Neutral Citation Number: [2022] EWHC 3366 (Ch)

Case No: CR-2020-002886

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

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

Date: 23/12/2022

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION) AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

The Honourable Mr Justice Hildyard

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Between :

(1) ALISON GRANT
(2) DAVID JAMES KELLY
(3) GILLIAN ELEANOR BRUCE
(4) EDWARD JOHN MACNAMARA
(the joint administrators of Lehman Brothers International (Europe)) **Applicants**

- and –

(1) FR ACQUISITIONS CORPORATION (EUROPE) LTD
(2) JFB FIRTH RIXSON INC. **Respondents**

Mr Daniel Bayfield KC and Mr Ryan Perkins (instructed by **Linklaters LLP**) for the **Applicants**
Mr Stephen Auld KC and Mr Henry Phillips (instructed by **Cleary Gottlieb Steen & Hamilton LLP)** for the **Respondents**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Honourable Mr Justice Hildyard

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Mr Justice Hildyard:

1. Further to my main judgment handed down on 11 October 2022, the parties have largely agreed a draft form of Order, including the terms of Declarations to give effect to that judgment and provision for an interim payment on account of costs by Firth Rixson.[1] However, there remain two issues for my determination:

   (1) whether what was described as a Part 36 offer made by letter from their solicitors (Linklaters LLP) dated 17 April 2020 ("the Administrators' Offer") was a compliant Part 36 offer; and if so, (a) whether the Administrators have obtained a judgment which is at least as advantageous to LBIE as the proposals contained in their Offer, and if it is, (b) what consequential orders should be made in respect of costs and interest having regard to the provisions of CPR 36.17; and

   (2) whether Firth Rixson should be given permission to appeal.

   I address these issues in turn.

The Administrators' Offer: the essential dispute

2. The Administrators were the successful parties, and it is not in dispute that Firth Rixson should pay the Administrators' costs of the Application. As stated above, Firth Rixson have accepted that they should make a payment on account of those costs. The issue is not as to the incidence of costs but as to the application of CPR Part 36 and its consequences.

3. It was not disputed either that CPR Part 36 applies in principle to the Application: CPR 12.1(1) of the Insolvency Rules 2016 provides that "*the provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under Parts 1 to 11 of the Act with any necessary modifications, except so far as disapplied by or inconsistent with these Rules*". CPR Part 36 is not disapplied by or inconsistent with the Insolvency Rules 2016, and no relevant modifications to CPR Part 36 are required.

4. There are, in essence, three questions in dispute:

[1] In this judgment I use the same abbreviations and definitions as in my main judgment, unless otherwise appears.

(1) The first is whether CPR Part 36 is engaged at all. Firth Rixson submitted that it was not, essentially because there was such a "disconnect" between the offer and the claims as to disqualify the offer in terms of Part 36. This was referred to in argument as the "disconnect point".

(2) The second question, if CPR Part 36 is engaged and the Administrators' Offer is to be treated as compliant, is what test should be adopted in determining whether the declaratory judgment to which I have held the Administrators are entitled *"is at least as advantageous to the claimant as the proposals contained in* [the Administrators' Offer]*"*. In particular, the question arises whether the claim in this case falls within CPR 36.17(2).

(3) The third question arises if the relief to which I have held the Administrators are entitled *"is at least as advantageous to the claimant as the proposals contained in* [the Administrators' Offer]*"* is whether, and if so to what extent, the Administrators should be entitled to consequential orders enhancing their recovery as set out in CPR 36.17(4).

The Administrators' Offer: key terms

5. The starting point is the terms of the Administrators' Offer. The key part of the Administrators' Offer read as follows:

> "*3.1 As set out above, it is not in dispute that the principal sums due to LBIE are £8,149,086.21 (in respect of the Sterling Swap) and US$53,629,230.05 (in respect of the Dollar Swap). Moreover, interest has been accruing (and continues to accrue) on the Dollar Swap in accordance with Section 9(h)(i)(3)(A) of the 2002 ISDA Master Agreement. That interest entitlement will be significant in light of the time for which it has accrued.*
>
> *3.2 Notwithstanding the strength of our clients' position, in order to avoid unnecessary court proceedings, we are authorised to make your clients an offer to settle under Part 36 of the Civil Procedure Rules (the "CPR") (the "Offer"). The Offer relates to the entirety of the proposed application and is intended to be a claimant's Part 36 offer with the consequences prescribed by that Part. The Offer may only be accepted in full.*
>
> *3.3 The terms of the Offer are as follows:*
>
> *3.3.1 Firth Rixson will pay a sum of US$53,535,379 in full and final settlement of the outstanding sums in relation to the Dollar Swap.*
>
> *3.3.2 FR Acquisitions will pay a sum of £7,334,117 in full and final settlement of the outstanding sums in relation to the Sterling Swap.*

3.3.3 The sums referred to at paragraphs 3.3.1 and 3.3.2 above are inclusive of all applicable interest.

3.3.4 Payment shall be made within 14 days of acceptance of the Offer to the following bank accounts …"

6. The Administrators' Offer was open for acceptance for 21 days from the date when it was made. This period expired on 8 May 2020 (the "Relevant Date").

7. As at the Relevant Date, the sums owing[2] by Firth Rixson to LBIE in respect of the Dollar Swap amounted to principal of US$53,629,230.05 plus accrued contractual interest (conservatively estimated to amount to at least US$3,253,950), i.e., US$56,883,180.05 in total, and £8,149,086.21 in respect of the Sterling Swap. In relation to interest:

(1) No contractual interest arises on the principal amount owing under the Sterling Swap, since there is no relevant provision for the accrual of interest on a suspended payment obligation under the 1992 ISDA Master Agreement.

