"SECURITY FOR COSTS FOR SECURITY FOR COSTS"

Fortification of Cross-Undertakings in Security for Costs Applications

Samuel Hodge

This article summarises and discusses a recent High Court decision regarding security for costs, which took place within the ongoing case of *Hotel Portfolio II UK Limited (in Liquidation) and another v Andrew Joseph Ruhan and another*. It was held that a claimant should provide security for costs, and (it appears for the first time) that a defendant should provide a fortified cross-undertaking. Samuel acted for the Claimants with James Pickering QC and PJ Kirby QC.

Introduction

1. On 28 January 2020, Mr Justice Butcher handed down judgment in two applications for security for costs which were heard together over one day in the Commercial Court: *Hotel Portfolio II UK Limited (in Liquidation) and another v Andrew Joseph Ruhan and another* [2020] EWHC 233 (Comm); [2020] Costs LR 2015.

2. The Defendants were ultimately successful in the applications for security for costs which they made against the First Claimant (**HPII**); however, the Defendants were required to (and did) provide cross-undertakings. The First Defendant was also required, due to his questionable solvency, to fortify his cross-undertaking either by way of a payment of a substantial sum of money into Court, or by providing another suitable form of security. This aspect of the decision is of considerable interest because it appears to be the first reported case in which a defendant has been ordered to provide a cross-undertaking, and to fortify it, in a security for costs context. Subsequent to judgment being handed down, HPII

advocated that the order should specify that the First Defendant's fortification be provided prior to the provision of security for costs by HPII; however, Mr Justice Butcher directed that the provision of the First Defendant's fortification should occur simultaneously with the provision by HPII of security for his costs. As will be discussed below, that simultaneity element of the order is controversial and raises a number of issues of principle and practice. It is suggested in this article that such an approach to the timing of the provision of security and fortification should not be adopted by the Court in future.

Background

3. HPII and its liquidator (**the Claimants**) bring claims against the Defendants within these proceedings for in excess of £100M. As at May 2003, HPII was an active company and owned a number of hotels, including three which overlooked Hyde Park, which had very considerable development potential. In summary, the Claimants say that in around March to April 2006, Mr Ruhan, the First Defendant – at a time when he was director of HPII – took steps to sell the hotels (and so the development opportunities) to a group of companies (**the Cambulo Group**) which had been set up in Madeira and which appeared on its face to be owned by Mr Stevens, the Second Defendant. The hotels were subsequently on-sold and redeveloped into luxury apartments, generating extremely large profits.

4. The Claimants allege, however, that the Second Defendant was in fact the First Defendant's nominee and accordingly that the First Defendant effectively controlled and beneficially owned the Cambulo Group. The Claimants contend that the First Defendant fraudulently breached various statutory and fiduciary duties which he owed to HPII by failing to disclose to HPII, before the sale of the hotels by HPII, his own interest in the Cambulo Group. The Claimants accordingly claim that the First Defendant should be required to account to HPII for the large profits that he made out of the subsequent on-sales. The Claimants pursue the Second Defendant on the basis of dishonest assistance and knowing receipt. Both Defendants are also sued for unlawful means conspiracy and (in the alternative) for bribery.

5. The Defendants deny all liability, and also claim that they have limitation defences (and/or are able to rely on the doctrine of laches).

The security for costs applications

6. The Defendants each applied, pursuant to CPR 25.12, for orders that HPII should provide security for their costs. It is well-known that the Court generally approaches security for costs applications in two stages. First, a jurisdictional question: is a condition in CPR 25.13(2) met? If so, the Court then goes on to consider a question of discretion: is it just in all the circumstances to order the claimant to provide security for costs? The Court ultimately found for the Defendants on both questions.

7. The jurisdictional gateway relied upon by the Defendants was CPR 25.13(2)(c): "*the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so".*

8. As HPII is a company in insolvent liquidation, the onus was upon it to provide evidence that there was *not* reason to believe that it could not pay the Defendants' costs if ultimately ordered to do so. HPII sought to place reliance on an ATE insurance policy which it had the benefit of. It submitted that in the circumstances there was no good reason to suppose that the policy would be avoided by the insurer, and that the ATE policy therefore provided sufficient protection for the Defendants such that the jurisdictional condition was not satisfied.

