GOWLING WLG

COURT ORDERS LITIGATION FUNDER TO GIVE SECURITY FOR COSTS

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In a recent decision the High Court has confirmed that a defendant is able to obtain security for its costs from a claimant's litigation funder.

The issue arose in the context of the RBS Rights Issue Litigation; long-running proceedings involving multiple claimants and managed under a Group Litigation Order. By April 2017, many of the claimants had settled their claims against the defendant, RBS, leaving one remaining group of claimants, the SG claimants still in active litigation.

RBS applied for security for costs in the sum of £11.6m against the SG claimants' litigation funders Hunnewell Partners (BVI) Limited ("**Hunnewell**") and London and Northern Capital Partners Limited, ("**LNCP**"). The application was brought on the basis that, although not parties to the litigation, the claimants' funders were persons who may be liable in respect of any adverse costs order which may be made against the claimants at trial. Both Hunnewell and LNCP opposed the application.

Hildyard J said there was no real dispute as to whether the Court had jurisdiction to make an order for security for costs against the funders. Under CPR 25.14, the court may make an order for security for costs against someone who has contributed to the claimant's costs in return for a share of any recovery in the proceedings, where the court is satisfied that it is just to do so. He then turned to look at the factors the Court would consider in exercising its discretion as to whether or not to order security be given:

a. **Was the non-party motivated by a commercial interest in the litigation?**

   Hildyard J distinguished between 'pure funders' (who make an essentially altruistic contribution to fund a case which could not otherwise be brought) and professional

litigation funders who engage in funding as a commercial enterprise. Hunnewell accepted that it had contributed to the SG claimants' costs in return for a share of any recovery, and as such that it could be ordered to pay costs, and to provide security for any such costs.

Hildyard J accepted that LNCP was not in the business of litigation funding and had provided funding only to a group of claimants related to it. Although it was therefore closer to a pure funder than a professional litigation funder, it had nonetheless made arrangements by which it would profit from the claimants' success, and so the court had jurisdiction to make an order against it.

Both Hunnewell and LNCP contended that although the court had jurisdiction to make an order against them, other factors militated against the court exercising its discretion to do so.

b. **Was there a risk of non-payment of any costs order, to justify ordering security?**

Hunnewell contended that it was able to meet any award for costs - not least because the settlements which had already been reached between other claimants and the defendant would trigger payments to Hunnewell which exceeded both the amount of security being sought in this application and indeed the amount of funding which Hunnewell had provided. However, Hildyard J found that this was no guarantee that those funds would remain available to meet any costs award which may be made at trial. The fact that Hunnewell had provided no accounts and instead had only given a general assertion of its means, gave the judge an impression of "deliberate reticence", and Hunnewell had not dispelled the inference that this reticence was because they could not demonstrate an ability to meet any order for costs. He added that the possibility that the defendants could recover any costs from the multiple individual claimants did not militate against an order for security against the funder. He further found that the defendants had sufficiently demonstrated a risk of non-recovery because it was now clear that the SG claimants had insufficient after the event (ATE) insurance cover, meaning any adverse costs would in all likelihood have to be met by the SG claimants themselves. He therefore found that the defendants had demonstrated there was a real risk that Hunnewell would not pay any costs awarded.

As to LNCP, while there was likewise some uncertainty about its financial position and ability to meet any costs order, Hildyard J found its position less opaque than

Hunnewell's because it was related to some of the SG claimants. Any reticence by LNCP about its financial position was also more justifiable when considering it was closer in nature to a pure funder than a commercial one.

c. **Was the non-party aware and / or had they been warned of the risk of a liability for costs?**

   As litigation funding has grown as a business, the suggestion in earlier cases that a party must expressly warn a non-party that he may seek a costs order against it has been diluted. As Hunnewell was engaged in the business of litigation funding, Hildyard J found that it should have been fully aware of the inherent risk of an adverse costs order being made against it.

   As to LNCP, as it was more akin to a pure funder and was not engaged in the business of funding, the judge was satisfied that LNCP may not have contemplated the possibility of an order for security for costs being made against it, let alone provided for it.

d. **Other factors, e.g. any delay in making the application for security**

   Both Hunnewell and LNCP contended that security should not be ordered because of the lateness of RBS's application. Hildyard J clarified that "lateness does not necessarily connote unjustified delay". He accepted that whilst a security application could have been made earlier, it had ultimately been prompted by two recent developments. First, the recent settlements with many claimants meant that the profile of the remaining SG claimants (who would be liable on a several basis for any costs order) was much altered. Many of the SG claimants were individual retail clients of limited means. This was compounded by the recent revelation that the SG claimants did not have adequate ATE insurance to meet the potential adverse costs liability, such that the SG claimants themselves would be forced to put their hands in their pockets to meet any costs liability. As such, lateness was not in itself a bar to the application for security.

Although Hildyard J said there was a further consideration whether there was a causal connection between the non-party's conduct and the costs incurred, he said it was not necessary to establish strict causation, and this consideration was not specifically addressed in the judgment.

Drawing those various strands together, Hildyard J concluded that, in all the

circumstances, it was just to order Hunnewell to provide security for costs, but not LNCP. The latter was not funding the litigation as a commercial venture and was therefore unlikely to have considered or provided for the risk of an adverse costs order.However, in the judge's view, there was less risk of it failing to pay any such order due to its connection to the claimants.

Hildyard J then went on to consider the amount of security to be given. He said he was concerned by the 'extraordinary' and, in his experience, 'unparalleled' amount of costs incurred in the litigation by the defendants, and appeared perturbed that it may have been precisely the extent of this potential adverse costs liability which had made it difficult for the claimants to obtain ATE insurance. He was therefore wary to make the claimants or their funders pay for a problem which may have been caused by disproportionate expenditure by the defendants. "[L]itigants are free to pay for a Rolls-Royce service", he said, "but not to charge it all to the other side". In the event, he determined that £10 million was a proportionate amount of costs, and ordered security be given for 75% of that sum.

Comment

Whilst litigation funding serves an important purpose of a means of parties obtaining access to justice, cases like this show the courts are taking pragmatic decisions that recognise funders are sophisticated commercial players who stand to make significant returns on successful cases, and so in certain circumstances it is just for them to be exposed to risk of costs orders. Other recent decisions are in the same vein. In November last year, in Excalibur Ventures LLC v Texas Keystone Keystone Inc & Others, the Court of Appeal confirmed that funders will generally follow the fortunes of those they fund. In that case it led to the successful party recovering indemnity costs from his opponent's litigation funder (albeit capped at the same amount as the funds he advanced). And in October last year, in Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited [2016] EWHC 2361 (Comm), the High Court upheld an arbitrator's award ruling that the successful defendant could recover £2 million of arbitration funding costs from the claimant.

Our experience

Our dispute resolution team has a wealth of experience in dealing with the funding of disputes, and are well placed to advise both litigants and funders, including:

- Reviewing and advising on the feasibility of complex litigation or arbitration funding

packages for both potential parties and funders;

- Advising on the suitability or otherwise of alternative funding arrangements (conditional fee agreements, partial conditional fee arrangements, damages based agreements and ATE); and
- Finding and advising on suitable funding solutions for litigation and arbitration disputes using our wide-ranging contacts in both the funding and insurance markets.

For more information on how we may be able to assist with your dispute and its funding, please don't hesitate to contact the authors using the details above.

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