(2) However, contractual interest has been accruing (and continues to accrue) on the principal amount owing under the Dollar Swap pursuant to Section 9(h)(i)(3)(A) of the 2002 ISDA Master Agreement. The accrual of interest on the Dollar Swap was expressly mentioned in the Administrators' Offer [B7/133] and has never been challenged by Firth Rixson (nor could it be, since it is expressly provided for by the terms of the 2002 ISDA Master Agreement). The contractual interest which had accrued under the Dollar Swap amounted to at least US$3,253,950 as at the Relevant Date. The Administrators emphasised that this is a conservative illustrative calculation: it is necessarily only an estimate, given that the ISDA contemplates applying a rate "*certified by the relevant payer to be a rate offered to the payer by a major bank in a relevant interbank market for overnight deposits*".

8. The Administrators' Offer thus provided, in effect, for a small discount or 'haircut' to the principal amount owing under each Swap and a complete write-off of the accrued interest on the Dollar Swap.

[2] The sums owing under the Swaps as at the Relevant Date were not yet due and payable by Firth Rixson to LBIE, since the Relevant Steps had not (and still have not) occurred. However, as explained below, it is inevitable that the Relevant Steps will occur in due course.

9. The Administrators presented the total discount proposed in their Offer as therefore amounting to at least US$3,347,801.05 and £814,969.21 (compared to the total sums owing to LBIE as at the Relevant Date).[3] Firth Rixson summarised the effect of the Administrators' Offer as being that they should settle the proceedings in return for a very limited haircut to the Principal Amounts claimed under the Master Agreements:

    (a) In the case of the 2002-form Master Agreement, the Administrators' Offer was for 99.8% (US$53,535,379) of the principal amount.

    (b) In the case of the 1992-form Master Agreement, the Administrators' Offer was for 90% (£7,335,117) of the principal amount.

The first issue and competing submissions as to application of CPR 36.17

10. As indicated in paragraph 4(1) above, Firth Rixson's principal and "threshold" argument was their "disconnect point". This argument focused and was based on the stipulation in the Administrators' Offer of immediate payment (within 14 days) of the Administrators' Offer amounts. In particular in that regard, Firth Rixson emphasised that the Administrators' Offer required payment irrespective of whether the "Relevant Steps" were taken and what were then (as they are still) continuing Events of Default. They submitted that the inclusion in the Administrators' Offer of relief which would never have been sought or available in the proceedings, was thus a proposed benefit extraneous to the claimant's asserted rights, and was no part of the declaratory relief they sought and obtained, produced what they described as *"a fundamental disconnect between the terms of the Part 36 Offer and the matters in issue in the proceedings."*

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[3] Interest has continued to accrue on the Dollar Swap. However, any interest accruing after the Relevant Date is disregarded for the purposes of Part 36: see Purrunsing v A'Court & Co [2016] EWHC 1528 (Ch) at [15] per HHJ Pelling QC (sitting as a High Court Judge): "*by CPR r.36.5(4) a Part 36 offer to pay money is deemed to include all interest down to the date when the relevant period for acceptance of the offer expires. In order to work out whether a judgment is more advantageous than such an offer it is necessary to ensure that the offer or the judgment sum is adjusted by eliminating from the comparison the effect of interest that accrues after the date when the relevant offer could have been accepted. In my judgment this is the effect of the words "…better in money terms …" in CPR r. 36.17(2). If that is not done then comparing the offer with the judgment is not comparing like with like and thus it is not possible to assess whether the judgment is "…more advantageous …" in money terms than the offer. Interest compensates for the loss of use of money over a given period. In theory at least interest that accrues due for the period between the last date when the offer could have been accepted and the date of judgment is neutral and so immaterial in deciding the question whether a subsequent judgment is "…more advantageous …" than a previous offer. The only interest that is material is that included or deemed included within the offer*."

11. Firth Rixson submitted further that in consequence, or as an aspect of the "disconnect", the Administrators' Offer did not satisfy the specific requirements of a valid Part 36 offer as prescribed by CPR 36.5(1). Pursuant to CPR 36.5(1)(d), a valid Part 36 offer must *"relate to"* the whole or part of a claim or to an issue that arises in the claim: it cannot be said to *"relate to"* a claim which has not been advanced, and likewise cannot properly be said to *"relate to"* a claim if it includes relief which could not have been and has never been advanced. Further, in light of (and as a further illustration of) the "disconnect" it was not possible fairly to compare the Administrators' Offer with the declaratory relief they have achieved: they were, Mr Auld KC submitted, as *"chalk and cheese"*.

12. Firth Rixson submitted in the round that my main judgment and the declaratory relief the Administrators have obtained does not provide an outcome *"at least as advantageous as"* the proposals in the Administrators' Offer. Firth Rixson's payment obligations remain contingent on the Relevant Steps being taken and also on no new Events of Default occurring in the meantime. The Administrators' Offer (if it had been accepted) would have put the Administrators in control of a substantial sum of money (to invest or distribute as they wished) and would have avoided any ongoing or future counterparty risk: it was, according to Firth Rixson, clearly far more favourable to the Administrators than their Offer.

13. The Administrators rejected the "disconnect" argument. They submitted that their offer engaged with the matters in dispute and offered a genuine means of resolving the points in issue. The fact that the Administrators' Offer included the provision for payment within 14 days did not signify otherwise or result in it not being compliant with Part 36.

