

Neutral citation number: [2023] EWHC 2672 (Ch)

Case No: BL-2021-MAN-000039

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Monday, 16 October 2023

Before:

**HIS HONOUR JUDGE HODGE KC
(sitting as a Judge of the High Court)**

Between:

AYMES INTERNATIONAL LIMITED

Claimant

-and-

**(1) NUTRITION4U B.V.
(2) NUTRIMESICAL B.V.
(3) SANDER KETELAAR**

Defendants

MR ANDREW LATIMER (instructed by **HEMINGWAYS SOLICITORS LIMITED**)
appeared on behalf of the **Claimant**

MR FRANCIS BACON (instructed by **FREETHS LLP**) appeared on behalf of the
Defendants

**APPROVED JUDGMENT
(CONSEQUENTIALS)**

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JUDGE HODGE KC:

First Ruling: Permission to appeal

1. This is my first extemporary ruling at this consequential hearing. Over four days between 28 March and 3 April 2023 I heard the trial of a claim by Aymes International Limited against Nutrition4U B.V and two others proceeding in the Business and Property Courts in Manchester under case number BL-2021-MAN-000039. On 19 June 2023, I handed down my written judgment in that case, which bears the neutral citation number [2023] EWHC 1452 (Ch).

2. In my judgment, I had identified the principal live issues in the case at paragraph 3. These were whether: (1) Following the exercise of a share purchase option, time was of the essence of completion of the resulting share purchase contract, at a price to be determined by reference to a formula which falls to be applied at a set date. (2) The consideration paid for the grant of the option falls to be excluded in the formula for calculating the purchase price for the option shares. (3) The claimant was entitled to specific performance of the option contract and, if so, the terms of any order for specific performance.

3. My conclusions were set out in section X of my judgment, between paragraphs 146 and 161. In summary, I found that time was not of the essence of completion of the contract for the purchase by the claimant from the first defendant company of all the shares in the second defendant company and that the claimant remained entitled to specific performance. However, I decided against the claimant on the amount of the option consideration. In short, the claimant had been contending that the purchase price for the shares in the second defendant company should be treated as effectively nil, whereas the defendants contended that a substantial sum should be paid for the purchase of the shares. That issue was resolved against the claimant and in favour of the defendants.

4. It is against that part of the court's judgment that the claimant now seeks permission to appeal. Mr Andrew Latimer (of counsel), who appears for the claimant, has produced proposed grounds of appeal, which are to be found at pages 265 to 267 of the bundle for today's consequential hearing. Ground 1 is the assertion that the court erred in law in deciding that, on the proper construction of schedule 1 to the option agreement, €150,000 per

annum should be included in Relevant Margin and thereby included in the calculation of Company Value.

5. It is contended that the court fell into error in four separate respects, identified at subparagraphs 1.1 through to 1.4 of the proposed grounds of appeal. In summary, it is said that the court should have decided that €150,000 per annum was excluded from Turnover and from the Company Value calculation, with the effect that Company Value was negative, and so the claimant should only pay a further one euro for the shares, in addition to the €537,500 already paid for the option.

6. My decision on that aspect of the case is set out at paragraphs 110 to 121 of the written judgment. Having summarised in detail the competing arguments of Mr Latimer, for the claimant, and Mr Francis Bacon (of counsel), for the defendants, at paragraph 118 of the judgment I explained that, on the Company Valuation issue, I had no hesitation in preferring Mr Bacon's submissions to those of Mr Latimer. For the reasons Mr Bacon had advanced, I found that, on the true construction of the call option agreement, and having regard to its language, its commercial purpose, the factual matrix, and commercial common sense, the Option Consideration received by the second defendant in year 3 (and repeated in year 4) should be included within the second defendant's Turnover for the purposes of schedule 1 to the option agreement. I elaborated upon my reasoning at paragraph 119 to 121.

7. In the course of summarising Mr Latimer's submissions (at paragraph 113), I referred expressly to Mr Latimer's submission that the conclusion for which the defendants were contending produced a "too good to be true" result and was effectively counter-intuitive. I am entirely satisfied that I fully considered all of the matters in relation to which Mr Latimer now seeks to say that the court fell into error, as set out at subparagraphs 1.1 through to 1.4 of his proposed grounds of appeal. In my judgment, none of those grounds, whether looked at individually or collectively, has any real prospect of success on appeal.

