Neutral Citation Number: [2020] EWHC 1286 (Ch)

Case No: BL-2019-001195

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH D)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 22 May 2020

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

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Between :

AWENDALE RESOURCES INCORPORATED	**Claimant**
- and -	
PYXIS CAPITAL MANAGEMENT LIMITED	**Defendant**

- -
- -

Mr Marcos Dracos (instructed by **Osborne Clarke LLP**) for the **Defendant**
Mr Paul Burton (instructed by **Blake Morgan LLP**) for the **Claimant**

Hearing dates: 30 April 2020

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APPROVED JUDGMENT

I direct that pursuant to CPR PD Para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2 pm on 22 May 2020.

Tom Leech QC :

The Applications

1. This is the hearing of an application by the Defendant, Pyxis Capital Management Ltd ("**Pyxis**"), for a stay of proceedings pursuant to Article 29 of Regulation (EC) No. 1215/2012 (the "**Regulation**"). In the alternative Pyxis applies for an extension of time under CPR Part 11 to apply to contest the court's jurisdiction or for an order that the issue be referred to the Court of Justice of the European Union (the "**CJEU**") (and that the present proceedings be stayed pending such reference).

2. Pyxis's Application Notice dated 25 November 2019 also contained an application for permission under CPR Part 35 to rely on the first expert report of Mr Tasos Panteli also dated 25 November 2019. By Application Notice dated 27 March 2020 the Claimant, Awendale Resources Incorporated ("**Awendale**"), also applied for permission to rely upon expert evidence of Cypriot law and by Application Notices dated 27 March 2020 and 9 April 2020 respectively Pyxis and Awendale both applied for permission to rely upon a responsive expert report.

3. At the outset of the hearing I granted permission to Pyxis to rely upon Mr Panteli's first report and his supplemental report dated 27 March 2020. I also granted permission to Awendale to rely on the expert report of Mr Andreas Haviaras dated 27 February 2020 and his supplemental expert report dated 9 April 2020.

4. Awendale is a company incorporated under the law of the Seychelles and Pyxis is a company incorporated under the law of Cyprus. On 7 November

2017 Infinitum Ventures Ltd ("**Infinitum**"), a company incorporated in the British Virgin Islands, issued proceedings in Cyprus (which I will call the "**Cypriot Derivative Claim**") against Mr Andreas Andreou ("**Mr Andreou**"), Awendale and Pyxis. It is common ground that Awendale entered an appearance and submitted to the jurisdiction of the Cypriot court although there was a dispute about the capacity in which Infinitum had brought those proceedings and whether it had standing to do so.

5. On 24 June 2019 Awendale issued the Claim Form in these proceedings (to which I will refer as the "**English Claim**") and on 20 August 2019 Pyxis filed an acknowledgment of service stating that it intended to defend the claim. Pyxis now applies to stay the English Claim on the basis that it and the Cypriot Derivative Claim involve the same cause of action between the same parties and that if Article 29 is engaged, the Court should stay the proceedings of its own motion or extend time to permit it to make such an application under CPR Part 11(4).

6. The hearing of this application took place remotely and Mr Marcos Dracos appeared on behalf of Pyxis instructed by Osborne Clarke LLP ("**Osborne Clarke**"). Mr Paul Burton appeared on behalf of Awendale instructed by Blake Morgan LLP ("**Blake Morgan**"). I am grateful to both of them for their assistance.

Background

Pyxis

7. I deal first with the shareholders of Pyxis. Mr Artem Doudko, the partner in Osborne Clarke who has conduct of the English Claim on its behalf, exhibited to his first witness statement dated 25 November 2019 the original Greek version and an English translation of an affidavit sworn by Ms Angeliki Charalambides in the Cypriot Derivative Claim. That translation was not challenged and it stated that the issued share capital of Pyxis consists of 1,500 ordinary shares of which 709 are held by Melward Investments Ltd ("**Melward**"), 750 shares are held by Ms Helena Papaioakeim and the remaining 41 shares are held by Christodoulos Christodoulou. It was also Ms Charalambides' evidence that:

i) Mr Mikhail Movshevich and Mr Alexander Nikolaev were the ultimate beneficial owners of Melward although Mr Nikolaev had complete control of the company.

ii) On 22 April 2015 Infinitum acquired 500 shares in Pyxis through Ms Papaioakeim and on 19 May 2015 it acquired 250 shares again through Ms Papaioakeim.

iii) Hatley Investments Ltd ("**Hatley**") holds the remaining 41 shares or 2.5% through Mr Christodoulou but is essentially controlled by Mr Nikolaev through Melward.

iv) Until 11 January 2016 Mr Andreou was the sole director of Pyxis but on that date Despo Efstathiou was appointed as a director to be replaced by Ivi Nuska on 14 October 2016 to be replaced by Ms Papaioakeim on 26 May 2017.

v) On 15 November 2017 Mr Andreou resigned as a director of Pyxis and his resignation took effect that day.

8. The exhibits to Ms Charalambides' affidavit were not in evidence and I have not seen either the register of members of Pyxis or the company search which she exhibited. However, in his first report Mr Haviarias referred to the company search and stated that at the time when the Cypriot Derivative Claim was issued the registered shareholders were Melward, Ms Papaioakeim and Hatley. Mr Doudko also exhibited to his second witness statement dated 27 March 2020 a declaration of trust dated 26 May 2017 which recorded that Ms Papaioakeim held the 750 shares in Pyxis as a nominee and on bare trust for Infinitum.

The Loan Agreements

9. By a series of five loan agreements made between 8 April 2014 and 4 July 2014 (the "**Loan Agreements**" and each a "**Loan Agreement**") Awendale advanced a total sum of US $25,000,000 to Pyxis which was repayable at various times between 1 May 2014 and 25 June 2016. All five Loan Agreements provided for the payment of interest at 12% per annum and four of the five agreements provided for the payment of default interest at 0.1% per calendar day whilst the fifth Loan Agreement provided for the payment of default interest at the rate of 0.2% per day.

10. Each Loan Agreement also provided that it was to be governed and construed by the laws of England and Wales and contained a jurisdiction clause by which the parties irrevocably agreed that the courts of England and Wales would have jurisdiction to hear and determine any suit, action or proceeding,

and to settle any dispute which arose out of or in connection with the agreement, and for such purposes, the parties irrevocably submitted to the jurisdiction of the courts of England and Wales.

11. It is common ground that Pyxis failed to make the repayments of principal and interest due under the Loan Agreements and Awendale claims that the total sum of US $52,255,402.37 was due and owing as at 5 June 2019 or, alternatively, that the sum of US 30,726,700.46 was due and owing (if the provision for default interest is not enforceable).

12. Pyxis admits that it entered into the Loan Agreements and that the total amounts of principal and interest have not been paid. But it contends that the context in which the loans were made was a joint venture to acquire and redevelop real estate projects in Moscow. In particular, it alleges that Infinitum (which was formerly called Zhora Trading Ltd) was ultimately owned and controlled by Mr Anton Agafonov, who was Mr Nikolaev's joint venture partner.

13. Pyxis also contends that the Loan Agreements were either void or voidable because Mr Andreou, as its sole director, signed (or purported to sign) them on behalf of Pyxis in breach of fiduciary duty and contrary to the company's interests. In particular, it is Pyxis's case that Mr Andreou signed the Loan Agreements on behalf of Pyxis on the instructions of Mr Oleg Belay, who ultimately owned and controlled Hatley but who was himself acting at the direction of Mr Nikolaev.