14. Further they dismissed the suggestion, which was advanced in oral submissions with enthusiasm by Mr Stephen Auld KC for Firth Rixson, that the *"proceedings have nothing to do with money"*. They submitted that the declarations granted in terms now agreed, *"are as good as money [up]on the Relevant Steps being taken, subject only to the entirely theoretical possibility of new Events* [of Default] *occurring"*; and they made the point that Firth Rixson had offered nothing to suggest any more than a theoretical or *"fanciful"* possibility of any such supervening Event of Default. Once

the *"fanciful"* was stripped away, as it should be, there should be no difficulty in comparing the result achieved with the Administrators' Offer.

15. In the round, the Administrators submitted that the relief they had obtained would result in payments without the discount they had offered; and that such relief was thus plainly *"at least as advantageous"* to them as the proposals in their Offer.

My determination of the first issue and the threshold question as to the application of CPR 36.17

16. CPR 36.5 defines the required form and content of a valid Part 36 offer as follows (in relevant part):

> *"36.5 (1) A Part 36 offer must –*
>
> *(a) be in writing;*
>
> *(b) make clear that it is made pursuant to Part 36;*
>
> *(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;*
>
> *(d) 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;*
>
> *(e) state whether it takes into account any counterclaim."*

17. The premise of this gateway provision is that a Part 36 offer must *"relate"* to the claim or part of a claim, or an issue arising in it. In *Hertel v Saunders* [2018] EWCA Civ 1831; [2018] 1 WLR 5852, the Court of Appeal clarified (upholding the decision of Morgan J) that, once proceedings have been commenced, an offer must be made by reference to the pleaded issues if it is to qualify as a Part 36 offer: after the commencement of proceedings, offers by reference to intimated but not yet pleaded claims will not satisfy the requirements of CPR 36.5.

18. However, CPR 36.5 must also be read subject to CPR 36.7 which extends the application of Part 36 to offers made before the commencement of proceedings (as the Administrators' Offer was in this case). CPR 36.7 states (in relevant part) as follows:

> *"36.7 (1) A Part 36 offer may be made at any time, including before the commencement of the proceedings."*

19. In *Hertel v Saunders*, the Court of Appeal appear to have accepted (at [27]) that *"the position pre-commencement is inevitably different to that which exists after*

commencement of the proceedings". Whilst making the point (at [28]) that pre-action protocols and practices should ensure that *"claims/parts/issues are therefore not nearly so difficult to identify before commencement of the proceedings…"* as might otherwise be thought, Coulson LJ (with whom Lewison and David Richards LJJ agreed) appeared to accept that an offer in respect of proceedings which are not yet commenced might qualify as a Part 36 offer even if not specifically tied and restricted to a defined claim/part/issue.

20. Then in *Calonne Construction Limited v Dawnus Southern Limited* [2019] EWCA Civ 754 the Court of Appeal made clear that *Hertel v Saunders* had no application to offers in respect of prospective proceedings; and that (following the earlier case of *AF v BG* [2009] EWCA Civ 757) provided the prospective claim was identified, genuine, and clear in nature (see [17] in *Calonne*) a genuine offer to settle it stating the matters prescribed in what is now CPR 36.5 should be compliant. Thus, the only real difference in this context between extant and prospective proceedings is that in the case of extant proceedings the offer to be complaint, must *"relate"* only to pleaded (as distinct from less formally defined) claims/parts/issues. In both contexts, the question is whether the offer does *"relate"* to the claims/parts/issues. No other connecting link is required.

21. I am satisfied that the Administrators' offer did *"relate to"* the claim as already advanced for the purpose of CPR 36.5. After inviting further submissions on the point, I have concluded that (a) the test (in CPR 36.5) that the offer must *"relate"* to the claim/part/issue is less exacting and does not require the exact correlation suggested by Firth Rixson: it means simply that the offer must be made by reference to identified claims and offer proposals in respect of it/them; and (b) provided of course that the offer is genuine, and clear in nature (see paragraph 20 above) the comparison required can reasonably be undertaken by identifying whether the relief obtained in the proceedings was in broad terms more advantageous to the claimant than its offer.

22. However, other aspects of the disconnect argument have certainly given me pause for thought. In particular, I have been troubled by the fact that it is difficult to weigh and translate into an acceptable discount the more innominate or uncertain advantages that Firth Rixson may legitimately have perceived the continuation of a period of

suspension might afford (including, for example, cash flow, exchange rate concerns or investment plans amongst others, as well as the possibility of some supervening new Event of Default). Further, during the contractually agreed period of suspension there is always the possibility, however theoretical, that a new Event of Default will arise which may be of a *"continuing"* nature such as not to bring the suspensory condition to an end upon cessation of the Administration. The Administrators' Offer to that extent may be said to have re-written the contract rather than to have offered a beneficial variation in the way it was performed.

23. I have concluded, however, that neither the fact that the offer includes a term which could not, in the particular form in which it was put forward, have been achieved by the claim, nor the fact that the value of a contractual right to defer payment may not easily be calculated to determine whether its foreclosure is more or less advantageous than the price offered (by way of discount on the payment obligation), makes inapplicable or unreasonable the comparison directed by CPR 36.17.

24. Of course, where (as here) the offer included terms which, if accepted, would have accelerated the due date for payment and foreclosed the contractual right to a suspensory condition and thus to rely on any new Event of Default, the comparison cannot be purely mathematical. In claims, like the claim here, which cannot be said to be exclusively money claims, and must take into account more innominate considerations, the assessment is necessarily a broader one. Thus, in *Carver v BAA plc* [2008] EWCA Civ 412 at [30] Ward LJ quoted Rix LJ's observation, in the course of argument in that case, that the test must be more *"open textured"*; and in his judgment he stated that it *"permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight."*

25. That requires identification of what was really the crux of the dispute. Here the crux of the dispute was whether the suspensory condition would survive the termination of the administration; the possibility of a supervening Event of Default was not in reality canvassed or germane. Firth Rixson fought on a point of principle and lost, and in all realistic likelihood, once the Relevant Steps have been accomplished, have to pay substantially more than they would have had to pay had they accepted the Administrators' Offer.