9. Mr Justice Butcher held, however, that the jurisdictional condition in CPR 25.13(2)(c) was met. First, the Judge held that the ATE policy did not provide adequate protection because there were non-fanciful bases upon which the insurers may seek to avoid the policy: the policy contained certain express cancellation clauses, and there were no anti-avoidance provisions (such as clauses limiting the circumstances in which there can be avoidance of the policy for fraud): *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872; [2018] 1 WLR 2955 followed. Although the liquidator said she had properly put relevant matters before the insurers when applying for ATE cover, given that the proposal was not before the Court and that the documentation in the case was voluminous, the Judge considered that it could not be said with sufficient certainty that the risk that the insurer might avoid the policy was fanciful, observing that the liquidator "*could not disclose what she did not know*". Second, it was material that the insurer had itself recently gone into insolvent administration. Despite the Claimants seeking to place reliance

on reinsurance arrangements and/or possible recourse to cover under the Financial Services Compensation Scheme, the Judge held that the evidence was not sufficient to provide the requisite assurance that there would in fact be sufficient cover in the event that a claim needed to be made. On the basis of the material before the Court, therefore, the Judge held that there was reason to believe that HPII would be unable to pay the Defendants' costs if ordered to do so.

10. The Judge went on to conclude that in all the circumstances it would be just to order security for costs. His Lordship considered that there was insufficient evidence before the Court to support the contention that HPII's claim would in fact be stifled if an order for security were to be made, and also held that the Defendants' delay in bringing the applications did not merit altogether refusing an order for security.

11. The First Defendant sought security for costs in the sum of £1.85M; the Second Defendant sought approximately £2.73M. His Lordship took a broad-brush approach and ordered HPII to provide security for approximately 65% of the security sought: £1.2M for the First Defendant and £1.8M for the Second Defendant, making a total of £3M. HPII was ordered to provide that security within 28 days. The Defendants were also required to provide certain cross-undertakings.

Cross-undertakings

12. Paragraph 5 of Appendix 10 to the Commercial Court Guide (10th ed) provides –

> *"In appropriate cases an order for security for costs may only be made on terms that the applicant gives an undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant."*

13. The White Book 2019 commentary, at 25.12.10, reiterates the above point and refers to the case of *Re RBS (Rights Issue Litigation)* [2017] EWHC 1217 (Ch); [2017] 1 WLR 4635 where an order for security for costs was successfully obtained as against a third-party commercial litigation funder (pursuant to CPR 25.14) subject to the applicant providing a cross-

undertaking. Hildyard J said at [150] that "*Though not commonplace or inevitable, I do not think it should be considered particularly exceptional for a court to require a cross-undertaking as the price of an order for security for costs.*" See also *Bailey and others v GlaxoSmithKline UK Ltd* [2017] EWHC 3195 (QB); [2018] 4 WLR 7: another security for costs application against litigation funders made pursuant to CPR 25.14 where a cross-undertaking was required of the applicant.

14. Mr Justice Butcher acceded to HPII's submission that the Defendants each ought to provide cross-undertakings, and that the requirement for HPII to provide security should be conditional upon the same. HPII was in insolvent liquidation; it would clearly only be able to put up the £3M worth of security (whether by raising cash/arranging for the provision of deeds of indemnity/etc.) upon incurring considerable expense and additional costs. Those additional costs would in principle be claimable under the cross-undertakings in the appropriate circumstances. The case was accordingly apt for cross-undertakings to be required; the Judge directed that the order should contain the usual wording to that effect.

Fortification of cross-undertakings

15. Paragraph F15.4 of the Commercial Court Guide (10th ed) discusses fortification of undertakings. This paragraph is located under the general heading "Interim Injunctions", however it is framed more broadly so as to apply to applications for interim remedies more generally (not exclusively injunctions), and states:

> "*(a) Where an applicant for an interim remedy is not able to show sufficient assets within the jurisdiction of the Court to provide substance to the undertakings given, particularly the undertaking in damages, it may be required to reinforce the undertakings by providing security.*
>
> *(b) Security will be ordered in such a form as the Judge decides is appropriate but may, for example, take the form of a payment into Court, a bond issued by an insurance company or a first demand guarantee or standby credit issued by a first-class bank.*
>
> *(c) In an appropriate case the Judge may order a payment to be made to the applicant's solicitors to be held by them as officers of the Court pending*

further order. Sometimes the undertaking of a parent company may be acceptable."

