CLIENT ALERT

Court of Appeal Narrows the Requirement for a Cross-Undertaking in Damages as a Condition for Ordering Security for Costs

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Summary

In a recent decision in *Rowe & Ors v Ingenious Media Holdings & Ors* [2021], the Court of Appeal narrowed the circumstances in which a cross-undertaking in damages is required as a condition for ordering security for costs, especially in circumstances where a litigation funder is involved.

Looking ahead, a cross-undertaking in favour of a claimant as a condition of ordering security for costs will be limited to "*rare and exceptional*" cases. Moreover, where a claim is funded by a litigation funder a cross-undertaking will be appropriate only in "*even rarer and more exceptional cases*".

Background

The appeal arose out of proceedings involving over 500 claimants claiming for losses incurred from investing in tax-saving schemes promoted by the defendants. A number of the claimants obtained funding from Therium Litigation Finance Atlas AFP IC and Therium Litigation Finance AF IC (together, the "**Litigation Funders**").

It was a condition of the litigation funding arrangement that security for costs would be funded and, if the claim was ultimately successful, the Litigation Funders would be entitled to an "enhanced return" of two and a half times the value of the security they had put up.

In 2019, the defendants brought an application for security for costs against the Litigation Funders. The Litigation Funders submitted that should security be granted, the defendants should provide a cross-undertaking in damages in respect of any loss suffered by them as a consequence of the order.

The defendants' application for security was successful. At the same time, the Court ordered that the defendants provide a cross-undertaking in respect of the Litigation Funders' costs of putting security in place. The cross-undertaking did not extend to the cost of the enhanced return under the litigation funding arrangement.

Both parties appealed. The claimants requested that the cross-undertaking should cover the enhanced return, whilst the defendants insisted that no cross-undertaking should be provided at all.

Court of Appeal Decision

In summary, the Court of Appeal allowed the defendants' appeal and ruled that no cross-undertaking was required.

In handing down its judgment, the Court of Appeal, and in particular Lord Justice Popplewell, emphasised that requiring a cross-undertaking in favour of a claimant as a condition of ordering security is limited to "*rare and exceptional*" cases. Furthermore, in cases where the claim is funded by a litigation funder a cross-undertaking will be appropriate only in "*even rarer and more exceptional cases*".

Key issues addressed by Popplewell LJ

The judgment of Popplewell LJ addressed the following issues:

1. Whether the court has jurisdiction to require a defendant to provide a cross-undertaking in damages as a condition to ordering security for costs;
2. Whether a cross-undertaking should ordinarily be required in litigation when an order for security is made; and
3. Whether the cross-undertaking should be required in favour of a litigation funder.

In respect of the first issue, it was common ground that the court had jurisdiction to order security for costs under CPR 25.14(2)(b) which permits security to be sought against anyone who "*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*". Popplewell LJ held that the court had jurisdiction to order cross-undertakings in respect of an order for security after considering Appendix 10 of the Commercial Court Guide, the discretionary nature of an order under CPR 25 as well as the court's general powers of case management under CPR 3.1.

In respect of the second issue, the court considered the claimants' and Litigation Funders' submissions that a cross-undertaking ought generally to be required as a condition of ordering security for costs since a security for costs order is akin to an interim injunction or freezing order, and serves to restrain a party's use of its assets. The court did not agree with this assessment. Popplewell LJ held that interim injunctions are "*exceptional*" remedies with the express purpose of restraining a respondent's use of his assets, with a principal purpose of the prevention of the dissipation of those assets. Popplewell LJ considered that there are good policy reasons for allocating the risk of making such an order to an applicant for what is a substantial interference with a respondent's way of life or conduct of his business. By contrast, Popplewell LJ saw a security for costs order as a different beast altogether; a security for costs order is an "*ordinary incident*" in civil litigation, and it is not the purpose of the order to restrain a party from using or enjoying its assets.

Popplewell LJ also saw a number of practical constraints to requiring cross-undertakings being given in respect of security for costs orders:

- A risk of a significant increase of inquiries into damages under cross-undertakings causing substantial and unwelcome satellite litigation.
- Providing cross-undertakings would increase the time and cost of security applications; for example applications regarding fortification.
- Requiring a cross-undertaking will be an "*unsatisfactory disincentive*" to defendants seeking security as it will require them to adopt an open-ended and uncertain liability in respect of the cross-undertaking.

The funding dynamic

The Court of Appeal held that a cross-undertaking in favour of a claimant as a condition of ordering security for costs will be limited to "*rare and exceptional*" cases. However, where a claim is funded by a litigation funder a cross-undertaking will be even rarer and limited to only exceptional cases.

In reaching this view, the court, by reference to *Excalibur Ventures LLC v Texas Keystone Inc (No2)* [2017], considered that the costs incurred by a litigation funder in putting up funds for an order for security should be treated no differently than any other costs incurred by a funder. The court considered there was no reason why such costs should be recoverable by means of a cross-undertaking.

Furthermore, the putting up of security is a normal and foreseeable aspect of the investment being made, and the funder can be expected to include this in its business model when determining the terms on which funding is provided.

Finally, drawing on Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report* as well as the Code of Conduct of the Association of Litigation Funders, Popplewell LJ held that "*a funder should be structured, and operated, in such a way that there is little doubt that it will be able to satisfy any adverse costs order which may be made against it*".

What next?

Popplewell LJ's recognition of the need for legislation around the issue of security for costs and litigation funders may well prompt legislative change. Until then, the *Ingenious* litigation is another step by the judiciary, following the Court of Appeal's decision in *Chapelgate Credit v Money* [2020] that a litigation funder's liability is not necessarily limited to the level of funds committed, to define its expectations of the liabilities and obligations of litigation funders.

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