

Security for Costs: Impecunious Companies and Litigation Funders

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CPR 25.13

Stage 1: Jurisdictional threshold

Court must be satisfied

- the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so; and
- having regard to all the circumstances of the case, that it is just to make such an order

Stage 2: Discretion

Court "may" make an order for security

Time for applying

Commercial Court Guide: first application before first CMC

Consequences of delay?

Examples:

Refusal to order security if the delay has deprived the claimant of time to arrange security

Security limited to future costs (*Warren v Marsden* [2014] EWHC 4410 (Comm)).

First Stage: the jurisdictional threshold

Is the Claimant the Company or the officeholder?

Liquidator not usually liable to pay costs of successful defendant to claim brought in name of the insolvent company (*Dolphin Quays Development v Mills* [2008] 1 W.L.R. 1829)

Not always safe to assume that a company in an insolvency regime will be unable to pay any order for costs

“there is reason to believe...”

Not sufficient for the Court to be “left in doubt”,
or to conclude that there is a “significant danger”

Does not require Court to be satisfied on balance of probabilities

“The court must simply have reason to believe that the claimant will not be able to pay them... That is... a matter of evaluation”

Sarpd Oil International Ltd v Addax Energy SA [2016] BLR 301 per Moore-Bick LJ

Followed in *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers llp* [2017] EWCA Civ 1872.

Significance of ATE Policy

"[A]n appropriately framed ATE insurance policy can in theory be an answer to an application for security"

(Premier Motorauctions Ltd [2017] EWCA Civ 1872 per Longmore LJ at [20])

Question usually posed:

Does the ATE policy give the Defendant "sufficient protection", so that there will not be "reason to believe" that the company will be unable to pay the defendant's costs if ordered to do so?

Significance of ATE Policy

Relevant considerations:

- Anti-avoidance clause?

(Nasser v United Bank of Kuwait [2002] 1 WLR 1868)

- Conditions precedent to insurers liability?

(Bailey v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB))

- Enforceability by D e.g. under Contracts (Rights of Third Parties Act) 1999?

(Lewis Thermal Limited v Cleveland Cable Company Ltd [2018] EWHC 2654 (TC))

Is it “just” to order security?

A requirement to raise funds which C is unable to raise may amount to a breach of ECHR art.6(1).

The Court will be cautious to ensure that an application for security is not used to bring the litigation to an end “by the back door”.

(Bailey v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB) per Foskett J at 75)

Court must first conclude it is probable that a claim would be stifled

(Startwell Ltd v Energie Global Brand Management Ltd [2015] EWHC 421 (QB) per Warby J at [91])

Is it “just” to order security?

Goldtrail Travel Ltd (In Liquidation) v Aydin [2017] UKSC 57 per Lord Wilson at [16]:

“for all practical purposes, courts can proceed on the basis that, were it to be established that it would probably stifle the appeal, the condition should not be imposed”

Is it “just” to order security?

Premier Motorauctions Ltd [2017] EWCA Civ 1872 per Longmore LJ at [37]:

*“As long ago as 1878, when section 69 of the Companies Act 1862 (25 & 26 Vict c 89) was in virtually the same terms as the present CPR r 25.13, this court thought that it was more or less axiomatic that in these circumstances security should be ordered: see *Northampton Coal Iron & Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 as followed by *Pure Spirit Co v Fowler* (1890) 25 QBD 235. I would follow this lead”*

Second Stage: discretion

Startwell Ltd v Energie Global Brand Management Ltd [2015] EWHC 421 (QB)

- (1) Is C's claim genuine and not a sham?
- (2) Does C have reasonably good prospect of success?
- (3) Has D made any admission that money is due?
- (4) Has D made an open offer of a substantial amount?
- (5) Is the application being used oppressively, e.g. so as to stifle a genuine claim?
- (6) Has C's want of means has been brought about by any conduct by D, such as delay in payment or in doing their part of any work?

