SECURITY FOR COSTS: STRATEGIC CONSIDERATIONS WHEN APPLYING FOR SECURITY FOR COSTS

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When it comes to defending proceedings, the first consideration on receipt of a claim is often the strength of the claim, but the Oscar for best supporting actor surely goes to the question of whether to make an application security for costs.

It is not just claimants who should consider the question of recovery. Defendants to claims brought against them, often with little control of that process, should also consider the same question: recovery of their costs to defend a claim they may well consider baseless. Psychologically, this may help defendants frame the narrative in their favour at an early stage (and throw in some digs at the claimant's conduct at the same time). Practically, and most importantly, a favourable order provides costs protection in the event a defendant is successful at trial. The alternative is a pyrrhic victory. Strategically, it puts the claimant on the back foot, now in the position of having to defend an application which, if decided against them, leaves them with an unenviable choice: satisfy the order or withdraw the claim[1].

Defendants really need to embark on their campaign for an order early on. Consideration of the question, and any factual investigation and inter-partes correspondence, must be concluded in time to bring the application

"promptly as soon as the facts justifying the Order are known"[2].

In the Commercial Court this means before the first case management conference[3].

CPR 25.13 sets out the conditions to be satisfied for a security for costs order to be made. These conditions are in the alternative, and the question of whether one or more of the conditions listed there apply are relatively self-explanatory. A claimant resident outside the jurisdiction, an insolvent claimant company, a claimant who has changed their address to evade litigation or has given an incorrect one on the claim form will all be at risk of a security for costs order and rightly so; these are pre-ordained factors which call into question whether the claimant can or, even if they can, will satisfy a costs order against them. In some circumstances, whether the conditions have been met may demand a detailed factual investigation but, whether straightforward or complex, the fact that one or more of these conditions have been met is not an automatic route to a favourable award. You still have to persuade the court to exercise its discretion in your favour pursuant to CPR 25.13 (1), and then,

1 Commercial Court Guide, Appendix 10, para. 6

2 The White Book at para. 25.12.6

3 The Commercial Court Guide, Appendix 10, para 1

once it has agreed to do so, how it is going to do so.

In Santina[4], the court set out the three stages it must analyse before exercising its discretion to make an order: it must be satisfied that one of the conditions in CPR 25.13(2) is engaged; it must be just in all the circumstances to make an order and, if it considers an order should be made, the quantum, timing and appropriate form of the security.

There is much to say on all aspects of this three stage test but insufficient budget to do so. The remainder of this article will focus on quantum; in most cases this is the most significant factor. There are competing authorities on the question of quantum but a helpful decision for defendants is Giaquinto[5]. In that case the court ordered 65% of incurred costs, but 100% of budgeted costs. These percentages were ordered in reference to agreed costs which accords with a trend of the court to approve 100% of agreed costs.

In Sarpd[6], the Court of Appeal held that agreed costs budgets are the "relevant reference point" [49] for conducting an evaluation of security and provide a

"strong guide as to the likely costs order to be made after trial" [52].

In Giaquinto the court commented on the "broad level of agreement over the defendant's estimated costs" [at 75] and commended the defendant's approach as

"proportionate in seeking security only from the corporate claimants, which represents only half the overall costs bill, and also by limiting security requested at this stage to the conclusion of the experts phase."

Agreement and proportionality are arguably this season's buzzwords for winning the highest value possible award.

4 Santina Ltdv Rare Art (London) Ltd t/a Koopman Rare Art [2022] EWHC 3513 (Ch)
5 Giaquinto v ITI Capital Ltd [2022] EWHC 973 (QB)
6 Sarpd Oil Internal Ltd v Addax Energy SA and another [2016] EWCA Civ 120