

**IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST**

Neutral Citation Number: [2023] EWHC 1424 (Comm)

Before
MR JUSTICE PICKEN
BETWEEN:

**(1) PALLADIAN PARTNERS LP
(2) HBK MASTER FUND LP
(3) HIRSH GROUP LLC
(4) VIRTUAL EMERALD INTERNATIONAL LIMITED**

Claimants

-v-

**(1) THE REPUBLIC OF ARGENTINA
(2) THE BANK OF NEW YORK MELLON (as Trustee)**

Defendants

Ms Susan Prevezer KC, Mr Alex Barden and Mr James Shaerf (Instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) appeared on behalf of the Claimants
Mr Ben Valentin KC, Ms Tamara Oppenheimer KC, Mr Samuel Ritchie and Ms Francesca Ruddy (Instructed by **Sullivan & Cromwell LLP**) appeared on behalf of the Defendant
Mr Adam Zellick KC and Mr Ian Bergson (Instructed by **Reed Smith LLP**) appeared on behalf of the Defendant

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(Approved)

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(Official Shorthand Writers to the Court)

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1. **MR JUSTICE PICKEN:** I turn now to another aspect which arises at this consequential hearing. It is an issue concerning the fact that a Part 36 offer was made by the claimants to the Republic on 5 February 2020.
2. That offer in fact followed an earlier offer made by the claimants, specifically in fact the first and second claimants, because they were at that stage the only claimants, in fact proposed claimants I think at that juncture. That earlier offer, however, was subsequently withdrawn in November 2019 to be replaced a few months later, on 5 February 2020, with a Part 36 offer made on behalf of all the claimants - that is to say, the four eventual claimants.
3. The February 2020 offer was on the same terms as the earlier offer but amended to reflect the position of all four claimants and their updated holdings.
4. The submissions I have heard yesterday afternoon and this morning have, as their focus, not the July 2019 offer but the February 2020 offer. The earlier offer is merely, in effect, context.
5. It is the claimants' position that the requirement contained in CPR 36.17.1(b) has in this case been met by virtue of the 5 February 2020 offer in that the "judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimants' Part 36 offer".
6. That 5 February 2020 offer contained an offer to settle at a discount to the principal sum of the payment amount in respect of 2013, and an effective waiver of interest in respect of that amount (at that stage for the five or so years which had intervened between the time for payment in respect of the 2013 Reference Year and the making of the 5 February 2020 offer).
7. The offer letter referred at paragraph 2 to the previous offer dated 26 July 2019 (and its withdrawal on 20 November 2019) and went on in paragraph 3 to refer to the claimants repeating that offer but amended in the way I have described so as to include the further claimants and their reference to their updated holdings. Paragraph 3 ended by stating this: "The offer is made to the Republic and the trustee jointly."

8. It then, in paragraph 4, referred to the offer constituting a Part 36 offer which was intended to have the consequences set out in CPR Part 36 and, in the usual way, described the offer as being open for acceptance within 21 days, before in paragraph 5 stating as follows under the sub heading "Terms of the offer":

"Our clients, i.e. the claimants, will accept a payment of 6.6 per cent per Security that they beneficially hold, being Euro 604954712 (the settlement sum) based on their combined beneficial holding of 9165980491 securities ... and rounded to the nearest euro in full and final settlement of the whole of their claims in the proceedings (the offer)."

9. Then a number of conditions were set out, including at sub-paragraph (a) that the Republic should pay the settlement sum "within 14 days of acceptance of the offer" and then at (b) reference was made to a further condition, namely that the Republic and the trustee should agree a number of matters as follows:

"(i) Payment of the settlement sum by the Republic is made in response to our client's demand for payment under the securities pursuant to Section 4.9 of the indenture and is made in satisfaction of our client's beneficial holdings in the securities for reference year 2013.

(ii) The Republic, via INDEC, the Ministry of Treasury and/or the Ministry of Economy and Production is obliged to produce the statistical information specified in the indenture and carry out the required calculations pursuant to the indenture.

"(iii) The Republic is required to publish via INDEC the gross domestic product of the Republic for each reference year measured at the current prices of each reference year.