Quantum

An approved costs budget should be used as the relevant reference point
(Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120)

Court has discretion to apply a discount to account for the uncertainties of litigation.

Bailey v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB) per Foskett J at [78]:
"...ordering security in a sum reflecting 50% of the reasonable working figure I have adopted above will do broad justice to the present application"

Other elements of discretion

Security may be ordered in stages

Startwell Ltd v Energie Global Brand Management Ltd [2015] EWHC 421 (QB) per Warby J at [92]:

“It is also, in my judgment, a matter to be borne in mind that security may be ordered in stages so that the Claimant is not required to post a large capital sum at one go but only to secure its opponents costs as those costs are incurred”

Other elements of discretion

Order may be made subject to cross undertaking in damages

Example:

Bailey and others v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB) per Foskett J at [82]

Orders against litigation funders: CPR 25.14

Stage 1: Jurisdictional threshold

Court must be satisfied

- funder has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and is a person against whom a costs order may be made; and
- having regard to all the circumstances of the case, that it is just to make such an order

Stage 2: Discretion

Court "may" make an order for security

Relevant matters

Re. RBS (Rights Issue Litigation) [2017] EWHC 1217 (Ch) per Hildyard J

- (1) Has the funder in effect become in all but name a real party motivated to participate by its commercial interest in the litigation?
- (2) Is there a real risk of non-payment such that security against the contingent liability should be granted?
- (3) Is there a sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made?
- (4) Has the risk of liability for costs has sufficiently been brought home to the funder, either by express warning, or by reference to what a person in its position should be taken to appreciate as to the inherent risks?
- (5) Are there any factors (e.g. delay in the making of an application for security) or likely adverse effects such as to tip the overall balance against making an order?

Disclosure

Inherent or implied power in CPR 25.14 to make orders so as to enable an effective application under CPR 25.14 to be made

Re. Hellas Telecommunications (Luxembourg) [2017] EWHC 3465 (Ch)
per Snowden J

Relevance of the Arkin Cap?

Bailey v Glaxosmithkline UK Ltd [2017] EWHC 3195 (QB) per Foskett J

Funder argued that the amount of security should be capped at the level of the funding facility (£1.2m) in accordance with *Arkin v Borchard Lines Ltd*.

The funder was ordered to give security in the sum of £1.75m.

Relevance of the Arkin Cap?

Reasons for decision (per Foskett J at [59]):

- The imposition of the cap would itself fetter the Court's general discretion
- There would be various options open to a party who wanted to argue that the cap was not applicable in the particular case (e.g. a "*wholesale attack on the reasoning in Arkin might be launched*")
- Arguable that the CA was addressing only the situation where a professional funder has merely contributed a part of the costs
- By including the proviso "*in a manner which... is not otherwise objectionable*" in para 40 of its judgment, the CA was leaving open the possibility of disapplying the cap (or not regarding it as applicable) in certain cases

Availability of Third Party Costs Order

Is the availability of the Third Party Costs order an answer to a claim for security?

Re. The Sherlock Holmes International Society Ltd [2015] EWHC 2882 (Ch)

- Winding up petition
- Family dispute
- Henderson J (as he then was) noted that, should the petitioner emerge victorious in the appeal *"he will be adequately protected by his ability to obtain costs orders (including, where appropriate, third party costs orders) against the individual protagonists on the losing side"*

Availability of Third Party Costs Order

Progas Energy Ltd and others v Islamic Republic of Pakistan [2018] EWHC 209 (Comm) per Picken J at [37]:

“the purpose of the security for costs jurisdiction is clear: it is to enable a defendant to recover costs subsequently awarded to it without delay or other difficulty”

TP Costs Order against security funder

Excalibur Ventures llc v Texas Keystone Inc (No 2) [2016] EWCA Civ 1144 per Lord Justice Tomlinson at [39]:

"I see no basis upon which a funder who advances money to enable security for costs to be provided by a litigant should be treated any differently from a funder who advances money to enable that litigant to meet the fees of its own lawyers or expert witnesses..."