Neutral Citation Number: [2021] EWHC 451 (Ch)

Case No: CR-2019-002315

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

4th February 2021

Before:

MR. NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

- -

Between:

DIANA LANGER

Petitioner

- and -

(1) JOHN MCKEOWN
(2) THE STRATOS CLUB LIMITED **Respondents**

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- -

MS. ANNA LINTNER (instructed by **Russells**) for the **Petitioner.**
MR. ROMIE TAGER QC and **MR. MAXWELL MYERS** (instructed by **Brook Martin & Co.**) for the **Respondents.**

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APPROVED JUDGMENT

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MR. NICHOLAS THOMPSELL:

1. This hearing is the second part of a consequentials hearing, following a judgment which I handed down on 21st December 2020 (the "**December Judgment**"), after the first part of a lengthy trial of an unfair prejudice action brought by Mrs. Diana Langer (the "**Petitioner**") against Mr. John McKeown, whom I will refer to as the "Respondent" although he is technically the First Respondent.

2. The action relates to the conduct of the affairs of the Second Respondent, the Stratos Club Limited, which I will refer to as the "Company". Generally, I will in my judgment today use the definitions given in the December Judgment.

3. The trial was the first part of a two-stage trial. A split trial had been ordered following a Case Management Conference in December 2019 before Deputy Insolvency and Companies Court Judge Barnett. In accordance with that order, this first stage was to determine the question whether the Respondent has engaged in unfairly prejudicial conduct and the basis of the relief to be given. I found that there was unfairly prejudicial conduct and that the chief appropriate relief to be given was for the Respondent to purchase the Petitioner's shares in the Company, on the basis of a valuation to be determined on the principles set out in the December Judgment. A second hearing will be necessary to determine that valuation.

4. At the first part of this current consequentials hearing, on 27th January 2021, I dealt with various consequential matters arising from the December Judgment and with an application made on behalf of the Petitioner in that action. Today I am called upon to look at only two matters; the precise form of the order providing directions for the second stage of the trial and the Petitioner's various applications in relation to costs.

5. Both parties were represented by counsel at this hearing, with Ms. Lintner representing the Petitioner and Mr. Tager and Mr. Myers representing the Respondent. Before this hearing I had an opportunity to consider the skeleton arguments that were put forward on both sides.

Order providing for directions in relation to the second stage valuation proceedings.

6. During the course of the hearing on 27th January I considered the form of draft order produced in relation to the second stage hearing and I made various rulings as to amendments to be made for that draft. The parties have attempted to agree a form of order based on those rulings but were unable to degree on a number of detailed points. In particular, Mr. Tager for the Respondent proposed some amendments to the wording which Ms. Lintner for the Petitioner objects to on the basis that these may amount to an attempt to alter the December Judgment.

7. Whilst I have respect for this principle, I am not convinced that it applies to all of the points proposed on behalf of the Respondent. Within the December Judgment I set out proposals for directions for the second stage as being "*on the principles described below, with such additions or embellishments as the*

parties may wish to put to me when this judgment is handed down, where I consider such matters to be helpful". So I think there is further scope for clarification.

8. Generally then, I have approached the draft order on the basis that where counsel have drawn my attention to something that needs clarifying I have tried to clarify it, and in the course of today I have gone through with the parties the various amendments that I would like to see to the form of draft order put in front of me. Ms. Lintner has taken a careful note of those amendments and will produce a final version of the draft order which I will ask the court to seal.

Costs

9. That brings on to what has been the main part of today's proceedings, which is costs. The Petitioner has sought the following orders as to costs at this stage:

   i) an order that the Respondent pays the Petitioner's costs to date, to be assessed if not agreed;

   ii) an order that the Respondent pay the Petitioner's costs of the disclosure, expert reports, PTR, trial preparation and trial phases on the indemnity basis;and

   iii) an order that the Respondent make payment on account of the Petitioner's costs in the sum of £450,000.

10. The first thing I need to consider is the appropriateness of making an order now.

11. In considering what orders to make in relation to costs, my starting point is CPR rule 44.2. This affords me a wide discretion whether or not to make an order and at what stage to make an order. If I do make an order, the general rule in CPR rule 44.2(2) is that the unsuccessful party will be ordered to pay the costs of the successful party.