"(iv) The Republic is required to publish via INDEC actual real GDP for each reference year in the year of base prices and if the year of base prices shall at any time be a calendar year other than the year 1993 then in addition the Republic is required to publish via INDEC actual real GDP for such reference year in constant 1993 prices.

"(v) If the year of base prices employed by INDEC for determining actual real GDP shall at any time be a calendar year other than the year 1993, then the base case GDP for each reference year ... shall be adjusted by multiplying the base case GDP for each reference year by the product of the actual real GDP for such reference year measured in the year of base prices published by INDEC for that reference year divided by the actual real GDP for such reference year, measured in constant 1993 prices.

"(vi) The definition of base case GDP used in the definition of base case GDP growth and nominal base case GDP, means the base case GDP for that reference year specified in ... the form of security with the adjustment if required set out at sub-paragraph 5 above.

"(vii) In carrying out these functions the Republic will act in a manner which is consistent with these terms of the securities for proper purposes and in a way which is not irrational, arbitrary or capricious."

10. Then, at paragraph 6, this was stated:

"This offer is inclusive of interest until the date on which the relevant period expires."

11. The offer went on in paragraph 9 to set out the consequences of any failure to accept the offer which was being made. Those consequences included reference to costs, and interest consequences, as described in the CPR.

12. The offer then ended in paragraphs 10 and 11 under the heading "Clarification of offer" with the following:

"10. If the Republic and the trustee require any clarification of the terms of this Part 36 offer, please make your request in writing, specifying the precise points on which you seek clarification within seven days of service of this offer.

11. If the Republic and trustee think that this offer is anyway defective or non-compliant with Part 36 please notify us ...".

13. It is Ms Prevezer's submission that, there having been no response or counter proposal made by the Republic in response to that offer of 5 February 2020 and the claimants having, in colloquial terms, beaten the offer which was made, so the consequences set out in CPR 36.17 should here be directed to apply.
14. There is no issue about, first, the fact that the Republic made no response, or counter proposal, to the offer and, secondly, the fact that the claimants have indeed done better as a result of the judgment which I have produced than the offer. Specifically as to the latter, the payment amount for 2013, which I have ordered, is appropriately to be made represents approximately 7.02% per security plus interest of a further 1.16%. That represents a total of 8.18% per security against 6.6% as offered in the February 2020 offer. As a result, the discount on the ultimate judgment sum achieved is some 19.3%.
15. I have referred to CPR 36.17. I now set out the contents of 36.17.4 and 5 as follows:
 - "4. Subject to paragraph 7, where paragraph 1(b) applies the court must, unless it considers it unjust to do so, order that the claimant is entitled to (a) interest on the whole or part of any sum of money excluding interest awarded at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the date on which the relevant period expired; (b) costs including any recoverable pre-action costs on the indemnity basis from the date on which the relevant period expired; (c) interest on those costs at a rate not exceeding 10 per cent above base rate and (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount which shall not exceed £75,000, calculated by applying the prescribed percentage ...
 5. In considering whether it would be unjust to make the orders referred to in paragraphs 3 and 4 the court must take into account all the circumstances of the case, including (a) the terms of any Part 36 offer; (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made; (c) the information available to the parties at the time when the Part 36 offer was made; (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated and (e) whether the offer was a genuine attempt to settle the proceedings."

16. Mr Valentin has emphasised the reference in CPR 36.17(5) in the introductory wording to the requirement that the court "must take into account all the circumstances of the case". In doing so, he stresses therefore that the factors set out in sub-paragraphs (a) to (e) (after the word "including") are merely specific factors, and so that the court should not regard itself as constrained only to consider those identified factors.
17. He, in this respect, cites two authorities in support of the proposition that there is no limit to the types of circumstances which in a particular case might make it unjust to order as set out in 36.17. Those two authorities are *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at [13(c)] and *Lilleyman v Lilleyman* [2012] EWHC 1056 (Ch) at [16].
18. Plainly it is right to look at all of the circumstances, given that that is what CPR 36.17(5) itself expressly states.
19. Ms Prevezer has equally helpfully referred me to one of the well known books on costs, namely Friston, at paragraphs 17.118 to 17.141, and in particular certain principles as follows.
20. The first is that the burden of showing that the consequences would be unjust for the purposes of CPR 17.5, resting on the party asserting the injustice, is (as it has been described in *Barnet v Creggy* [2015] EWHC 1316 (Ch)), a "formidable obstacle". That was the description used by David Richards J (as he then was) at [46], in referring to the word "unjust" as being "strong".
21. Secondly, as Friston explains, the provisions are in a sense punitive in character since, as a matter of public policy, the court ought not to be making an exemption other than in circumstances where there would be injustice.
22. Thirdly, the Part 36 consequences should be regarded as trumping the general Part 44 discretion on costs. That point is indeed a point which was made by Sir Stanley Burnton in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 at [37] and [38], when he said this:

