

Security for costs: No "sliding-scale"

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A recent English Court of Appeal decision has clarified the principles applicable to security for costs applications, where a party is not resident in the jurisdiction in which the claim is being brought.

In *Danilina v Chernukhin and others* [2018] EWCA Civ 1802, the claimant was a Russian national, resident in Moscow, who had commenced proceedings in the English courts against, amongst others, her ex-partner who is resident in England.

The defendants sought security for costs against the claimant on the basis that she is an individual resident outside of the EU, which under the English Civil Procedure Rules is one of the conditions for the granting of a security for costs application (see: CPR 25.13(2)(a)).

High Court Judgment

At first instance, the judge found that there was (just) a real risk of non-enforcement of costs orders in Russia. The greater probability was that enforcement would be possible but would be more difficult and take longer. In such circumstances, the judge held that a "sliding scale" should be applied to the costs claimed.

In applying this sliding scale, the judge took the figures, which the defendants had claimed up to the case management conference, and extrapolated them out to an (unstated) total costs figure up to trial, and then applied a discount (without explaining what that percentage discount was) to arrive at the appropriate order for costs.

This approach reduced the £820,786.32 claimed by the first two defendants and the £104,741.28 claimed by the third defendant, to £700,000 and £90,000 respectively.

The third defendant appealed this decision.

Court of Appeal Judgment

In the judgment of the Court of Appeal, Lord Justice Hamblen undertook a review of the relevant authorities concerning security for costs applications where a claimant is resident outside the jurisdiction (which in England, currently requires the claimant to be outside the EU).

From these cases, Hamblen LJ summarised the following principles:

- Once it is established a person is outside of the jurisdiction, the court has a discretion to make an order for security for costs where *"it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order"*.

- The court must exercise this discretion in a non-discriminatory manner, which requires a consideration of *objectively* justified grounds relating to the obstacles to, or the burden of, enforcement of a costs order in the context of the particular foreign claimant or country concerned.
- Such grounds will exist where there is a real risk of either non-enforcement and/or additional burdens of enforcement.
- The order for security should be tailored depending on the relevant risk. Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings. Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement.

In this case, the relevant risk was that of non-enforcement of costs orders in Russia. Where this is the relevant risk, Hamblen LJ held that the **starting point** is that the defendant is entitled to **security for the entirety of his costs** and there is no room for discounting the security figure by grading the risk using a "sliding scale" approach.

Hamblen LJ felt that the difficulties to which a "sliding scale" approach to risk could lead are illustrated by this case. The first instance judge was left to: (1) without any evidence, extrapolate from the costs claimed up to the CMC the costs which would be incurred up to trial; and (2) then apply a discount to those costs to arrive at the appropriate costs order. It is difficult and speculative to grade risk and arrive at an appropriate discount.

Hamblen LJ went on to hold that, whilst security for the entirety of a defendant's costs is the starting point, it does not follow that security for all or indeed any of those costs will be ordered. He explained that the quantum of security is a matter of discretion and discretionary factors, such as delay on the part of an applicant or the prospect of stifling a claim, may affect the amount of security to be ordered, if any.

Ultimately, Hamblen LJ allowed the appeal and referred the case back to the High Court to deal with the quantum of the security.

Relevance to Guernsey

The international nature of the business conducted in Guernsey means that, more often than not, one or more of the parties to litigation will be resident outside of Guernsey.

The issue of being able to recover any costs ordered against a party resident outside the jurisdiction is therefore one that often needs to be considered and addressed (especially by defendants), and security for costs applications are common.

Whilst not binding on the Guernsey courts, this case provides welcome guidance on the relevant principles which will apply when making an application for security for costs against a party resident outside of Guernsey, and helpful guidance on the level of costs an applicant should expect to be ordered when a real risk of non-enforcement and/or increased burden of enforcement can be established.

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