8. I bear in mind Mr Latimer's submission that he needs to demonstrate a real prospect of success on only one of those four separate aspects of his first ground of appeal; but I am satisfied, for the reasons set out in my substantive judgment, that none of them has any real prospect of success. As Mr Bacon has submitted in his written skeleton argument for today's hearing, the first ground of appeal is really no more than a re-argument of the claim presented

at trial, which the claimant lost, both on the law and on the facts. Since the matter is an issue of construction, it is essentially a matter of law; but I am satisfied that Mr Latimer's proposed grounds of appeal have no real prospect of success.

9. The second and third grounds of appeal can really be taken together. Ground 2 relates to a line of questioning in relation to a completely separate corporate entity called Nualtra. It is said that the court erred in law, or alternatively exercised its discretion in a way which was not open to it, in allowing cross-examination of Mr Aymes and Mr Patrick Eraut by the defendants, through Mr Bacon, on a collateral matter which was irrelevant to the present dispute about the option agreement.

10. It is said that the answers of Mr Eraut, in particular, were used as support for a conclusion that Mr Aymes had not been truthful about certain letters and emails sent in 2014 to 2015, and that this in turn damaged Mr Aymes's credibility as a witness in the present proceedings. It is said that the court should have excluded this line of cross-examination as irrelevant, and that Mr Aymes's answers to questions that went to credit was final or, alternatively, any relevance was so peripheral that it did not warrant examining those issues in circumstances where: (1) the letters and emails were not pleaded, nor was the general issue of untrue communications about Nualtra pleaded; (2) the matter was not mentioned in the defendants' sole witness statement; and (3) this line of questioning was identified in advance merely by the presence of cross-examination documents in bundle D3 of the trial bundles.

11. Ground 3 is that there was no, or no sufficient, basis for finding that Mr Aymes had deliberately over-stated his role within a former employer, Nutrica. In particular, it is said that the court erred in its approach to paragraph 7 of Mr Aymes's witness statement. Instead, the court should have concluded that that paragraph was accurate about his previous employment, and in turn, that the consequent failure of the defendants' allegations in that respect reduce still further any reason for rejecting his evidence.

12. Once again, I am satisfied that there is no real prospect of either of those grounds of appeal succeeding at trial. The court had addressed the issue of cross-examination on collateral matters expressly at paragraph 65 of its judgment. So far as ground 3 is concerned, the court's findings were amply supported by the evidence of Mr Eraut, as recited in my summary of Mr Bacon's further cross-examination of Mr Eraut concerning paragraph 7 of

Mr Aymes's witness statement in that part of paragraph 63 of my judgment which is to be found towards the bottom of page 28 of the consequential hearing bundle. Mr Erant, who had full knowledge of these matters, described paragraph 7 of Mr Aymes's witness statement as "a slightly confusing statement", although he went on to acknowledge that although "it is perhaps a slightly misleading mistake in the way it is presented", there is "not necessarily anything deeply suspicious" about it.

13. I am entirely satisfied that there was no error in the court's approach to those two matters. But, in addition, as Mr Bacon points out at paragraph 46 of his skeleton argument for the purposes of this hearing, the second and third grounds of appeal, whether individually or taken together, will not in any way affect the outcome of this case and simply go to credit. Even if I had taken a different view of Mr Aymes's evidence and credibility on these matters, it would not in any way have affected the court's ultimate decision on any of the issues at this trial. Mr Latimer expressed the matter well in his oral submissions today when he said that essentially these matters go to Mr Aymes's reputation and credibility. But this case did not turn on those matters; and even if Mr Latimer were to be given permission to appeal, and even if he were to succeed in overturning my views on the matters raised by grounds 2 and 3, it would have no impact whatsoever on the court's ultimate decision on any of the matters that fell to be determined at trial.

14. I am satisfied that neither grounds 2 nor 3 has any real prospect of success. Even if either of them did, there would be no effect upon the court's ultimate decision on these matters. So, for those reasons, I would refuse permission to appeal on all three grounds. I will, after this hearing concludes, complete the necessary form N460 and upload it to CE-File; but the reasons given in that N460 should be read in conjunction with this extemporary ruling.

