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# Security for costs: a lottery or an established well-honed process which protects Defendants from opportunistic and impecunious Claimants?

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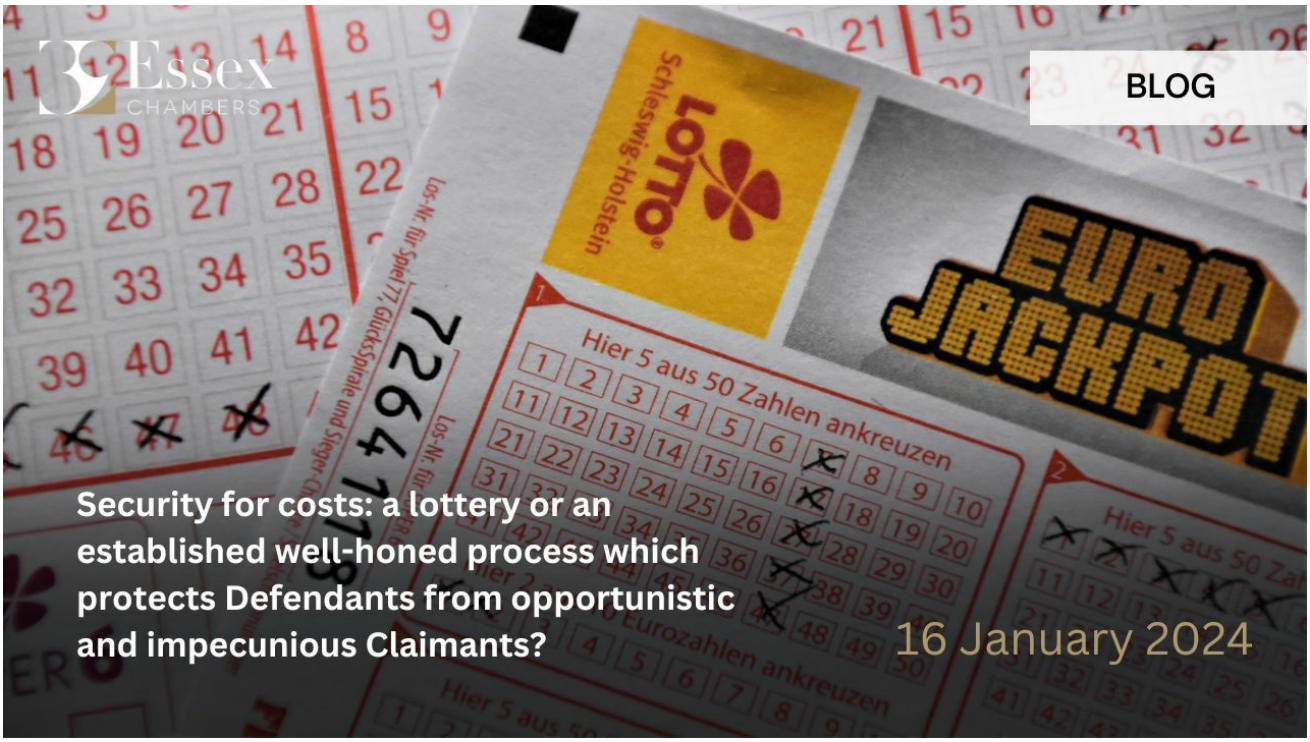


In a climate where the financial position of parties to construction litigation is increasingly precarious, it is worth revisiting the principles upon which security for costs may be granted by the Court.

The lot of the defending party in construction litigation brought by an ostensibly impecunious claimant can be downright precarious. Practically, there are two choices: either try and settle the claim for a nuisance payment or, dig in and seek security for costs coupled with an order to stay the proceedings pending payment. If it is successful, while not really amounting to "job done", either the future costs of the proceedings are secured, or the security is not paid by the claiming party, and the proceedings are stayed by the Court.