12. In the December Judgment I found, in relation to the matters determined in that judgment, fairly comprehensively in favour of the Petitioner and there can be no doubt that the Petitioner is the successful party at this stage. Absent any other considerations, I would have no hesitation in awarding costs at this stage to the Petitioner, notwithstanding the split stage trial and that we have another part of this to come, relating to valuation. This reflects the modern emphasis of the CPR rules on using costs to encourage parties not to take unmeritorious points by being ready to award costs according to who has won at different stages in the action, rather than taking a "winner-take-all" approach at the end of the action. The desirability of this approach was summed up by Lord Woolf, Master of the Rolls, in *Phonographic Performance Ltd v AEI Redifussion Music Ltd* [1999] 1WLR 1507 (*Phonographic*) when he said:

> "It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you

> win, you are encouraged to leave no stone unturned in your effort to do so."

13. These words were quoted with approval in *Weill v Mean Fiddler* where the circumstances under consideration were similar to those before me today. The Respondent had lost at the first stage of a split trial on the question of liability but might still win on the valuation stage. At first instance the judge, His Honour Judge Bruce Coles QC, held that it was inappropriate and premature to make an order of costs at this stage. He thought that it was pre-empting the exercise of the court's discretion at the final stage of the proceedings, after it had decided whether or not the Claimant suffered anything more than a nominal loss. The Court of Appeal upheld the court's discretion but this does not provide authority for the proposition that the court's discretion should always be applied in that way. It is apparent from the remarks of Mr. Justice Lightman, with which the other judges agreed, that this case is one upholding the level of discretion afforded to the trial judge in such cases. He said:

> "The short issue on this appeal is whether the Judge was entitled to conclude (as he did) on the argument addressed to him that a nil valuation of the warrants could justify a refusal to make an order in favour of the Claimant of the full costs of the trial ... Whilst in the exercise of his discretion the Judge could have made, and indeed might well have been expected to make, an immediate order for the payment to the Claimant of the costs of the trial or at least a proportion of those costs" -- I am slightly paraphrasing now -- "with some hesitation I reach the conclusion that on this appeal it is not possible to say that the Judge's decision was clearly one he was not entitled to reach."

14. In other words, the normal position is that the trial judge should make a payment for costs at this stage but the judge has discretion not to.

15. Ms. Lintner has put forward various reasons why I should award costs now: that I have found on the liability and the Petitioner has won on all the issues before the court; the conduct of the Respondent in taking every point possible in relation to the liability point, and the Respondent's record in relation to late and poor disclosure.

16. Generally, I find those points persuasive having regard to the principle enunciated in *Phonographic*. Even if the Respondent is successful at the next stage in showing that the valuation to be placed on the shares is much lower than expected, the fact remains that the Petitioner has been put to considerable effort, expense and delay through the Respondent taking points in relation to liability which have proved to be without merit and the Petitioner, in such circumstances, should be entitled to her costs in relation to this stage of the proceedings.

17. I take the view then that, subject to any other considerations, it is open to me to award costs at this stage and that I should do so. I am fortified in this conclusion by various precedents that Ms. Lintner has referred me to, including the decisions in *Annacott Holdings* and in *Merck*.

18. However, there is one other consideration that could be important. This is the question whether there has been any offer to settle and in this regard I have been referred to a number of circumstances applicable in this case.

19. First, I am referred to the fact that an offer was made in open correspondence, on behalf of the Respondent, for the Respondent to purchase the Petitioner's shares for £25,000. I am not sure that this is strictly a settlement offer since it did not state whether it would settle all disputes between the parties, including those relating to Mrs. Langer's loan account. However, I think this is something that I can take into consideration. Secondly, this offer was repeated in the Respondent's Points of Defence.

20. Mr. Tager has argued that given that this is a split trial and there is a possibility that at the end of the trial it will be determined that the shares which fall to be valued in accordance with principles set out in the order turn out to be valueless or at least worth less than the £25,000 offered. He argues that if that were to happen then the Respondent should be considered to have won in the action overall and should be the person entitled to receive his costs.