16. Guidance as to the approach that the Court should take when considering whether to require fortification of cross-undertakings was authoritatively set down by the Court of Appeal in *Energy Ventures Partners Ltd v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1295; [2015] 1 WLR 2309: a case which concerned a freezing injunction. Having reviewed the authorities, Tomlinson LJ at [52] summarised certain aspects of the rationale underlying cross-undertakings and their fortification in such cases:

> *"…[S]ince the claimant has obtained a freezing order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the defendant can show that it too has a good arguable case that it will suffer loss in consequence of the making of the order, it should equally be protected. It may be said that what the defendant in such circumstances obtains is security whereas the claimant obtains something less, but in many cases, of which the present is probably one, a freezing order has the practical if not theoretical effect of giving security to the claimant for its claim."*

17. Tomlinson LJ then stated at [53] that an applicant for fortification need not make out its case for the same on the balance of probabilities, as that would be completely contrary to principle and would encourage wasteful satellite litigation. Rather, it must show a good arguable case that it will suffer loss in consequence of the making of the order. That overarching principle, according to Tomlinson LJ, was an effective summary of a passage from *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) where Briggs J noted at [25] three requirements that should be taken into account by the Court (and which Tomlinson J considered to be "inextricably linked" to one another): (i) an intelligent estimate must be able to be made of the likely amount of any loss which may be suffered by the applicant for fortification by reason of making the interim order; (ii) it should be shown that there is a sufficient level of risk of that loss being suffered to require fortification; and (iii) it must be likely that the loss has or will be caused by the granting of the interim relief.

18. From the point of view of a respondent to an application for security for costs, it will often be the case that the additional costs of it having to put up the required security will be fairly readily ascertainable or estimable; and, of course, such costs would be directly referrable to and caused by the order for security itself. Accordingly, if the above guidance is of equal

application in security for costs applications[1] it is fair to say that a respondent will likely often be able to successfully obtain an order for fortification of a cross-undertaking where there is any doubt as to the applicant's solvency and/or ability to satisfy any order which might be made against it pursuant to the cross-undertaking.

19. In the present case, HPII submitted that the First Defendant's cross-undertaking should be fortified because there was reason to believe that the First Defendant would be unable to satisfy an order, should one be made, that he should compensate HPII pursuant to his cross-undertaking. The First Defendant did not reside within the jurisdiction and, more importantly, in his recent matrimonial proceedings he had asserted that he was potentially greatly insolvent. Whilst the First Defendant's solicitor, within the security for costs application, gave evidence that the First Defendant's financial position had improved (in an attempt to argue that there was no reason to think that the First Defendant would be unable to compensate HPII if ordered to do so), the Judge took account of the inconsistency of that position with the First Defendant's stance in his matrimonial proceedings. The Judge also noted that no documentary evidence had been adduced to support the proposition that the First Defendant's financial position had improved, and remarked that no witness evidence had been put in by the First Defendant himself which spoke to his own financial situation. Accordingly, the Judge ordered that the First Defendant should indeed fortify his cross-undertaking (which took the form of a substantial payment of money into Court).

20. This is the first reported decision in which applicants for security for costs under CPR 25.12 have been required to provide cross-undertakings, and where one has been ordered to be fortified. Although the Judge did not in his judgment deal in depth with matters of general principle relating to fortification, he clearly took into account as a key factor the fact that there was a serious question mark over the First Defendant's solvency and/or his likely ability to meet an order requiring him to compensate HPII should the cross-undertaking eventually

[1] and it is hard to see any reason in principle why it should not be: the applicant is obtaining a valuable order for a very potent form of interim relief; the consequences to a respondent of failing to comply are significant and onerous. In complying with an order, a respondent will often be put to significant additional expenditure; where a respondent demonstrates that such expenditure is both likely to be incurred *and* that there is reason to think that the applicant may not be good for the money if the cross-undertaking is successfully invoked, then the provision of fortification for that foreseeable expenditure is justifiable.

be successfully called upon. In order to avoid the risk of the cross-undertaking ultimately ringing hollow, this was an appropriate case for fortification.

