High Court Provides Guidance on Ordering Security for Costs against a Non-resident Claimant

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In *Ras Al Khaimah Investment Authority v Azima* [2022] EWHC 1295 (Ch), the High Court provided helpful guidance about when it will exercise its discretion under the CPR to order security for costs against a non-resident claimant (the "Respondent" to the security for costs application), particularly one refusing to disclose the nature and location of its assets. It also made a rare order for Model E disclosure on the train of inquiry basis.

A Respondent's failure to engage in providing information as to its asset position enhances the risk that the court will order the provision of full security as opposed to enforcement security (a lesser amount to meet the additional costs of enforcing a costs order abroad).

Background. The Ras Al Khaimah Investment Authority ("RAKIA") sued Mr Azima, who had had various dealings with RAKIA, for fraudulent misrepresentation and conspiracy. Mr Azima counterclaimed, alleging that his email accounts had been unlawfully hacked by RAKIA and his data used against him in the case (the "Counterclaim"). The judge at first instance found in favour of RAKIA on its claims as to fraudulent misrepresentation and conspiracy and dismissed the Counterclaim (at [2020] EWHC 1327 (Ch)). The Court of Appeal dismissed Mr Azima's appeal against RAKIA's claims but remitted the Counterclaim to be retried by a different judge of the Chancery Division on the basis that new evidence had come to light (at [2021] EWCA Civ 349). The judge on the remitter, Green J, subsequently gave permission to Mr Azima to join four additional Defendants to the Counterclaim. The present judgment dealt with two matters: (1) applications by all the Defendants to the Counterclaim for Mr Azima to provide security for their costs of defending the Counterclaim; and (2) certain disputed issues concerning the draft List of Issues for Disclosure under CPR PD 51U (the Disclosure Pilot).

SECURITY FOR COSTS

The Applications

The security for costs applications were made pursuant to the condition in CPR 25.13(2)(a) that Mr Azima was resident out of the jurisdiction (in the USA) in a State not bound by the 2005 Hague Convention. While this condition was evidently satisfied, Mr Azima contested: (i) whether the court should exercise its discretion under CPR 25.13(1)(a) to order security "*if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order*"; and (ii) the quantum of the security being sought.

Existing Case Law

Green J reviewed the existing case law, noting the following key principles in this area:

Where there is a "*risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings*" (at [10]–[11]).

It is "*well established that the evidential hurdle in these applications is 'real risk of substantial obstacles to enforcement' rather than 'likelihood' and that a 'real risk' can be equated with a 'non-fanciful risk'*" (at [12]).

"*The main limitation on the Court's power to order security is the non-discrimination principles originally set out by the Court of Appeal in Nasser v United Bank of Kuwait [2002] 1 WLR 1868 …* [that] *the Court must not act in a discriminatory manner towards a non-resident unless there are 'objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned'*" (at [13]).

"*A non-resident's impecuniosity cannot alone justify an order for security because that would be discriminatory as a resident individual's impecuniosity cannot lead to an order for security (it is different for companies – see CPR 25.12(2)(c))*" (at [13]).

The Principles

Green J held that when considering whether to exercise its discretion to order security for costs against a non-resident Respondent, the court will take into account:

Whether the Respondent Has Provided Evidence of Its Assets

The court is entitled to infer that there is a real risk of there being substantial obstacles in the way of enforcing a future costs order if the non-resident Respondent does not disclose any details about the location, nature and/or value of its assets, and there is no other evidence available (at [20]–[21]). It is insufficient for the Respondent to state that it has "*substantial means*" without "*objective verification*" to substantiate this assertion (at [43]).

The Location of All the Respondent's Assets

In considering the evidence of the Respondent's assets, the Court will look at the actual location of all assets, not just those in their place of residence (at [16]).

The Respondent's Character

The Court can take into account the Respondent's character, including whether the Respondent is "*untruthful, dishonest and self-serving*" (at [39]) or lacks "*probity*" (at [37]–[39]). Judicial findings of dishonesty and fraud are also relevant (at [39]).

The Ease of Enforcing a Costs Order in the Respondent's Place of Residence

It may also be relevant to consider whether the Respondent would be able to delay or avoid the enforcement of the costs order (at [22]) and whether there would be additional irrecoverable costs of enforcing a costs order in the place of residence (at [30]). However, Green J noted that without evidence of the location and nature of the Respondent's assets this factor "*misses the point*" as "*there is no material from which to assess obstacles to enforcement against such assets*." In other words, a Respondent cannot defeat an application for security simply by establishing the ease with which an English costs order can be enforced in the foreign jurisdiction without evidence that assets are located there.

Green J noted that whether a Respondent had previously paid an adverse costs order was irrelevant to the exercise of the discretion as "*there is a substantial qualitative difference between being ordered to pay a sum of money or costs as the price of continuing with the litigation and being willing to pay an adverse costs order at the end of the proceedings, having lost*" (at [34]).

Having failed to provide evidence of his assets and their location, Mr Azima was ordered to provide security for 60% of each of the defendants' estimated costs.

Comment

It is not enough for a Respondent to simply assert that it has sufficient means to meet any adverse costs orders. Nor is it acceptable to point to one's place of residence without demonstrating that sufficient assets are also located there. If a Respondent fails to provide an adequate explanation of the location and value of its assets, and there is no other sufficient evidence from which the court may take comfort, then the court may order that full security is provided, if the remaining criteria are established. Respondents should think carefully before failing to engage with respect to questions concerning their assets when applications for security for costs are contemplated.

DISCLOSURE

It is also notable that Green J made an order for Model E "train of inquiry" disclosure on one contested disclosure category. This is only ordered in "*exceptional case*[s]"; for example, "*it is not enough to say that this is a relatively high value case, that it is important to the Claimants or that it involves allegations of fraud*" (at [64]). Green J was satisfied that this was such a case on the basis that the category related to a "*critical central issue*" (at [80]) and "*the circumstances surrounding it*" justified it; namely, that "*where there has potentially been a cover-up of wrongdoing, there needs to be a mechanism for exploring whether there was indeed a cover-up and, if so, how it worked*" (at [79]). Accordingly, it was sufficiently exceptional to order disclosure to be conducted on the train of inquiry basis.

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Please do not hesitate to contact us with any questions.

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