26. In that context the reality, after nearly 15 years of administration, is that the possibility of some supervening Event of Default is much more theoretical than real: it is, in my view, approaching the fanciful to suppose that a new Event of Default will arise between now and the time of cessation of the administration. As appears from my judgment to explain the grant of a three-year extension of LBIE's administration (see [2022] EWHC 2995 (Ch)), the only substantial outstanding matters relate to litigation in the USA for which full provision has been made.

27. I have taken into account also that the Part 36 rules themselves envisage, and absent contrary agreement between the parties require, payment within 14 days of any offer to pay or accept a single sum of money, subject to express agreement between the parties to the contrary. CPR 36.14(6)(a) provides as follows:

> *"Unless the parties agree otherwise in writing, where a Part 36 offer that is or includes an offer to pay or accept a single sum of money is accepted that sum must be paid to the claimant within 14 days of the date of –*
>
> *(a) acceptance…"*

As it seems to me, that both explains (as being a necessary ingredient) the term for payment within 14 days which the Administrators' Offer contained and gives some support to the argument that notwithstanding a contractual provision for later payment, a compliant offer may be made which will automatically require payment within 14 days.

28. I consider that I am also reinforced in my conclusion by the fact (as I perceive it) that the real gist of the dispute was a point of principle whether the Events of Default would continue after the cessation of Administration: and it would be odd if there was no way for the Administrators to have made a compliant Part 36 offer by proposing some financial discount on what would be the result if they succeeded on that point of principle. Put another way, the real point in dispute was whether Firth Rixson should be required to pay upon cessation of the administration; and it would be odd if a genuine and clear offer to settle a dispute which in the end would be about the payment of money could not be brought within CPR Part 36 by including a monetary discount in respect of the various uncertainties and foreclosure of the suspensory condition.

29. I also have borne in mind that if the only objection to the offer had been the provision for payment within 14 days, it was open to Firth Rixson to seek agreement for later payment and/or to make a counter-offer to take into account of the matter. As it was, Firth Rixson offered a payment of only $2 million, illustrating that the real dispute was whether they would ever have to pay at all, even at the end of the administration of LBIE.

30. In the circumstances, in my judgment, the fact that in this case the Administrators' Offer included a term for accelerated payment of a debt not yet due, which acceleration could never have been part of or obtained by the claim (or prospective claim) but for which a discount for early payment was offered, did not prevent it being compliant with CPR 36.5. In my judgment, the Administrators' Offer complied with Part 36.

The second issue: the relevant test and whether CPR 36.17(2) applies

31. The second issue thus arises (see paragraph 4 above), which is what test should be adopted in determining whether the declaratory relief to which I have held the Administrators are entitled *"is at least as advantageous to* [them] *as the proposals contained in* [their] *Part 36 offer"*, and more particularly, whether the arithmetic test prescribed in CPR 36.17(2)(b) applies.

32. CPR 36.17(2) provides that for the purposes of determining the issue:

> *"…in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly."*

33. I do not accept Firth Rixson's argument that these proceedings were not *"about money"*. Plainly they are and always have been so: the question being whether the sums specified in the Swaps will become due on termination of the Administrators' appointment. The Declarations sought and obtained in terms now agreed require payment of money as soon as the Relevant Steps are accomplished, subject to the theoretical possibility of a supervening Event of Default, as Mr Bayfield submitted.

34. However, whether the proceedings constitute a *"money claim"* for the purposes of CPR 36.17(2) is a different question, as is the post-threshold question (insofar as it arises) whether Declarations constitute an *"award"* of *"any sum of money"* for the more particular purposes of CPR 36.17(4).

35. As to the former question, in my judgment, the proceedings were not framed as a *"money claim"*. That is so even though if the Administrators were successful (as they have been) the consequence of the Declarations would and will be that Firth Rixson would and will become, after accomplishment of the Relevant Steps and in the absence of any Event of Default in the meantime, obliged to pay a settled and liquidated sum of money, as the proposed and agreed draft order accurately records. Accordingly, it is not sufficient to compare arithmetically what was offered with what ultimately will be received. Further, the fact that the suspensory condition remains in place must be taken into account. The extent of that benefit to Firth Rixson and concomitant disadvantage to the Administrators depends on the extent of that duration: presently the duration envisaged is three years from 30 November 2022, being the extension granted for the Administrators' appointment by my Order dated 25 November 2022. But that cannot be entirely certain, just as, although very unlikely, it cannot in theory at least be entirely certain whether any Event of Default may arise in the same period. In my judgment, these matters in combination mean that the mechanistic or mathematical test prescribed by CPR Part 36.17(2) is not applicable.

36. It is nevertheless appropriate first to consider whether, assuming continuation of the suspensory condition, the discount offered was real and substantial in mathematical terms. The mathematics are that the Administrators will obtain under the declarations more in money terms than they would have obtained under their offer, even allowing for the fact that they would have received earlier payment under the latter.

