Neutral Citation Number: [2021] EWCA Civ 1792

Case No: A3/2021/0348

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court of Justice
Business & Property Courts of England & Wales
Insolvency & Companies List (ChD)
Mr Nicholas Thompsell (sitting as a Deputy Judge of the High Court)
[2021] EWHC 451 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE GREEN
and
LORD JUSTICE NUGEE

- -

Between :

JOHN MCKEOWN	**Appellant/ Respondent**
- and -	
DIANA LANGER	**Respondent/ Petitioner**

- -

Jamie Carpenter QC & Maxwell Myers (instructed by **Brook Martin & Co Solicitors**) for the **Appellant**
Anna Lintner (instructed by **Russells**) for the **Respondent**

Hearing date: Wednesday 20 October 2021

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Approved Judgment

Lord Justice Green :

A. Introduction: The Issue

1. A narrow issue arises for determination upon this appeal. In litigation where there are split issues (such as liability preceding quantum), where no offer to settle the litigation under CPR Part 36 has been made, and where one party makes a without prejudice save as to costs offer covering the entirety of the litigation ("*a Calderbank offer*") how might the discretion as to costs under CPR 44.2 be exercised? In particular, where the judge is aware of the existence of the Calderbank offer but unaware of the date it was made, or as to its terms, is the judge, in effect, bound to treat such an offer as equivalent to an offer under CPR 36 and defer a ruling on costs until the conclusion of all stages of the litigation?

B. The facts

Procedural history

2. The facts of the underlying litigation may be shortly summarised. On 2nd April 2019, the respondent brought a petition for unfair prejudice pursuant to Section 994 Companies Act 2006. She is a minority shareholder in a company engaged in providing lap dancing and entertainment services and which owns a number of establishments in the centre of London. By a case management order dated 11th December 2019, it was ordered that there be a split trial of the petition with liability to precede valuation. The first stage trial ("*the liability trial*") was heard over the course of 9 days between 19th – 30th November 2020. The issues to be determined were as follows. First, whether the appellant, as majority shareholder in The Stratos Club Limited ("*the Company*"), had unfairly prejudiced the respondent's interests as a minority (25%) shareholder in the Company. Secondly, if so, what was the appropriate form of relief. Thirdly, if relief was ordered and was that the majority should purchase the respondent's shares in the Company at a price to be determined, the appropriate basis and mechanism for the valuation of those shares.

3. Judgment was given on 21st December 2020 ([2020] EWHC 3485 (Ch)) ("*the liability judgment*"). The judge found that the appellant had unfairly prejudiced the interests of the respondent: (i) by causing the Company to sell the business and assets of the "Soho Club" to a company owned by the appellant for the sum of £10,000 in circumstances where the true value of the club was in excess of £800,000; (ii) by acquiring the "Euston Club" for himself in circumstances where the Company required new premises from which to trade the "Marylebone Club"; (iii) by transferring the business and assets of the "Marylebone Club" to companies owned by the appellant at an undervalue; (iv) by using the assets of the Company to make excessive payments of salary and rent to family and friends; (v) by using assets of the Company to pay the appellant an excessive salary; (vi) by using the assets of the Company to pay invoices relating to the legal costs of the appellant in the present proceedings; and (vii), in the maladministration of the respondent's shareholder loan account.

4. On 27th January 2021, the judge ordered relief in the form of a share purchase order pursuant to which the appellant was ordered to acquire the respondent's shares in the Company. Further, the appellant was ordered to assume the liability to repay the

respondent's shareholders' loan account with the consequence that the appellant was precluded from continuing oppressively to threaten legal action against the respondent to seek repayment of the loan account.

5. Permission to appeal against this judgment was refused by Newey LJ on 3rd May 2021.

6. On 4th February 2021, the judge gave judgment in relation to the costs of the liability trial ("*the costs judgment*" - [2021] EWHC 451 (Ch)). He ordered the appellant to pay the respondent's costs of the proceedings up to and including and consequential upon the liability trial including in relation to the hearing for costs. He also ordered that the respondent's costs incurred in relation to disclosure, expert evidence, pre-trial review, trial preparation and trial phases of the respondent's cost budget be assessed upon an indemnity basis by reason of the unreasonable conduct of the appellant leading up to and during the trial. Finally, the appellant was ordered to make a payment of £450,000 on account of the respondent's costs.

