Neutral Citation Number: **[2023] EWHC 1640 (Ch)**

Case No: PT-2020-000768

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Property Trusts and Probate List (ChD)

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

Date: 30 June 2023

Before :

MASTER PESTER

- -

Between :

PAUL JEFFREY WOODGATE	**Claimant**
- and -	
ROBERT JOHN WOODGATE	**Defendant**

- -
- -

Nathan Wells (instructed by **Gardner Leader LLP**) for the Claimant
Charlotte John (instructed by **Bird & Lovibond Solicitors**) for the Defendant

Hearing date: 20 April 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 2.30pm on 30 June 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

MASTER PESTER:

1. This judgment addresses one point of dispute on the draft order following my ruling on costs, first circulated to the parties on 10 October 2022.

2. The Claimant ("Paul") and the Defendant ("Robert") are brothers. Paul began these proceedings by way of a Part 8 claim, issued on 1 October 2020, seeking various heads of relief, including Robert's removal as personal representative of their mother's estate, the appointment of an independent administrator, and an account. In June 2021, I made an order which (among other things) removed Robert as executor and appointed a professional administratrix to conclude the administration of their parents' estates. At the same time, Robert was ordered to provide an inventory and account of his administration of both estates.

3. Robert duly filed an account of his administration. Paul raised various objections. On 21 July 2022, there was a further hearing to determine the outstanding issues on the account. At the end of that hearing, with a view to saving the parties further costs (which were already considerable), I invited the parties to file written submissions on costs, and indicated that I would determine matters on the papers, without a hearing.

4. I circulated a ruling on costs on 10 October 2022. The parties have agreed an order, reflecting the points I made in that ruling, including that Robert should pay Paul's costs, such costs to be subject to detailed assessment on the standard basis if not agreed. However, Paul says he should have permission to apply to the court for additional relief under CPR Part 36 "if it is subsequently established that [Robert] has failed to beat the Part 36 offer". What is suggested is that Paul would apply for any additional costs relief under r. 36.17 "within 28 days of the administratrix providing

formal written confirmation to [Paul] of the final value of [Paul]'s beneficial interest" in his mother's estate.

5. I have no doubt that such permission should be refused, for the following reasons.

6. *First*, I doubt whether the offer on which Paul relies is properly a Part 36 offer at all. Part 36 is a self-contained and highly prescriptive code: see *Greenwich Millennium Village Ltd v Essex Services Group plc* [2014] EWHC 1099 (TCC), at [39], per Coulson J (as he then was). Moreover, the particular status of Part 36 as a prescriptive regime with draconian, or at least severe, consequences for non-compliance supports the proposition that the court should be wary of liberally construing its rules to achieve a pragmatic answer: see *Hertel v Saunders* [2018] 1 WLR 5852, CA, at [37].

7. In this case, Paul's offer to settle was made on the standard form, N242A, dated 30 May 2022. The details of the offer stated "The Claimant shall accept the sum of £351,297.50 from the Defendant in full and final settlement of the remaining claims brought by the Claimant in proceedings case number PT-2020-000768." The reference to "full and final settlement <u>of the remaining claims</u> … <u>in [the] proceedings</u>" (emphasis added) would appear, on my reading, to be a reference to what were the outstanding claims at the time when the offer was made, that is, a claim for an account and for occupation rent in relation to the principal asset in the estate, a property known as "Fernbank". Those were the issues which were still live at the time when the offer was made. It was those issues on which I ruled, at the hearing on 21 July 2022.

8. However, judging from the submissions made on behalf of both Paul and Robert, that does not appear to be how the parties understood the offer. Instead, the offer appears to have been based on the assumption that Paul was offering Robert a chance to buy

Paul's 50% entitlement in the estates for the price of £351,297.60. However, that is not the relief that Paul was either claiming or could obtain from Robert in these proceedings. Looking at the Part 8 claim by which these proceedings were commenced, Paul claims a wide variety of relief, but nothing is said as to the ownership of Fernbank, which is the principal asset within the estate (and where Robert has been living throughout). Indeed, the parties' interest in Fernbank itself has never been an issue in the proceedings, although there has always been an issue as to whether Robert ought to pay occupation rent to the estate in respect of it, and if so, in what amount.

9. Subject perhaps to arguments about certainty of terms, such an offer is a perfectly valid offer of settlement, but it is not a Part 36 offer. CPR r. 36.2(3) provides that "A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in (a) a claim, counterclaim or other additional claim ...". Further, CPR r. 36.5(1) sets out the form and content of a Part 36 offer, including that such an offer must state "… whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue …". The Court of Appeal's decision in *Hertel v Saunders* is authority for the proposition that the words "claim", "part of a claim" and "issue" are referring to pleaded claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded: see at [33].

10. Counsel for Paul relied on *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] 4 WLR 43 to submit that "a valid Part 36 offer does not have to reflect an available outcome of the litigation". I do not consider that this assists Paul. In that case, Edwards-Stuart J held that the fact that the claimant's Part 36 offer did not reflect an available outcome of the litigation did not affect its validity. There,

the claimant had offered to settle liability on the basis that the defendant pay 95% of the damages. It may be true that it was unlikely that a court would have ever awarded the claimant 95% of its claim. But, quite rightly, that would not mean that such an offer was not a Part 36 offer, because it still relates to a claim or an issue in the proceedings, that is, the quantum of the claimant's claim. The *Jockey Club* case is dealing with a different point.

