

Security for Costs – Moving the Goal Posts

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The mere mention of Leeds United Football Club brings memories flooding back of Saturday afternoons at the ground watching Brian Flynn and Ray Hankin weave their magic. The recent foray of the Club into litigation in Jersey not only stirred those memories but has also resulted in a significant shift in the security for costs position in Jersey. The judgment of the Court of Appeal in an appeal brought by the Club has potentially far reaching effects and may make it easier for litigants not resident in this jurisdiction to pursue claims against Jersey companies.

The appeal was from a decision of the Deputy Bailiff who had ordered Leeds United Football Club to put up security for the defendant's costs in the sum of £263,000. The defendant to the proceedings was AdMatch Ltd, a Jersey company that had acted as the Club's agent for the sale of match and season tickets by credit card. The Club paid the security into court as it was ordered to do and then appealed the Deputy Bailiff's decision to

the Court of Appeal (presided over by Jonathan Sumption QC).

The starting point for any application for security for costs in Jersey is Rule 4/1(4) of the Royal Court Rules. This states that "any plaintiff may be ordered to give security for costs".

Whilst the court's discretion to order security for costs is unlimited, the Court of Appeal was careful to point out that in practice the principles applied in this jurisdiction have developed by analogy with those applied in England. Indeed this case raised serious questions of the circumstances in which security should be given and ultimately resulted in the removal of the "blanket presumption" that such protection is appropriate purely on the basis that the plaintiff is resident out of the jurisdiction. In a reasoned judgment, the Court of Appeal considered the legal principles to be applied in applications of this nature and also the extent to which the **Human Rights (Jersey) Law 2000** would apply in cases such as these.

HUMAN RIGHTS

The Court of Appeal looked first of all at the decision of the English Court in **Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd** [1973] QB 609 which started from the premise that a defendant ought not to have to pursue a foreign resident plaintiff abroad for his costs. In that case, the court stated that “The mere fact of his non residence was enough to make it just to order security, unless (i) the plaintiff could be seen, even at an interlocutory stage, to have a high probability of success, or (ii) the plaintiff’s financial situation was such that an order for security would be likely to stifle a claim that was at least arguable”. The Court of Appeal acknowledged that these principles had been followed in the Jersey case of **A.E Smith & Sons Ltd v. L’Eau des Iles (Jersey) Ltd** [1999] JLR 319.

SPARED THE NEED TO ENFORCE

The question of whether a defendant should be spared the need to enforce a judgment for costs abroad, however, was explored further and in considering the position of AdMatch, the Court of Appeal highlighted two key objections to this principle; objections that no doubt should be considered in any future applications of this kind:-

- (i) that there is no “logical relationship between residence outside of the jurisdiction and inability or unwillingness to pay a successful defendant’s costs”. Moreover, any procedural difficulties in recovering costs from solvent plaintiffs are much diminished by the reciprocal enforcement of judgments which has become “a normal feature of modern international litigation”; and
- (ii) that an order requiring a non resident plaintiff to put up security for the defendant’s costs in advance of the matter proceeding to a trial of the merits of the proceedings is an “impediment to the plaintiff’s access to justice”. “The fact that such an order is only available where the plaintiff resides

out of the jurisdiction is discriminatory as well”.

DISCRIMINATION

Taking the discriminatory point one step further, the Court of Appeal considered the English Court of Appeal case of **Nasser v. United Bank of Kuwait** [2002] 1 WLR 1868. In that case the Court of Appeal held that an order for security for costs was not in itself contrary to the provisions of the European Convention on Human Rights (which has the force of law in Jersey by virtue of the **Human Rights (Jersey) Law 2000**). However, to treat the foreign residence of a plaintiff as prima facie justifying such an order discriminated against him contrary to the Convention.

The Court of Appeal concluded that the Deputy Bailiff had been mistaken to conclude that even assuming that discrimination on the ground of mere residence would be contrary to the Convention, an order for security pursued a “legitimate objective and was proportionate to that objective”. In reaching this conclusion, the Deputy Bailiff was effectively disagreeing with the English Court of Appeal in the **Nasser** case. In reaching his decision, the Deputy Bailiff had reasoned that the jurisdiction to order security against a non resident plaintiff was proportionate as (i) a non resident plaintiff is unlikely to have assets in this jurisdiction to which any ultimate award of costs could attach; (ii) in such circumstances, the defendant would have to institute proceedings in a foreign country to enforce this costs order; and (iii) the defendant may be deterred from pursuing his costs in a foreign jurisdiction due to the plaintiff’s ability to hide assets and to take procedural points in any subsequent proceedings. The Deputy Bailiff concluded that once it was accepted that security would not be ordered where its effect was not to stifle the claim, there was no prejudice to the plaintiff.

STIFLE THE CLAIM

The Court of Appeal held that the Deputy Bailiff’s approach to the Convention was mistaken and that

it was unable to accept that “a blanket presumption that such protection [to a defendant] is appropriate where the plaintiff is resident outside Jersey is a proportionate way of achieving that objective”. The Court of Appeal did not agree that a plaintiff is not stifled by an order for security when the plaintiff is forced to provide funds in addition to meeting its own costs of the proceedings. Additionally, whilst the Court of Appeal appreciated that enforcement of a costs order may be difficult in some jurisdictions, the present proceedings concerned a British plaintiff which necessarily meant a judgment would be relatively easy to enforce. There was also no evidence put forward to support the proposition that the plaintiff would be unable to meet any cost order ultimately made.

This judgment would appear to have moved the goal posts for Jersey defendants when being faced by a claim from a British plaintiff. It now seems that a Jersey defendant may no longer be able to

claim this protection as of right but will need to consider carefully, based on the facts of a particular case in issue, whether an application for security would be successful. Time will tell whether there will now be an influx of claims as a result of this ruling.

Should you have any questions or requests for further information, please contact:

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