37. In that connection, after the oral hearing I asked the Administrators for:

    (a) an estimate of the aggregate interest which would have reasonably been expected to be earned by LBIE on the principal sum of £7,334,117 (being the amount proposed in the Part 36 offer to be payable in respect of the Sterling Swap within 14 days of acceptance) between the last date for acceptance of the offer and the present date for the termination of the Administrators' appointments; and

    (b) Clarification whether it was/is the practice of the Administrators to retain moneys collected in the currency in which they were paid or to exchange monies collected into Sterling; and if the latter, (a) what at the

dollar/sterling exchange rate applicable on the last date for acceptance of the offer the Sterling equivalent of $53,535,379 would have been and (b) what the Sterling equivalent of that US dollar sum would be at present rates of exchange.

38. My purpose was to double-check that in mathematical terms the payments required by the declaratory relief will exceed the amounts of the offer, even allowing for the fact that the Sterling Swaps imposed no interest during the period of suspension, whereas payment within 14 days if the Administrators' Offer had been accepted would have resulted in the Administrators earning interest or other return on the money paid. I also wished to consider the possibility of exchange rate benefit.

39. The answer provided as to (a) in paragraph 37 above was that

(i) the actual interest rate that has been paid on LBIE's principal sterling deposit account with HSBC for the relevant period, and from this they can calculate the sum of interest that would have been earned on the sum of GBP £7,334,117 from 9 May 2020 to the end of December 2022 – that sum is GBP £118.577.99.

(ii) The Administrators could not know what rate they will receive from 1 January 2023 to the current anticipated date for the termination of the Administrators' appointments in November 2025, and have therefore presented two alternative illustrative scenarios. One assumed that the interest that would be paid from 1 January 2023 to 30 November 2025 would continue to be the same as the rate that is paid on that account today, and that it would continue to be paid at that rate until the end of November 2025, which would result in additional interest of £554,277.16 (which when added to the £118,577.99 above, gives a total interest figure for the period of £672,855.15). The other took an illustrative forecast of the Bank of England's base rate for 2023 – 2025, and estimated the future rate that might be earned by reference to those base rates (i.e. by applying the same percentage discount as is currently applied to the HSBC account, and applying that same percentage to forecasted rates). This rate results in an alternative interest calculation of £793,566.94 accruing from 1 January 2023 (which when added to

the £118,577.99 interest calculated above, gives a total interest figure for the period of £912,144.93)

(iii) Based on these illustrations, the Administrators' answer to my first question above is therefore that their estimated range of interest for the period would be between £672,855.15 and £912,144.93.

40. By way of comparison, the Administrators' Offer proposed discounts of approximately £815,000 in respect of the Sterling Swaps and US $3.35 million in respect of the Dollar Swaps, so that the payments required by the declarations will comfortably exceed what the Administrators would have received under their Offer, even allowing for interest.

41. As to (b) in paragraph 37 above, both on and after 9 May 2020, the Administrators clarified that their usual practice has been to retain sums collected in dollars in that same currency, rather than to exchange them for any other currency – that remains the Administrators' usual practice at the time of writing. The Administrators would have retained the sums in dollars in part because there is a substantial potential liability of the LBIE estate denominated in dollars. For completeness: (i) the Administrators have (at earlier stages in the course of LBIE's administration) on occasion exchanged dollar sums for other currencies where they considered it appropriate to do so (ii) the Administrators' general practice has historically varied with the currency in question (for example, the Administrators have generally exchanged Euros for Sterling, as at one time during the course of LBIE's administration, Euro balances attracted negative interest rates).

42. Next must be brought into account the theoretical possibility of there arising in the future some further Event of Default. As it seems to me, the discount offered, though relatively small, can fairly be considered to be more than adequate recompense for this possibility which, as previously explained I think very unlikely indeed to arise.

43. In my judgment, CPR 36.17(1) applies. CPR 36.17(2) does not; but the relief to which they are entitled is *"at least as advantageous"* to the Administrators as their Offer, so as to trigger the consequences set out in CPR 36.17(4), unless I am persuaded that any is *"unjust"*.

The consequences if the Administrators' Offer complied with CPR Part 36

44. CPR 36.17(4) provides that the Court must [my emphasis] "*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% above base rate for some or all of the period starting with the date on which the relevant offer expired (CPR 36.17(4)(a)).

    (b) Costs on the indemnity basis from the date on which the relevant offer expired (CPR 36.17(4)(b)).

    (c) Interest on those costs at a rate not exceeding 10% above base rate (CPR 36.17(4)(c)).

    (d) An "additional amount" not exceeding £75,000 calculated by applying a prescribed percentage of any sum awarded to the claimant by the court or, where there is no monetary award, the sum awarded to the claimant in respect of costs (CPR 36.17(4)(d)).

45. When considering whether it would be *"unjust"* to make the orders specified in CPR 36.17(4) the Court must take into account "*all the circumstances of the case"* (CPR 36.17(5)) including (but not limited to, see paragraph 46 below):

    (a) "*the terms of any Part 36 offer"* (CPR 36.17(5)(a));

    (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"* (CPR 36.17(5)(b));

    (c) *"the information available to the parties at the time when the Part 36 offer was made"* (CPR 36.17(5)(c));

    (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…evaluated"* (CPR 36.17(5)(d)); and

(e) "*whether the offer was a genuine attempt to settle the proceedings"* (CPR 36.17(5)(e)).

46. The principles for determining whether it would be "unjust" to make the orders in question were summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at [13] (as approved by the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899). The following four principles are relevant:

(a) The question is not whether it was reasonable for the defendant to refuse the offer. Rather, the question is whether, "*having regard to all the circumstances and looking at the matter as it affects both parties, an order that the defendant should pay the costs would be unjust"*.

(b) Each case will turn on its own circumstances. Ultimately, the Court should be trying to assess "*who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been"*.

(c) The Court is not constrained by the list of potentially relevant factors in CPR 36.17(5), "*there is no limit to the types of circumstances which may, in any particular case, make it unjust that the ordinary consequences set out in [36.17(4)] should follow"*.