21. In light of this decision, security for costs applicants should now be cognisant of the very real possibility that their own financial position may be scrutinised in the context of the application. The credibility of any cross-undertaking offered is now also likely to be rigorously tested by respondents – particularly where the quantum of security being sought is very substantial, and where complying with an order to provide security would involve the respondent incurring significant expenditure. To that end, applicants can also expect requests to be made on behalf of respondents, prior to the application for security being heard, for full disclosure of the applicant's financial position and/or for the provision of any information capable of evidencing a realistic ability on the part of the applicant to pay the costs which may reasonably and foreseeably be incurred by the respondent in raising the security sought. Where an applicant is of questionable solvency, there is now every chance that they may only ultimately benefit from an order for security for costs if they can stump up the money to "buy it" – i.e. if they can provide what is in effect counter-security for the costs of the respondent raising the security for costs ordered. In other words, such applicants should be made aware that they may well be required to provide "security for costs for security for costs." This may conceivably have an impact on the quantum of security which certain applicants apply for.

22. On the flip side, the extent (if at all) to which a successful applicant for security for costs may actually be able rely on its own impecuniosity so as to argue that it would be unfair and/or unduly prejudicial to them to condition the order for security upon their own provision of fortification, has not yet been tested.[2] Presumably, the Court would follow a similar path to that signalled by the Court of Appeal in *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252, where a legally-aided applicant for an injunction could not give a credible cross-undertaking due to her apparent impecuniosity. Their Lordships commented that the impecuniosity of an applicant (such that it was unable to give a credible cross-undertaking in damages) did not of itself in every case rule out an injunction being awarded; the Court should look broadly

[2] In the instant case, this issue did not arise as the First Defendant asserted that he was solvent and so could give a credible cross-undertaking which did not justify fortification.

at all the competing factors involved, and consider the balance of justice and convenience.[3] Extending that general principle to the giving of cross-undertakings (whether fortified or otherwise) in security for costs cases: in an appropriate case the inability of an applicant for security for costs to provide a credible cross-undertaking and/or to fortify it due to its own impecuniosity (where a (fortified) cross-undertaking would, all other things being equal, be required) should not, of itself, necessarily debar the applicant from obtaining the benefit of an order for security for costs.

23. In practical terms, it is fairly clear that the Court would in such circumstances require full disclosure of the applicant's financial position and a cogent explanation as to precisely why the fortification in question could not be raised by either the applicant itself or through third-party assistance. The writer anticipates that the Court would, in approaching that question, employ a methodology that is directly analogous to that which governs the Court's assessment, in the context of an application for security for costs, of a respondent's contention that an order for security should be refused because the respondent's underlying claim would be stifled by the making of an order for security. In short, the burden would be on the party resisting fortification to show on the balance of probabilities that it cannot provide fortification and cannot obtain appropriate assistance to do so; the Court would expect that party to be full and frank in relation to these matters (applying by analogy the principles noted in *Lederer v The Pensions Listed at Schedule 1* [2019] EWHC 554 (Ch) per Fancourt J at [32] (referring to Lord Wilson's comments in *Goldtrail Travel v Onur Air* [2017] 1 WLR 3014 at [17]) ; and *Al-Koronky v Time-Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) per Eady J at [31]-[32] – as cited by Mr Justice Butcher at paragraph 18 of his judgment in the instant case)[4]. Such an approach would also be exactly consistent with the approach of the Court in cases where it is considering the making of an order conditional

[3] Also see *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] 1 WLR 1405, where Lord Hoffman said at [17] that "*it is often hard to tell whether damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.*"

[4] It would certainly be surprising if a party resisting fortification on the basis of impecuniosity should, in order to succeed in resisting it, have to reach a lower standard of proof (i.e. less than on the balance of probabilities) than a respondent to a security for costs application who was taking a stifling point; for the latter, the stakes are higher/consequences more severe should they be ordered to provide security but ultimately fail to provide it.

upon the payment of a sum into Court, but where the party who would be subject to the condition claims that they are unable to pay the sum[5].