7. By an order dated 25th February 2021 the judge ordered the appellant to make an interim payment on account of the sum that he was likely to be ordered to pay for the respondent's shares in the sum of £200,000. The judge further ordered the appellant to pay the respondent's costs of the interim payment application in a sum exceeding £35,000.

The offers to settle

8. Various offers to settle were made during the course of the proceedings.

9. First, on 23rd August 2018, prior to issue of the petition, the respondent made an offer to the appellant that he purchase the respondent's shares in the Company at a price to be determined by an independent expert (*an "O'Neill offer*") following the guidance given in *O'Neill v Phillips* ([1999] 1 WLR 1092 ("*O'Neill"*). The offer specified the assumptions which were to govern the purchase. In the light of the liability judgment the proposed buy-out terms were more favourable to the appellant than those ordered by the judge. The offer was rejected. On 2nd April 2019, the same offer was repeated. Again, it was rejected. It is pointed out by Ms Lintner, counsel for the respondent, that both these open offers were rejected by the appellant notwithstanding the repeated assertion, included in written submissions before this court, that the respondent's shares were valueless. Neither of these offers is referred to in the costs judgment.

10. Secondly, on a date which was not specified to the judge or recorded in the costs judgment, the appellant made an open offer to acquire the respondent's shares for £25,000. The judge took this into account when determining costs.

11. Thirdly, a global Calderbank offer was made. The judge recorded that he was aware that an offer had been made but that he had not been told who had made the offer or what its terms were or when it had been made. The judge was told that this was not an offer under CPR Part 36. This court was informed that the offer was in fact made on 27th May 2020 which is substantially after the petition was first issued and subsequent to a great deal of the preparatory work for trial having been undertaken. The judge recorded that the respondent proposed that the correspondence concerning the offer, insofar as it bore upon the liability trial, be placed before the court suitably redacted.

Counsel for the appellant however resisted this approach, even upon a redacted basis, arguing that the redaction might leave the court with a misleading impression. He insisted that he was entitled not to place the offer before the court (citing *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corp* [1981] Comm LR 132). The appellant nonetheless contended that the court should still take the "*existence at large of this correspondence and this offer*" into account in deciding whether to award costs at this stage and that it should be treated as equivalent to a CPR Part 36 offer. The argument was advanced upon the basis that it was well-established under CPR Part 36 that the existence of an offer in the case of a split hearing displaced the normal presumption that costs would be awarded at the end of the first stage. As explained below the judge rejected this analysis.

12. The appellant made no CPR Part 36 offer in relation to either the liability issues or the proceedings as a whole, nor did the appellant make an *O'Neill* offer.

The costs judgment

13. As observed, the respondent sought orders under CPR 44.2 that the appellant pay the respondent's costs and the Judge agreed.

14. CPR Rule 44.2 (1)-(5) is in the following terms:

> "**Court's discretion as to costs**
>
> **44.2**
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> (3) The general rule does not apply to the following proceedings –
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> (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
>
> (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) 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.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

15. The reasoning of the judge can be summarised as follows.

16. First, the Court had a wide discretion under CPR Rule 44.2 which included whether or not to make an order, and as to the stage at which an order might be made.

17. Secondly, if the court did make an order the "*general rule*" was that the unsuccessful party would be ordered to pay the costs of the successful party. In the liability judgment the judge had found "*fairly comprehensively in favour of the Petitioner and there can be no doubt that the Petitioner is the successful party at this stage*". It followed that absent any other consideration the judge would have "*no hesitation*" in awarding costs to the respondent, notwithstanding that there was another part of the litigation outstanding relating to valuation.

18. Thirdly, the policy underlying the CPR was to encourage parties not to take unmeritorious points. This was achieved by awarding costs at different stages of the action rather than adopting a "*winner takes all*" approach at the conclusion of the litigation: see per Lord Woolf MR in *Phonographic Performance Limited v AEI Rediffusion Music Limited* [1999] 1 WLR 1507 at page [1523A]. This was endorsed in *Weill v Mean Fiddler Holdings Limited* [2003] EWCA Civ 1058 at paragraph [30]. The normal position was that a trial judge should make a payment for costs on a stage by stage basis albeit that there was a discretion not to follow that approach. This was a case where the respondent had not only prevailed but where the appellant had taken a large number of unmeritorious points.

