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COMMERCIAL DISPUTES KNOW-HOW GUIDES

SECURITY FOR COSTS

A party to proceedings (usually the defendant) may be able to obtain an order that another party (usually the claimant) provide security for its costs. The purpose of the order is to protect that party against the risk it may win at trial but be unable to recover the costs awarded in their favour against the losing party. The relevant provisions are set out in Part 25 of the Civil Procedure Rules 1998 (CPR 25).

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OBTAINING SECURITY FOR COSTS FROM THE CLAIMANT

Under CPR 25.13, the court may make an order for security for costs against a claimant if (i) satisfied on the evidence before it that it would be just to do so and (ii) one or more of the conditions in CPR 25.13 (2) applies. These are:

- the claimant is resident out of the jurisdiction, but not resident in a state bound by the 2005 Hague Convention;

- the claimant is a company or other body and there is reason to believe it will be unable to pay the defendant's costs if ordered to do so;

- the claimant has changed their address since the claim was commenced with a view to evading the consequences of the litigation;

- the claimant failed to give their address in the claim form, or gave an incorrect address in that form;

- the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19 of the CPR, and there is reason to believe that they will be unable to pay the defendant's costs if ordered to do so;

- the claimant has taken steps in relation to their assets that would make it difficult to enforce an order for costs against them.

OBTAINING SECURITY FOR COSTS FROM OTHER PARTIES

The court can also order security for costs:

- In favour of a claimant defending a defendant's counterclaim, in particular where the counterclaim is a substantial stand-alone claim;

- In favour of a defendant against a non-party who (i) assigned the claim to the claimant to avoid the risk of an adverse costs order or (ii) is contributing to the costs of the claim in return for a share of any recovery, provided it would be just to do so (see CPR 25.14);

- Against an appellant or a respondent who is also appealing (see CPR 25.15).

NATURE AND TIMING OF THE APPLICATION

The application must be supported by written evidence and should be made timeously (as with any court application, it should be made 'as soon as it becomes apparent that it is necessary or desirable to make it' - CPR Practice Direction 23A 2.7). It is therefore advisable to apply for security prior to or at the Case Management Conference - unless the party from whom security is sought agrees to provide it voluntarily. If there is unjustified delay, the court may decide that it would not be just to order security.

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OPPOSING THE APPLICATION

The party against whom security is sought may resist the application by disputing that the applicable test under CPR 25 has been satisfied. The quantum of costs sought as security can also be disputed and very often is.

An important ground for opposition is if an order risks stifling a genuine claim because of the claimant's inability to provide security if ordered to do so, especially where the claimant alleges that its impecuniosity is due to the conduct of the defendant prior to the issue of proceedings.

FORM OF SECURITY

Security for costs can be provided in different ways, subject to the court being satisfied it offers sufficient protection for the applicant. A payment into court or a guarantee from a parent company or bank are the two most common ways of giving security. In Tulip Trading Ltd v Bitcoin Association for BSV and others [2022] EWHC 141 (Ch), the court rejected the claimant's request that it be allowed to give security in the form of Bitcoin to be held by their solicitors due to the volatile nature of crypto currencies.

EFFECT OF THE ORDER FOR SECURITY

The order may stay the claim until the security ordered is put in place. Alternatively, the court can order that the claim be struck out unless the security is provided by a certain date, although that practice was questioned by the Court of Appeal in Radu v Houston and another [2006] EWCA Civ 1575, or else give the applicant liberty to apply to strike out the claim if no security is provided by the date specified. An inability to provide security for the defendant's costs may therefore lead to the claimant abandoning its claim or being struck out, making CPR 25 a powerful tool for defendants to use in the right circumstances.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact Gavin Kramer at gavin.kramer@collyerbristow.com or on +44 (0) 7956 381277 or contact any member of the commercial disputes team.

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