Neutral citation [2023] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1533/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 March 2023

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL BUYERS GROUP LIMITED

Claimant

- v -

(1) ASSOCIATED LEAD MILLS LIMITED
(2) ROYSTON SHEET LEAD LIMITED
(3) INTERNATIONAL INDUSTRIAL METALS LIMITED
(4) H.J. ENTHOVEN LIMITED
(5) ECO-BAT TECHNOLOGIES LIMITED

Defendants

Heard at Salisbury Square House on 23 March 2023

RULING (SECURITY FOR COSTS)

APPEARANCES

Owain Draper (instructed by TupperS Law) appeared on behalf of the Claimant.

David Went (instructed by Hill Dickinson LLP) appeared on behalf of the First and Second Defendants.

Tim Johnston (instructed by White & Case LLP) appeared on behalf of the Fourth and Fifth Defendants.

A. INTRODUCTION

1. By its decision in Case 50477 – *Roofing materials* dated 4 November 2020 ("the Decision"), the Competition and Markets Authority ("CMA") found that major rolled lead suppliers had committed four infringements of the prohibition imposed by section 2(1) of the Competition Act 1998 and/or Article 101(1) of the Treaty on the Functioning of the European Union. The current proceedings relate to the first of the four infringements found, which is defined as the October 2015 Infringement in the Decision.

2. The October 2015 Infringement was found to constitute an agreement and/or concerted practice between Associated Lead Mills Limited ("ALM", the First Defendant), Royston Street Lead ("JML", the Second Defendant) and H.J. Enthoven Limited (trading as BLM British Lead, "BLM", the Fourth Defendant). International Metal Industries Limited ("ILM", the Third Defendant) is the parent company of ALM and JML, but is in liquidation and has not been served with the proceedings. Eco-Bat Technologies Limited ("Eco-Bat", the Fifth Defendant) is sued as the parent company of BLM. For convenience I will label the First and Second Defendants as ALM and the Fourth and Fifth Defendants as BLM for the purposes of this Ruling. The Defendants were all parties to a settlement with the CMA under which they admitted the four infringements, including the October 2015 Infringement.

3. The October 2015 Infringement was directed at the Claimant, Commercial Buyers Group Limited ("CBG"). CBG claims that as a result of withdrawal and refusal of supply of rolled lead by ALM, BLM and Calder Industrial Metals Limited ("Calder") who together supplied approximately 90% of the UK market for rolled lead, it ceased to trade. CBG's business plan or model was wholly dependent upon it being able to source rolled lead from the UK. CBG's business plan was for it to broker deals with building contractors needing rolled lead as roofing materials to be supplied via a merchant customer of the relevant supplier (such as ALM and BLM) for general contractor purchases. As regards artisan sales of rolled lead these deals were to be entered directly with the supplier.

4. Mr Saul Treherne was a director of CBG at the relevant time and he was the person with the contacts and experience in the industry to pursue the business plan. Prior to joining CBG, Mr Treherne was employed by ALM. On 12 December 2016 he resigned his directorship and on 8 August 2017 CBG was dissolved. The other director was Jeremy Turner. The shareholders of CBG are Mr Treherne and Mr Turner. No doubt with a view to bringing proceedings to recover damages arising from the collapse of CBG, on 18 June 2020 CBG was restored to the Companies Register on the application of Mr Turner as member and director. Mr Turner has yet to be billed and pay for the solicitors costs of the restoration of CBG.

5. On 29 September 2022 CBG issued its Claim Form with Particulars of Claim against the Defendants. The claim is a follow-on damages claim within the meaning of Section 47A of the Competition Act 1998 ("the Act"). On 7 February 2023 ALM filed its Defence and BLM filed its Defence on 7 February 2023. There appears to be no dispute that the October 2015 Infringement occurred. However it is said the October 2015 Infringement was of very short duration, it did not cause the losses alleged and in any event the losses are time barred.