19. Fourthly, the costs regime served to deter unprofessional conduct in the management of litigation. On the facts of the case, the reprehensible conduct of the appellant in the conduct of the litigation was an additional reason why costs should be awarded at the interim stage. The judge criticised "*… the [appellant's] record in relation to late and poor disclosure. This had the effect that the Petitioner had been put to considerable effort, expense and delay as a result of the [appellant] taking unmeritorious points and adopting an unacceptable approach to the litigation*".

20. Fifthly, in relation to offers to settle which might alter the provisional conclusion arrived at, the Judge took account of offers to settle made by the appellant only. He first referred to the appellant's open offer to acquire the respondent's shares for £25,000. He stated that this was not strictly a settlement offer since it did not state that it would settle all disputes between the parties including those relating to the appellant's loan account. Nonetheless, the judge took it into consideration. The appellant argued that since this was a split trial there was a possibility that following the valuation trial the shares might be valued at less than the £25,000 offered. If this were the case, the appellant should be considered to have won overall and would or might be entitled to all the litigation costs. Accordingly, to prevent a risk of injustice to the appellant it was appropriate to defer any costs order until then. The Judge rejected this submission. He noted that the evidence before the court on valuation indicated a value substantially in excess of £25,000 but, regardless, the appellant would be relieved of all and/or at least a proportion of her shareholder loan which could be worth £40,000 - £60,000. Had the appellant accepted the £25,000 offer, she would also not have been entitled to anything in relation to her own costs. The judge stated:

> "I therefore think it is highly unlikely that an ultimate recovery at the next stage will leave her in a lesser position that 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."

21. The judge then turned to the Calderbank offer. The judge held that the offer was not something that he could consider: (i) it was not an "*admissible*" offer under CPR 44.2; (ii) to take it into account would involve unacceptable speculation as to its terms and possible effect; and (iii), the appellant could have obtained protection from the risk of an interim costs order by making a CPR Part 36 offer or an *O'Neill* offer, but chose not to. This exclusion of the offer from consideration lies at the heart of this appeal. The Judge's reasoning is found in paragraphs [30] – [33] of the judgment:

> "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."

22. The appellant sought permission to appeal the Judge's order for payment on account of the respondent's costs in the sum of £450,000. The Judge refused permission for two reasons of potential relevance to the appeal. First, in relation to the argument that the judge erred by failing to consider the unidentified Calderbank offer, the judge observed that CPR Rule 44.2(4)(c) had been carefully drafted. It required a court to take account only of "*admissible*" offers to settle. The choice of the expression "*admissible*" was deliberate. The rule did not compel a court to take account of "*any offer to settle of which the court is aware*". Secondly, the judge accepted a submission of Ms Lintner for the respondent in relation to an argument about informational asymmetry:

> "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."

C. The ground of appeal

23. Permission to appeal has been granted on a single ground:

> "The Judge was wrong in the circumstances of this case in concluding that he should not treat a Without Prejudice Save as to Costs ("WPSATC") offer made by the appellant in the same way as a Part 36 offer for the purposes of CPR, r.36.16(3)(d) and (4) and r.44.2."

24. Mr Carpenter QC, in his helpful submissions, contended that the appeal raised a short but important point of principle which was whether a global Calderbank offer was to be treated as having the same effect as an offer under CPR Part 36. Whether as a matter of case law or policy, there was no difference in substance between such a Calderbank offer and a CPR Part 36 offer. They should be treated in the same way. Accordingly, when a global Calderbank offer was made a determination on costs should be deferred until the end of the litigation. It followed that the judge erred when, having been made aware of the *Calderbank* offer, he proceeded to determine costs. In so doing, he created a significant risk of injustice for the appellant.

25. In analysing an undisclosed Calderbank offer a number of matters were, it was argued, irrelevant: (i) the appellant's conduct or misconduct during the course of the trial; (ii) the merits or relative demerits of the appellant's position at trial and the judge's conclusion as to who had won and who had lost; (iii) the parties' financial position and the alleged impecuniosity of the petitioner; and (iv), the policy considerations set out in *Phonographic* which supported an issue by issue approach to costs. The only relevant consideration was the risk of injustice to the appellant.

