)), but is only partly-decided. That being so, the Respondents had a period of 7 days after the Judgment was handed down to withdraw their Part 36 Offer if they wanted to (rule 36.12(3)). They did

not do so, with the consequence that it remained open for acceptance on 22 April 2024, and it was duly accepted by Mr Wells.

19. Although forcefully and attractively made, I have come to the conclusion that I cannot accept these submissions.

Discussion

20. My reasons all flow from the text of rule 36.12 itself. This provides as follows:

> *"Acceptance of a Part 36 offer in a split-trial case*
>
> *36.12*
>
> *(1) This rule applies in any case where there has been a trial but the case has not been decided within the meaning of rule 36.3.*
>
> *(2) Any Part 36 offer which relates only to parts of the claim or issues that have already been decided can no longer be accepted.*
>
> *(3) Subject to paragraph (2) and unless the parties agree, any other Part 36 offer cannot be accepted earlier than 7 clear days after judgment is given or handed down in such trial."*

21. Prior to the introduction of this provision in 2015 (by means of the Civil Procedure (Amendment No. 8) Rules 2014, SI 2014/3299), there had been a number of judicial dicta expressing the view that in order for a Part 36 offer to remain open for acceptance, it must relate to proceedings which are ongoing (see, for example, the comments made by Flaux J (as he then was) in Super Group Plc v Just Enough [2014] EWHC 3260 (Comm) at [25]: " *... although the rules do not deal with the matter expressly, they contemplate that Part 36 offers are made in respect of proceedings which are extant ...*".) That makes obvious sense: if the proceedings have been resolved, then the contingency which the offer was designed to try and avoid – determination by a Court of the issues separating the parties – will already have occurred.

22. It seems to me that CPR, rule 36.12 expressly recognises this principle, and seeks to apply it in the potentially more difficult context of split trial proceedings. According to the commentary in the White Book, some practical problems had emerged in dealing with such cases before 2015, *"... created largely by the fact that the pre-2015 rules as to acceptance countenanced a straightforward case where all contested issues are disposed of at one trial*" (see the Notes to the White Book 2024, at para. 36.12.1).

23. In order to address such matters, Rule 36.12 makes it clear that *even if* the case is a split-trial case, if the offer made relates only to issues *which have already been determined* in a first trial, then it can no longer be accepted (rule 36.12(2)). If however the offer also relates to

matters which still have to be determined, then the offeror is given a period of 7 days after judgment is handed down, to revisit the offer and withdraw or amend it, in light of the ruling given (rule 36.12(3)).

24. In argument, I did not detect any disagreement between the parties about this basic approach; but there was disagreement about whether the present is a split-trial case or not. In agreement with the Respondents, I have come to the decision that it is not, and that the relevant claims and issues have in fact already been determined. That is for the following reasons:

i) CPR, rule 36.3 contains some important definitions, which help inform the meaning of CPR, rule 36.12. Remembering that under rule 36.12(2), the trigger event which renders an offer no longer capable of acceptance is whether it relates to a claims or issues which have already been "*decided*", rule 36.3(e) helps us understand what it means for a case to be "*decided*" – it says *"... a case is 'decided' when all issues in the case have been decided, whether at one or more trials*." Under rule 36.3(c), "*trial*" is defined to mean, "*any trial in a case whether it is a trial of all the issues or a trial of liability, quantum or some other issue in the case*."

ii) In her submissions, Ms McNicholas in dealing with rule 36.3(e) emphasised the words, "*whether at one or more trials.*" I think she was correct to do so. What they signal is that a case will be regarded as having been "*decided*" under the rules when it can be resolved without the need for a further trial.

iii) In my opinion, that is the case here. There will not need to be a further trial. Moreover, it is entirely possible – perhaps even likely – that matters between the parties can finally be resolved without any further intervention from the Court at all. As Ms McNicholas also pointed out, the Order made following the consequentials hearing on 15 April 2024 reflects the final form of relief due to the Petitioner: he is to sell his shares for the price to be determined by the valuer, and the obligations on him to transfer his holding, and on the Respondents to pay the purchase price, are triggered by delivery of the valuer's report (para. 10 of the Order, at [11] above). No further intervention from the Court is necessary in order for any of that to happen. It is therefore appropriate to say that as far as the Court is concerned, final relief on the Petition and Counterclaim has already been obtained, and the case has already been "*decided*". I do not think it can make a difference that the original Order made by DJ Jackson (at [4] above) contemplated that there *might* need to be a second trial, because equally the Order contemplated that there might not – it would all depend on the outcome of the first trial. In any event, it seems to me one must approach the present analysis in light of what has actually happened, not in light of what might have happened in other circumstances.