14. Pyxis also contends that the provision for default interest was a penalty and unenforceable and that it was agreed that Pyxis would defer repayment until

the real estate projects which the joint venture was redeveloping in Moscow generated a positive cashflow. It is Pyxis's case that this agreement was recorded in a document dated 26 March 2016 described as "**Term Sheet 2**" and signed on behalf of Awendale, Melward, Infinitum and Hatley. It is also Pyxis's case that it made payments to Awendale of US $777,608 and US $345,000 in reliance on the agreement in Term Sheet 2.

The Cypriot Derivative Claim

15. It is common ground that on 7 November 2017 Infinitum issued a Writ of Summons in the Cypriot Derivative Claim (the "**Writ**") in the District Court of Limassol. Mr Doudko also exhibited an English translation of the Writ which was not challenged by Awendale. I make the following observations about it:

    i) Infinitum was identified as the Claimant and the heading stated that it was bringing the claim in its capacity as a shareholder in Pyxis and that it was a derivative or representative action.

    ii) Mr Andreou, Awendale and Pyxis were identified as the Defendants although no relief was claimed against Pyxis itself.

    iii) The primary relief which Infinitum claimed was a "declaratory judgment" for deceit, fraud, conspiracy, conspiracy to defraud, unlawful means conspiracy, damage by illegal means and fraudulent or dishonest assistance in a breach of trust in connection with the loan agreements.

iv) In paragraphs 4 and 5 of the Writ Infinitum also claimed the following relief:

> "4. Further and/or Alternative declaratory judgment of the Honorable [sic] Court that the terms of the Loan Agreements in relation to the amount of the interest rate and the repayment margin foreseen are abusive and/or punitive and/or constitute penalty clauses and are therefore invalid.
>
> 5. Declaratory judgment against Defendants 1 and 2 in favour of Defendants 3 that the Loan Agreements are invalid."

v) In paragraph 6 Infinitum also claimed a declaration that the Loan Agreements had been modified by written or oral agreement and in paragraph 7 it claimed a declaration that Awendale had acted in breach of that agreement.

16. On 16 November 2017 the Cypriot law firm AG Paphitis & Co LLC filed a memorandum of appearance on behalf of Mr Andreou in his personal capacity and the court registry stamped the memorandum to certify that it had been delivered that day. This was the day after Mr Andreou had resigned as a director.

17. On 3 April 2018 Infinitum made a without notice application for permission to serve the Writ out of the jurisdiction on Awendale and Ms Charalambides swore her affidavit in support of this application. Ms Charalambides deposed that Infinitum had a good arguable case and the translation records that in paragraphs 24 and 25 of her affidavit she stated as follows:

> "24. In any case, based on Order 6(1)(e) of the Civil Procedure Rules, on when the service out of the jurisdiction is permitted provided always that a good arguable case is demonstrated, it is

> for the action to be raised to impose or rescind or dissolve or in any way affect a contract or rectify damage or other relief for or in relation to a breach of contract made in Cyprus. In the present case, the illegal and irregular loan agreements were signed in Cyprus.
>
> 25. At this stage, I would also note that, according to the five loan agreements, it is provided that the courts of England and Wales are competent over disputes arising under those agreements but do not have exclusive jurisdiction; As a result such dispute may also be settled in the courts of Cyprus, even if the law to be applied is English. Regarding this, I attach the 5 Loan Agreements as a set of **Exhibits 9** and in particular I refer the Court to Term 10 of each loan agreement."

18. On 17 April 2018 the Cypriot court made an order for substituted service at an address in the Seychelles and service appears to have been effected on 8 May 2018. On 1 June 2018 the Cypriot law firm Sotiris Pittas & Co LLC filed a memorandum of appearance on behalf of Awendale and the registry stamped the memorandum to certify that it had been delivered that day.

19. Pyxis did not file a memorandum of appearance. However, Mr Doudko exhibited to his second witness statement an affidavit of service dated 8 November 2017 together with its English translation in which Mr Pavlos Papakostas, a process server, deposed that on 7 November 2017 he had served the Writ personally on Pyxis by leaving it with Mr Andreou, who was then still a director of the company.

20. Finally, Pyxis offered little explanation for its failure to issue proceedings against Awendale in Cyprus itself. Mr Doudko's evidence in his second witness statement was that Ms Papaioakeim worked for a firm of corporate service providers, that their services did not extend to litigation and that she was not prepared to appear as a party in any court action.

The Cypriot Winding Up Petition

21. Ms Sarah Rees, the partner at Blake Morgan who has the conduct of the English Claim on Awendale's behalf, exhibited to her first witness statement dated 27 February 2020 the English translation of an affidavit sworn on 4 April 2018 by Ms Papaioakeim (who described herself as the managing director of Pyxis). This affidavit was made in answer to a winding up petition issued by Awendale against Pyxis on 15 November 2017 ("**The Cypriot Winding Up Petition**"), the same day on which Mr Andreou had resigned as a director.

22. In paragraphs 23 to 26 of her affidavit Ms Papaioakeim dealt with the merits of the dispute between the parties. In paragraphs 27 to 38 she deposed that Awendale had also issued a petition to wind up Infinitum in the British Virgin Islands and that this petition had been dismissed. In paragraphs 43 to 54 she also stated that a provisional liquidator had been appointed by the Cypriot Court on 27 November 2017 and criticised the actions which he had taken since his appointment. Finally, she disputed the winding up petition on a number of grounds. In particular, in paragraph 63 she criticised Awendale for failing to mention the Cypriot Derivative Claim and in paragraphs 64 and 65 (under the heading "In essence Shareholders' Dispute") the translation of her affidavit states as follows:

> "64. Therefore, and in accordance with all the above, it is clear that this is not a genuine liquidation, as the Applicants call it, debt, but a shareholders' dispute. It should also be noted that there is no Shareholders' Agreement between the shareholders of the Company (and the other companies involved in the development of the 3 projects in general), governing their relations.

> 65. Alexander Nikolaev himself, who for a long time had control over the Company and was and continues to be the ultimate beneficial owner of the Applicants, has created the Company's alleged debts and the moment he lost complete control of the Company by trying to exploit the same, he decided to pursue its dissolution to regain control of the 3 projects as the Company holds a key position in the group of companies behind these projects. He had followed the same tactic in the British Virgin Islands (BVI) which had failed. This paragraph summarizes the essence of this Application."

23. On 26 October 2018 the Cypriot Court dismissed the Cypriot Winding Up Petition. Mr Doudko exhibited to his second witness statement a translation of extracts from the judgment of the Court. In particular, it stated:

> "What Pyxis contends to establish its defence in the present petition, namely that there is a genuine dispute with regards to the debt and therefore the Petitioner's claim is not liquidated, is raised and asked in the form of declaratory orders in the action which the Respondent characterizes as a derivative action. The Petitioner challenges whether that action is indeed a derivative action. It is not for the present Court, in the context of the winding up petition, to decide on the merits of the action. Neither the Court will decide whether the claimants are to be given the remedies they seek. This is a matter for the Court, before which the aforementioned action is pending. Otherwise, the substance of the claim would be decided in the context of a winding up, which I consider impermissible."

The English Claim

24. On 24 June 2019 Awendale issued the Claim Form in the English Claim with the Particulars of Claim dated 21 June 2019 attached. Awendale claimed payment of a debt of US $52,255,402.37 or, alternatively, US $30,726,700.74. In the alternative to the debt claim Awendale claimed these sums as damages for breach of the loan agreements.

25. On 29 July 2019 the Claim Form and Particulars of Claim were served on Pyxis in Cyprus. On 20 August 2019 Osborne Clarke filed an

acknowledgement of service. They ticked the box against the statement: "I intend to defend all of this claim". They did not tick the box against the statement: "I intend to contest jurisdiction." By the side of these two boxes the form clearly stated:

> "If you do not file an application to dispute the jurisdiction of the court within 14 days of the date of filing this acknowledgment of service, it will be assumed that you accept the court's jurisdiction and judgment may be entered against you."