26. Mr Carpenter cited a series of decided cases which he contended supported his analysis and which made clear that when an offer was made the terms of which were not known to the judge the court should defer any ruling on costs until the end of the litigation. Only in this way could a risk of injustice to the party losing at the interim stage be ruled out. There was Court of Appeal authority for this proposition. In *HSS*

Services Group v BMB Builders Merchants ("*HSS*") [2005] EWCA Civ 626 the judge split liability and quantum in a case involving breach of contract. A Part 36 offer had been made in the form of a payment into court. The judge was told of the existence of the offer but not its terms. The claimant won on liability and the Judge ordered costs to be paid at the interim stage. On appeal it was held that the judge erred because where a global Part 36 offer had been made and the judge was aware of its existence but not its terms the proper course was to adjourn costs until the end of the trial (paragraphs [28] – [35]). A similar result was arrived at in *Tullett Prebon v BCG Brokers LP* [2010] LR Costs 891 (*"Tullett Prebon*"), and in *Interactive Technology Corporation Limited v Jonathan Ferster et Ors* [2017] EWHC 1510 (Ch).

27. The rigour of this principle could be seen also in cases where, following a split trial and where the successful party sought immediate costs both generally and prior to the date of the Part 36 offer, the Court nonetheless robustly rejected the invitation to determine either. In *Lifestyle Equities Ltd v Sportsdirect.Com Retail Limited et Ors* [2018] EWHC 962 (Ch) ("*Lifestyle Equities*") the Deputy Judge refused to determine costs, whether incurred before or after the making of a Part 36 offer, upon the basis that it was "…*manifestly a disproportionate, inappropriate and unsatisfactory way of proceedings. If there is a Part 36 offer in play, then it is only following the completion of the quantum stage that it would be possible to discern who had been successful and who had not and whether the part 36 offer has any impact on the costs order that should be made*" (paragraph [27]).

28. Next, it is argued that such is the rigour of the rule that even where a judge is unaware whether a Part 36 offer has been made it remains proper to proceed *as if* one had been made. In *Beiber v Teather* [2012] EWHC 539 (Ch) ("*Beiber*") the judge not knowing whether a Part 36 offer had been made nonetheless concluded that it was "*reasonable*" to proceed as if one had been made and to defer a decision on costs (paragraph [30]). In *Ted Baker v Axa Insurance* [2012] 6 Costs LR 1023 ("*Ted Baker*") a split trial had been ordered and the claimant prevailed and sought costs. The defendant argued that a decision on costs should be adjourned. The Judge had not been told of any CPR Part 36 offer (paragraph [13]). Nonetheless, he recorded a concession by the parties that he could not exclude the possibility that such an offer had been made and that he could proceed accordingly. The judge deferred the costs decision.

29. Mr Carpenter QC acknowledged that in exceptional circumstances a court can make an immediate costs order even where a Part 36 offer has been made: *HSS* (*ibid*) paragraph [35]; *AB v CD* [2011] EWHC 602 (Ch) ("*AB*") paragraph [18]; and *Dinglis v Dinglis et Ors* [2019] Costs 188 ("*Dinglis*") paragraph [2]. In *Multiplex Constructions Ltd v Cleveland Bridge UK Ltd* [2007] EWHC 659 (TCC) ("*Multiplex*") at paragraph [26] Jackson J held that where a Part 36 offer had been made and the judge was aware of it then the court should still consider all the circumstances, but the "*normal*" order should be to reserve costs although in an "*exceptional case*" the court could make an immediate order "*if the circumstances warrant such a course".* Mr Carpenter argued that the circumstances have to be extremely rare, and the discretion could not in any event be exercised if there was any vestigial risk that in making an immediate order an injustice would be done to the other (losing) party. He contended that *"exceptional*" meant, in effect, extremely rare and as applied to the present case none of the facts and matters referred to by the

judge (e.g. conduct, merits, etc) could be recycled as part of "*exceptional circumstances*". If they were irrelevant as support for an immediate determination of costs they could not be resurrected as exceptional circumstances to justify the same sought after end result. For facts to be exceptional and thereby to justify an interim costs order they had to extinguish altogether any risk of injustice to a respondent being ordered to pay costs on an interim basis (which was not possible on the facts of this case).