Second Ruling: Costs

15. This is my second extemporary ruling this morning at the hearing of consequential matters following my handing down of a written judgment in this case on 19 June 2023. I have already delivered a first extemporary ruling refusing the claimant's application for permission to appeal from part of my judgment; and this extemporary ruling on costs should be read in conjunction with that earlier ruling, which sets out the background to this case.

16. This extemporary ruling addresses the incidence of the costs of the litigation. It is common ground that the court has a discretion as to costs; but the starting point is that the unsuccessful party will pay the costs of the successful party, and the burden is on the unsuccessful party to justify a departure from that general rule. A departure should only be made where the needs of justice require it, and some measure of caution is required in that regard.

17. Apart from the outcome of the litigation, in deciding what order, if any, to make about costs, the court will also have regard to all the circumstances of the case, including the parties' conduct, whether a party has succeeded on part of its case even if that party has not been wholly successful, and any admissible offers to settle which are drawn to the court's attention. In the present case, there have been no Part 36 offers but there have been a number of 'Without Prejudice Save as to Costs' offers. It is common ground that such *Calderbank* offers operate differently from offers under Part 36, although they are relevant in the issue of costs.

18. I can dispose of two matters at the outset. First, there are three defendants to this claim; but the second and third defendants were joined essentially to ensure that they were bound by the outcome of these proceedings. There was no counterclaim by any of the defendants. I am satisfied that no additional costs were incurred as a result of the joinder of the second and third defendants. I am satisfied that the principal, and effective, parties to this litigation were the claimant and the first defendant, and that there should be no order for costs as between the claimant and the second and third defendants, who were effectively, so far as the latter are concerned, formal parties to this litigation. Secondly, I am also satisfied that this is not a case that in any way departed from the norm in commercial litigation, and that there is no justification whatsoever for ordering any assessment of costs to proceed on the indemnity, rather than the usual, standard basis.

19. The difference between the parties as to the incidence of costs is stark. The claimant proposes that the defendants should pay the claimant's costs of the whole proceedings, subject to detailed assessment, with the costs being assessed on the indemnity basis after 26 October 2021, when the claimant's 'Without Prejudice Save as to Costs' offer contained within a letter of 4 October 2021 expired. That offer had essentially proposed, first, that the

parties should agree that they remained bound by the exercise of the option, which had been validly exercised by notice served on the first defendant on 1 April 2020. It was further proposed that the parties should jointly refer the issues of the Company Value, and the Consideration payable following the exercise of the option for the purchase by the claimant of the first defendant's shares in the second defendant, for determination in accordance with the mechanism contained within clause 12 of the option agreement.

20. It was proposed that the third defendant, Mr Ketelaar, should be retained in his role as chief executive officer of the second defendant and should enter into an employment contract on the same terms as his existing service contract. It was also proposed that there should be no order upon the claimant's claim for damages against the defendants, and that there should be no order as to costs.

21. Mr Latimer submits that it was the claimant that succeeded at trial and secured the relief sought by way of specific performance of the contract constituted by the exercise of the option. He says that Mr Ketelaar could have had the Company Value determined by an expert, which is what he had been seeking. There would have been no damages awarded in favour of the claimant; and Mr Ketelaar would have succeeded in securing a chief executive officer employment contract very similar to his existing one.

22. That offer was rejected by letter from the defendants' solicitors dated 12 October 2021. The reason given for rejecting the settlement proposal was that the option agreement was no longer binding on the parties, and there was said to be a wealth of evidence that was said to support that position. The defendants did not therefore intend on proceeding with an option agreement that no longer bound them. The response proposed that the claimant should discontinue the claim and pay £25,000 towards the defendants' costs.