26. On 3 September 2019 that 14 day period expired. However, on that day the parties agreed to extend the time for service of the Defence until 1 October 2019 and on 10 September 2019 the parties agreed to extend time for the service of the Defence until 1 November 2019. (I take these two dates from the procedural chronology filed by Pyxis.)

27. On 1 November Pyxis filed the Defence. It took the point that the Cypriot Court had acquired exclusive jurisdiction under the Regulation because the Cypriot Derivative Claim was currently pending and Awendale had entered an unconditional appearance and submitted to the jurisdiction: see paragraphs 6 to 8.

28. Without prejudice to this jurisdiction challenge, Pyxis also raised the defence on the merits which I have set out above, namely, that the Loan Agreements were void or voidable for Mr Andreou's breach of fiduciary duty, that the default interest provision was a penalty and that in any event the Loan Agreements had been varied by the agreement in Term Sheet 2 so that no sums were due and owing.

29. On 20 November 2019 Deputy Master Linwood made an order by consent extending time for service of service of a Reply and the filing of Directions Questionnaires until after the determination of this application and on 25 November 2019 Pyxis issued the Application Notice. On 20 December 2019 Deputy Master Bartlett made a further order by consent giving directions for the service of evidence.

30. On 9 April 2020 the evidence was complete when Ms Rees made her second witness statement. By letter dated 3 April 2020 Blake Morgan also made a Request for Further Information under CPR Part 18 asking why Mr Doudko had failed to exhibit the affidavit of service on Pyxis to his first witness statement. By letter dated 8 April 2020 Osborne Clarke replied. In paragraphs 11 and 12 they stated as follows:

> "11.….In preparing the witness statement Osborne Clarke consulted Infinitum's Cypriot lawyers about the steps taken in the derivative action, and specifically Mr Tsirides. In circumstances where there was not known to be any dispute about the fact that Pyxis had been served, nor indeed that such a dispute might be relevant (which is any event denied, since Awendale has submitted to the Cypriot jurisdiction), it did not appear necessary to exhibit any document evidencing the fact that Pyxis had been served. The affidavit of service of Awendale was also not exhibited to that witness statement. When we realised that Awendale disputed service, we sought and obtained the affidavit of service.
>
> 12. As to the earlier absence of the affidavit from the court file, we understand from Mr Tsirides that is it not the practice in the District of Limassol for the affidavit of service to be placed on the court file by the bailiff after service. It is usually given by the bailiff to the lawyers, who will file it in Court only if they need to prove service as part of some application. We trust that this resolves the question."

The Issues

31. In his Skeleton Argument on behalf of Pyxis Mr Dracos identified the following six issues for determination by the Court (which I gratefully adopt):

    i) *The same cause of action*: Are the English Claim and the Cypriot Derivative Claim "proceedings involving the same cause of action"?

    ii) *The same parties*: If so, are the English Claim and the Cypriot Derivative Claim "between the same parties"?

    iii) *Seisin*: If so, was the Cypriot court first seised?

    iv) *The scope of Article 29:* If so, is Article 29 nevertheless inapplicable because of the jurisdiction clause in each Loan Agreement?

    v) *The time of application*: Is the operation of Article 29 excluded because the stay application was not filed earlier and in accordance with CPR Part 11.

    vi) *Reference to the CJEU*: If Pyxis succeeds on the first four issues but fails on the fifth issue, should the Court consider referring a question to the CJEU?

Discussion

Article 29

32. Article 29 provides that the court of a Member State first seised with a dispute shall have jurisdiction and that any court other than the court first seised shall stay its proceedings:

> "1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.
>
> 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

33. However, the Regulation (as recast) now provides that Article 29 is without prejudice to Article 31(2). Article 31 provides as follows (in full):

> "1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> 2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
>
> 3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court."

34. Nevertheless, Article 31(2) does not apply in the present case because it is expressed to be without prejudice to Article 26 which confers jurisdiction on a court of a Member State before which a defendant enters an appearance. Article 26(1) provides as follows:

> "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest

> the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24."

35. In the normal course, therefore, the jurisdiction clause in each Loan Agreement would have given the English Court exclusive jurisdiction to determine the English Claim. But it was common ground between the parties that the effect of Awendale's submission to the jurisdiction in Cyprus was to confer jurisdiction upon the Cypriot Court under Article 26.

36. Article 29 applies, therefore, to determine whether Pyxis is entitled to a stay of the English Claim (subject to the application to challenge the jurisdiction being out of time under CPR Part 11(4)). If Article 29 is engaged because the Cypriot Derivative Claim and the English Claim are proceedings "involving the same cause of action and between the same parties", then the court first seised will have jurisdiction. If Article 29 is not engaged or the Cypriot court was not first seised, then Pyxis is not entitled to a stay of the English Claim.

37. It was also common ground between the experts that the Cypriot court became seised with the Cypriot Derivative Claim when the Writ was issued in the District Court in Limassol subject to compliance with Article 32(1)(a) which provides as follows:

> 1. For the purposes of this Section, a court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;…"

i) The same cause of action

38. In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG, The Alexandros T* [2013] UKSC 70, [2014] 1 Lloyd's Rep 223 Lord Clarke provided detailed guidance about the way in which the same cause of action issue should be addressed and resolved. The case involved Article 27 of Regulation (EC) 44/2001 and for ease of reference I extract below the key propositions set out by Lord Clarke without his full citation of the authorities:

> 28. The principles of EU law which are relevant to the determination of this question are in my opinion clear. They have been considered in a number of cases in the CJEU and are essentially as submitted on behalf of the CMI. They may be summarised in this way.
>
> i) The phrase "same cause of action" in Article 27 has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law: see *Gubisch* at para 11.
>
> ii) In order for proceedings to involve the same cause of action they must have "le même objet et la même cause". This expression derives from the French version of the text. It is not reflected expressly in the English or German texts but the CJEU has held that it applies generally: see *Gubisch* at para 14, *The Tatry* at para 38 and *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2009] Lloyd's Rep IR 365 , per Beatson J at para 24.
>
> iii) Identity of cause means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action: see *The Tatry* at para 39….
>
> iv) Identity of objet means that the proceedings in each jurisdiction must have the same end in view: see *The Tatry* at para 41, *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207 at para 25, Primacom at para 42 and Sinco at para 24.
>
> v) The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims: see *Gantner* at paras 24-32,….See also to similar effect *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] 1 Lloyd's Rep 434 , per Lawrence Collins LJ at para 93 and Research in Motion UK Ltd v Visto

> Corporation [2008] 2 All ER (Comm) 560 , per Mummery LJ at para 36.
>
> vi) It follows that Article 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings. I would accept the submission on behalf of the CMI that this is an important point of distinction between Articles 27 and 28. Under Article 28 it is actions rather than claims that are compared in order to determine whether they are related……
>
> 29. How do these principles provide an answer to the question whether the 2006 proceedings involve the same cause or causes of action as the Greek proceedings? It is necessary to consider the claims advanced by the CMI and the LMI separately and, in the case of each cause of action relied upon, to consider whether the same cause of action is being relied upon in the Greek proceedings. In doing so, the defences advanced in each action must be disregarded.
>
> 30. The essential question is whether the claims in England and Greece are mirror images of one another, and thus legally irreconcilable, as in *Gubish* and *The Tatry* , in which case Article 27 applies, or whether they are not incompatible, as in *Gantner*, in which case it does not. Thus in *Gantner* a claim for damages for repudiation of a contract and a claim for the price of goods delivered before the repudiation could both have succeeded and the fact that a set-off of the damages would make the price less beneficial to the seller did not make them incompatible. And in *Maersk Olie & Gas A/S v Firma M de Haan en W De Boer* (Case C-39/02) [2004] ECR I-9657 owners of a vessel which damaged a pipeline (owned by Maersk) sought a declaration that they were entitled to limit their liability under the 1957 International Convention relating to the Limitation of Liability of Owners of Sea-going Ships and the Dutch legislation that gave effect to it and that a limitation fund be established. Maersk subsequently commenced proceedings in Denmark claiming compensation for damage to the pipeline. The CJEU held that the causes of action were not the same: see paras 35 to 39."

