



Neutral Citation [2020] EWHC 1468 (Pat)

Claim No: HP-2020-000005

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (Pat)
PATENTS COURT**

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

Date: 8 June 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) NEURIM PHARMACEUTICALS (1991) LIMITED
(a company incorporated under the laws of Israel)
(2) FLYNN PHARMA LIMITED
(a company incorporated under the laws of the Republic of Ireland)

Claimants

(1) GENERICS UK LIMITED (trading as MYLAN)
(2) MYLAN UK HEALTHCARE LIMITED

Defendants

Mr Andrew Waugh, QC and Ms Katherine Moggridge (instructed by **Gowling WLG (UK) LLP**) for the First Claimant

Mr Andrew Waugh, QC and Ms Katherine Moggridge (instructed by **Pinsent Masons LLP**) for the Second Claimant

Mr Mark Vanhegan, QC and Mr Adam Gamsa (instructed by **Taylor Wessing LLP**) for the Defendants

Hearing date: 3 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A 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.

Mr Justice Marcus Smith:

1. On 3 June 2020, I handed down a judgment in this matter refusing Neurim’s application for an interim injunction ([2020] EWHC 1362 (Pat)). The hearing that took place on 3 June 2020 was intended to deal with various matters consequential to that judgment. Due to time constraints (there were a number of other matters in my list for that day), I was unable to hear full submissions on the question of the costs of that application. I heard some oral argument, but it was agreed that the parties would submit further written submissions and that I would give my ruling on the papers. This is that ruling. I take my judgment at [2020] EWHC 1362 (Pat) as read, and adopt the terms and definitions set out therein.
2. Neurim and Flynn contended that I should reserve the costs, basing themselves on the approach considered by Neuberger J in *Picnic at Ascot v. Kalus Derigs*, [2001] FSR 2, following the decision of the Court of Appeal in *Desquenne et Giral UK Ltd v. Richardson*, [2001] FSR 1. The question before Neuberger J was the approach a court should take to the question of costs in the case of an application for an interim injunction when that injunction is granted or when the defendants accede to the injunction being granted.
3. Neuberger J held that in a case without any other special factors, where a claimant obtains an interlocutory injunction on the basis of the balance of convenience, the court normally reserves the costs. The thinking behind such an order for costs reserved is that the purpose of the interlocutory injunction is to “hold the ring” until trial, when the dispute between the parties can properly be decided. This is entirely consistent with the reasoning of Lord Diplock in *American Cyanamid*: his entire approach was to avoid an interlocutory hearing on the merits, thus avoiding a “trial within a trial”. The consequence of this approach is that the merits are only peripherally considered, which no doubt redounds to the advantage of the applicant (who only has to show a serious issue to be tried).
4. Accordingly, one can see that where an interim injunction is granted, it is (in the usual case) wrong to say that the defendant was the unsuccessful party or that the claimant was the successful party. *Ex hypothesi*, the claimant only succeeded by meeting the low requirement of serious issue to be tried.
5. In this case, of course, the interim injunction was not granted. More to the point, the reason it was not granted was not because there was no serious issue to be tried (I found there was – and, at least at the hearing, there was little push-back on this point from Mylan), but because damages were (as I found) an adequate remedy. The application therefore failed at what I called Stage 2 of the *American Cyanamid* process.
6. I do not consider that the reasoning of Neuberger J automatically or inevitably translates to this case. Whereas the merits of the dispute are revisited, indeed determined, at trial, the question of the adequacy of damages is principally one to be assessed at the interlocutory stage. It therefore seems to me that this case should not be treated as one of those exceptional cases where costs are reserved to the trial judge, but rather are dealt with now.

7. It follows – having successfully resisted the application for an interim injunction – Mylan should have their costs, on the standard basis, and subject to a detailed assessment if not agreed. However, I do not consider that Mylan should have all their costs. Mylan fought a losing battle – which they duly lost – on the question of serious issue to be tried. Although this question did not occupy very much time at the hearing – Mr Vanhegan, QC quite properly conceded that there was a serious issue to be tried – substantial costs were incurred by Mylan in the run-up to this hearing on this point, which I do not consider Neurim and Flynn should be obliged to pay. There were a number of other points – notably, questions of the amount of damages Neurim and Flynn might recover – on which Mylan lost for the reasons given in my earlier judgment.
8. It therefore seems to me, first that this is appropriately a case where I should take an “issues” based approach and secondly that the fact that Mylan has lost on a number of these issues should be reflected (in the usual way) in the proportion of costs that Mylan can recover. I shall order that Mylan should, on a detailed assessment, recover no more than 65% of its assessed costs. Mylan’s costs are around £182,432. 70% of this (to reflect what would probably be recovered on a detailed assessment) is £127,702 and 65% of this is just over £83,000. I will order a payment on account of costs in the amount of £80,000.