

REVIEW



Security for costs:
Second bites of the cherry
and shifting the evidential
burden of financial
standing to the claimant
company



back home forward



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Security for costs has long been a useful tool available to Defendants concerned about the ability of a foreign, or corporate Claimant to satisfy the costs of a court case which they have made the Defendant incur. Put simply, the relief allows the Defendant to ask the court to force a non resident and/or company Claimant to pay a sum of money into court, or for example the Defendant's advocate's bank account. The amount paid is at the discretion of the court and will depend, in part, on the circumstances of the claimant.

In most cases involving claimants who are individuals the amount of security will be limited to the legal costs involved in enforcing a costs judgment made against him or her in the jurisdiction in which they live. However, if for example enforcement of an order may be difficult, either by reason of the jurisdiction the Claimant resides in, and/or because of there being limited assets to enforce against, and/or because the Claimant has displayed in the past a lack of probity, then the court may be persuaded to order security in a sum equal to, or approaching, the actual costs likely to be incurred by the Defendant in being forced to conduct the litigation. See for example the judgment of the Manx court in *Prest v Petrodel Resources*, 13 August 2015.

Where claimant companies are involved, the position is slightly different. There are two gateways available to a defendant to apply for

security for costs against a company claimant, albeit they are very similar. Rule 7.28(2) (b) of Rules of the High Court of Justice (Isle of Man) 2009 allows an application in circumstances where:

"... there is reason to believe that [the company]... will be unable to pay the defendant's costs if ordered to do so..."

Section 336 of the Companies Act 1936 (act of Tynwald) provides that an application can be made:

"where... it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence..."

These gateways were recently relied upon in the Manx case of *MRP International & otr v Maclver*, 17 May 2018. Generally, in applications of any nature, the burden is on the applicant to prove the matters complained of. In the case of an application for security against a company that burden is specified in the gateways available by the wording "reason to believe" and "appears by credible testimony". Indeed, in the aforementioned judgment, Deemster Corlett referred to the need of an applicant to

"...establish the necessary ingredients for its security for costs application..." (see paragraph 26)

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However, crucially, where, as in this case, a Defendant has asked a company claimant for proof of worth/assets to satisfy a costs order in the future, then the burden subtly shifts and, if the request is ignored, then the court is entitled to draw adverse inferences such as to satisfy the 2 gateways referred to above, resulting in an order for security on behalf of the Defendant (see paragraphs 33 and 34 of the aforementioned judgment).

The MRP case is interesting for another reason as well. In that case the application dealt with the second request for security which the Defendant had made. Previously, having requested security for costs based on an assumption of the likely costs of the whole case, an amount had been agreed and paid by the Claimant. Some months later the costs of the Defendant had exceeded the sum agreed, chiefly because the Claimant had amended its pleaded case. The Court applied settled English law and found that a second bite of the security cherry could be allowed where there had been a significant and relevant change in circumstances since the previous payment had been made (whether that payment had been made by agreement or order did not matter).

In the MRP case the court found (again applying settled English principles) that the amendment of particulars of claim had sufficiently altered the shape and format of the case and that its formulation and presentation had significantly altered such that...

“... [it] will inevitably require a reassessment of the case by the Defendant and give rise to an increase in the projected costs of the proceedings.” (paragraph 29)

Subsequently, the court made a further order for security in favour of the Defendant, albeit against one of the Claimants only and in a reduced sum compared to what was requested.

Security for costs is therefore a remedy which lawyers should keep in mind throughout the conduct of a case, even where payment by agreement or order has previously been made. On the first occasion requesting, or applying for security, lawyers should be careful to specify the stage up to which security is required. Where an order has been made granting security up to a specified stage in proceedings, say discovery, and that stage has been reached, then a change in circumstances is likely to be easily shown sufficient for the court to make a further order. It is more difficult perhaps to show a sufficient change in circumstances (although not impossible per the above) where security is ordered/agreed for the whole of the proceedings.

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