39. Mr Dracos submitted that applying these principles the English Claim involved the same cause of action as the Cypriot Derivative Claim. He placed considerable reliance on the fact that Infinitum is seeking negative

declarations that the Loan Agreements were void and invalid: see paragraphs 4 and 5 of the Writ (set out above).

40. He also referred to the facts of *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4871 and *The Tatry* [1999] QB 515 (both of which were cited and applied by Lord Clarke in *The Alexandros T* (above)). In *Gubisch*, for example, the CJEU stated their facts and conclusion in their judgment at [16] and [17] as follows:

> "[16] In particular, in a case such as this, involving the international sale of tangible moveable property, it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. If it is the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a defence against the first action, brought in the form of independent proceedings before a court in another Contracting State. [17] In those procedural circumstances it must be held that the two actions have the same subject-matter, for that concept cannot be restricted so as to mean two claims which are entirely identical."

41. Mr Burton submitted that the English Claim did not involve the same cause of action as the Cypriot Derivative Claim. He submitted that the two claims were radically different because of the far-reaching claims made against Mr Andreou. He also submitted that their object was very different, namely, declaratory relief rather than the recovery of a liquidated debt.

42. In my judgment the English Claim and the Cypriot Derivative Claim do involve the same cause of action (as that expression is understood in accordance with its autonomous meaning). I say this for the following reasons:

i) In the English Claim Awendale seeks to recover the principal due under the Loan Agreements together with interest at the contractual rate and default interest either in debt or as damages for breach of contract. The Particulars of Claim also anticipate the defence that the default interest provision is penal and contains an alternative claim for the principal and contractual interest only.

ii) In the Cypriot Derivative Claim Infinitum claims declarations that the Loan Agreements were void or invalid or that the sums payable under them have not fallen due because they have been varied by the Term Sheet 2 agreement. Infinitum also claims that the default interest provision is a penalty and unenforceable. As in *Gubisch*, the question whether the Loan Agreements (and the default interest provision) are binding lies at the heart of the two actions.

iii) Although a separate claim has been made against Mr Andreou, Infinitum's end in view, so far as Awendale is concerned, is to prevent enforcement of the Loan Agreements and Awendale's end in view is to enforce them. I bear in mind that Infinitum's claims in Cyprus only fall within Article 29 to the extent that they involve proceedings between Awendale and Pyxis: see *The Tatry* (above) at [34] (which I set out below). It follows that the claims made against Mr Andreou are not relevant to the question whether Awendale's cause of action against Pyxis in the English Claim is the mirror image of Infinitum's cause of action against Awendale in the Cypriot Derivative Claim.

iv) Finally, Mr Dracos reminded me that I am required to consider the substance of the claims not their form. For example, in *The Tatry* a ship owner had brought a claim for a declaration that it was not liable to the cargo owners in the Netherlands and the cargo owner brought *in rem* proceedings to arrest the ship in England. It was held that they involved the same cause of action and the form of action was irrelevant: see [47] and [48]. In my judgment it is not material that Infinitum has claimed to set aside the Loan Agreements on a number of different grounds or sought a number of different declarations. In substance, Infinitum's claim is that the Loan Agreements are not enforceable (or the debts are not due).

43. This conclusion can also be tested in the following way. In the Cypriot Winding Up Petition Awendale sought to wind up Pyxis on the basis of the debts payable under the Loan Agreements. The Court dismissed the petition on the basis that the Cypriot Derivative Claim gave rise to a genuine dispute about whether those debts were due. Professor Briggs suggests that one way to address the same cause of action issue is to ask whether a decision in one set of proceedings would have been a conclusive answer in the other: see *Briggs Civil Jurisdiction and Judgments* (6th ed) at 2—265 (p 310). It seems to me that the dismissal of the Cypriot Winding Up Petition demonstrates this to be the case.

ii) The same parties

44. Although the test for the same cause of action involves some flexibility of interpretation, Mr Burton submitted that the test for the same parties is much

more exacting. He drew my attention to the opinion of Mr Advocate General Fennelly in *Drouot Assurances SA v Consolidated Metallurgical Industries* [1999] QB 497 (at [26]) where he pointed out the contrast between the two tests:

> "It is true that, in *Gubisch*, the court held that the concept of "the same subject matter," which, in effect, it interpreted into the English text by reference to the other language versions, could not "be restricted so as to mean two claims which are entirely identical:" para. 17. In practice, it applied that reasoning to the two actions, one of which was brought to enforce, and the other to rescind or discharge, the same contract. In doing so, it attached great importance to the purpose expressed, inter alia, in article 27(3) of the Convention of avoiding irreconcilable judgments between the same parties and how such judgments could arise if the competing claims had to be "entirely identical" before a lis alibi pendens plea could be upheld. That reasoning is not, however, equally applicable to the concept of "the same parties," since the judgment proceeds on the assumption that, whatever differences exist in the subject matter, the parties are the same. Nothing in the judgment, in the text of article 21 or in the purpose of the Convention requires that a flexible approach be adopted in that instance. The contrary is rather the case. Judgments are, in my view, truly irreconcilable only if they are contrary and given in actions between the same parties."

45. Nevertheless, it is possible for two separate corporate entities to be treated as the same party for the purpose of Article 29. In *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] 1 Lloyd's Rep 434 Aikens J held that the interests of a legal assignee under a deed of assignment were identical to the interests of three assignors from the moment that notice of the assignment was given to the Defendants and the Court of Appeal dismissed an appeal against his decision.

46. Lawrence Collins LJ (as he then was) gave the principal judgment with which Rimer and Tuckey LJJ agreed. Mr Dracos drew my attention to the

propositions which he set out [85] and, particular, the third proposition (which was as follows): "in considering whether two entities are the "same party" for the purposes of applying the regulation, the court looks to the substance, and not the form." Mr Burton relied on the same passage at [85]. But he also relied on the passage at [88] to [90] in which Lawrence Collins LJ identified the circumstances in which separate entities may be regarded as identical for the purposes of Article 29. I set out that passage (and also those passages in which he applied that test):

> "86. How are these principles to be applied to the present case? If there has been an effective legal assignment of the rights of the original claimants under the Assignment, then (section 136(1) of the Law of Property Act 1925) the assignment is effective to transfer (from the date of notice to the "debtor"), the legal right in the thing in action transferred, all legal and other remedies for the thing in action and also "… the power to give a good discharge for the same without the concurrence of the assignor." As the judge said (para 69 of the judgment), the effect of this is that the assignee becomes the owner of the thing in action. He can sue the debtor in his own name without joining the assignor: *In re Westerton: Public Trustee v Gray* [1919] 2 Ch 104. The assignor has no further interest in the right in action: see *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 , 121.
>
> 87. First, as I have said, the parties must be "identical" (*The Tatry*, para 33; *Drouot*, para 18), but this does not mean that two separate legal entities cannot be "identical" for this purpose, as is shown by the rulings in those cases.
>
> 88. Second, a decision against one must be res judicata as against the other. In English law res judicata estoppels operate for or against not only the parties, but those who are privy to them in interest, and privies include any person who is identified in estate or interest, and accordingly "assignees will be bound as privies of the assignor" (Spencer Bower, Turner and Handley, Res Judicata , 3rd ed. 1996, 230–231, citing *Effem Foods Pty Ltd v Trawl Industries Pty Ltd* (1993) 43 FCR 510 , 540–2)…..
>
> 89. I am satisfied that there is the requisite privity of interest which would preclude an assignor from re-litigating any finding on liability under the contracts in a proceeding to which the assignee had been a party.