D. Analysis and conclusions

30. I do not accept the appellant's analysis. This is essentially for three reasons which I develop below. First, because it is inconsistent with the language of CPR 42.2 which by its express terms confers a broad discretion upon a court and which makes the existence, scope and effect of admissible offers to settle but one of the factors which a court is required to take into account. Secondly, because it is inconsistent with the policy considerations which underpin CPR 42.2 which have been recognised by the courts. Thirdly, because nothing in the case law on either CPR 36 or CPR 42.2 compels such a conclusion.

The scope and effect of CPR 44.2 and CPR 36

31. A number of points flow from the language of CPR 44.2. First, it confers an express power or discretion upon a judge to decide whether to make an order for costs. Secondly, if a judge decides to make an immediate costs order there is a duty ("*will*") to have regard to "*all the circumstances*". There is no fixed list of relevant circumstances. Thirdly, relevant matters that a court is required to take into consideration include those in CPR 44.2(a) – (c) which includes but is not limited to the existence of "*admissible*" offers to settle. Fourthly, where an offer to which the costs consequences under CPR 36 apply that would not be an "*admissible*" offer under CPR 44.2(c). There is no definition of "*admissible*" in CPR 44.2. Evidence might be inadmissible because it is simply irrelevant to the issue being determined and/or because it has a nil probative value.

32. In the present case the parties agreed that the offer *at that stage* in the litigation could not be looked at and this was the basis for the appellant's argument that the entire exercise should be deferred. On the express terms of CPR 42.2 a judge is entitled to conclude that an offer should not be taken into account yet proceed to make an interim order.

33. CPR 44.2 is by its very nature different to CPR 36 which is a self-contained set of rules which departs from the more general rules in CPR 44.2 (see e.g. the analysis in the White Book (2021) paragraph [36.2.1ff]). The special rules in CPR Part 36 do not therefore govern or limit the broader discretion which arises under CPR 44.2 where there is no CPR Part 36 offer in play.

34. I turn to the judge's analysis. He held that the Calderbank offer was not admissible at the present stage of the litigation because it had not been placed before the Court (paragraph [30]). He rejected the proposition that the appellant could have it "*both ways*" by withholding "*admission*" but nonetheless requiring the court to take account of it. He considered that the offer had a nil probative value since it was incapable of being analysed and it was wrong to speculate about its terms. The Judge highlighted

the practical difficulties of assessing an offer the nature and terms of which were undisclosed (paragraph [33]). Finally, he rejected a "*read across*" between CPR Part 36 and CPR 44.2 (paragraph [31]). He also observed, reflecting the differences between CPR Parts 36 and 44.2, that the appellant could have obtained protection from interim costs by making a CPR Part 36 offer, or by the making of an "*O'Neill offer*" (paragraph [32]).

35. I agree with this analysis. The appellant's submissions turn the language of CPR 44.2 upon its head. It entails the proposition that a Calderbank offer that is *prima facie* inadmissible: (i) becomes admissible; and (ii) acquires such compelling probative value that it ousts all the considerations that are otherwise required to be taken into account under CPR 44.2(4); and (iii) leads (subject only to exceptional circumstances) to a decision not to make any immediate costs order; and (iv), requires a legal effect equivalent to a CPR Part 36 offer to be accorded to a Calderbank offer even though Part 36 offers are excluded from the mandatory exercise of discretion under CPR 44.2(4)(c). The appellant's submissions lead to these conclusions even though the court remains ignorant of the terms of the offer and whether, had it been disclosed, it would have made any difference to the outcome. The appellant's submission is, in my view, inconsistent with the clear and express language of CPR 44.2.

Policy considerations

36. I turn now to issues of policy. The courts have identified a number of policy considerations which underpin decisions on costs. These shed light on "*the circumstances*" which a court is required to have regard to under CPR 44.2. Without intending to set out a definitive list the following have been identified as having potential relevance.

