Cross-Undertakings in Security for Costs Applications—Exceptional Circumstances?

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Whilst the security for costs regime is governed primarily by CPR 25, Paragraph 5 of Appendix 10 to the Commercial Court Guide provides that:

> "*In appropriate cases an order for security for costs may only be made on terms that the applicant gives an undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant.*"

No similar provision exists in the guides to the Queen's Bench Division or the Chancery Division, and the Court of Appeal, in *Rowe v Ingenious Media* [2021] EWCA Civ 29, noted that "*until recently claimants rarely if ever suggested the imposition of a cross-undertaking as a condition of providing security for costs.*" The absence of this condition was "*striking, and might suggest that there was not perceived to be the need for such a requirement in the normal run of cases.*"

Three decisions considering cross-undertakings were handed down last year.

- In *TBD (Owen Holland) Ltd v. Simons* [2020] EWHC 2681 (Ch), Marcus Smith J perceived two difficulties in the making of such an order: the first was that it would be difficult to define the "*contingency which triggers the undertaking*", and the second that it would be difficult to "*baseline*" the consequences of the undertaking for a defendant. These were to be distinguished from the circumstances in which a cross-undertaking was given in return for an interlocutory injunction. In the circumstances, the Court found, there was jurisdiction to require a cross-undertaking in circumstances which were "*special and unusual*". On the facts before him, that test was not met.
- In *Pisante v Logothetis* [2020] EWHC (Comm), in which Debevoise acted for the claimant, Henshaw J ordered that a cross-undertaking should be provided as a condition for the granting of security. The particular losses identified included the

"*tying up of capital and the incurring of bank charges*" by the individual first claimant, in putting one of the corporate claimants in funds so as to permit it to obtain a bank guarantee in favour of the defendants. In the case, the Judge found that the concerns expressed by Marcus Smith J in *TBD* could be addressed by the cross-undertaking being given in the usual form, which gave the Court liberty to decide at a later stage whether compensation should be given and, if so, to what extent. The submission that an undertaking should only be required in exceptional circumstances was rejected, and the requirement imposed on the bases that:

- there was evidence that some loss would be suffered by the claimants;
- the claimants had identified substantial assets but security was ordered as a result of concerns about their availability to meet a costs order;
- whilst security was ordered in part because of the first claimant's reluctance to provide sensitive financial information to a party that he was suing for fraud, that may be viewed in a different light if the fraud claim succeeded; and
- the cost of providing the security would be borne by the first claimant, who was an individual and should be protected from such costs.

Both parties have applied to the Court of Appeal for permission to appeal the decision in *Pisante*.

- Finally, in the *Ingenious* litigation [2020] EWHC 235 (Ch), Nugee J (as he then was) declined to order that a cross-undertaking be given, drawing a distinction between (1) a cross-undertaking in relation to losses sustained by the claimants in having to pay to their funder a larger return out of the litigation than would otherwise be the case ("internal costs"), and (2) a cross-undertaking in relation to the external costs of providing security including, for example, the cost of obtaining a bank guarantee ("external costs"). The Judge held that the former category was a matter to be determined between the claimants and their funder, which did not amount to an external cost on the claimants as a whole.

As noted above, the decision in *Ingenious* has since been considered by the Court of Appeal. In that decision, the Court of Appeal dismissed the appeal and held that "*it should only be in a rare and exceptional case that the court should require a cross-undertaking in favour of a claimant as a condition of ordering security for costs, and only in even rarer and more exceptional cases that it should do so in favour of commercial litigation funders.*"

The Court also recommended that any new practice in this area be "*considered and developed by primary or delegated legislation*", and not by judicial decision. With such focus in the current climate on third-party litigation funding, this may well be an area which is ripe for development.

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