6. The current claim in terms of the amount of damages sought is small in comparison with most cases coming before this Tribunal. The claim is at best around £750,000 and so I must contemplate that even if successful CBG may be awarded damages anything up to but maybe significantly less than that sum. On the other hand the anticipated costs of these proceedings if they go to trial will significantly exceed the maximum claim, and I will need to separately assess the proportionality of the provisional budgets provided, especially those of ALM and BLM. The costs budgets of the parties reveal the following anticipated costs to trial:

   (1) CBG £434,350

   (2) ALM £858,744

   (3) BLM £809,039.37

7. In this first Case Management Conference ALM and BLM seek security for costs. ALM's application was filed by letter from Hill Dickinson dated 3 March 2023 and supported by the witness statement of Robert Campbell, ALM's solicitor. ALM seeks £400,000 by way of security. BLM's application was taken out on 3 March 2023 and is supported by the witness statement of Marc Israel of White & Case, BLM's solicitor. BLM seeks £100,000 by way of security (or such other sum as the Tribunal may consider appropriate). Both applications rely on the fact that CBG is a limited liability company without any or any significant assets and exists in effect solely for the purposes of bringing these proceedings. They are concerned that if they are successful in their defence of these proceedings they will end up bearing the costs of the proceedings as CBG will not be in a position to meet any adverse costs order.

8. CBG accepts that there is jurisdiction to order security for costs, but contends that the application should be refused. Whilst CBG does indeed lack assets and the ability to honour any substantial order for costs, it is contended that the effect of any order for security would stifle the claim. The proceedings are being conducted with the benefit of a conditional fee agreement with TupperS Law precisely because CBG lacks the funds to bring these proceedings which have a strong prospect of success given that the October 2015 Infringement is admitted. Neither Mr Treherne nor Mr Turner appear to have the funds available to provide security. Neither is willing to advance funds for CBG to provide security for costs if it is ordered. To date they have provided no funding at all for the proceedings, even for the pre-action stage (apart from Mr Treherne paying some limited administration costs). After the event ("ATE") insurance and funding from a litigation funder is simply not available in a small claim like the present where the costs are so high relative to any likely or claimed damages. The evidence in opposition to the applications is set out in the witness statements of Mr Treherne and Stephen Tupper, CBG's solicitor, dated 13 March 2023.

9. In dealing with this application I have read and taken account of the witness statements of all the parties as well as the written and oral submissions before me.

B. THE LEGAL FRAMEWORK

10. Applications for security for costs are governed by Rule 59 of the Competition Appeal Rules 2015 ("the Rules"), which provides as follows:

> "**Security for costs**
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> 59.—(1) A defendant to a claim may seek security for its costs of the proceedings.
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> (2) A request for security for costs shall be supported by written evidence.
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> (3) Where the Tribunal makes an order for security for costs, it shall—
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> (a) determine the amount of security; and
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> (b) direct—
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> (i) the manner in which, and
>
> (ii) the time within which,
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> the security must be given.
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> (4) The Tribunal may make an order for security for costs under this rule if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and—
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> (a) one or more of the conditions in paragraph (5) or, as the case may be, paragraph (6) applies; or
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> (b) an enactment permits the Tribunal to require security for costs.
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> (5) Where a defendant seeks security for costs against the claimant, the conditions are that—
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> (a) the claimant is—
>
> (i) resident out of the jurisdiction; but
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> (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(b); (a) OJ No L124 20.05.2003 p.36.
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> (b) the claimant is a company or other body (whether incorporated in or outside the United Kingdom) 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 its address since the claim was commenced with a view to evading the consequences of the litigation;

(d) the claimant failed to give its address in the claim form, or gave an incorrect address in that form;

(e) the claimant is acting as a nominal claimant, other than under section 47B of the 1998 Act (collective proceedings) (a), and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(f) the claimant has been authorised to act as the class representative in collective proceedings under rule 78 and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

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

(6) Where a defendant seeks security for costs against someone other than the claimant, the conditions are that the person—

(a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against the person; or

(b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings,

and is a person against whom a costs order may be made."