37. First, there is a general "*salutary*" rule that costs follow the issue rather than the "*event*". This is because an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned: *Phonographic* (ibid page [1523A]); *Mean Fiddler Holdings Limited* (ibid paragraph [30]); and *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2014] EWHC 3920 (Ch) ("*Merck*") where Nugee J (as he then was) stated at paragraph [6]) that it was "*... in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial*". In the present the merits were overwhelmingly in favour of the respondent and the Judge recorded his displeasure at the taking of unmeritorious points by the appellant.

38. Secondly, the making of discrete issue-based costs orders encourages professionalism in the conduct of litigation, which is an objective sought to be achieved by the Overriding Objective in CPR 1.1 and 1.2 and which parties are under a duty to facilitate pursuant to CPR 1.3. Parties do this by being required to "*help the court*". In the present case the Judge condemned the behaviour of the appellant in the conduct of the litigation which had a material effect on delay and costs, as falling below the standards to be expected of a professionally advised litigant (paragraphs [32] and [34] the latter in relation to the award of indemnity costs). Interim costs orders therefore

serve the good administration of justice by incentivising parties to conduct litigation professionally.

39. Thirdly, the principle of equality of arms plays a part as was recognised by Lord Hoffman in *O'Neill* (*ibid* page [1107H]). This is also reflected in the Overriding Objective at CPR 1.1(2)(a) which instructs courts, when exercising any of the powers in the CPR, to have regard to the object of "*...ensuring that the parties are on an equal footing and can participate fully in proceedings…*". This applies to the exercise of a discretion to order costs: See e.g. *Allan Attwood v Geoffrey Maidment et ors* [2011] EWHC 3180 (Ch) at paragraph [40]. An inequality of arms can be manifested in a variety of different ways, such as in an asymmetry of information as between the parties (as recognised by Lord Hoffman in *O'Neill ibid*). In some types of litigation, of which minority shareholders' suits might be an illustration, a claimant may be poorly placed to assess the reasonableness of an offer to settle not being in possession of the internal financial documents of the company. A similar scenario may confront a successful litigant in an intellectual property case who seeks an account of profits but who may have no knowledge of what profits the defendant has earned. Such situations may be contrasted with a successful claimant in, for example, a personal or clinical injury case or a routine case for breach of contract, where the relevant facts needed to determine quantum may be largely in the possession or under the control of the claimant. It is consistent with the above considerations that costs rules should encourage the making of reasonable offers to settle such that a refusal by a litigant to accept a reasonable offer can militate against the making of a costs order in the successful party's favour. However, a refusal on the part of a petitioner to accept what might turn out subsequently to be a reasonable offer might weigh less heavily against that party where there is asymmetry of access to information and this obviously includes where there has been inadequate disclosure by the party in possession of the relevant information.

40. The appellant's solution, if accepted, would represent the antithesis of good policy. It would reward bad behaviour, encourage the taking of unmeritorious points, exacerbate problems associated with the inequality of arms and accentuate the adverse litigation consequences of informational asymmetry.

41. The appellant's submission would, in my view, be an enticement to strategic gameplaying. On the appellant's analysis a majority shareholder could instruct solicitors that if, following the hearing of a liability trial, an adverse draft judgment was sent to the lawyers by the court the solicitors should then serve an immediate, but derisory, Calderbank offer since this would, on the appellant's analysis, prevent an otherwise nigh on inevitable negative costs order being made against the majority shareholder.

42. In the present case, the judge adopted an approach consistent with the policy considerations underpinning the costs regime. He emphasised the importance of issue-based costs determinations. He took into account the need to reflect merits and the desirability of not incentivising unprofessional behaviour. He refused to base his decision upon speculation. He correctly reflected the differences between CPR Parts 36 and 42.2 in terms of their ability to enable litigants to protect their positions.

Case Law

43. I turn then to the case law. I can state my conclusions in summary form.

44. First, almost all the cases relied upon by the appellant concern the operation of CPR Part 36 which sets out a costs regime intended to differ from the more general rules under CPR 42.2. Case law on CPR Part 36 provides but scant guidance in a case not involving a Part 36 offer. The Judge, in my view rightly, observed that there was no read across from CPR Part 36 to CPR Part 42.2 and that his discretion under this latter regime was broad. The Judge was correct to focus upon case law where there was no Part 36 offer and where, as it was put in *Merck* (ibid), there is a discretion whether to award costs but that in "*general*" in complex litigation those who lose should pay costs as and when they lose. The Judge there was not laying down a hard and fast rule but only identifying a "*salutary*" starting point for the exercise of discretion. I agree with that analysis.