> 90. Third, their interests must be "identical" and "indissociable." The word "indissociable" is very rarely used in English legal parlance except where it has been used to translate the same French word in judgments of the European Court of Justice and the European Court of Human Rights, and acts of the European institutions. The point frequently arises in the context of VAT in determining whether the supply of goods and services is one service, or two: see, e.g. Case 353/85 *Commission v United Kingdom* [1988] STC 25; *Doctor Beynon and Partners v Customs and Excise Commissioners* [2004] UKHL 53, [2005] STC 55. The European Court of Human Rights has emphasised that some of the rights are indissociable from "a danger of arbitrary power" (*Golder v United Kingdom* (1975) 1EHRR 524, para 35) or indissociable "from a democratic society" (*Kokkinakis v Greece* (1993) 17 EHRR 397 , para 31: see also *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, paras 38–39). So also Council Regulation (Dublin II) provides in Article 4(iii) that the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member is to be "indissociable" from that of his parent or guardian: see *AA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1540.
>
> 91. In my judgment the interests are identical, because in relation to each of the SPAs there is only one right, and there are successive owners of that one right. It follows that the interests of assignor and assignee are indissociable in the sense of indivisible. It does not matter that an assignment only passes the benefit and not the burden of a contract, nor that the assignor remains primarily liable to the obligor for the non-performance of its outstanding contractual obligations. The interest of the assignor and assignee in relation to the claim being advanced against the appellants is identical. There is also force in the point made by Kolden that the question of outstanding contractual obligations is irrelevant on the facts, as the SPAs are executed so far as the original claimants are concerned; they have no further obligations under the SPAs. It is the appellants who continue to have an obligation under the SPAs, viz. to transfer the Maltsovsky shares immediately onwards to JV (or to pay damages for breach of that obligation)."

47. Mr Burton emphasised that I must be satisfied both that a decision against Pyxis will be *res judicata* against Infinitum (and vice versa) and also that their interests must be indissociable (in the sense explained by Lawrence Collins LJ). However, it is important that I should note that Mr Burton did not go so

far as to submit that a properly constituted derivative action brought by a minority shareholder of Pyxis in Cyprus would not have satisfied the test for same parties in Article 29.

48. On 16 August 1960 Cyprus became independent. Section 29(1)(c) of the Courts of Justice Law (14/1960) provided that after Independence the existing provisions of law (both common law and equity) would remain in force and both experts agreed that the law then in force included the rule in *Foss v Harbottle*. (The Cyprus Company Law 1951 closely resembles the English Companies Act 1948). There was a difference of emphasis between the experts about the weight to be given to English and Commonwealth authorities decided after that date. But both were agreed that they had persuasive force.

49. Mr Haviaras, Awendale's expert, provided the following description of a derivative action in paragraphs 19 and 20 of his first report:

> "19. A derivative action under Cyprus Law is a procedural device, under the *Foss v Harbottle* rule, whereby an action may be brought by the aggrieved minority shareholders for a wrong allegedly done to the company where they are shareholders. The alleged wrongdoers are made the defendants in the action and the company is joined as a nominal defendant so that the company can be bound by the judgment and recover any damages awarded by the Cyprus Courts.
>
> 20. Although any remedy recovered goes to the company, the company is not named as a plaintiff."

50. Mr Panteli, Pyxis's expert, gave evidence that in *Christou v Melliou* (2013) 1 AAD 1210 the Supreme Court of Cyprus adopted the following passage from Gower's Principles of Modern Company Law (4th ed) at p.651 in his first report at paragraph 16:

> "The company must be made a defendant to the action. As already pointed out, the company is the true plaintiff, and if a money judgment is recovered against the true defendants – the wrongdoing directors or other controllers – this will be in favour of the company and not in favour of the individual shareholder who is nominal plaintiff. The company cannot, in fact, be the plaintiff, because neither of its organs – the board of directors and the general meeting – will authorise suit by it. As the next best thing the court insists upon its being made the nominal defendant."

51. Mr Panteli expressed the view that in the light of this passage Pyxis was the true plaintiff in the Cypriot Derivative Action and that the actual defendants were Mr Andreou and Awendale. Mr Haviaras disagreed with this conclusion. However, in paragraph 34 of his first report, he did agree that if the Cypriot Derivative Action had been a derivative action under the law of Cyprus, Mr Andreou, Awendale and Pyxis would have been the correct Defendants.

52. The real issue between Mr Panteli and Mr Haviaras was whether Infinitum had standing to bring a derivative action in Cyprus given that it was not registered as a member of Pyxis and its 750 shares were registered in the name of Ms Papaioakeim. Mr Haviaras argued that the Cypriot Court would only entertain a derivative action by a member of the company. Indeed, he went so far as to say that the Cypriot Derivative Action is liable to be struck out and bound to be dismissed because Infinitum did not have legal standing. By contrast, Mr Panteli relied on English and Commonwealth authorities to argue that Infinitum had standing to bring a derivative action in Cyprus as the beneficial owner of the shares.

53. Neither of the parties urged me to reach a final decision on this issue (even if it had been possible for me to do so) and in *Kolden* (above) the Court of Appeal held that was appropriate to apply the "good arguable case" standard to the

question whether the interests of the parties were identical or indissociable: see [47] to [53]. Subject to one qualification, Pyxis has satisfied me that there is a good arguable case that Infinitum had standing to commence and proceed with the Cypriot Derivative Claim. I say this for the following reasons:

i) Although it is quite possible that Mr Haviaras's view of the law is correct, I consider it well arguable that the Supreme Court of Cyprus will adopt the view expressed by Mr Panteli and hold that the beneficial owner of shares in a company has standing to commence a derivative claim.

ii) Mr Haviaras gave a number of good reasons why the Court might strike out the Cypriot Derivative Claim. In particular, Pyxis provided no real explanation why it could not have brought proceedings in Cyprus itself (other than that Ms Papaioakeim was unwilling to get involved in litigation). Nevertheless, as Mr Dracos submitted, the Cypriot Derivative Claim is still pending in the District Court of Limassol and no application has yet been made to strike it out. Indeed, he went as far as to offer an undertaking to apply to lift any stay if such a strike out application was successful.

iii) But in any event, Mr Dracos submitted (and I accept) that the Cypriot Court has already had to consider whether Infinitum has a good arguable case in the Cypriot Derivative Claim in order to permit service out of the jurisdiction on Awendale. It has also had to decide whether there was a genuine dispute that the debt to Awendale was due. Indeed, on the hearing of the Cypriot Winding Up Petition,

Awendale challenged "whether that action [i.e. the Cypriot Derivative Claim] was indeed a derivative action".

54. If Pyxis had standing to bring the Derivative Action, then in my judgment the English Claim and the Cypriot Derivative Claim involved proceedings between the same parties for the simple reason submitted by Mr Dracos, namely, that both Awendale and Pyxis are parties to both sets of proceedings. Mr Haviaras agrees that if Infinitum had been a member of the company and if it had had standing to bring a derivative claim, Pyxis would have been a proper defendant. He also agreed that any remedy would be awarded to Pyxis (and not Infinitum).

55. Moreover, the passage from Gower approved by the Supreme Court in *Christou v Melliou* (above) shows that the fact that Pyxis is a defendant rather than a claimant is a question of form only. In substance, therefore, the Cypriot Derivative Claim involves a claim by Pyxis for a declaration against Awendale that the Loan Agreements are void or invalid or, alternatively, that the debt has not fallen due and that the provision for default interest is penal and unenforceable.