This issue came before the TCC recently in the case of Bend Weld Engineering SDN, BHD ("BWE") and FMC Technologies Limited ("FMC") [2023] EWHC 2782 (TCC). The judgment is that of Mr. Roger Ter Haar KC, sitting as a Deputy High Court Judge. The claim was brought by BWE, a Malaysian company that manufactures and supplies metal components, against FMC, a company that specializes in industrial manufacturing. FMC's business includes the construction and/or management of the metal

structures required for offshore petroleum and natural gas extraction. Through a series of contracts FMC engaged BWE to fabricate and supply metal structures for use in its offshore and gas projects. In its claim, BWE alleged that FMC wrongfully terminated all open purchase orders and failed to pay invoices due. The claim for unpaid invoices was US$85,968; for wrongful termination of purchase orders it was US$1,496,459.33, and for storage charges for the cancelled structures it was US$144,000.

BWE's claim was met with a swift demand for security for costs from FMC.

As a reminder: an application for security for costs may be made under CPR Part 25.12(1) by a defendant to any claim (this includes counterclaims or other additional claims). By ss(2) the application must be supported by written evidence. By ss(3), where the Court makes an order for security it will determine the amount and direct the manner and time within which it is to be provided.

By Part 25.13, the conditions under which the Court may make an order for security for costs under rule 25.12 are that (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (b) (i) one or more of the conditions in paragraph (2) applies, or (ii) an enactment permits the Court to require security for costs.

The test is therefore twofold, firstly that the Court is satisfied that it is just to make the order, and secondly, one or more of the conditions in ss2 or an enactment permits the court to order security. These preconditions are matters of fact and not discretion: see Infinity Distribution Ltd (In Administration) v Khan Partnership LLP [2021] EWCA Civ 565; [2021] 1 W.L.R. 4630 at [30], Nugee LJ**.** The same case makes clear that security cannot be ordered solely because one or more of the conditions in r.25.13(2) is made out. It can only be ordered if, having regard to all the circumstances of the case, the Court is satisfied that it is just to do so.

The conditions mention in Part 25.13(2) include under (a): that the claimant is resident out of the jurisdiction… and, (c): that 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.

As far as the conditions are concerned, in this case it was accepted that BWE was resident outside the jurisdiction. The controversy therefore, as is so often the case in applications engaging questions about the ability of a company to pay a defendant's costs if ordered to do so, was whether, when the time came, it could be demonstrated that there was reason to believe that the claimant would be unable to pay the defendant's costs. A relevant question in this analysis is the likely quantum of those costs.

On the basis of BWE's accounts to 30 June 2022, it had made a pretax loss of £0.6m; in addition to a pre-tax loss of £0.46m the previous year, and was being supported by a cash loan of £0.7m from a holding company. It had cash of £42,000. In pre-hearing correspondence, BWE had accepted that in principle it should provide security for costs. It asked for FME's projected costs which were provided in the form of a draft precent H costs budget that amounted to £800,223.

BWE's approach to the information provided was to assume recovery of standard rate costs at 65% of the estimate, and additionally to reduce the costs by a further 2/3 to excise those referrable to FME's intended counterclaim. The sum offered by BWE as security was £141,135.21.

FME sought to cut through the quantum, and increase the security, by recasting its estimate of costs to deal with costs only up to and including the CMC, at which hearing, if the Parties had not agreed them, the Court would assess the Parties' costs budgets. FMC sought £162,078.40 for this period or, if the Parties disagreed, such proportion of this sum that the Court decided. Its costs were calculated to recover as security: 80% of incurred pre-action costs; 100% of issue/statement of case costs, and 100% of CMC costs. BWE countered offering: 35% x 65% of the pre-action costs, 33% x 65% of the issue/statement of case costs; and 35% x 65% of the CMC costs – in total £39,660.63.

Before the Court, the Parties' cases on the amount of security remained polarized as above. However at the hearing, BWE also challenged FMC's entitlement to any order for security for costs.