11. The applications against CBG undoubtedly satisfies one of the conditions in Rule 59(5) in that CBG is a company and there is reason to believe that it will be unable to pay the defendants costs if ordered to do so (condition (b)). The real issue is whether the Tribunal should order security and if so in what amount as a matter of discretion. It is appropriate to decide first whether or not it is appropriate to order security. If I decide it is appropriate, then I should then go on to consider the amount and form of security.

12. As to the circumstances which the Tribunal may take into account, these are set out in paragraph 5.158 of the Guide to Proceedings 2015 ("the Guide") which provides as follows:

"5.158 The Tribunal will only order security for costs if it is just to do so in the circumstances of the case. Amongst the circumstances to which the Tribunal will have regard are: (a) whether it appears that the application is made in order to stifle a genuine claim, or would have that effect; (b) the stage of the proceedings at which the application

> is made and the amount of costs which the claimant has incurred to the date of the application; (c) the claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the defendant's infringement; (d) the likely outcome of the proceedings and the relative strengths of the parties' cases if that can be discerned without prolonged examination or voluminous evidence; (e) any admissions by the defendant and, for example open offers - but the defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and (f) the provisions in the Tribunal's rules as to orders for costs: see BCL Old Co v Aventis [2005] CAT 2, at [27]."

13. Contested applications for security for costs are not a regular feature of hearings before the Tribunal, and it is rarely ordered. For example security for costs was refused in *BCL Old Co Ltd v. Aventis SA* [2005] CAT 2, *2 Travel Group Plc v. Cardiff City Transfer Services Ltd* [2011] CAT 30 and *Albion Water Ltd v. Dwr Cymru Cyfyngedig* [2013] CAT 10. The mere fact that security for costs has usually been refused by the Tribunal where security for costs has been contested in itself is not a good reason for refusing a properly founded application for security.

14. *BCL* like the present case was a follow-on damages claim under Section 47A of the Act. In that case, despite the likelihood that BCL would be unable to satisfy any adverse costs order, the Tribunal refused to order security. In *BCL* the Tribunal set out the circumstances which the Tribunal will have regard at [27] in terms which are now incorporated into paragraph 5.158 of the Guide.

15. The Tribunal notes that this specialised jurisdiction under Section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered as a result of infringements of domestic or European competition law (*BCL* at [28]).

16. In *BCL* it was not suggested that to order security would stifle the claim, not least because the ultimate parent company of BCL was a FTSE 250 listed company. However in refusing security the Tribunal took into account the merits of the case, under which the claimants appeared to have a strong case subject to an untested pass-on defence. The Tribunal ultimately found that BCL

should not bear the financial risk on the various issues. In particular, the Tribunal reasoned at [39]-[43]:

> "39. However, one question relevant to security of costs in the present case seems to us to be which of the parties should take the financial risk on these various issues. In the circumstances of this case and having regard to the submissions of the parties, we do not consider that the financial risk should be taken by the Claimants, as far as security for costs is concerned.
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> 40. It was submitted to us by the Defendants that this Tribunal's jurisdiction to order security for costs under Rule 45 applies only to damages claims under section 47A and, accordingly, must be available in principle to a party who has been found to infringe the competition rules. We accept that submission. However the question which the Tribunal must consider on a security for costs application in any particular case is the risk of the Defendant securing a costs order in its favour, and then being exposed to an impecunious Claimant not being in a position to comply with the terms of that order. In cases under section 47A not involving a possible passing on defence that will not be the position since the Claimant will be entitled to an order of damages. The issue before the Tribunal will only be as to quantum. The Defendants will not, in those circumstances, normally be entitled to costs, subject to special factors such as to payments into court, or unreasonable or vexatious conduct in the part of the Claimants. No such considerations arise in the present case.
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> 41. There may be cases where the Defendants can show that the claim for damages is plainly vexatious or very unlikely to succeed. In those circumstances the Defendants may be able to satisfy the Tribunal that a costs order in its favour would be a likely outcome and that it would be just to make an order for security for costs. Again, this consideration does not apply here. Although the Defendants put the amount of the damage in issue, it could not be reasonably suggested that, apart from the passing on defence, the Claimants have suffered no loss.
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> 42. Bearing the foregoing in mind, we are not satisfied, having regard to all the circumstances of this case, that it is just to make an order for security for costs in favour of the Defendants.
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> 43. The essential reason is that, at this stage of the proceedings, we are unable to be satisfied that there is a substantial likelihood that the Defendants may in due course benefit from a costs order in their favour. On the contrary, the Claimants' have, at first sight, a good claim, and the only reason for awarding costs against the Claimants would be if it were established that, in law, "passing on" was a good defence, that the defence applied to the facts of this case, and that in those circumstances the Claimants' damages were properly to be reduced to nil or a very low figure. Moreover, the Tribunal has not yet decided how its ultimate jurisdiction to award costs under Rule 55(2) is likely to be exercised. In these circumstances we consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the Defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the Claimants in whose favour liability is, at least prima facie, established."

17. In *2 Travel Group*, the Tribunal refused to order security having found that the effect of accepting the application would have been to stifle a genuine claim. CBG relies on that case and the stifling point in resisting the applications. Further the Supreme Court in *Goldtrail Travel Ltd v Aydin* [2017] UKSC 57, [2017] 1 WE.L.R. 3014 at [15] and [18] to [24] gave some guidance as to what would amount to stifling in circumstances where the claimant's shareholder may be able to provide funding but would not do so. In *2 Travel Group*, it was common ground that the principles listed by Peter Gibson LJ in *Keary Developments Ltd v. Tarmac Construction Ltd* [1995] 3 All ER 534 were relevant. Peter Gibson LJ said

> "1. As was established by this court in Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
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> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v Naydler [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).
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> 3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] All ER 531 at 537, [1977] 1 WLR 899 at 906).
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> 4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of

the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can 6 properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal. However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see Flender Werft AG v Aegean Maritime Ltd [1990] 2 Lloyd's Rep 27). …

7. The lateness of the application for security is a circumstance which can properly be taken into account (see The Supreme Court Practice 1993 vol 1, para 23/1-3/28). But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."

18. In deciding whether or not ordering security is just in all the circumstances in cases where stifling is an issue, it is necessary to carry out a balancing exercise between the potential injustice to the claimant if prevented from pursuing a proper claim by an order for security, and the potential injustice to the defendants if no security is ordered and the defendants are unable to recover costs from the claimant.

C. THE PARTIES' SUBMISSIONS

19. The Defendants submit that an order for security for costs is appropriate for the following reasons:

(1) There is no dispute that CBG will be unable to pay the Defendants' costs, if ordered to do so and substantial damages are not awarded. This is a case where the costs of defending the claim is likely to be in the order of the value of the claim itself. They contend that there is insufficient evidence as to the financial position of the shareholders of the Claimant company so that the burden of proof placed on the Claimant to evidence that security would stifle a genuine claim has not been discharged.

(2) The Tribunal at this stage is unable to form a view on the strength of CBG's claim and should not proceed on the basis that any award of substantial damages is likely. The claim is disputed on the basis of liability (not merely quantum), which claim is weak from a causation perspective such that the Claimant is not impecunious as a result of the Defendants' actions. Notwithstanding the infringement, the Defendants otherwise legitimately did not want to supply an intermediary which would supply to contractors directly as this would be disruptive to their relationship with existing merchant customers and commercial interests generally. In the application of ALM it is contended that the Defendants have a strong defence and the claim is at best an ambitious one.