56. Accordingly, it is unnecessary for me to decide whether the different interests of Infinitum and Pyxis are identical and indissociable. However, if it had been necessary for me to do so, I would have been prepared to find that they were. The 750 shares in Pyxis were held on bare trust by Ms Papaioakeim for Infinitum and a derivative claim is brought by the minority shareholder for the benefit of the company and all of its shareholders. It is impossible to see how a finding made by the Cypriot Court that the Loan Agreements are void or

invalid will not bind Infinitum, Pyxis and Awendale (and Mr Burton did not suggest otherwise). Moreover, the claim is the claim of the company and not of the individual minority shareholder and the company is entitled to the remedy. In that sense, therefore, the interests of both are indissociable.

57. I reach this conclusion subject to one qualification. As Mr Burton rightly submitted, this conclusion assumes that Pyxis was served with the Writ and became a party to the Cypriot Derivative Action. If it was not served with those proceedings, then the two actions do not involve the same parties. Since the question whether Pyxis was served and, if so, when is the subject matter of Issue iii) I turn to that now.

iii) Seisin

58. In his first witness statement Mr Doudko stated that Pyxis had been served with the Writ but he did not exhibit the affidavit of service. In his first report Mr Haviaras challenged Mr Doudko's evidence that there had been good service on the basis that the affidavit of service was not on the court file (although an affidavit from the same process server had been filed dealing with service on Mr Andreou personally). Mr Haviaras also made two points about the consequence of the failure to file the affidavit in paragraphs 41(ix) and (x):

> "ix. If both affiants say the truth then I can only conclude that the claimant in the Cyprus Action failed to file the evidence of service on Pyxis and I can say that what matters are the contents of the Court file and nothing else.
>
> x. If the fact that Pyxis service documents were not in the court's file was brought to the attention of the Cyprus judge the order to serve on Awendale abroad would never have been issued. This is because the phrase "*against some other person*"

> in Order 6(1)(h) of the Cyprus procedure Rules (see paragraph 41(ii) above) should not be understood to mean that it suffices to serve just any one of the defendants who are Cypriot residents. The requirement should be understood that all Cypriot residents must be first served before the claimant being eligible to apply for leave to serve abroad."

59. In reply, Mr Doudko exhibited a copy of the affidavit of the process server sworn on 8 November 2017 together with an English translation. In their letter dated 8 April 2020 Osborne Clarke also explained why Mr Doudko had not exhibited the affidavit to his first witness statement and why it had not been filed at court.

60. In his second report Mr Panteli also gave evidence confirming that this amounted to proper service. He also addressed Mr Haviaras' argument that permission to serve Awendale out of the jurisdiction should not have been granted because the affidavit of service was not on the court file. He confirmed that the Cypriot Court had assumed jurisdiction under Order 6(1)(e) because the Loan Agreements were made in Cyprus rather than under Order 6(1)(h). He also made the point that Awendale had submitted to the jurisdiction and that it was no longer open to it to challenge the basis on which service out of the jurisdiction had been granted.

61. Mr Haviaras did not take issue with any of these points in his second report limiting his evidence to the standing of Infinitum. He did not disagree with Mr Panteli that Pyxis had been properly served or that service out of the jurisdiction had been granted under Order 6(1)(e) rather than Order 6(1)(h). Nor did he suggest that it still remained open to Awendale to apply to set aside the order for service out of the jurisdiction.

62. Nevertheless, Mr Burton submitted that Pyxis had not been served with the Writ (or not validly served). He described Pyxis as a "stalking horse" and submitted that there remained a serious doubt over service. Relying on a passage in *Dicey, Morris & Collins* The Conflict of Laws 15th ed (2018) at 12—067 to 12—069 he suggested that there had been a substantial failure to comply with the rules for service which was not put right before the issue of the English Claim and that the English Court was first seised.

63. I cannot accept that there was any real doubt about service. Mr Burton did not challenge the authenticity of the affidavit of service or the veracity of the process server. Moreover, Mr Haviaras gave no evidence that any Cypriot rules of procedure require that an affidavit of service is filed on the court file before service is treated as effective or complete and I accept Mr Doudko's reasons why he did not exhibit the affidavit of service to his first witness statement. I find, therefore, that on 7 November 2017 Infinitum served Pyxis with the Writ in the Cypriot Derivative Action.

64. I also reject the argument that the Cypriot Court would not have granted permission to serve Awendale out of the jurisdiction if it had been told that Pyxis had not been served for the reason given by Mr Panteli, namely, that service out of the jurisdiction had been granted under Order 6(1)(e) rather than Order 6(1)(h). In paragraph 24 of her affidavit (which I have set out above) Ms Charalambides clearly stated that this was the basis of the application.

65. I note that in paragraph 25 of her affidavit (which I have also set out) Ms Charalambides also stated that: "the courts of England and Wales are competent over disputes arising under those agreements but do not have

exclusive jurisdiction". However, this was not a point which Mr Haviaras took and Awendale could have applied to set aside the permission on the basis that the English Court had exclusive jurisdiction under Articles 25 or sought a stay under Article 31(2). Instead, Awendale chose to submit to the jurisdiction and issued the Cypriot Winding Up Petition.

66. It was common ground between the experts that Article 32(1)(a) of the Regulation applies and that the Cypriot Court was first seised when the Writ was issued unless Infinitum subsequently failed to take the steps which it was required to take to have service effected on the Defendants. Mr Burton submitted that Pyxis failed to take the steps required by the proviso to Article 32(1)(a). But I do not accept this submission. Both Mr Andreou and Pyxis were served with the Writ and Infinitum obtained permission to serve Awendale out of the jurisdiction. On 8 May 2017 Awendale was served with the Writ and on 1 June 2018 Awendale submitted to the jurisdiction. In my judgment, it follows, that the Cypriot court was first seised for the purposes of Article 29.

iv) The scope of Article 29

67. The question whether to stay the English Claim on the basis that the Cypriot Court was first seised turns on the relationship between Article 29 and CPR Part 11 the relevant parts of which provide as follows:

> "(1) A defendant who wishes to— (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must— (a) be made within 14 days after filing an acknowledgment of service; and (b) be supported by evidence.
>
> (5) If the defendant— (a) files an acknowledgment of service; and (b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim."

68. In *The Alexandros T* Starlight, a shipping company, and a number of related parties entered into settlement agreements with two groups of insurers settling claims brought in England under certain insurance policies. The settlement agreements were enforceable by the Court under Tomlin orders and contained exclusive jurisdiction clauses in favour of the courts of England and Wales. However, some years later the Starlight parties commenced proceedings in Greece claiming consequential financial losses arising out the insurers' failure to pay under the original policies.

69. Lord Clarke summarised the procedural chronology (which he described as "startling") at [100] to [111]. The insurers issued applications to enforce the settlement agreements and applied for permission to join and serve some of the relevant parties out of the jurisdiction or to bring new claims against them (so that they were all bound). His Honour Judge Mackie QC granted the application and the order made it clear that the Respondents had seven days to challenge the jurisdiction. There was no jurisdiction challenge and the Defendants served Defences which contained the following paragraph:

> "The claims in the Greek proceedings fall outside the jurisdiction clause in the policy and the jurisdiction clause in the settlement agreement. It is respectfully denied therefore that the High Court of Justice of England and Wales has jurisdiction to determine the claims in the Greek proceedings."

70. The insurers then applied for summary judgment taking the point that no application had been made under what was then Article 27 (although the Respondents had made a separate application out of time under Article 28). In their Skeleton Argument counsel for the Starlight parties expressly stated that they were not relying on Article 27 and Lord Clarke described this at [107] as "a clear and reasoned decision".