(d) However, the Court does not have an unfettered discretion to depart from the ordinary cost consequences, "*the burden on the defendant to show injustice is a formidable obstacle to the obtaining of a different costs order"*.

47. In *Lilleyman v Lilleyman (No. 2)* [2012] EWHC 1056 (Ch), another decision of Briggs J, he said at [16]:

> "*It is plain that the court's discretion to depart from CPR r 36.14(2), constrained as it is by a precondition that its full enforcement would be unjust, is much more circumscribed than the court's broad discretion under Part 44. Furthermore, the four specific considerations identified in paragraph (4)(a)–(d) disclose a common thread which focuses the injustice analysis upon the circumstances of the making*

> *of the offer and the provision or otherwise of relevant information in relation to it, rather than upon the general conduct of the proceedings by the parties. None the less, I consider that the requirement to take into account all the circumstances of the case does enable the court to take a broader view in an appropriate case, so that it is not entirely disabled from having regard to questions of justice or injustice arising from the manner in which the offering party has made use of its costs expenditure prima facie now recoverable from the unsuccessful offeree, in the pursuit of its defence to the claim*."

48. In *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB), Sir David Eady (sitting as a High Court Judge) observed at [61] that:

> *"It is elementary that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."*

49. In exercising its circumscribed discretion, the court must have regard to the objective of the provisions of CPR 36.17(4), which Sir Geoffrey Vos, when Chancellor of the High Court sitting in the Court of Appeal described in *OMV Petrom SA v Glencor International AG* [2017] 1 W.L.R. 3465 at [32] as being *"…in large measure, to encourage good practice"* and to incentivise both the making and acceptance of genuine Part 36 offers. Sir Geoffrey Vos accepted that this could result in awards which are *"not entirely compensatory".* Briggs LJ (as he then was) described the approach as being both *"carrot and stick"* and as operating *'pour encourager les autres'* (see *PGF II SA v OMFS Company I Limited* [2013] EWCA Civ 1288 at [40] and [56]).

50. The court must also have regard to all the circumstances of the case, which may include (but again are not limited to): (i) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence; (ii) what level of disruption can be seen to have been caused to the claimant as a result of a refusal to accept (at [38]). In the context of (i), where (as here) the dispute can fairly be regarded as "all or nothing" or "binary" litigation in the sense of there being no room for the court to make a partial award, the court is entitled to and should assess the reasonableness of the offer having regard to the amounts at stake, the discount offered and the prospects of success: see *Ritchie*

and Others v Joslin and Others [2011] 1Costs LO 9 at [47] (a decision of HHJ Behrens sitting as a High Court Judge).

51. I turn to the application of this approach in this case, and to deal in turn with each of the four consequences specified in CPR 37.17(4). In addition, the relevant "circumstances" rendering it "unjust" to grant relief may not necessarily be identical for each of the four orders the Court can make under CPR 36.17(4) (*OMV Petrom SA v Glencor International AG* at [23]).

Firth Rixson's primary position: unjust to grant any additional relief under CPR 36.17(4)

52. Firth Rixson's primary position is that in all the circumstances of this case it would be unjust to grant any of the additional relief provided for under CPR 36.17(4).

53. Firth Rixson especially relied on the following:

(1) The terms of the Part 36 Offer: As noted above, the terms of the Part 36 Offer entailed immediate payment of the Principal Amounts. That is something which LBIE is not entitled to under the Master Agreements and still not entitled to under the Judgment. Further, the offers in relation to the Principal Amounts offered a very limited discount (0.2% in relation to the US Dollar Swap, 10% in relation to the Sterling Swap). There were no additional savings in respect of interest in relation to the Sterling Swap. As regards the US Dollar Swap, there was no interest payable as at the Relevant Date – interest will only become payable in the event that Events of Default under the Master Agreements cease to be continuing.

(2) The binary nature of the proceedings: The issue in the proceedings was whether, once the Relevant Steps had been taken any existing Events of Default would cease to be continuing, such that s.2(a)(iii) of the Master Agreements would cease to have any suspensive effect on Firth Rixson's payment obligations. This was, in effect, a binary issue leaving little scope for any meeting in the middle, which (as noted in paragraph 50 above by reference to *Ritchie and Others v Joslin and Others*) makes it appropriate to assess the prospects of success of the claim to determine the

reasonableness of the refusal of the offer and whether it would be unjust for the ordinary Part 36 consequences to follow.

(3) The prospects of success and conduct of the proceedings: The issues of construction in the present case are far from straightforward. Firth Rixson submitted that in this case the merits of the competing submissions were reasonably balanced and there was nothing unreasonable in Firth Rixson's decision to take the case to trial. Nor was there anything unreasonable in Firth Rixson's conduct of the litigation.

54. In making the determination whether it would be unjust to make the orders sought, however, there must also be taken into account (by reference to the mandatory requirements of CPR 36.17(5) in particular) the fact that in this case:

(1) the terms of the Administrators' Offer were clear;

(2) the Administrators' offer was made before the issue of the proceedings but after an iterative discussion of the essential matters in dispute and the provision of a copy of the draft intended witness statement in support of the intended application which clearly delineated the points in issue;

(3) adequate information was thereby provided;

(4) that information was plainly adequate to enable the offer to be evaluated; and

(5) I am satisfied that the offer was a genuine attempt to settle the proceedings.

55. The principal point left to determine is whether the binary nature of the issue, its complexity and the reasonably balanced nature of the competing arguments, and/or Firth Rixson's reasonable conduct are sufficient to warrant total or partial derogation from the ordinary consequences stipulated by CPR 36.17(4) on the basis that in the circumstances their application would be unjust.