45. Secondly, as for the factors the Judge took into account (merits, conduct, offers to settle, the undesirability of speculating, etc) these are all factors that decided case law on CPR 42.2 recognises as relevant.

46. Thirdly, and in any event, even under CPR Part 36 it is accepted that there may be exceptional circumstances where the Court retains a discretion to award costs on an issue by issue basis and not defer a costs order until the end of the trial. So, even if the appellant was correct in his equating of a Calderbank offer with a Part 36 offer a court could still make an interim costs order in a case such as the present. Ms Lintner, for the respondent, argued that if we were minded to accept the appellant's submissions on their primary argument (that a Calderbank offer be treated as equivalent to a Part 36 offer) we should nonetheless reject the appeal upon the basis that there were "*exceptional circumstances*" which arose. She relied upon: (i) the existence of the *O'Neill* offers made by the respondent petitioner which turned out, in the light of the liability judgment, to be more favourable to the appellant than the judgment itself but which the appellant persisted in rejecting (see paragraph [9] above); (ii) the reprehensible behaviour of the appellant in the conduct of the litigation to date; (iii) the wholesale failure of the appellant on the merits; (iv) the Judge's conclusion that on the evidence before him it was likely that the respondent would succeed in the next stage of the litigation in obtaining a share valuation substantially in excess of that advanced in offers by the appellant (i.e. a maximum of £25k); and (v), the respondent's impecuniosity relative to that of the appellant. The appellant argues that all of these considerations are irrelevant, and the sole relevant exceptional circumstance would be that an immediate costs order created no risk whatsoever of an injustice to the appellant if he prevailed at the final trial. It is strictly unnecessary for me to express a definitive view on this given my conclusion that the Judge must be upheld for the reasons he gave. Nonetheless, I found the respondent's submissions to have very considerable force.

47. There are two additional points that I would make about the case law. First, the appellant relies upon the judgment in *Lifestyle Equities* (*ibid*) which it is said highlights the rigour with which the courts refuse to entertain interim costs orders prior to the end of the case. As set out above (see paragraph [27]) the Judge expressed the view in general terms not seemingly confined to the facts of the instant case, that courts should not make costs orders even in respect of costs incurred prior to the making of a Part 36 offer. With respect to the Judge I disagree. Nothing in CPR Part 36 precludes a costs order being made in relation to costs incurred prior to a

CPR Part 36 offer. Given that this is a power that exists in law it would be wrong in principle for a court to fetter its discretion and refuse even to consider whether to exercise that power. In a case such as the present, for instance, substantial costs were incurred prior to the making of the Calderbank offer. Had it been necessary the Judge could, in my view, have made an order about these costs. The second point concerns the decision of two judges (in *Beiber* (*ibid*) and *Ted Baker* (*ibid*)) to speculate about whether a Part 36 offer had been made and then to proceed to determine costs upon the unestablished premise that such an offer had been made. I strongly suspect that the "*speculation*" in those cases was in truth very well-informed surmise, and not genuine speculation. In my view no judge seeking to take a decision should be compelled to speculate about a fact that the parties are aware of and then, by virtue of the speculation, take into account a supposed fact that is or might be false. Legal representatives owe an overarching duty to the Court which must encompass ensuring that a judge does not proceed – usually unfairly to one party – upon a premise that the parties know to be untrue. Nothing precludes parties being candid with a court as to whether a Part 36 offer has been made or not (see CPR 36.16). In the present case the Judge expressed his concern at being asked to speculate about matters the parties declined to put before him (the details of the Calderbank offer) but about which they of course were well informed. He did not have to speculate about whether a Part 36 offer had been made; it was common ground that no such offer had been made. If however it had been suggested to him that he *should* proceed upon the hypothesis that a Part 36 offer had in fact been made but where the parties knew that this was not true, then they were duty bound to prevent this from happening.

Conclusion

48. For all these reasons I would dismiss the appeal.

Lord Justice Nugee:

49. I agree.

Lord Justice Lewison:

50. I also agree