71. The judge held that the claims in the Greek proceedings had been brought in breach of the exclusive jurisdiction clauses and granted summary judgment. The Starlight parties then applied for permission to appeal raising for the first time the argument that Article 27 applied. The judge granted permission to appeal and the Court of Appeal allowed the appeal. Lord Clarke set out the effect of the Court of Appeal's decision at [19] and [20]:

> "19. The insurers sought to enforce the settlement agreements referred to in the Tomlin orders and, in a judgment handed down on 19 December 2011, having refused a stay under article 28, the judge held that they were entitled to summary judgment for (inter alia) a declaration that the matters sought to be raised in Greece were part of the settlement of the claim and that Starlight (and OME) are bound to indemnify the insurers against any costs incurred and any sums that may be adjudged against them in the Greek proceedings.
>
> 20. As stated above, the Court of Appeal held that it was bound to stay the 2006 proceedings and 2011 Folio 702 and 1043 under article 27, made no final determination of the position under article 28 and declined to consider the issues of summary judgment. The Court of Appeal also held that it was not too late for the owners to rely on article 27 or article 28."

72. The insurers appealed to the Supreme Court. Lord Clarke set out his conclusions on the scope of Article 27 in the following passage at [121] to [123]:

> "121. In my judgment, there is no sensible basis on which it can be said that the time limit under CPR r 11(4), which can in an appropriate case be extended under CPR r 3.1(2)(a), is contrary to EU law. The time limit satisfies the principle of equivalence because it is the same rule that applies in all cases. It fulfils a legitimate aim, namely making sure that points going to whether the proceedings are to be tried on their substantive merits in England are taken promptly and without unnecessary costs. It satisfies the principle of legal certainty because parties need to know where they stand. The absence of a time limit would allow a litigant to take the point years afterwards. Moreover, the time limit does not render the right to apply for a stay under article 27 (or article 28) impossible or excessively difficult to exercise. It allows sufficient time for the point to be raised, especially given the express rule permitting an extension of time in appropriate cases.
>
> 122. As to the expression "of its own motion" in article 27, there are a number of different parts of the Regulation that have a similar provision. On the facts here the potential for a stay under article 27 was before the courts on at least two occasions. The position was explained to Judge Mackie QC on the without notice application referred to above. There is no reason to think that he did not give consideration to the position. More importantly perhaps the position was explained to the judge in the skeleton arguments to which I have referred. He was given both reasons and authority on the question whether a stay should be granted under article 27. It seems to me that the judge was entitled to accept those submissions, which were made on the owners' behalf by experienced counsel and solicitors.
>
> 123. For these reasons I would hold that the Court of Appeal should have refused to allow the owners to rely on article 27 in the Court of Appeal. That said, I would accept that the meaning and effect of the duty to consider article 27 of its own motion are matters of some potential importance and I have (somewhat reluctantly) reached the conclusion that they are not acte clair. I would therefore refer an appropriate question to the Court of Justice of the European Union if it were necessary in order to resolve the appeal. If the insurers abandon the claims to the declarations referred to in paras 58 and 59 above, such a reference will not be necessary because, for the reasons given

> above, I would allow the appeals under article 27 in their entirety."

73. Mr Dracos submitted that Article 29 required the Court to stay the English Claim of its own motion notwithstanding Lord Clarke's conclusion in *The Alexandros T*. In his Skeleton Argument he submitted that *The Alexandros T* established the following limited propositions:

i) First, Lord Clarke accepted that it was not clear whether Article 29 imposes a duty on the English Court to stay proceedings regardless of the procedural history of the case.

ii) Secondly, Lord Clarke expressed the view that the correct answer is that the procedural history of the case may be such as to permit an English Court to consider that the point was settled and to refuse to allow a party to reopen it. Lord Clarke expressed the view that the facts of *The Alexandros T* were such an instance, but he accepted that it was not acte clair.

iii) Thirdly, it was not necessary to resolve the point because Article 29 did not apply.

74. He also drew my attention to the following passage in the Jenard Report at p. 41 (pointing out that it was not clear whether it had been referred to in argument in *The Alexandros T*):

> "As there may be several concurrent international jurisdictions, and the courts of different States may properly be seised of a matter (see in particular Articles 2 and 5), it appeared to be necessary to regulate the question of *lis pendens*. By virtue of Article 21, the courts of a Contracting State must decline jurisdiction, if necessary of their own motion, where proceedings involving the same cause of action between the

> same parties are already pending in a court of another State. In cases of *lis pendens* the court is therefore obliged to decline jurisdiction, either on the application of one of the parties, or of its own motion, since this will facilitate the proper administration of justice within the Community. A court will not always have to examine of its own motion, whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to believe that this may be the case."

75. In his oral submissions he also pointed out that Section 8 of the Regulation is headed "Examination as to Jurisdiction and Admissibility" and took me to a number of Articles which required the Court to examine jurisdiction of its own motion: see Articles 27, 28(1), Article 29 and Article 33(4). He also drew a contrast between Article 29 and Article 33(4) which was introduced after *The Alexandros T* and which requires the Court to apply the Article "on the application of one of the parties or, where possible under national law, of its own motion". Article 29 does not, of course, contain the same qualification.

76. Finally, in accordance with his duty to the Court, Mr Dracos drew attention to *SET Select Energy GmbH v F & M Bunkering Ltd* [2014] 1 Lloyd's Rep 652 where Blair J adopted a wider view of Lord Clarke's conclusion but nevertheless extended time for compliance with the time limit CPR Part 11(4). After setting out Lord Clarke's conclusion at [121] (above) Blair J stated this at [25]:

> "It is true, as F&M points out, that the Supreme Court did not regard this conclusion as acte clair (see [123]) and that it would (if necessary) have referred an appropriate question to the Court of Justice of the European Union. However, the fact that the issue can ultimately be resolved authoritatively only by the CJEU does not mean that the decision in The Alexandros T is not binding in the meantime. It is plainly binding on this court, and I take the rule to be, therefore, that notwithstanding the mandatory language of Article 27, CPR Pt 11(4) and (5) may

> apply so as to bar a challenge which is late under the rules, and deem the applicant to have submitted to the jurisdiction."

77. Given the way in which Blair J interpreted *The Alexandros T,* I express my own views very briefly on this point and out of deference to the detailed argument advanced by Mr Dracos. I cannot read Lord Clarke's judgment as limiting the general principle which he set out in [121] to cases in which the point has already been raised and the Court has considered it either on the application of the parties or of its own motion. I say this for the following reasons:

i) Mr Dracos relies heavily on Lord Clarke's analysis at [114] to [119] and his application of the law to the facts at [122]. Those paragraphs must be understood in the context of the "startling facts" of the case and that there had been a considered decision not to take the Article 27 point.

ii) The submission made on behalf of Starlight was the same submission as Mr Dracos makes in this case and Lord Clarke recorded it in [116] (my emphasis): "However, it is said that on the true construction of art 27, the court, including on these facts *has a duty to consider the application of its own motion whenever the point is taken.*"

iii) Lord Clarke rejected this submission. In doing so, he rejected the subsidiary argument that CPR Part 11 was inconsistent with Article 29 which should override it: see [117] to [119]. He also emphasised that the finality of judgments is just as much a principle of European law: see [120].

iv) Lord Clarke's conclusion was that the time limit in CPR Part 11(4) was not contrary to EU law: see [121]. As Mr Dracos accepts, he also stated that CPR Part 11 applied to applications under Article 29: see [114]. I must therefore apply it.

v) I do not accept that Lord Clarke intended to introduce a distinction between cases in which the point is settled because there is some issue estoppel or abuse of process and those cases in which it remains open. This would be to introduce yet a further test and a further level or complexity.