"37. In deciding what costs order to make under Rule 36.14 the court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself. The alternative construction requires the court first to exercise its discretion under Part 44 on the basis of all the circumstances of the case and then to exercise his discretion under Part 36, again having regard to all the circumstances of the case. This makes no sense.

38. It follows from the above and in particular that Part 36 is a self-contained code that the discretion under Rule 36.14 relates not only to the basis of assessment of costs but also to the determination of what costs are to be assessed. I agree with the judge that Part 36 does not preclude the making of an issue based or proportionate costs order ...".

23. Fourthly, Friston observes at paragraph 17.131 that the quantum of the costs involved is not a relevant factor in the exercise of the court's discretion when it comes to CPR 36.17(5).
24. Ms Prevezer, in support of her clients' position and by reference to the specific factors set out in CPR 36.17(5), submits that the terms of the Part 36 offer made in February 2020 were clear and reasonable, representing a substantial discount to the Republic's liability. Secondly, she submits that the Part 36 offer was an attempt to settle the dispute, which was made early on - indeed, really quite early on. Thirdly, she notes that the Republic had full information available to it when the offer was made and indeed at all times thereafter, but chose not to seek any information or clarification, despite the express invitation to do so at the end of the February 2020 offer itself.
25. The position adopted by Mr Valentin is that it would be unjust for the consequences of CPR 36.17(4) to apply in this case. He makes a number of submissions in this regard. First, he suggests that the February 2020 offer was not a genuine attempt to settle the proceedings. Secondly, he submits that the Republic could not have accepted the February 2020 offer without the trustee's agreement. Thirdly, he submits that the Republic could not in any event have complied with the terms of the February 2020 offer, given the financial circumstances in which the Republic found itself at the time. Fourthly, he submits that it would be inappropriate for the consequences set out in CPR 17.4 to apply, given that the claimants were advancing, albeit in the alternative, a bad

faith case against the Republic, in circumstances where the Republic is a sovereign state and the allegations were advanced against current and former public officials. Lastly, Mr Valentin also submits that it would be inappropriate for the consequences to apply given that the offer would have entailed the Republic accepting a position not only as regards itself but as regards other note holders, and furthermore the Republic being obliged to accept a position as to the application of the adjustment provision, which was inconsistent with the position adopted by the Republic since about 2014.

26. Mr Valentin also goes on to submit that, even if the court were minded to direct that the consequences set out in 36.17.4 should apply, nonetheless that ought not to be the case inasmuch as there is any liability for costs at all in respect of the bad faith case.
27. That question of incidence of costs for the bad faith case is a matter to which I will return, my having not yet heard full argument in relation to it, but it is agreed between Ms Prevezer and Mr Valentin that I can deal with the Part 36 point that I am now dealing with freestandingly because, if I am with Ms Prevezer on it, the consequences for the bad faith case will then hinge on whether or not I consider it appropriate that a costs order is made in relation to the bad faith case at all, whereas, of course, if I am with Mr Valentin on the Part 36 issue as a matter of principle, then his further submission concerning the application of the Part 36 regime to the bad faith case costs is academic.
28. I return, therefore, to the central issue in this respect, which is to determine whether it would indeed be unjust for the consequences set out in CPR 36.17(4) to apply in this case, taking into account all the circumstances of the case.
29. I can say straightaway that my conclusion is that it would not be unjust for those consequences to apply, and so, subject to the point to which I have just referred concerning the alternative bad faith case, I consider that the orders as sought by the claimants should indeed be made.
30. I can state my reasons relatively briefly, taking as my starting point the correctness of Ms Prevezer's primary submissions by reference to the specific factors set out in

36.17(5) before coming on to deal with the particular points which Mr Valentin has advanced in opposition to the orders sought.