iv) In response, as I have mentioned, Mr Budworth pointed essentially to two factors. One is the fact that the price payable by Mr Wells has still to be determined by the valuer. In this regard, Mr Budworth submitted that Part 36 should operate predictably and thus should be construed in a manner understandable by the layman not only the specialist lawyer. Mr Budworth submitted that a layman would say that the issues in the case have *not* all been determined, while the matter of the price to be paid remains outstanding. As to this point, I agree that predictability is desirable, but that is why the definitions in rule 36.3 are so important, and looking at the circumstances of this case, it seems to me that even the layman would be forced to concede that there is no obvious need for a further trial (see rule 36.3(e)), and would accept the proposition that the question of price can now plainly be resolved without any further intervention from the Court, because the Court by way of final relief has put in place machinery which will enable it to be identified.

v) Mr Budworth's further point concerned the possibility of the parties applying for further directions under the liberty to apply provision in the 15 April Order (noted above at [12]), and relatedly the fact that the Court retains a limited form of supervisory jurisdiction over expert determinations, and can set them aside in certain circumstances (Mr Budworth referred to Hollington on Shareholders' Rights, 10th Edn., at 8.25, 8.29, 8.63 and 8.66-7). None of that, however, persuades me that the issues generated by the Petition, and by the Respondents' Counterclaim, have not been "*decided*" in the relevant sense. They have been, and appropriate relief flowing from the decisions made has already been granted. It does not alter the substance of the position to say that implementation of that relief may possibly involve further directions being given, if there are procedural matters the parties cannot agree on. Even if that were so, it would not involve the Court at a further trial deciding any of the issues in the original Petition or Counterclaim, only policing the relief already granted following final determination of those issues. Likewise, the possibility of some challenge in due course to the determination made by the expert is pure speculation at this stage; and even if it were to materialise, such a challenge would in my opinion plainly involve the bringing of a new claim, not the resolution of issues still outstanding from the Petition or the Counterclaim.

vi) Finally, Mr Budworth had a policy point. He said there was a basic unfairness in the Hornshaws continuing to have the benefit of the Part 36 Offer after Judgment was handed down in February 2024, while on the Respondents' analysis Mr Wells was effectively disabled from accepting it. The gist of the point seemed to be that if the Hornshaws wanted the ongoing benefit of the Part 36 Offer, they had to live with the fact that it continued to be open for acceptance. Building on this, Mr Budworth said it was thus fairer to regard the present case as a split-trial case falling within rule 36.12, because then (under rule 36.12(3)) the Hornshaws would be regarded as having had a 7 day window within which to decide whether to leave their Part 36

Offer on the table or not. That gave then the chance to decide what to do; but having plainly decided to leave the Offer open – in order to bank the ongoing benefits – they could not sensibly complain about Mr Wells having accepted it.

vii) I am not persuaded by this argument. It has some superficial attraction, but rather begs the question whether the case is properly speaking a split-trial case or not, within the meaning of the rules. I think not, for the reasons already given; and in a case which is not a split-trial case, the policy underpinning the rules is to my mind clear. A party who has been given the opportunity of avoiding judicial determination of a claim by accepting an offer but who has refused to do so, must accept the consequences of the claim then being determined against him. Such consequences may (in an appropriate case) involve the effects contemplated by CPR, rule 36.17, if the outcome of the judicial decision is less favourable than that represented by the offer. There is nothing unfair in such a case in the offeree being disabled from accepting the offer, once the determination it was designed to avoid has been made; and likewise nothing unfair in the offeror then being entitled to derive such benefits as may accrue to him from having chosen to make it, and thus having taken the risk that it might be accepted before the outcome of the claim was known.

Conclusion and Disposition

25. For all those reasons, in my opinion the Petitioner's application falls to be dismissed. I will need to hear from the parties in relation to any consequential matters, if they cannot be agreed.