

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2020

Before :

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

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

JUDGMENT (COSTS)

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 10.30 am on 22 July 2020.

Tom Leech QC :

Introduction

1. On 22 May 2020 I gave judgment on the application by the Defendant, Pyxis Capital Management Ltd (“**Pyxis**”), for a stay of proceedings pursuant to Article 29 of Regulation (EC) No. 1215/2012: see [2020] EWHC 1286 (Ch). I held that this action (described by the parties in the Order (below) as the “**English Proceedings**”) involved the same cause of action between the same parties as proceedings commenced in Cyprus by Infinitum Ventures Ltd (“**Infinitum**”) (described by the parties as the “**Cypriot Proceedings**”) and that the Cypriot Court was first seised. I also extended time for compliance with CPR Part 11(4) from 3 September 2019 to 25 November 2019 and stayed the English Claim under Article 29.
2. I gave judgment staying the English Claim on terms that Pyxis gave an undertaking to consent to any stay being lifted if the Cypriot Derivative Claim was struck out. I also made it clear that the undertaking would extend not only to the claim being struck out on the basis that there was no reasonable cause of action but also for any other reason (such as want of prosecution). I also indicated that I would give the Claimant, Awendale Resources Inc (“**Awendale**”), permission to apply to set aside the stay if Infinitum failed to take reasonable steps to prosecute or proceed with the Cypriot Derivative Claim.
3. The parties agreed a form of order subject to the question of costs. They also agreed a form of undertaking. In correspondence they agreed that I should deal with the issue of costs on paper and a timetable for exchanging written submissions. On 3 July 2020 Pyxis served a statement of costs for summary assessment of the application together with a supplemental statement of costs. On 10 July 2020 Awendale served a Costs Argument and on 17 July 2020 the Defendant served a Costs Argument in reply.
4. I set out my decision on costs below. I also append to this short costs judgment an approved Order with an approved draft of the undertaking. I will make the

Order and the Court will seal it subject to Pyxis agreeing to give the undertaking in the slightly modified form of the approved draft.

The Undertaking

5. The parties agreed a form of undertaking to be given by Pyxis to the Court and I accept the form of that undertaking subject to minor changes in paragraph 1 (which I have set out in the accompanying approved draft). In its current form the undertaking is limited to the Cypriot Derivative Claim being struck out by the District Court of Limassol but it ought to extend to the claim being struck out on any appeal by either party.

The Order

6. I approve the form of the Order which has been agreed between the parties subject to the issue of costs. I have modified the agreed draft to incorporate my judgment on costs and I will make the order in that form. Paragraph 4 of the agreed provisions of the Order are relevant to the issue of costs and for that reason I set the out here:

“3. The English Proceedings are stayed, subject to the Defendant providing the undertaking set out in Schedule 1 to this order within 7 days.

4. The Claimant has liberty to apply to the court to lift the stay if:

- a) Infinitum Ventures Limited fails to take reasonable steps to prosecute or proceed with the Cypriot Proceedings (in so far as they relate to the Claimant); or
- b) the Cypriot Proceedings are struck out.”

7. The undertaking which Pyxis had agreed to give is also relevant to the question of costs. In the agreed undertaking Pyxis stated that if the District Court of Limassol struck out the Cypriot Proceedings, it undertook to consent to any application by the Claimant to lift the stay of the English Proceedings.
8. I have also removed paragraph 5 of the agreed draft which contained a general liberty to apply. I have approved the order in paragraph 4 (above) which gives the Claimant liberty to apply in the stated circumstances (and also in relation

to costs: see further below). I did not give general liberty or permission to apply and it will lead to confusion and possible argument if I make an order now which gives general liberty to apply in other circumstances which are not clear.

Costs

Principle

9. It was common ground between the parties that the Claimant was the unsuccessful party and that the normal rule is that costs should follow the event. However, Awendale submitted that the appropriate course would be to reserve the costs in order to wait and see whether the Cypriot Proceedings were struck out or if the Claimant applied to lift the stay.
10. Awendale advanced a number of cogent reasons why the issue of costs should be reserved and although Pyxis made a number of good points in answer to those reasons, I would have been prepared to reserve the issue of costs for those reasons but for one point. In particular, I would have been prepared to reserve the costs for two principal reasons. First, in deciding whether to grant the stay, it was unnecessary for me to investigate the merits of the Cypriot Proceedings in any detail or to decide what the prospects were of them being struck out. As Mr Dracos pointed out, once it was clear that the two sets of proceedings fell within Article 29 I was bound to grant a stay.
11. Secondly, given the significant lack of progress in the Cypriot Proceedings, it seemed to me that the price which Pyxis had to pay for the stay was to take reasonable steps to pursue them. If Pyxis failed to do so, then Awendale ought to be at liberty to return to this Court and ask for the stay to be lifted. Moreover, if the stay was to be lifted, then the entire costs of the application before me would have been wasted.
12. However, in my judgment it would not be appropriate to reserve costs because it is just as likely that the parties will never come before the Court again. If the Cypriot Proceedings are never struck out and it is unnecessary for Awendale to apply to lift the stay, there will be no hearing in the future to which I can

reserve the costs. Moreover, it seems to me that I am in a much better position to assess costs now than at some indeterminate time in the future. In my judgment, therefore, costs should follow the event in the normal way and I order Awendale to pay the costs of the application.

Assessment

13. Pyxis provided me with two statements of costs totalling £198,546.40 (including VAT of £32,989.40). Awendale submits that I should not summarily assess the costs but make an order for detailed assessment with a payment on account of costs. Pyxis submitted that it is appropriate for a summary assessment and that it would be an unreasonable and disproportionate burden to require the parties to engage in a detailed assessment.
14. In my judgment, this is not an appropriate case for summary assessment, particularly, in light of the order which I propose to make in relation to the payment of costs (below). There is a substantial disparity between the costs of both parties. Pyxis's costs of £198,546.40 are to be contrasted with Awendale's costs of £96,028.99. Awendale also submits that it should not be liable to pay the VAT element of Pyxis's costs because it is based in Cyprus. That is not an issue which I can decide with confidence on an application for summary assessment and is better dealt with on detailed assessment.
15. Awendale accepts that it is appropriate to order a payment on account of £100,000. Pyxis submits that a figure of £125,000 would be more appropriate. In my judgment, it would be appropriate to order a payment of £120,000 on account of costs (which is just over 60%).

Stay

16. In my judgment, justice would best be served in the present case by staying the order for payment of costs (including the order for payment on account) for nine months. Within that time it ought to be clear whether Awendale will apply to lift the stay and, if so, whether Pyxis will be required to consent to

this. I will also give liberty to Awendale to apply to vary or discharge the costs orders if such an application is made within the period of nine months.

17. If Awendale does not apply to lift the stay within nine months, then the stay automatically expires and Pyxis will be entitled to payment on account of costs of £120,000 within 14 days. I should also say that the stay will not apply to any proceedings for detailed assessment or to prevent the parties from agreeing a final figure for costs. The stay will only apply to any orders for the payment of costs.
18. On the other hand, if Awendale applies successfully to lift the stay within nine months, then it would also be entitled to apply to vary or discharge the costs orders for the reasons which Mr Burton has given in his Costs Argument. The Court may refuse to vary or discharge the costs orders for the reasons given by Mr Dracos in his Costs Argument. But either way the Court can decide whether they should stand in the light of the position in the Cypriot Proceedings.