21. Whilst I am not sure that this offer does amount to an admissible offer to settle of the type mentioned in CPR rule 44.2(4)(c), I think its existence is something that I should consider and I have fully considered this point, taking account of the representations made by both counsel.

22. Ms. Lintner set out strong arguments that it is highly unlikely on the evidence that the court has seen to date and the findings that the court has made and the order that is proposed, that the value of the shareholding will be below £25,000. Mr. Tager has countered this with a number of detailed points and his overarching point that we do not have any evidence as to the likely valuation as it will be found at the valuation date as that date, which is set for October, is well after the points that were under consideration at trial.

23. Having heard both arguments, my view is that the existence of this offer for the shares should not affect what is the normal position in the split trial, that if the Petitioner has won at this stage she should get her costs at this stage.

24. In coming to this view I am mindful that the only evidence that has been before the court as to the valuations involved would suggest a share valuation of much more than £25,000 and furthermore, whatever the outcome of the share valuation the Petitioner will be relieved of perhaps all and/or at least a proportion of her shareholder loan, which may be in the order of a value of £40,000 to £60,000. Had she accepted the £25,000 first stage offer she also would not have received anything in relation to costs. I therefore think it is highly unlikely that her ultimate recovery at the next stage will leave her in a lesser position than she would have been had she accepted the £25,000 offers when they were made and I do not think that the small prospect of that happening is a good enough reason to overturn the normal principle that she should be entitled to her costs at this stage.

25. In addition, there has been some suggestion of a without prejudice offer save as to costs. I am told that such an offer has been made. I have not been told who

has made the offer or what are the terms of the offer. I am, however, told that this was not a settlement offer under Part 36 of the CPRs.

26. Ms. Lintner has proposed that the correspondence relating to this offer, in so far as it has bearing on the first stage of trial and redacting any other element of it, should be put before the court. Mr. Tager has resisted putting this in front of the court, even on a redacted basis, on the grounds that the redaction may leave the court with a misleading impression. He cited, in support of the proposition that he is entitled to insist on not putting it in front of the court, the judgment of Mr. Justice Mustill in *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corp* [1981] Com. L. R. 132.

27. However, he argues that the court nevertheless should take existence at large of this correspondence and this offer in deciding whether to award costs at this stage. He argues that it is a well-established principle in the case of Part 36 settlement offers that the existence of the offer in the case of a split hearing, if that offer does not apply only and solely to the first part of the hearing, displaces the normal presumption that costs will be awarded at the end of the first stage.

28. He has pointed me to two cases demonstrating this proposition, one called *Interactive* and another called *HSS*, as authority for this proposition.

29. He argues that the reasons for this, as explained within the commentary in the White Book, are that the court wants to encourage early settlement and the court's desire to encourage early settlement should apply equally to an offer made without prejudice, except as to costs that is outside the Part 36 regime.

30. I do not accept this proposition as applied to an offer to settle that is not admissible at this stage. I do not think that the Respondent is entitled to have it both ways by withholding admission of the evidence of the offer but sill asking the court to take account of it.

31. Under CPR rule 44.2(4)(c), one of the items I am required to have regard to is "*any **admissible** offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under Part 36 apply*". What has been discussed before me today is not, on Mr. Tager's own argument, an admissible offer to settle. It may become one at a later hearing, but today it is not at this stage an admissible offer to settle and I do not think I should be deciding an important costs matter on the basis of speculation as to what may or may not have been in that offer. Neither do I accept that the principles that have caused the Part 36 offer to have a different outcome should be read across to these other types of offer.

32. If this Respondent, or indeed any litigant, wishes to protect himself in costs they are free to do so by making an offer under Part 36. There are also other possibilities in an action of this type (an unfair prejudice action) to make an O'Neill offer. Had the Respondent wanted to protect himself in costs at this stage, knowing that this was going to be a split trial, he could have protected himself by one of those routes, so I do not accept the principle that because Part 36 offers are considered to be a good idea, that costs principles applicable to those offers should be read across to other more informal types of offers.