11. Counsel for Paul also drew my attention to a recent decision of Hildyard J, *In the Matter of Lehman Brothers International (Europe) (In administration); Grant v FR Acquisitions Corporation (Europe) Ltd* [2022] EWHC 3366 (Ch). In summary, Hildyard J held in that case that although a claimant's offer of settlement had provided for accelerated payment of a debt not yet due, where acceleration could never have been obtained by the claim, that had not prevented it "relating" to the claim and so complying with CPR r.36.5. Obviously, the facts of that case are very far removed from the situation before me, and I do not derive a great deal of assistance from it. As I read the judgment, the crux of the decision is that the real point in dispute was whether the first defendant should be required to pay upon cessation of the administration, and that it would be "odd" if a genuine and clear offer to settle a dispute which would "in the end be about the payment of money" could not be brought within the Part 36 machinery "by including a monetary discount in respect of the various uncertainties and foreclosure of the suspensory condition": see at [28]. It seems to me that the decision is at or near the outermost bounds of when an offer may be said to "relate" to a claim. I note that permission to appeal has been granted in relation to the decision.

12. In summary, it does not seem to me that Paul's offer of 30 May 2022 did relate to any pleaded claims in the proceedings. Accordingly, it seems to me that Paul's offer of May 2022, in so far as it can be construed as being an offer to sell his 50% interest in the estate to his brother for the sum of £351,297.60, was not a Part 36 offer at all.

13. *Second*, and assuming that I am wrong, and Paul's offer is treated as being a valid Part 36 offer, there is the timing point. On the authorities, it appears that it is open to a party to invite the court to defer making a decision on a Part 36 offer until it has all the information: see *Crooks v Hendricks Lovell Ltd* [2016] 1 Costs LO 103, CA. *Crooks v Hendricks Lovell* is, however, readily distinguishable. In that case, a Part 36 offer had been made in a personal injuries claim "net of CRU" (that is, net of the recoverable benefits certified by the Compensation Recovery Unit). Sensibly, the Judge deferred making a decision on the Part 36 offer until the CRU had carried out its review.

14. In this case, Paul has already asked the court to make a decision on costs. That decision has been made, and moreover, made in Paul's favour. Assuming again for present purposes that the offer made was a valid Part 36 offer, it may have been open to Paul to ask the court to defer making any ruling on costs immediately after the last hearing. But what he cannot do in my judgment is simultaneously to ask the court to rule on costs, and then further reserve his right to come back to court at some uncertain point in the future to see whether, as events have transpired, Paul has after all done better than his Part 36 offer.

15. *Third*, Paul has not suggested that he has beaten his alleged Part 36 offer, and the notion that he might be seen to have met or bettered his offer at a later stage appears fanciful. Paul's offer to accept the sum of £351,297.60 in full and final settlement of

the remaining claims in the proceedings is predicated on the total value of the estate being £702,594, to be divided equally between Paul and Robert. There is expert evidence which suggests that Fernbank is worth about £435,000 (the average of the two expert reports provided for the hearing in July 2022). Recent developments in the housing market are unlikely to have increased this figure. On the basis of the figures currently available, the distributable value of the estate stands at approximately £528,679. Even that figure does not include costs and expenses, such as the administrator's fees, costs of sale and any CGT liability, plus Inheritance Tax. Realistically, the only way in which Paul has any prospect of "beating" his offer would be if Fernbank were to increase in value to at least £550,000 to £600,000. This seems very unlikely.

16. In the circumstances, where at the date of the judgment Paul has clearly not bettered his offer, and where the prospect of the offer ever being seen as being equally as advantageous as the judgment seems entirely remote, if not fanciful, it would be wrong to leave it open to Paul to re-apply to the court in the future. It is preferable for the court to rule on costs without delay at the conclusion of litigation: see *Lamport v Jones* [2023] EWHC 667 (Ch), at [111].

17. Finally, and in any event, even if Fernbank very significantly and unexpectedly increased in value, contrary to all expectations, the fact that it was not possible to evaluate as at the date of judgment whether or not the judgment was equally advantageous would be a strong pointer in favour of the court declining to award any further relief on the grounds that it would be "unjust" to do so. The court is required to consider the information available to the parties and the circumstances which prevailed at the date when the offer was made for the purposes of evaluating whether

or not it would be unjust to order further relief under Part 36: see CPR r. 36.17(5)(c). See *Novus Aviation Limited v Alubaf Arab International Bank* [2016] EWHC 1937 (Comm), at [26]. Taking into account the information available to the parties and the circumstances prevailing when the offer was made, Paul had plainly not done better than what he achieved following the hearing in July 2022.

18. It was submitted to me that the ability of Paul to re-apply to the court at the conclusion of the administration of the estates is properly seen as an "incentive" to Robert "to do what he reasonably can to assist in bringing the administration to a timely conclusion". If Paul's real concern is that Robert may in some way seek to further delay the completion of the long-overdue administration, then there are other options open to the parties (including the professional administratrix). It is not, however, right that that concern, whether justified or not, warrants keeping "this final costs issue" relating to the offer of May 2022 open.

19. For these reasons, I refuse permission for Paul to apply back to court for additional costs relief in the future.