FME accepted by reference to authorities that the onus was on the defendant applicant for security to justify by its evidence, its assertion that there was reason to believe that the claimant will not be able to pay the ordered costs. Evidence which gave rise only to a doubt or which showed that the claimant might be unable to pay was not enough. Moreover, the enquiry was not about the claimant's current inability (unless the order was imminent) to pay the defendant's costs but an order made at some future time, often after the trial.

While the burden of proof was on the defendant, the position was that if the defendant established legitimate concerns, and those concerns were not addressed in evidence from the claimant, the court may be justified in concluding that the test was satisfied.

Having assumed in its application that BWE accepted the principle that security should be given, FMC's evidence in support of its application did not include evidence of entitlement. The basis of BWE's challenge was that FMC's application failed to include the necessary evidence to support its claimed entitlement to security for costs. BWE also questioned the relevance of June 2022 accounts to the assessment of BWE's likely financial position at the end of the trial, which might be mid-end 2025. It also cited FMC's failure to pay BWE's invoices and its cancellation of the purchase orders, as well as its loss of custom from FMC or companies in the FMC Group as contributing factors to its poor financial position in 2021 and 2022. It also provided further details of ongoing parent company finance supporting BWE as a going concern.

Analysing the evidence, the Court concluded that it was satisfied that BWE would be unlikely to be able to satisfy an order for costs in FME's favour at the relevant time. It cited BWE's own admission that it did not itself have funds to pay even its own costs of the action, that its [cumulative] financial position was worse than in June 2022, and that it was reliant on a loan from and the support of its holding company.

As far as the counterclaim for approximately US$2million was concerned, the Court applied the principles cited in Explosive Learning Solutions Ltd v Lanmark support Services Ltd [2023] EWHC 1263 (Comm), paragraphs 20-24 and 37-40. Thus the starting point, as summarized by Moore-Blick LJ inAnglo Irish Asset finance Plc v Flood [2011] EWCA Civ 799 was that *"…if the claim and counterclaim raise the same issues… it will not usually be just to make an order for security for costs in favour of the defendant, although the court must always have regard to the particular circumstances of the case."*

However, the fact that there is a claim and a counterclaim arising out of the same or substantially the same facts, does not mean that the Defendant must be denied security for costs: Jones v Environcom Ltd [2009] EWHC 16 (Comm). Further, where it is established that the Defendant would not have advanced its counterclaim but for the proceedings brought by the Claimant, and/or has undertaken that, in the event of the dismissal of the claim as a result of the claimant's failure to provide security, it will consent to the stay or dismissal of the counterclaim, these factors help dispel reservations about the justness of making an order.

Applying these principles and caveats to the facts, the Court declined to order BWE to provide security for the costs incurred prior to the start of the proceedings but concluded that it was appropriate to order security for the costs of the proceedings from commencement up to the CMC. It opined that the contemporaneous correspondence showed that the Defendant's concerns were not merely defensive but also focused on a positive case/counterclaim. It was therefore difficult to conclude that FMC's pre-action costs were being incurred substantially for its defence.

Interestingly, the Court also questioned the basis for an order of security for costs already incurred before proceedings have been started? Without the claim, there would be no legal mechanism for their recovery; they were not costs of defending the proceedings. Moreover, in the context of a case where the defendant is considering bringing a claim of its own, it considered that those pre-commencement or "sunk" costs should fall outside the remit of a security for costs order.

The Court quantified the security for the costs claimed from security up to the CMC as claimed in the Defendant's Precedent H estimates on the basis that it considered they were not unrealistic.

I see two clear takeaways here, firstly a more realistic approach to the provision of security notwithstanding

the presence of a counterclaim, and secondly, much less ability to reduce the quantum of the security in the era of costs budgeting in the TCC.

## Key points

- Using security for costs to check opportunistic but impecunious claimants.
- The importance of keeping in mind the “justness” of the case for security.
- A more refined approach to applications for security for costs.
- What needs to be established by the applicant for security for costs.
- Security for costs may be available even if you have a counterclaim.
- A new approach to quantification of security for costs?
- Sweeping away arbitrary reductions in the quantum of recoverable costs.
- The impact of costs budgets on the amount of security.

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