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Security for costs – an update

Introduction

In the recent decision of Prest ("Mr Prest") v Pretrodel Resources Limited (in Liquidation) ("Petrodel")[1] His Honour Deemster Corlett reviewed the Manx law on Security for Costs, where an application was brought before the court under Rule 7.28 of the Rules of Court of Justice of the Isle of Man.

The Court Rule and the Court's Discretion

The court has a wide discretion to grant a defendant security for costs under Rule 7.28(1)[2]. It may grant an order for Security for Costs if:

> *(a) it is satisfied, having regard to all the circumstances of the case that it is just to make such an order and*
>
> *(b) either;*
>
> > *i. one or more of the conditions in paragraph (2) of Rule 7.28 applies, or*
> >
> > *ii. or an enactment permits the court to require Security for Costs.*

2. The conditions are-

- *(a) the claimant is ordinarily resident out of the jurisdiction;*
- *(b) the claimant is a company or other body (whether incorporated in or outside the Island) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;*
- *(c) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;*
- *(d) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;*

[1] Prest v. Pretrodel Resources (unreported) Deemster Corlett's Judgment, Chancery Division, August 13 2015

[2] Steele v. Paz Limited (in liquidation) and Others 1993 - 95 MLR 102 (CHD)

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(e) the claimant is acting as a nominal claimant, other than as a representative claimant under Chapter 6 of Part 3, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(f) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

The wording in of Rule 7.28(2) is similar to the equivalent rule under the UK Civil Procedure Rules[3] save that a defendant can be granted security for costs under Rule 25.12 if the claimant is (i) resident out of the jurisdiction; but (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982. The Lugano Convention does not apply to the Isle of Man nor is it a Regulation State.

Deemster Corlett determined that the pre-requisite, in Rule 7.28(2)(a), was satisfied as Mr Prest was ordinarily a resident out of the jurisdiction of the Isle of Man. At the time of this judgment, Mr Prest was resident in Sienna (Italy) but he also appeared to have addresses in Abuja (Nigeria), in Nevis, and Monaco and also London.

The underlying case which Mr Prest brought before the Manx court was a claim that assets were his, which he said the Liquidator held on trust for him.

Deemster Corlett cited and relied upon Akhavan v Quinn Legal Advocates Limited 2013[4] as the leading case in the Isle of Man on security for costs[5].

The Relevant Law

Deemster Corlett referred to two English decisions in Nasser v United Bank of Kuwait[6] and De Beer v Kannar& Co[7]. These cases examine the courts approach when assessing the amount of costs to be awarded in an order for Security for Costs.

The White Book[8] refers to Nasser[9] and says that:

"… a reasonable estimate of the applicant's likely costs in Nasser up to the end of the proceedings was £10,000. However, there was no obstacle to or difficulty about the

[3] PART 25 - INTERIM REMEDIES AND SECURITY FOR COSTS, II SECURITY FOR COSTS, CPR 25.13 "Conditions to be satisfied"
[4] MLR 310
[5] Prest v. Pretrodel Resources (unreported) DeemsterCorlett's Judgment, Chancery Division, August 13 2015
[6] [2002] 1 WLR
[7] (No.1) [2001] EWCA Civ 1318
[8] On Civil Procedure of the Supreme Court of England and Wales 2015, Paragraph 25.13.6 "No discrimination against claimants resident in other States"
[9] Nasser v. United Bank of Kuwait [2002] 1 WLR

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enforcement of an order for costs other than impecuniosity. Therefore, it was appropriate to limit the amount of security to the amount needed to protect the applicant from the extra burden in terms of costs and delay which was likely to be involved in seeking to enforce an order for costs in the country in which the claimant resided (the USA).”

Costs in the Nasser case were assessed in the sum of £5,000 and an order for security was made for that amount.

At paragraphs 189 and 190 of Nasser, Walker J in stated that:

“… the court should consider tailoring the order to the particular circumstances: if there is likely to be no difficulty about enforcement, but simply an extra burden in the form of costs or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.”

In contrast, the White Book comments that in the Court of Appeal decision of De Beer v Kannar& Co[10] (the “de Beer case”):

“… a reasonable estimate of the applicant’s costs up to the end of the proceedings in question was £130,000. There was evidence that the claimant had sufficient assets out of which he could pay such costs not only in Switzerland but also in the USA. However, the court was satisfied that (i) there was a lack of probity on the part of the claimant in these proceedings (ii) the claimant’s assets in Switzerland were assets which could easily be moved, and (iii) there was a risk that an order for costs against them would be difficult or even impossible to enforce in the USA. In the circumstances, the amount of security which it was appropriate to award was £130,000.”

Deemster Corlett[11] stated that in Kazakhstan Kagazyplc v Zhunus[12] it was emphasised that “the Court should not make orders which are discriminatory to Articles 6 and 14 of the European Convention on Human Rights”.

Thus, in light of these two contrasting cases there is clearly a need for the courts to assess the amount of costs to be awarded in an order for security based on the individual merits of each case.

Determination

In determing whether to grant security for costs to Petrodel, Deemster Corlett considered, in particular, the followings factors:

[10] (No. 1) [2001] EWCA Civ 1318
[11] Paragraph 13,Prest v. Petrodel Resources (unreported) DeemsterCorlett’s Judgment, Chancery Division, August 132015
[12] [2015] EWHC 996 (Comm)

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1. Mr Prest was alleging in Nigerian proceedings that the assets of the companies were held on trust for his siblings.
2. Mr Prest had not paid an earlier costs order in related proceedings and faced the potential of imprisonment because of non-payment of maintenance to Mrs Prest.
3. The Liquidator was acting essentially for the creditors of Pretrodel and their interests needed to be in the forefront of the Court's mind.
4. The company was wound up on August 1 2013. It was a substantial insolvency and the assets should be available prima facie to pay the creditors.
5. Mr Prest claimed that as a result of the English Supreme Court ruling on June 12 2013[13] the assets of Petrodel were in fact held on trust for him. If that was the case, the creditors would lose out substantially as there would have been no assets available to pay them.
6. The security should not be limited to the costs of enforcement in the five relevant jurisdictions, but should instead reflect the amount of the Liquidator's assessed costs if he were to be successful.
7. The whole point of security for costs is to protect a defendant who is obliged to litigate at the election of a claimant.
8. Mr Prest seemed likely to do all within his power to avoid paying the Liquidator's assessed costs from any available assets.

This concluded with Deemster Corlett ordered Mr Prest to pay into court the sum of £125,000 plus VAT, i.e. £150,000.

Summary

Where a claimant opposes the making of an order for security for costs or seeks to limit the amount of security, the onus is on them to put forward sufficient evidence before the court, and in doing so, to make full and frank disclosure of their financial resources.

If a claimant gives an incomplete account of their financial resources, the court may, in exercising its discretion, set an amount which represents the court's best estimate of what the claimant can reasonably afford.

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[13] Prest v Petrodel Resources Limited [2013] UKSC 34

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