56. Adopting Briggs J's explanation at [15] in *Smith v Trafford Housing Trust* (see paragraph 46 above) of the essential purpose of Part 36 as being *"to visit costs consequences upon parties of whom it can properly be said that they ought to have*

settled by accepting the other party's offer, rather than taken the matter to trial" the litmus test, as I see it, is whether this was (*"unusually"*, Briggs J suggested) *"a case properly taken to trial by both parties"* notwithstanding the genuine offer which the Administrators' offer comprised and which would have brought the dispute to an end. That, in my view, requires there to be considered once again what the offeree reasonably hoped to achieve from the litigation which was denied it by the offer, and whether the rejection of the offer was, in all the circumstances, sufficiently justified that it would be unjust for the loss of the point in issue to result in consequences more onerous than those incidental to litigation in the ordinary course.

57. In my judgment, this case is on the cusp. The point of interpretation raised by the proceedings was, in my view, arguable, and the amount at stake was plainly considerable. Further, and most important perhaps, Firth Rixson has retained, despite the result, such amorphous and uncertain advantage as there may be to it, beyond the discount it was offered, of not having actually to pay until conclusion of the administration of LBIE.

58. Against that, it seems to me appropriate to take into account that Firth Rixson was pressing for a somewhat counter-intuitive result (that it should never have to pay a large sum of money which it owes its counterparty, even when that counterparty is fully solvent and is no longer subject to any insolvency proceedings). It is notable that (as appears from the introduction to the Administrators' Offer) once the Court of Appeal had decided that the effect of Section 2(a)(ii) of the ISDA Master Agreements was to suspend but not extinguish the liability (see paragraph 35 of my main judgment), LBIE was able to reach agreement with most, if not all, the other counterparties which had been withholding sums owed to LBIE in reliance on Section 2(a)(ii) of the ISDA Master Agreements for the settlement of their debts. Further, the fact is that the effect of the Administrators' offer was to provide for a benefit by way of discount in excess, in all likelihood, of the time value in monetary terms of delayed payment.

59. In circumstances where I consider that to achieve an egregious result Firth Rixson have resorted to a theoretical possibility of some supervening Event of Default which in my view is barely more than fanciful, it seems to me that Firth Rixson cannot complain that it is unjust the effect of the Administrators' Offer was to "up the ante"

in the event that the dispute was decided against Firth Rixson. In my judgment, it is not *"unjust"* for there to be some additional consequences of failure over and above those which would ordinarily follow the loss of contested litigation.

60. I do not, therefore accept Firth Rixson's primary argument that the circumstances of this case offer a sufficient basis on which to conclude that it would be unjust to visit on Firth Rixson any of the various consequences prescribed by CPR 36.17(4). However, in all the circumstances, I consider that it would be unjust to impose relief which is quasi-penal in nature. I turn to consider the application of each of the sub-paragraphs in CPR 36.17(4), and certain specific arguments advanced by Firth Rixson in that regard.

Application of CPR 36.17(4)(a)

61. Firth Rixson submitted that CPR 36.17(4)(a), which provides for the claimant to be entitled to *"interest on the whole or any part of any sum of money (excluding interest) awarded"*, is only applicable in cases where the judgment includes the award of a sum of money, and that the declaratory relief as to the contractual consequences that may arise if and when the Relevant Steps are taken which had been sought and obtained by the Administrators does not constitute any such *"award"*.

62. The Administrators submitted that the effect of the declarations in this regard, though prospective, was in substance that the sums due under the Swaps were required to be paid when the Relevant Steps were taken and that as a matter of substance the Court will thereby have *"awarded"* a *"sum of money"* within the meaning of CPR 36.17(4)(a).

63. In my judgment, CPR 36.17(4)(a) applies only to an award for the immediate payment of sums of money (excluding interest). I do not consider that it was the intention of the rule to provide for an award of interest in respect of sums which are not yet immediately due and payable. To that extent, I agree with Firth Rixson's submissions in this regard.

64. Further, even if (contrary to my view) CPR 36.17(4)(a) is applicable, I would consider it unjust to apply it in circumstances where it is common ground (and always has been) that Firth Rixson is under no obligation to make payments to LBIE for as long

as Events of Default are continuing (which they are, and may be so for up to three years or even longer if the administration process is once again extended).

65. If I am wrong in that regard also, I would not have awarded interest at a rate higher than that specified in the relevant contract between the parties: none being so specified in the case of the Sterling Swaps. I well appreciate that the provision enables and probably envisages the payment of interest at a higher rate of interest at the going rate ("the enhanced rate" though that is not to exceed 10%). I also appreciate that an award pursuant to CPR 36.17(4) may not be entirely compensatory. But in this case, the fact that no payments are yet due would, in my judgment, render it unjust to provide for any enhancement.

Application of CPR 36.17(4)(b)

66. Firth Rixson did not advance specific additional arguments in support of their contention that CPR 36.17(4)(b), which provides for costs to be paid on the indemnity basis, did not apply even if the Administrators' Offer was held to be a compliant Part 36 offer.

67. The purpose of ordering costs on an indemnity basis, though outside the context of Part 36 unusual, is compensatory and not penal. It is intended to ensure a more realistic and complete level of cost recovery for the paying party. In my judgment, it is not unjust that Firth Rixson should have to pay costs on the indemnity basis. I therefore order Firth Rixson to pay costs on the indemnity basis from the date on which the *"relevant period"* expired, being 21 days after the date of the Administrators' Offer.