(3) In the absence of any findings in relation to the effects of the infringement in the Decision, CBG never would have traded successfully with the Defendants as its business model was contrary to their commercial interests. CBG could have traded with other third parties and indeed did so with Calder until late 2016. CBG in fact traded until early 2017 and other sources of rolled lead supply were available. No other company has entered the market operating CBG's business model.

(4) The Defendants argue that it is just, having regard to all the circumstances, to order security. They stress that the application has been made in a timely manner and the application is not made to stifle the claim. It is submitted that the lack of costs exposure would create a profound imbalance between the parties, whereby there is no incentive on CBG to settle and it is not commercially rational for the Defendants to defend the claim. Whilst it may be that CBG has been unable to now find acceptable ATE cover, that may be due to the failure of CBG to explore the options as to funding and ATE insurance before launching the claim.

20. CBG submits that the Tribunal in its discretion should dismiss the applications for the following reasons:

(1) CBG has a strong case on the merits in that the October 2015 Infringement is admitted and that infringement was specifically targeted at CBG. This is in the context where the anti-competitive objective of the Defendants was to starve CBG of supplies and, given that alternative sources of supply were low on the UK domestic market, that objective was achieved the with result that CBG exited the market and has only resuscitated now to pursue this claim and not resume trading.

(2) CBG is impecunious and such impecuniosity is attributable to the conduct of the Defendants. CBG does not have to prove that Calder, the third party to the Decision and these proceedings, participated in the infringement in order to succeed in the claim. Rather, CBG is alleging the unavailability of supply of rolled lead from the other supplier of only a few suppliers on the market was a further indirect effect of the Defendants' direct conduct. To order security would stifle a genuine follow-on claim to an infringement, similar to the situation considered in *Keary* and *2 Travel Group*, as was intended to be facilitated by section 47A of the Competition Act 1998.

(3) It has not been possible to secure litigation funding from a funding company or ATE insurance, not because of the lack of merits of the

claim, but because the costs are so high in relation to the amount of damages claimed or likely to be awarded. The proceedings are being conducted under a conditional fee agreement ("CFA") as CBG and its directors/shareholders were left with no substantial resources to fund any litigation. Mr Treherne has limited funds himself and Mr Turner is unable to work because of a serious cycling accident and his compensation fund needs to be maintained for his ordinary living expenses.

(4) In all the circumstances the just approach is to refuse security bearing in mind the merits, the stifling effect and the reasons for CBG's impecuniosity.

D. THE TRIBUNAL'S ANALYSIS

21. The intention of section 47A is to permit follow-on claims like the present where an infringement of competition law has been found by the CMA. The October 2015 Infringement has been admitted by the Defendants as part of the settlement with the CMA. The Tribunal should look with some scrutiny at security for costs applications which may have the effect of deterring, if not stifling, such claims for damages.

22. It is usually inappropriate to go into the merits of the underlying substantive dispute on an application for security for costs. To do so may simply add to the cost and complexity of what should be relatively short applications, in circumstances where early on in proceedings prior to disclosure and witness statements it may be difficult to expect the court to come to a considered or accurate view as to the merits. It is usually where the merits are strongly in favour of one party or the other that the merits are of significance in dealing with security for costs. In the present case both sides claim that the merits are strongly in their favour. Whilst I can say on the material before me, including the admitted October 2015 Infringement, the fact that it was specifically directed at CBG, it may well be that CBG is more likely than not to succeed in recovering some damages, I am unable to conclude that it has the level of high probability as argued by CBG. Thus it may well be that there is an adverse costs

order at the end of the day, even though I do not consider that is more likely than not. I appreciate that there are real issues as to causation and quantum of damages which need to be resolved at trial, and the nature of the issues is different to that in *BCL* where the defence centred on whether an untested defence of pass-on would succeed.

23. There is no dispute that the jurisdictional requirements for security for costs are met. CBG is a limited company with no significant assets apart from the present claim. If there is an adverse costs order it will not be paid.