Timing of the provision of fortification

24. As mentioned above, HPII was ordered to provide security within 28 days of the date that the judgment was handed down. An issue then arose in correspondence between HPII and the First Defendant, while the minute of order was being drawn up, as to the timing of the provision of fortification relative to the timing of HPII's provision of security.

25. HPII argued that the order should specify that the First Defendant's fortification be provided "first in time" – within 14 days of the date of the order – i.e. before the deadline which had been specified for HPII to provide security for the First Defendant's costs. The argument was advanced on two related grounds:

(1) Where the Court considers that the "price" for the interim relief sought should be that an applicant be required to provide a cross-undertaking (as here), should the applicant fail to provide that cross-undertaking it would follow that the order would not be made. In the event, the Court accepted the Defendants' undertakings and the order was made. The Judge also held that HPII had made out, as at the hearing of the application, its case for fortification of the First Defendant's cross-undertaking: it had shown that there was a real risk of loss being caused to it by the making of the order (i.e. the costs, assessed in light of the information available at the time, that would likely be associated with raising security for the First Defendant's costs). HPII therefore submitted that, as a matter of principle, the requirement for it to put up security – failing which its claim against the First Defendant would likely have fallen to be stuck out – should only "bite" in the manner described after the First Defendant has first been required to provide, and has in fact provided, his fortification.

(2) As a matter of practicality and fairness, it was also argued that fortification should come first in time. As mentioned above, it was argued that should the First Defendant fail to

[5] See a very useful discussion of the all the case law concerning this question in the recent decision of Waksman J in *Industrial and Commercial Bank of China Ltd v Ambani* [2020] EWHC 272 (Comm) at [9]-[35].

provide fortification within 14 days of the order, then HPII should not have been required to provide security for his costs at all, and nor should it have to be put to any more additional expense in taking steps to arrange the raising of that security. In short, the mechanics of the order should have functioned to put HPII in a position to know with certainty, ahead of the deadline, how much security it would ultimately be required to provide by the deadline. Within 28 days, would HPII have to put up £3M worth of security in respect of both Defendants' costs? Or just £1.8M worth of security in respect of the Second Defendant's costs? The latter was clearly a far more achievable task. Moreover, were the Court to order HPII to put up security first, with the First Defendant's fortification to follow (as the First Defendant was advocating), an entirely conceivable but unsatisfactory scenario was capable of playing out where, for instance (a) HPII raises security at considerable expense to itself, but (b) the First Defendant then fails to provide fortification, and then (c) HPII is subsequently deemed entitled to recover from the First Defendant the costs it incurred in raising security, pursuant to the cross-undertaking. Given the lack of fortification, there would in those circumstances be a real likelihood that HPII would stand to recover nothing from the First Defendant such that it would in fact ultimately suffer the very loss which was foreseen and which the fortification was intended to guard against in the first place.

26. The First Defendant argued that the order should require him to provide his fortification at a time after the date on which HPII provided security – specifically, within 28 days of security being provided by HPII. He argued that it could not be right for security to be made conditional on the provision of fortification for the following reasons –

(1) It would be wrong to impose a more aggressive deadline on the First Defendant to provide fortification for his cross-undertaking than the 28 days in which HPII had to provide its security for the First Defendant's costs in any event.

(2) Fortification is only relevant to the question of any loss flowing from the provision of security. There can be no question of loss prior to the date on which security is provided, and so HPII should be required to provide security first, rather than subverting the proper order of payments.

(3) The First Defendant's approach would be consistent with that where the Court grants a freezing injunction: the application is granted and the applicant immediately has the benefit of the freezing injunctive relief, with fortification following thereafter.

27. The above arguments on behalf of the relevant parties were put to Mr Justice Butcher on paper only – in brief written submissions on the form of order – and so were perhaps not tested to any great degree. For the benefit of the analysis in this article, the writer makes the following points about the First Defendant's arguments set out above –

(1) As to the argument that it would be wrong to impose a more aggressive deadline of 14 days on the First Defendant to provide fortification: it was open to the First Defendant to request a lengthier deadline for him to put up his fortification. However, the knock-on effect should then have been that HPII would in turn be given more time to provide security for the First Defendant's costs. That would be justified in circumstances where HPII had made out its case for fortification. The shortness of a deadline does not of itself provide a reason for fortification coming second in time.