23. The only other relevant offer is a *Calderbank* offer made by the defendants on 2 February 2023. Mr Latimer points out that that offer was open for acceptance until 1 March 2023. That date should be viewed in the context of a trial which was due to begin only four weeks later, on 28 March 2023. Essentially, the defendants abandoned their position that the option agreement was no longer binding and agreed to remain bound by it. The offer proposed that the parties should agree that the Company Valuation of the second defendant should be €526,930, which was the figure found by the court at trial. In the absence of

agreement as to that figure, the dispute was to be referred to an independent expert accountant, in accordance with clause 12 of the option agreement, to determine the Company Value and the Consideration for the purchase of the option shares. It was proposed that the claimant should, in lieu of the transfer of shares in the claimant company by way of consideration for the option shares, pay the first defendant a fair value for the option shares in cash, which was gain to be determined by an expert in accordance with clause 12 of the option agreement. Mr Ketelaar agreed to forfeit his right to a chief executive officer contract. The defendants were to pay the claimant one pound in respect of the claimant's damages claim; and each party was to bear their own legal costs.

24. What Mr Latimer says in relation to that offer, at paragraph 45 of his skeleton argument for this consequential hearing, is that not only was that offer made at a very late stage, but the reality is that the defendants' *Calderbank* offer would only have avoided a trial of the claim at the price of going to an independent expert against the background of the true construction of schedule 1 to the option agreement, by reference to which the Company Value was to be determined, remaining in dispute. That, Mr Latimer acknowledges, would probably have led the loser to declaring that the expert had stepped outside the contractual mandate because his or her contractual mandate was to apply schedule 1, and not to apply it wrongly. Mr Latimer says that a decision outside the mandate is not binding; and, doubtless, litigation would have followed. He says that whatever the superficial appearance of the defendants' very late *Calderbank* offer, it does not help them to rebut the presumption, or general rule, that they are the unsuccessful parties and should pay the costs.

25. Mr Latimer submits that the starting point is to identify the loser in this litigation. In this case, the relief sought was specific performance of the contract constituted by the exercise of the option to purchase shares in the second defendant; and, on that issue, the claimant was the winner. Had there been no specific performance ordered, the consideration payable for the shares would not have mattered.

26. Mr Bacon, for the defendants, submits that the fundamental dispute between the parties as to the Company Value of the second defendant, and thus the Consideration payable for the purchase of the option shares, was a matter which had to be determined by the court, and was ultimately determined in the defendants' favour. He says that it is absurd to suggest that the appointment of an independent accountant could have resolved the valuation issues,

particularly when the claimant was asserting that the Company Value of the second defendant was negative, and therefore only a nominal consideration of one euro was payable for the option shares. He reminds me of what I had to say at paragraphs 83 and 87 of my judgment.

27. At paragraph 83, I agreed with Mr Latimer's submission that the dispute fell outside the final and binding provisions of clause 12, and so the expert determination clause was a red herring. At its core, the dispute about Company Value essentially raised issues of law and construction, which an accountant would lack the necessary skill and expertise to determine. At paragraph 87, I agreed with Mr Latimer that the construction issue was not something which any accountant could, or ever was, intended to determine. As the parties had diametrically opposed views on construction, any offer to refer the dispute to an independent accountant, in accordance with clause 12 of the option agreement, was a red herring. I quoted, and accepted, Mr Latimer's submission that the dispute was beyond the reach of any accountant.

28. Mr Bacon submits that this is a case where, essentially, the successful parties are the defendants because they succeeded on the issue of the price payable for the option shares. He accepts that the defendants were not successful on the specific performance issue, and he therefore accepts that there should be some discount from the award of costs to which the defendants would otherwise have been entitled. He invites the court to order that the claimant should pay 80 per cent of the defendants' costs of the proceedings, subject to detailed assessment.

29. As in so many cases where the court is required to determine the incidence of costs, a difficulty arises in determining which is the successful party in the litigation. The claimant was successful on the issue whether time was of the essence of completion of the option contract, and the claimant succeeded on the issue whether it was still entitled to specific performance. On the other hand, it was seeking specific performance of a contract to purchase shares for a nominal consideration of €1; and, in fact, the consideration it is going to have to pay is substantial. That is evidenced by the fact that it is Mr Latimer, for the claimant, who has sought permission to appeal my decision, and not Mr Bacon, for the defendants.

30. The defendants were unsuccessful on the specific performance issue, but they were successful on the issue as to the Consideration payable for the shares by the claimant to the first defendant. They were also successful in resisting a chief executive officer contract on all of the terms proposed by the claimant; and they were also successful in resisting the claimant's claim for damages.