33. Where an offer of this type is made, unlike a Part 36 offer which has set costs consequences, the existence of an admissible offer is one that need to be taken account of in the judge's discretion. The judge may look at the offer and may decide that despite the offer being there it will not affect his decision to award costs at all or at this stage. That is not a discretion that I can exercise without knowing anything about the offer in question and I think that there must be a good reason why the court's discretion as to costs is to consider only "admissible offers" to settle made by a party within the words of rule 44.2(4)(c). Even if it were open to me to consider an inadmissible offer to settle, I do not know how I would consider it. So I think that I should ignore this offer to settle in making the order today and I see no reason for delay. I propose to make an award of costs now and for costs to be assessed, if not agreed, at the earliest convenience of the court.

34. The next issue that was put before me was the appropriateness of the indemnity basis. The Petitioner sought an order that the Respondent pay the Petitioner's costs of the disclosure, expert reports, PTR, trial preparation and trial phases all on an indemnity basis. Ms. Lintner, on behalf of the Petitioner, set out a number of points as to the conduct of the Respondent and the Respondent's legal team in relation to the matter which I recognise from my involvement in the trial at its first stage and particularly many points regarding the lateness and presentation of financial evidence. I do not think that the Respondent has met the standards that would be expected of a professionally advised litigant in dealing with these matters and I accept that this has involved additional cost on behalf of the Petitioner to an unusual extent that warrants costs being awarded on the indemnity basis on at least part of what the Petitioner has asked for.

35. Accordingly, I am ordering that the following matters will be assessed to costs on an indemnity basis. These relate to:

    i) the disclosure phase in so far as disclosure relates to the Petitioner's dealing with the Respondent's disclosure;

    ii) the expert evidence phase in respect of the expert evidence, excluding the expert evidence of Mr. Hague in relation to brand matters where I do not consider that the issues that Ms. Lintner complained of will have made much of a difference;

    iii) the PTR stage, trial preparation and trial.

    Those all, I order, should be made on an indemnity basis.

36. Finally, the Petitioner has sought an order that the Respondent make payments on account of the Petitioner's costs in the sum of £450,000. This is slightly in excess of the amounts allowed for in costs budgeting, but there are extra days of sitting to be taken into account. There is one extra day of the main trial, the PTR was two days rather than one day and we have two days on these consequential hearings, all of which will add to the budgeted costs and should do. I have ordered that some of the costs be on an indemnity basis and this is likely to swell the costs allowed for on taxation of costs beyond those budgeted and the budgeted costs did not take account of VAT, which will be a

consideration in this matter. Taking account of all those matters, I am satisfied that the eventual order for costs up to this stage is likely to be in excess of £500,000 and on that basis I consider that an interim payment of £450,000 would be an appropriate interim payment.

[Further submissions]

37. I am going to refuse Mr Tager's request for leave to appeal my decision to make an interim award at this stage on two grounds.

38. The first is that I think that the reasons I have given for not taking account of an inadmissible offer to settle are sound reasons. I think that CPR rule 44.2(4)(c) will have been carefully drafted. It requires me to take an account of an admissible offer to settle. It did not need to use the word "admissible", it could have read "any offer to settle of which the court is aware". It did not do that and I think I am being carefully corralled by the drafting here either to apply the Part 36 regime where Part 36 applies, or to use my discretion where I can use my discretion where there is an admissible offer to settle. That is the first ground. I do not believe there is a reasonable prospect of that being overturned because I consider that rule 44.2 is clear on this point.

39. The second reason is I do see some force in Ms. Lintner's point, in particular in relation to the information asymmetry point. We saw, during the trial, the enormous difference in valuation between the valuation that one party put on this. If you tot up the valuation that the Petitioner's experts came to for the business, I think one gone to something in excess of £9 million. On the other hand, the Respondent's experts estimated the value at zero. I find it very difficult to believe that there could have been an offer that was made that the Respondent would have been happy to make given the Respondent's view on valuation, that the Petitioner could have ever been able to assess as being a reasonable value, so I find it extremely unlikely that if I were aware of this offer that it would alter the decision I have come to today. If it cannot alter the decision I have come to today then I do not think I should be inviting the possibility of yet further proceedings on appeal to deal with this point, so for both of these reasons I consider that there is no reasonable prospect of the appeal succeeding and I dismiss Mr Tager's application for leave to appeal.

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This judgment has been approved by the Judge.