

IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
BRITISH VIRGIN ISLANDS  
(COMMERCIAL DIVISION)

Claim No: BVIHC (COM) 2021/0022

BETWEEN:

OSCAR TRUSTEE LIMITED

Claimant

and

MBS SOFTWARE SOLUTIONS LIMITED

Defendant

**Appearances:**

Mr. Robert Nader of Forbes Hare for the Claimant

Mr. Jonathan Addo, Ms. Victoria Lissack and Mr. Andre McKenzie of Harneys for the Defendant

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2022 March 3  
March 11

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**JUDGMENT**

[1] **JACK, J[Ag.]**: On 6<sup>th</sup> July 2021 I gave a substantive judgment in this matter staying proceedings on grounds of *forum non conveniens* and refusing the summary judgment application made by the claimant (“Oscar”). I made a costs order in favour of the defendant (“MBS”). On 25<sup>th</sup> January 2022 I ordered that Oscar by 8<sup>th</sup> February 2022 make an interim payment of costs in the sum of \$600,000. Oscar failed to pay that sum or any of it and on 14<sup>th</sup> February 2022 MBS issued an application for an order that, unless and until that money be paid, it be “barred... from being heard, making representations in or otherwise participating in these proceedings.” It is that application which I heard on 3<sup>rd</sup> March 2022. At the

conclusion of the hearing I indicated that I would grant the application and put my reasons in writing. These are those reasons.

[2] Mr. Addo for MBS submits:

“2.1. The authorities are clear that a debarment is the ‘default rule’ for a party in breach of a costs order unless the party being required to make payment is being driven from access to justice.<sup>1</sup>

2.2 Oscar Trustee has not provided ‘detailed, cogent and proper evidence’ of its alleged impecuniosity. As such, Oscar Trustee has failed to demonstrate why a debarring order should not be made;<sup>2</sup> and

2.3. In any event, the effect of the order sought will only be to preclude Oscar Trustee from pursuing its arguments on the detailed assessment of MBS’ costs until it complies with the Interim Payment Order. There will still be an assessment; MBS’ costs will not be rubber-stamped in the amount claimed and Oscar Trustee’s Points of Dispute will still be taken into account.<sup>3</sup> As such, there is plainly no risk of any “gross injustice” 2 being facilitated by the granting of the order

[3] These propositions are borne out by the cases cited. In **Crystal Decision v Vedatech**, the English Court of Appeal said:

“17. [T]o my mind, most importantly — the court’s ability to make interlocutory costs orders... is a sanction which is available to it in order to encourage responsible litigation. The court marks what it regards as an irresponsible application by an immediate order for the payment of costs. That is intended to bring home to a party — when considering whether to make an application — that an unsuccessful application may carry a price which will have to be paid at once. If the court is not in a position to enforce immediate interlocutory orders for the payment of costs which it was thought right to make, then the force of that sanction is seriously undermined. It is important that, in cases where the court thinks it right to make an order for immediate payment on an interlocutory application, that it does have the power — and can exercise the power — to ensure that order is met. For the reasons which Patten J explained, the only effective sanction in a case

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<sup>1</sup> Crystal Decision (UK) Ltd v Vedatech Corp [2008] EWCA Civ 848; Siddiqi v Aidiniantz [2020] EWHC 699 (QB).

<sup>2</sup> Michael Wilson & Partners v Sinclair [2017] EWHC 2424 (Comm).

<sup>3</sup> Days Healthcare UK Ltd v Phisiang Machinery Manufacturing Co Ltd [2006] EWHC 1444 (QB), [2006] 4 All ER 233.

of this nature is to require payment of interlocutory costs as the price of being allowed to continue to contest the proceedings. Unless the party against whom an order for costs is made is prepared to, or can be compelled to, comply with, that order, the order might just as well not be made.

18. That point attracted the judge, He said this, at paragraph [16] of his judgment:

‘In any event I take the view that orders of the court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 [of the European Convention on Human Rights] that compels the court to take a different view, the normal consequence of a failure to comply with such an order, is that the court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation.’

For my part, I would hold that — whether or not a statement in such general terms can be supported — the proposition can be supported in a case (such as the present) where there is no other effective way of ensuring that the interim costs order is satisfied. That, of course, is always subject to what the judge referred to as the overwhelming consideration falling within Article 6: that orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice. But, for the reasons that the judge explained and to which I have already referred, this was not such a case.”