31. By way of brief reminder, and by reference to the specific factors set out in 36.17(5), I agree that the terms of the Part 36 offer made in February 2020 were indeed clear and reasonable and did represent a substantial discount to the Republic's liability. Secondly, the offer was made at an early stage, and certainly long in advance of the ultimate trial. Thirdly, by reference to sub-paragraph (c) of CPR 36.17(5), the Republic had full information available to it when the offer was made but did not seek further information or clarification.
32. Turning then to the particular points made by Mr Valentin, the offer was, in my clear view, a genuine attempt to settle the proceedings. Mr Valentin, in his submissions, acknowledged, albeit in a footnote (footnote 34 to his skeleton argument), that the offer amount was some 85% or so of the monetary amount of the judgment liability I have found existed. His submission is nonetheless that this was, as he puts it, an extremely high offer.
33. I do not agree with that. It may have been high, but the fact remains that it is an offer which has been well and truly beaten by the claimants as a result of the trial. It was not an offer, therefore, for 100% which might then be said to be in the category of not a genuine offer to settle. It was an offer, put differently, which involved a not insubstantial discount had the Republic chosen to accept it. In those circumstances, I cannot accept that this is a case where the offer is to be regarded as anything other than a genuine attempt to settle for the purposes of CPR 36.17(5)(e).
34. As to Mr Valentin's second objection, this is that the February 2020 offer could not have been accepted without the trustee's agreement. I have previously pointed out that the offer was clear in its terms at paragraph 3 of the letter that it was being made to the Republic and the trustee jointly. In those circumstances, Mr Valentin submits that, without the trustee's agreement to accept the offer, the Republic was unable to do so unilaterally.

35. In this respect, Mr Valentin has helpfully referred me to a decision of Insolvency and Companies Court Judge Barber in *Bramston v Pye* [2020] EWHC 3001 (Ch), where this was stated at [23]:

"I am far from convinced that the provisions of CPR 36.17(4) are engaged in the case of an offer made jointly but not severally to two respondents which is beaten in respect of one respondent but not in respect of the other. For the purposes of this hearing, however, I will proceed on the basis that the provisions of CPR 36.17(4) are engaged. Even proceeding on that basis, I am satisfied that it would be unjust for the consequences of CPR 36.17 to apply in this case. The offer was made fairly late in the day, March for a June hearing, when all significant costs save for the costs of trial had already been incurred. The offer was made jointly to the first and second respondents and it is clear that the first respondent could not accept it without the second respondent accepting it as well. The consequences of the second respondent accepting it would be to render the second respondent liable to make payment in damages and costs for which he was not liable. In addition, a consequence of the first respondent accepting it would be to render the first respondent liable for all of the applicant's costs of the proceedings, including those relating to its unsuccessful claim against the second respondent up to the point of acceptance. In my judgment these factors do take the case out of the norm. It would clearly be unjust in the circumstances of this case for the consequences of CPR 36.17 to apply, for these reasons I reject the applicant's application for relief insofar as it is based upon 36.7."

36. That is a very different case to the present. In the present case there is no indication in the evidence before me that the Republic ever contemplated accepting the February 2020 offer. There is no evidence, for example, that the Republic reverted to Quinn Emanuel, the solicitors for the claimants, whose letter it was that contained the Part 36 offer, saying that the Republic was interested in principle in settling on the terms of the offer, but that there was a difficulty because the trustee would not agree. On the contrary, given that I have no such communication put before me in the evidence, it is clear that there was no such response on the part of the Republic.
37. As to whether there were exchanges between the Republic and the trustee in real time, as it were, I do not know. But it does not seem to me ultimately that anything turns on

that. It was always open to the Republic, had the Republic wished to settle on terms as set out in the February 2020 letter, to explore with the claimants the practical possibilities, and the Republic chose not to do so.