24. I consider that any order of substantial security or indeed any sum other than a nominal amount will not be satisfied. I do not consider that CBG has any realistic source of funding. The shareholders are both unwilling to provide CBG with funds either to pursue the claim or to provide security. They say that they have put no funding into the current proceedings (other than Mr Turner paying for the costs of the restoration of CBG to the register and any necessary administration fees) and the costs are all covered by a CFA. Mr Treherne himself has no significant savings and only a modest income. He says that he is unable to fund the litigation personally. Mr Turner was the victim of a serious accident and is unable to work. Whilst there is a compensation fund, that is needed for his ordinary living expenses. This is not a case where a corporate claimant is being funded to pursue a claim by a third party or its shareholders who would hope to benefit from any damages awarded, but at the same time are unwilling to provide funds to secure or meet adverse costs orders. The only support that Mr Turner appears to have given to CBG since its initial dissolution has been incurring the costs of the restoration application, which he has yet to be billed for by his solicitors.

25. The shareholders/directors of CBG have not given details of their illiquid assets, including real estate, so what properties they own and any mortgages on them are not known. That said even if there is some real estate owned by them, I do not think it is reasonable to expect them to realise or borrow against their family homes or other property to fund security.

26. I do not consider that ATE insurance is likely to be available for a figure that is nothing other than at an unattractive or unaffordable rate. It is unclear what attempts were made to obtain such cover prior to the commencement of the proceedings, but enquiries since the security for costs applications were intimated resulted in a quote to cover the levels of security sought at an up-front premium of £168,000 together with a 50% share of any damages awarded. Exton, the broker, has informed TupperS Law that it is very unlikely that it would be unable to obtain commercially attractive cover. This is not surprising given the modest quantum of the claim and the relatively high costs on all sides.

27. In summary CBG does not have the funds to provide security for costs, nor are the two directors going to provide CBG with the funds to do so either, for wholly understandable reasons. Thus in my view to order security would stifle a genuine claim and this is an important consideration in determining the current application.

28. I also consider the fact that the October 2015 Infringement was allegedly directed at CBG is relevant. I cannot finally conclude that it was the Defendants' conduct that was the cause or sole cause of the downfall and impecuniosity of CBG as that is an issue for trial, but there is at least a good arguable case that it was. I therefore take that into account as a factor, but not as an overriding or conclusive factor.

29. I accept that the applications for security for costs have been made promptly and it is appropriate for such an application to be taken out prior to the first CMC and dealt with as part of that CMC. The costs are high relative to the likely quantum that may be awarded and this is particularly unsatisfactory for the Defendants. Even if they make an offer of settlement, there is in reality no costs sanction if CBG declines to take an offer and then loses at trial. There is some pressure on the Defendants to settle or seek settlement at least up to the level of their irrecoverable costs. The Defendants here are facing a claimant pursuing them with the benefit of a CFA, which is putting up none of its own money up front to fund the action, whilst the Defendants have no real prospect of recovering their costs even if they succeed in their defence at trial.

30. There are potentially two unsatisfactory outcomes. On the one hand the Defendants are exposed to the risk of and may end up with an unsatisfied costs order if they succeed at trial. On the other hand if security is ordered then CBG will be unable to pursue its claim for damages which it contends were caused by the Defendants. As to who should bear the risk, I consider it is appropriate that the Defendants do so, especially as the effect of an order for security would in effect lead to the end of the claim.

31. The applications for security for costs are dismissed.

32. The Defendants should pay the costs of and occasioned by the applications, but at a level which should take account of the fact that they are being heard as part of the CMC and hence the parties would have had to prepare and incur the costs of the CMC in any event. I summarily assess CBG's costs at £20,500 plus VAT (if VAT is payable by CBG), which also represents a fair allocation of their costs as between the security of costs applications and the CMC generally. The balance of their costs will be treated as part of the CMC with the result that such costs will be in the case. The Defendants are jointly and severally liable for payment of these costs within 28 days of this Ruling

Hodge Malek KC
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 23 March 2023