(2) As to the argument to the effect that fortification is only relevant to loss flowing from the actual provision of security, such that ordering fortification to come first would subvert the proper order of payments: with respect, fortification is aimed at giving respondents protection from loss which flows *from the making of the order*. It is by no means the case that there can be "no question of loss prior to the date on which security provided" – it is precisely the additional expenditure which the respondent is put to in arranging for the security to be put up, as well as the costs of that security itself (e.g. a premium payable on a deed of indemnity), that fortification will in the majority of cases be addressing and securing for. That kind of expenditure is not necessarily incurred only after the provision of security; it will very often be incurred at time prior to the provision of security (e.g. the benefit (and thus the security) associated with a deed of indemnity will usually not be available until after the premium is duly paid). Such expenditure, which is antecedent to the actual provision of security, certainly flows from the making of the order – and so is an appropriate subject of fortification. Clearly, expenditure caused by the order and the provision of security might *also* be continuing or prospective in nature and so could fall to be secured-for by way of fortification as well (e.g. further or additional borrowing charges, or staggered premium payments, falling due after the initial provision

of security). Nonetheless, there is no necessary "subversion" in the proper order of payments where fortification comes first in time.

(3) As to the argument that fortification coming second in time would be consistent with the approach taken by Courts in freezing injunction cases (where the remedy comes first and fortification, where it is ordered, often then follows at a later date): it is respectfully suggested that this is not a sound comparison –

(i) A freezing injunction is a very different kind of remedy to an order for security for costs; an applicant for a freezing order has to meet a very different legal test than an applicant for security for costs; and, most importantly, the interests being protected by a freezing injunction are markedly different to those being protected by an order for security for costs.

(ii) Given that in successful freezing injunction applications it is shown to the satisfaction of the Court that there is a real risk of dissipation of assets, it is of course sensible that the injunction should, in the great majority of cases, come first and with immediate effect – with the question of fortification of a cross-undertaking either being argued about later, or with fortification being ordered to be provided at a later time (albeit often in short order). By contrast, there are usually no such urgent considerations in security for costs applications; the reason for the application is fundamentally different.

(iii) In any case: seeing as the availability of an injunction, and the quantum and timing of fortification, are matters within the judge's discretion – it does not follow as a matter of necessity that a judge would or should always grant a freezing (or indeed any type of) injunction before requiring fortification of a cross-undertaking. There may well be circumstances in which it would be appropriate for a judge to condition the granting of an injunction upon the prior provision of fortification, or alternatively to grant the injunction on terms requiring fortification to be paid immediately.

(iv) Further, in many freezing injunctions cases, the losses likely to be occasioned by the making of the order will be suffered at some time in the future; it is not invariable that such losses will be suffered in the short or immediate term. Nor is

it always the case that the losses likely occasioned by the injunction will be readily foreseeable, ascertainable or estimable as at the date the injunction is sought and/or granted. This is another reason why it is not more fundamentally objectionable, in injunction contexts, to either deal with the question of fortification at a later date (once the likely effects of the injunction are more appreciable), or to require the payment of the fortification ordered at a time after the granting of the injunction. Contrastingly, whilst orders for security for costs are rarely made on terms that the respondent must put up security immediately, respondents are often required to put up security in very short order. In the instant case HPII was ordered to put up £3M worth of security in just 28 days. The expenditure associated with the provision of security is therefore in most cases proximate indeed to the making of the order. Where fortification of a cross-undertaking has been ordered by the Court, in a security for costs context, at the hearing of the application, it will be the case that the respondent has made out a good arguable case that in order to abide by the order for security it will likely have to incur a certain amount of expenditure; and it will be the case that (given the likely deadline that will be imposed on it to raise security) such expenditure will likely have to be incurred in very short order. It is that expenditure which fortification is intended to provide security for. Accordingly – if it is not to be toothless – fortification should, in the vast majority of cases, come first in time.

28. In the event, Mr Justice Butcher directed that the provision of security and the provision of fortification should take place simultaneously – i.e. both within 28 days of the date of the order.