[4] Mr. Nader submits:

“c. [T]he magnitude of the costs order is to be challenged, and there are strong grounds for believing that MBS will recover nothing like as much as the interim costs order, never mind the amount claimed, it would be particularly harsh to shut out Oscar Trustee from making representations in (what is effectively) its own defence on quantum. This is not a case in which there is a risk that MBS will incur any significant further costs before this Court — the only remaining matter is the hearing of the costs assessment.

d. The reason that Oscar Trustee is cash-poor is because its asset is tied up in a receivable from MBS which it is refusing to pay. In other words, the cause of Oscar Trustee’s cash difficulties is the fact that MBS has not paid the money it owes.

e. While it is accepted that the costs order made in July ‘followed the event’, the circumstances of this particular ‘interim’ order are unusual in that, after

leave to appeal was granted by the Court of Appeal, the July Order ceased to be the 'last word' in the BVI litigation. The policy behind ordering costs orders payable before the end of the litigation is to discourage 'irresponsible' interlocutory applications (or irresponsible resistance to successful interlocutory applications). In this case, however, Oscar Trustee's conduct was plainly not 'irresponsible', and while it lost at first instance, it would not be a just outcome, still less the fulfilment of a legitimate policy objective, for it to be shut out from continuing the litigation (and *a fortiori* where its immediate participation is required to defend itself from an egregious costs claim) simply because it is unable (because of current cash impecuniosity) to meet an interim costs order at this stage.

f. There is a good reason why Oscar Trustee did not seek the costs order not be payable until the conclusion of the proceedings, namely that the determination of the lower court was then, as far as the lower court was concerned, the conclusion of the proceedings. The Court of Appeal has since given leave to appeal, meaning that the proceedings are not concluded, and the lower court's order will in fact be reviewed.

g. The only asset of Oscar Trustee is the claim for the money it is owed by MBS. It has borrowed money in order to bring the litigation so far, and owes approximately (in USD) 200,000. It may need to assign the claim in order to meet the liability, or alternatively find a professional funder to continue, particularly if (as the Court ordered) it needs to litigate in Hong Kong. This is difficult, though not impossible. Any external funder will furthermore obviously want to know the outcome of the BVI appeal. It would be unjust to shut it out from litigation in the BVI in the meantime, however, when the only litigation it wishes to undertake pending a decision on whether to litigate in Hong Kong is (i) the costs assessment itself, and (ii) the appeal (although this Court should not make an order in respect of extant Court of Appeal proceedings)."

[5] I agree that, if Oscar is impecunious and has no means of raising funds, this would be a strong ground for refusing the "unless" order sought by MBS. However, it is for Oscar to show that. The *locus classicus* is still the passage of Brandon LJ approved by Lord Diplock in **MV Yorke Motors v Edwards**:<sup>4</sup>

"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

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<sup>4</sup> [1982] 1 WLR 444 at p 449.

[6] The evidence adduced on Oscar's behalf falls well short of this. In Mr. Paget's third affidavit he says:

"I emphasize that I would... wish Oscar Trustee to comply with all the Court's orders, including [the interim costs order]. Unfortunately, however, it is currently unable to do so because its assets are illiquid, being the chose in action for the sums are owed to it by MBS. Because MBS is not paying the monies owed under the contract, Oscar Trustee has been forced to take legal action, and to do so has borrowed the money from Mr. Zulpo and myself, who are ordinary working professionals (and not in a position to advance a further USD 600,000) to meet an interim adverse costs order of this magnitude."

[7] There are three matters which arise from this. The first is that Oscar holds substantial assets for Mr. Paget's family trust and may also hold assets for Mr. Zulpo's family trust. It may be that Oscar has no recourse to those assets for funding this litigation, but nothing is said in evidence to that effect. If the litigation against MBS is for, at least the partial benefit of, the family trusts, a right of recourse by the trustee might be expected.

[8] The second is that no evidence is given of Mr. Zulpo's and Mr. Paget's financial position. Mr. Zulpo was a partner at Ernst & Young. Mr. Paget has been an apparently successful professional man. Both might be expected to have accumulated some assets over the course of their careers. Yet nothing is said about their asset position. Beyond the bald assertion that they cannot find \$600,000 (presumably \$300,000 each) no evidence is given as to why this might be the case.

[9] The third is that not one cent has been paid towards the interim costs order. If there were any substance in Mr. Paget's assertion that he wanted to honour the Court's interim costs order, one would expect him to make some payment, identify the source of the money and give a detailed explanation of why he and Mr. Zulpo could pay no more. Instead there is a complete blank.

[10] In my judgment, Oscar has failed to satisfy the **Yorke Motors** test.

[11] As to Mr. Nader's point that the \$600,000 interim payment order was grossly excessive, the appropriateness of the figure is a matter which has already been determined by this Court at first instance. If Oscar is unhappy with it, its remedy is to appeal and to apply for a stay. Unless and until a stay is ordered, the money is owed. The sole relevance of the amount (if Oscar's alleged inability to pay is rejected) is that it may affect the time necessary for Oscar to raise the funds.

[12] Accordingly, I grant the "unless" order.

**Adrian Jack**  
Commercial Court Judge [Ag.]

**By the Court**

**Registrar**