
Security for Costs (October 2015)

Key Statutes and Authorities

- *CPR 25, section II; CPR 3.1; CPR 13.3;*
- *PD 24, para. 5.2*
- Case Law: *Lobster Group Ltd. v Heidelberg Graphic Equipment Ltd.*; *Huscroft v P & O Ferries Ltd.*; *Olatawura v Abiloye*

What is Security for Costs?

- Where a party has a reasonable concern that its legal costs will not be paid by the opponent if its case is successful, they can apply to the Court for an Order that the opponent provide security for costs;
- An Order for security for costs gives protection to a party from the possible risks of their opponent not being able to pay costs if ordered to do so;
- The Order will usually require the opponent to pay money into Court or provide a bond against which the winning party can subsequently enforce an order for costs;
- Security is usually provided in the form of money paid into the Court, or held in an account operated jointly by both parties' lawyers;
- If the applicant is successful, the money can be applied against any costs order. If, on the other hand, the opponent is successful, the security is returned to them;
- The amount of security that is usually ordered reflects the strength or weakness of the opponent's case:
 - The weaker the opponent's case, the higher the security order.

When is Security for Costs applied for?

- Typically an opponent will be outside the jurisdiction of the Court: the law of security for costs recognises that orders of the court relating to payment of a party's legal costs can be very difficult to enforce in non-common law jurisdictions;
- Security can also be ordered where the opponent is insolvent, or prone to vexatious litigation.

Under what conditions can Security for Costs be applied for? (*CPR 25.13*)

- Only Defendants can apply for security (*CPR 25.2*);
- The Claimant resides outside the EU, Norway, Iceland, or Switzerland, e.g. a Claimant based in the Isle of Man or Channel Islands;
- The Claimant is a company, and there is reason to believe that it will be unable to pay the applicant's costs if ordered to do so;
- The Claimant has changed his address since commencing the claim (with a view to evading the consequences of litigation);
- The Claimant's address on the Claim Form is incorrect;
- The Claimant is a nominal claimant, and there is reason to believe he will be unable to satisfy any costs order;
- Enforcement of a costs order would be difficult, e.g. assets are dissipated or moved;
- It is not available on the Small Claims Track (*CPR 27.2(1)(a)*)

Which CPR rules govern Security for Costs?

In deciding on the amount of security, the Court must examine the extent to which the costs sought are recoverable under s. 51 *Senior Courts Act 1981*, which provides that the Court may award “the costs of and incidental to the proceedings”.

- *CPR 3.1(3) & (5)* govern security for costs as a sanction or condition.
- *CPR 13.3* refers to the Court’s power to attach conditions to orders when it is deciding whether or not to set aside a default judgment.
- *PD 24, para 5* sets out the Court’s power to order security for costs as an alternative to granting an application for summary judgment.
- Part 20 claims are also covered, as they are not excluded by *CPR 20.3*

Under what circumstances will security be granted?

- The Court has a wide discretion over whether to order security. It will look at all the facts and circumstances and aim to deal with the case justly. If there is any criticism of the manner in which the opponent has conducted the litigation, it should be highlighted;
- There must be reason to believe that the opponent will be unable to pay the applicant’s costs if ordered to do so. Clear and contemporaneous evidence of this will be needed to substantiate this. You should request the opponent’s up-to-date management accounts, and any reluctance to disclose them can be used in evidence in support of an application for security;
- There must be a robust defence. If it is weak or spurious, the Court may well consider the application as an attempt to stifle a genuine claim;

- Ensure that the amount of security requested is reasonable and justified. The Court will often only grant security up to a certain stage of the proceedings, leaving you to make a further application at a later date.

Applying for Security for Costs

- An application for security for costs can be made at any stage in the proceedings, but it is advisable to apply as soon as the relevant evidence is available;
- The Court has no inherent jurisdiction to order security for costs (*Wu v Hellard* [2013] Ch. D. 25/11/2013);
- A Defendant to a counterclaim can apply for security for costs, but if there is no substantial free-standing counterclaim it may not be granted;
- Security under *CPR 3.1* cannot be sought independently. It must be sought alongside another application, such as summary judgment;
- A delay in applying for security for costs can result in no security being granted or in the applicant being deprived of some or all of the costs they have already incurred;
- A Claimant cannot apply for security solely on a Defendant’s interim application;
- If an Order is made, the Defendant has the right to treat the money paid into Court as security (*CPR 3.1(6A)*);
- In the Commercial Court, Defendants who seek security for costs orders may have to compensate a winning Claimant against losses suffered from having funds tied-up

Current case law

Lobster Group Ltd. v Heidelberg Graphic Equipment Ltd. [2008] EWHC 413 (TCC):

- The Court confirmed that pre-action costs falling within s. 51 are recoverable, but they must be litigation costs, and may be the subject of an application for security for costs.
- Where there is considerable delay and costs are large, the Court should be slow to exercise its discretion to allow security for pre-action costs as it could amount to a penalty. Furthermore, where there was a greater period between the incurring of costs and the start of proceedings, the losing party is more likely to be in a position to dispute any liability for such costs when they are assessed.

Huscroft v P & O Ferries Ltd. [2010] EWCA Civ 1483:

- This was a second appeal against an order that unless the Claimant paid £5,000.00 as security of costs, the claim would be struck out.
- The original Application was made on the grounds that the Claimant's case did not have any reasonable prospects of success and the Claimant's Solicitors – who were acting on a CFA without ATE insurance – had informed the Defendant there was no real prospect of enforcing any costs order.
- The Order itself was made on the grounds that the Claimant had “played fast and loose with orders” and the Court was critical of his conduct. However, on Appeal this was not considered to be a sufficient ground on the facts of the case.
- The Claimant had also appealed the amount of the security of costs order, and although the security order was set aside, the Court stated that had it

not been, the sum payable was reasonable in the circumstances.

Olatawura v Abiloye [2002] EWCA Civ 998:

- The Claimant issued proceedings against the Defendant alleging non-payment for work done for a firm of solicitors of which the Defendant was the sole proprietor.
- The Defendant denied the claim and applied for summary judgment under the *CPR 24.1*.
- The District Judge ordered the action to be stayed if the Claimant failed to give security for the costs, having formed the view that the order would not prevent the Claimant from litigating the claim; that it had only limited prospects of success; and it had been conducted unreasonably.
- The Court of Appeal dismissed the Claimant's appeal holding that:
 - There was jurisdiction under the CPR to make orders which were tantamount to orders for security for costs outside *CPR 25 section II*, e.g. *PD 24, para. 4 & 5* and *CPR 3.1*; and
 - Before ordering security in any case, the Court should be alert and sensitive to the risk that by making such an order it might be denying the party concerned the right to access to the court. However, the factors taken into consideration by the district judge justified the order for security for costs.

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