29. No judgment or reasoning was given by the Judge for that direction: as mentioned above, His Lordship did not have the benefit of hearing developed oral submissions on the point. Whilst at first blush this direction might appear to be a "happy medium" or middle ground between the parties' respective positions, it is respectfully suggested that requiring provision of fortification simultaneously with the provision of security is, unfortunately, just as problematic as requiring the provision of fortification to be made subsequently to the provision of security – for all the reasons given above.

30. The conceptual difficulty caused by the requirement for simultaneous provision of fortification and security was in this case also highlighted by the fact that it sat very uneasily alongside another part of the order which expressly provided that should the First Defendant fail to provide fortification of his undertaking in accordance with the deadline, HPII would be permitted to apply on notice for an order to vary or set aside the order that required it to provide security for the First Defendant's costs. By the time HPII would be in a position to apply to vary or set aside the order requiring it to provide security in respect of the First Defendant's costs, the damage would already have been done. A very significant amount, if not all, of the expenditure involved in raising the security required would need to have been incurred by HPII by the deadline, because the alternative would entail HPII running the risk of (a) having its claims against the First Defendant struck out for failure to provide security on time, and/or (b) the Court refusing any application which might be made, before the deadline, to extend time for the provision of security for the First Defendant's costs, due to a lack of evidence that HPII had been proactive in making the appropriate arrangements. Simultaneity therefore meant that the expenditure associated with raising security would have to be incurred by HPII *before* it could ever be in a realistic position to assess whether to apply to vary or set aside the order for security due to the First Defendant's failing to provide fortification. HPII was thus left in the "catch-22" of needing to incur the expense of arranging for the provision of security before knowing whether it could apply for an order relieving it from having to incur that very expense. That is deeply unsatisfactory, and defeats the purpose of an order for fortification in this context.

31. It is accordingly submitted that, in security for costs cases, to require an applicant (who gives, as a condition of the order for security for costs being made in the first place, a cross-undertaking of questionable value) to provide fortification of its cross-undertaking at the same time as (or after) the respondent's provision of security for costs fundamentally undermines the purpose and function of fortification in these circumstances, and denudes an order for fortification of much of its practical value.

32. To conclude: where fortification is successfully sought at a time prior[6] to the deadline that has been imposed upon the respondent to provide security for costs, it is difficult to see any justification for the proposition that an order against a respondent for security for costs should not be made conditional upon the prior provision by the applicant of that fortification. Where such fortification is ordered, in most cases the applicant should be given a reasonable time to provide it. Where such fortification is provided, the respondent should then be afforded a reasonable time to provide security for the applicant's costs. Where such fortification is not provided, the respondent should not be required to provide security for the applicant's costs at all (subject to any variation or extension which may be obtained by the applicant).[7]

33. It remains to be seen whether the Court will – in future security for costs cases where fortification of cross-undertakings is ordered at a time prior to the deadline for the giving of security – continue to adopt this "simultaneity of provision" approach. For the reasons given above, it is suggested that such an approach would be a step in the wrong direction.

SAMUEL HODGE

April 2020

ENTERPRISE CHAMBERS

Representation at the hearing of the applications for security for costs:

Mr PJ Kirby QC, Mr James Pickering, and Mr Samuel Hodge on behalf of the Claimants (instructed by Spring Law)

Mr George Spalton on behalf of the First Defendant (instructed by Fortuna Law)

Mr David Lord QC, and Mr Stephen Ryan on behalf of the Second Defendant (instructed by Richard Slade & Co)

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[6] e.g. at the hearing for the security for costs application itself (or at least by way of an application made a good time before the initial deadline for the respondent to provide security)

[7] Of course, a host of different considerations would come into play where, for instance, a party has already been ordered to provide, and has provided, security for costs, but then subsequently applies (a) for further or additional fortification to be ordered; (b) for a cross-undertaking to be required of the applicant for security for costs who had not previously been required to give one (and possibly for fortification of the same); and/or (c) for fortification to be ordered in respect of a cross-undertaking which had been required/given but had not previously been ordered to be fortified (either where fortification was not initially sought at all, or where it was sought but not successfully obtained). A discussion of the principles and practical considerations that would be relevant in such circumstances is outside the scope of this article.