78. Furthermore, I agree with Blair J that *The Alexandros T* is clearly binding on this Court. In my judgment a party who fails to apply to stay proceedings under Article 29 within the time limit in CPR Part 11(4) is deemed to have submitted to the jurisdiction. I decline, therefore, to stay the proceedings under Article 29 unless Pyxis is able to persuade the Court to extend time for compliance with CPR Part 11(4).

v) The time of application

79. Pyxis has put forward no explanation for the failure to comply with CPR Part 11(4). In his first witness statement in support of the application to extend time Mr Doudko relied only on the risk of irreconcilable judgments and the delay between Awendale submitting to the jurisdiction and commencing the English Claim. His second witness statement took the issue no further.

80. Mr Burton submitted that an application for an extension of time under CPR Part 11(4) is an application for relief against sanctions to which CPR Part 3.9

applies and that the Court should apply the three stage test set out in *Denton v TH White Ltd* [2014] 1 WLR 3926. I have some sympathy with that submission but I reject it for the reasons given by Blair J in *SET Select Energy GmbH v F & M Bunkering Ltd* (above) at [30]:

> "As a matter of law, however, I reject S.E.T.'s submission that the sole route available to a defendant in the position of F&M is an application for relief against sanctions under CPR Pt 3.9 . This question is covered by authority. In *The Alexandros T* at [121] cited above, the Supreme Court stated expressly that the time limit under CPR 11(4) "can in an appropriate case be extended under CPR 3.1(2)(a) ". Such an extension is made pursuant to the court's general powers of management, and an order extending time may be granted retrospectively (White Book 3.1.2)."

81. I would also add that the "sanction" for which relief would be required is set out in CPR Part 11(5) and it remains an open question whether that provision applies only to the existence of the jurisdiction rather than the exercise of it: see *The Alexandros T* (above) at [114]. I was not addressed on this issue by either party and it would be wrong for me conclude that the sanction applies in the present case without argument.

82. I therefore approach the question whether to extend time for compliance with CPR Part 11(4) on the basis that I am exercising the case management power in CPR Part 3.1(2(a). I also do so on the basis that one of the factors which I should take into account is the context in which the application is made (i.e. an application under Article 29). Blair J expressed this factor in *SET Select Energy GmbH v F & M Bunkering Ltd* (above) in the following way (at [27]):

> "Furthermore, it is relevant that the CPR in this context is concerned with civil procedure not in the purely domestic context, but with the relationship between proceedings carried on at the same time in different member states of the EU. The

> mutual recognition of judgments under the Judgments Regulation includes rules as to lis pendens and related actions intended (among other things) to preclude inconsistent judgments. Though the CPR Pt 11(4) time limit is not objectionable under EU law (see *The Alexandros T*, ibid, at [121]), the context may (in my view) operate as a factor when considering whether to extend time. This is because a case might be heard in England which might otherwise not have been had the jurisdiction application been on time. This was the approach adopted by Beatson J in *Polymer Vision R & D Limited v Van Dooren* [2011] EWHC 2951 (Comm) at [79] based on *Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd* [2009] UKPC 46 , and I would follow the same approach."

83. In *The Alexandros T* the facts were startling. By contrast in *SET Select Energy GmbH v F & M Bunkering Ltd* the extension of time which the Court was asked to make was on one view a single day and on another view 16 days: see [8]. The present case falls somewhere between the two extremes. In the present case, the Court is being asked to extend the time for compliance for almost 12 weeks from 3 September 2019 to 25 November 2019 (although Pyxis did raise the issue of jurisdiction in the Defence dated 1 November 2019). It seems to me that the critical question which I have to decide is how much weight to attach to the context and the risk of irreconcilable judgments between the courts of two Member States. This issue did not really arise in *SET Select Energy GmbH v F & M Bunkering Ltd* because the extension of time was a very short one and, on the facts, the jurisdiction challenge failed.

84. I have reached the conclusion that the context (i.e. the risk of irreconcilable judgments by the courts of two different Member States seised with proceedings which fall within Article 29) provides a strong reason for me to extend time and I should exercise my discretion in favour of Pyxis unless Awendale is able to point to some prejudice or detriment (or some other

equally strong factor) which would prevent me doing so. I note that in *Polymer Vision R & D Ltd v Van Dooren* [2011] EWHC 2951 (Comm) (upon which Blair J relied in *SET Select Energy GmbH v F & M Bunkering Ltd*) Beatson J (as he then was) adopted a similar approach at [77] to [79].

85. Awendale could not point to any particular prejudice or detriment which it has suffered (or will suffer) if I extend time for compliance with CPR Part 11(4) and, in my judgment, the other reasons which it advanced are not sufficiently strong to justify the refusal to extend time. I say this for the following reasons:

i) I accept that Pyxis offered no explanation for its failure to issue an application under CPR Part 11(4) before 3 September 2019 and until 25 November 2019. On the other hand, Awendale did not suggest that it had suffered any prejudice or detriment as a consequence of Pyxis's failure to challenge jurisdiction between 3 September 2019 and 1 November 2019 (when Pyxis served its Defence) and 25 November 2019 (when it issued its Application Notice).

ii) I accept that each Loan Agreement contained a jurisdiction clause in favour of the courts of England and Wales and, in the normal course, I would have given effect to them and refused an extension of time. On the other hand, Awendale offered no explanation for its failure to apply to the Cypriot Court to set aside the order for permission to serve out of the jurisdiction under Article 25 or for a stay under Article 31(2). It was Awendale's decision to waive its right to rely on the exclusive jurisdiction of the English Court and to submit to the jurisdiction which gave the Cypriot Court jurisdiction under Article 26.

iii) I accept that Pyxis has taken no steps to progress the Cypriot Derivative Action since Awendale was joined as a party. Indeed, it has not even served the Statement of Claim. On the other hand Awendale has taken no steps to apply to strike out the Cypriot Derivative Claim either on the basis that Infinitum has no standing to bring it or on the basis of its persistent delay. Mr Panteli's unchallenged evidence was that Awendale could apply to strike it out for want of prosecution and in that event the Cypriot Court will usually give the plaintiff one more opportunity to file a Statement of Claim.

iv) In any event, Awendale does not allege that it has suffered any particular prejudice or detriment as a result of the delay in prosecuting the Cypriot Derivative Claim and I propose to address this point further (below) in the terms on which I am prepared to grant a stay.

86. Accordingly, I exercise my discretion under CPR Part 3.1(2)(a) to extend time for compliance with CPR Part 11(4) from 3 September 2019 to 25 November 2019 and permit Pyxis to apply out of time for a stay of proceedings under Article 29.

vi) Reference to the CJEU

87. Mr Dracos did not invite me to consider this issue unless the Court reached the conclusion that Article 29 was engaged but refused to grant a stay or to extend time. In the event, I have granted the application for an extension of time and this issue does not arise.

Disposal

88. Accordingly, it is my judgment that the English Claim and Cypriot Derivative Claim are proceedings involving the same cause of action between the same parties and that the Cypriot Court was first seised. I extend time for compliance with CPR Part 11(4) from 3 September 2019 to 25 November 2019 and (subject to the following terms) stay the English Claim under Article 29.

89. Mr Dracos offered an undertaking on behalf of Pyxis to consent to any stay being lifted if the Cypriot Derivative Claim is struck out and I will make an order staying the English Claim subject to the terms of such an undertaking to be agreed between the parties (or, if it cannot be agreed, determined by the Court). For the avoidance of doubt, I should make it clear that such an undertaking will extend not only to the claim being struck out on the basis that there is no reasonable cause of action but also for any other reason (such as want of prosecution). I will also give Awendale permission to apply to set aside the stay if Infinitum fails to take reasonable steps to prosecute or proceed with the Cypriot Derivative Claim. If necessary, I will hear from the parties on the precise form of the order.