Application of CPR 36.17(4)(c)

68. Decisions as to whether to award an enhanced rate of interest on costs (that is to say, higher than the rate (if any) which would otherwise be chosen under section 35A of the Supreme Court Act 1981) are to be regarded separately from decisions as to the rate of enhancement.

69. The provision for an enhanced rate of interest to be paid was described by Chadwick LJ in *McPhilemy v Times Newspapers Ltd (No. 2)* [2001] EWCA Civ 933 (at [23]) as being intended *"to redress…the element of perceived unfairness which arises from*

the general rule that interest is not allowed on costs paid before judgment…" The objective is compensatory.

70. In relation to the decision as to the rate of enhancement, such awards are not entirely compensatory, but nor can they be considered "penal": *OMV Petrom SA v Glencore International AG* [2017] 1 WLR 3465. The Court has a discretion to include a non-compensatory element to the award, but the level of interest "*must be proportionate to the circumstances of the case"* (at [38]).

71. In my judgment, it has not been shown in this case that an award of interest on costs to compensate for the cost of money (or the loss of the use of money) would be unjust; and it is therefore directed by CPR 36.17(4)(c).

72. The Administrators submitted, relying on the notes at 36.17.4.3 of the White Book, that the conventional rate would be 4% above the base rate. They explained that their proposed rate of 6% offered, in effect, a discount on the norm to reflect the fact that the base rate was lower for part of the period in which interest would fall to be paid. Firth Rixson submitted that a 6% rate would be disproportionate and that the appropriate rate would be about 2%.

73. Although sharply rising interest rates now tend to dislodge the memory of historically low rates, it should be remembered that the base rate in March 2020 was just 0.1% and was not raised until December 2021 and then only to 0.25%. Even after a further rise in February 2021 it stood at 0.5%. Having regard to the low rate for much of the period after the date of the Administrators' Offer, I consider that the rate of 6% proposed by the Administrators would be disproportionate, even adopting 4% over base rate as the norm. However, the rate of 2% proposed by Firth Rixson seems to me to be inadequate having regard to the purposes of the provision. I propose to adopt the rate of 4.5% as fair having regard to all the circumstances of the case.

Application of CPR 36.17(4)(d)

74. Firth Rixson relied on their general points in support of their overall position that none of the consequences of CPR 36.17(4) should apply in the circumstances of the case; but they did not put forward any more specific considerations to support a contention that it would be particularly unjust to grant an order for *"an additional amount"* as provided for by CPR 36.17(4)(d).

75. The notes at 36.17.4.4 in the White Book suggest that the provision was originally introduced further to the *Review of Civil Litigation Costs: Final Report (21 December 2009)*. It was there noted that the costs sanctions against a defendant for failing to accept a claimant's offer to settle generally amount to less than the sanctions against a claimant for failing to beat a defendant's offer, resulting in there being less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant. The notes in the White Book go on that the new provision *"therefore deliberately rebalanced Part 36 by increasing the claimant's reward for making an adequate offer."*

76. Rule 36.17(4)(d) states that the *"additional amount"* is to be calculated by applying the prescribed percentage to an amount which is either *"the sum awarded to the claimant by the court"* or *"where there is no monetary award, the sum awarded to the claimant by the court in respect of costs…"* The latter test would be applicable here; and the amount concerned would be the maximum of £75,000.

77. I was not shown any case in which CPR 36.17(4) was engaged where an order was not made under CPR 36.17(4)(d). Such an order is not compensatory; it is in the nature of a prescribed reward to encourage offers and their acceptance and is part of the regime introduced "to encourage good practice" (*per* Sir Geoffrey Vos C. in *OMV Petrom SA v Glencor International AG* at [32]). Remembering Sir David Eady's admonition in *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* (at [61]) that a judge *"should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust"*, it does not seem to me that I have been provided with any sufficient reason specifically referable to this provision why, under the regime, the Administrators should not be entitled to the specified reward in the maximum figure. I have concluded that I am required to make such an order accordingly.

Permission to appeal

78. Firth Rixson seek permission to appeal the decisions in my main judgment now reflected in the agreed draft Order on the basis that:

(a) An appeal against those declarations has a real prospect of success (CPR 52.3(6)(a)) for the reasons advanced at trial and set out in the Draft Grounds.

(b) There is, in any event, some other compelling reason why the appeal should be heard (CPR 52.3(6)(b)). The Judgment and the Grounds of Appeal involve matters of public importance concerning, inter alia the proper construction of the Master Agreements including, in particular, key provisions in Sections 2 and 5 of the Master Agreements relating to default and questions as to the contractual context and purpose for those provisions, the proper construction of their wording and whether and if so to what extent it is or could be appropriate to imply additional wording.

79. The contrary argument of the Administrators is that, stepping back to consider the merits and appropriate disposition of the case as a whole, Firth Rixson's position that it should never be required to pay any amounts under the Swaps notwithstanding that its counterparty is fully solvent and after the taking of the Relevant Steps will no longer be subject to any insolvency proceedings is so lacking in merit that there should be no realistic prospect of the Court of Appeal concluding that the ISDA Master Agreements work in that way. In any event, the Administrators urged me to refuse permission and leave it to the Court of Appeal to decide whether permission should be granted.

80. I consider that (a) the points in issue are of some complexity and it is not unrealistic to suppose that another court might reach a different conclusion (b) the amounts at stake are considerable and (c) the issues are plainly of some general commercial interest. I shall grant permission to appeal.

Form of order

81. Counsel provided to me a draft form of order recording the matters agreed and leaving for completion the matters outstanding which I have now determined. I would invite them to agree the insertions required to conform with this decision, and to lodge an agreed draft Order with my clerk.