31. If I look at the matter for the moment ignoring the 'Without Prejudice Save as to Costs' offers, it seems to me that neither party has been wholly successful, and neither party has been wholly unsuccessful. There is to be specific performance of the option contract, but at a price considerably in excess of the price which the claimant was hoping to pay for the option shares.

32. In those circumstances, the court might have approached the matter on the basis that there should be no order for costs as between the parties. Had the parties' costs been similar, that might have been a proper approach to take. However, in the present case, there is a considerable disparity between the budgeted costs of the two parties. The claimant's cost budget, in its final form, is a little over £330,000, as opposed to the defendants' cost budget, which is some £185,420. For all phases except for trial preparation and trial, the claimant's cost budget is over £250,000, as against nearly £116,000 for the defendants. The cost budgets for trial preparation and trial are over 93,000 for the claimant against a little under 70,000 for the defendant. In the light of those disparate figures, it would not be a just result simply to say that there should be no order as to costs.

33. Mr Bacon invites me to bear in mind that of the two issues on which the defendants succeeded, those were the two issues which had necessitated the expense of expert evidence of accountants and of a Dutch lawyer. In that regard, I had preferred the evidence of the defendants' expert accountant to that of the claimant.

34. I also have to bear in mind that I expressed concerns about the unreliability, and the unsatisfactory nature of the evidence, of the claimant's principal witness, Mr Aymes, whereas I found the defendants' principal witness, the third defendant, Mr Ketelaar, to be a reliable and honest witness. However, this was not a case that turned principally upon the witness evidence; and it seems to me that my views on the witnesses should not have a material impact upon the incidence of costs.

35. It seems to me that it is an oversimplification for Mr Latimer to submit that since this was a claim for specific performance, and the court ordered specific performance, then the claimant was the successful party. It ignores the important question: specific performance at what price? And, on that, the claimant was spectacularly unsuccessful, as evidenced by the fact, as I have already mentioned, that it is the claimant, and not the defendants, that is seeking permission to appeal.

36. Doing the best I can to achieve justice between the parties, it seems to me that, absent reference to the 'Without Prejudice Save as to Costs' offers, the just result in the present case, as regards the incidence of costs, would have been to order the claimant to pay half the defendants' costs, and the first defendant to pay half of the claimant's costs.

37. I then need to consider whether the *Calderbank* offers make any difference. The initial offer made by the claimant would not have averted the present litigation. Although it would have resolved the issue of the claimant's entitlement to specific performance, it would have left the purchase price unresolved, and would simply have led to the present litigation, albeit confined to the issue of the amount of the option consideration. Therefore, I do not consider that the claimant can derive any benefit from the offer that it made on 4 October.

38. The defendants' offer of 2 February amounted to a substantial reversal of the defendants' previous attitude. The defendants' agreed, for the first time, that they remained bound by the option agreement. They proposed a figure for Company Value which accorded with that ultimately determined by the court. Mr Ketelaar agreed to forfeit his right to a chief executive officer contract. The damages claim was to be settled for a nominal £1.

39. The difficulty with that offer was that it provided for each party to bear their own legal costs. Those budgeted costs were substantially greater, so far as the claimant was concerned, than the defendants. I have already given the figures, and the claimant's budgeted costs were more than double those of the defendant. In those circumstances, it seems to me that the defendants' offer is not one that should affect the ultimate incidence of costs. It was made only about seven weeks before trial, and it expired only four weeks before trial; and it would have left the claimant out of pocket to a far greater extent than the defendants.

40. In those circumstances, I do not consider that that late *Calderbank* offer made by the defendants should affect the conclusion to which I would otherwise have come concerning the incidence of costs. In my judgment, and in the exercise of the court's discretion, the appropriate order as to costs should be that each of the claimant and the first defendant should pay half of the opposing party's costs, to be the subject of detailed assessment on the standard basis if not agreed. I will now hear submissions as to the appropriate interim payment on account, which will be netted off in each case, resulting in an ultimate payment from the first defendant to the claimant because the claimant's costs are so much greater.