38. It is true, as Mr Valentin submits, that, as at the time of the February 2020 offer and indeed at all times since until my judgment, it was the trustee's pleaded case that the claimants did not have the right under Section 4.9 of the Indenture to pursue proceedings for the enforcement of their own beneficial interest in the Securities and that it would not be appropriate or consistent with the indenture and the duties of the trustee for the Republic to pay directly or solely to the claimants any amounts in respect of reference year 2013. But I have, of course, ultimately decided that the claimants did have their own such right and that the trustee was indeed so obliged. It was, in those circumstances, open to the Republic at the very least to have explored with the trustee and the claimants, or alternatively one or the other, the possibilities, and as a result achieved a resolution of the dispute. The Republic did not do that.
39. I have the clear sense, as Ms Prevezer submits, that this objection, in the circumstances, is an after the event thought rather than a contemporary perceived difficulty. Either way, I am satisfied that it is not a reason to conclude that it would be unjust for the consequences set out in CPR 36.17(4) to apply in this case.
40. I turn to the next objection raised by Mr Valentin, which is that the Republic could not, in any event, have complied with the terms of the February 2020 offer. This has, as I understand it, two aspects.
41. The first is the fact that the offer contemplated payment of the settlement sum within 14 days of acceptance of the offer. The answer to that, however, is that again it would have been open to the Republic to have approached the claimants with a counter proposal concerning timing and yet that was not done. The fact that it was not done reinforces, in my mind, the fact that the Republic here did not wish to settle on the terms set out in the February 2020 letter. Had the Republic approached the claimants with proposals as to timing, the position may well then have been that an accommodation could have been reached.

42. The second aspect of this objection is Mr Valentin's reliance on the difficulties with the Argentinian economy at the time that the February 2020 offer was made. In this respect, Mr Valentin relies also on the material put before the court for this hearing concerning the stay application, which I addressed yesterday. The difficulty here, however, is that again it would have been open to the Republic to have explored with the claimants a regime as regards timing which would have accommodated the difficulties identified. Again, however, the Republic chose not to do that. In those circumstances, it does not seem to me to be unjust for it now to follow that the consequences set out in CPR 36.17(4) should apply.
43. Specifically in this respect, as the evidence put before me for the stay application demonstrated, there have been times, most recently in January of this year, when the Republic has found itself in a position where it has funds to use. In January of this year, for example, substantial monies were deployed in the direction of a buy back of debt.
44. It is difficult, given the timescale here, looking at an offer made some three years ago, to conceive that it would not have been open to the Republic to make a proposal as regards timing which would have seen a resolution of these proceedings without the need for trial along the lines set out in the February 2020 offer, by which I mean in the terms of that offer, albeit with timing arrangements to be sorted out between the Republic and the claimants.
45. I come then to the next objection, which concerns the existence of the alternative bad faith case. I do not see any merit in this objection at all. The offer made in February 2020 had nothing to say about the bad faith case. It was plainly an offer which was premised on the claimants' primary case rather than its alternative case. In other words, it was an offer premised on the claimants being right on their construction of the Adjustment Provision and, in those circumstances, the bad faith case played no role at all. I remind the parties, although I am sure they do not need it, that the bad faith case only arose in the event that the claimants were wrong on their primary case as to the construction of the Adjustment Provision.

46. Putting this point shortly, the offer of February 2020 could have been accepted by the Republic without any implication that the Republic accepted the bad faith allegations, and, were there any doubt about that at all, the Republic could no doubt have spelt that out in their acceptance of the offer and no doubt the claimants would have gone along with that.
47. That leaves the final aspect, which is the suggested precedent value, indeed as it is put “considerable” precedent value, implicit in the acceptance of the February 2020 offer. As to the two main aspects or sub aspects of this point, the fact that the Republic might, as Mr Valentin submits, "for many years of government practice" have engaged in an approach to the adjustment provision which is inconsistent with that offered in the February 2020 letter, but this seems to me to be at best a small point and in all probability a complete non-point. Even if that were the position, I do not consider it matters one jot.
48. As to the second aspect, namely the interests of other note holders, the position here is that it was always open to the Republic to safeguard its position by entering into a private settlement with the claimants and the notion that the Republic has had at the forefront of its mind altruistic considerations for other note holders is somewhat fanciful.
49. This was an offer which, had it been accepted, would have resolved proceedings as between the Republic and the claimants. It was not accepted and I see no injustice in the consequences contained in the 36.17(4) accordingly following.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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