COURT OF APPEAL CONSIDERS TEST FOR SECURITY OF COSTS

Bestfort Development LLP & Ors v Ras Al Khaimah Investment Authority & Ors [2016] EWCA Civ 1099 (08 November 2016)

Introduction

In a decision handed down in *Bestfort Development LLP & Ors v Ras Al Khaimah Investment Authority & Ors* [2016] EWCA Civ 1099 (08 November 2016), the Court of Appeal considered the appropriate test for the granting of an order for security of costs, and the impact of Article 14 of the European Convention on Human Rights.

In the English legal system, the rule that applies is that the "loser pays" legal costs in civil proceedings. Sometimes a Claimant is ordered to provide "security for costs" at different stages of legal proceedings, so that, if it is the loser, the other side does not face obstacles in recovering its legal costs.

The test applied by the English Courts in deciding whether to order security for costs where all the claimants were non-EU residents was considered by the Court of Appeal in this case.

Legal provisions

CPR 25.13 provides for the provision of security for costs in certain circumstances:

Conditions to be satisfied

25.13

(1) The court may make an order for security for costs under rule 25.12 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)
(i) one or more of the conditions in paragraph (2) applies, or
(ii) an enactment permits the court to require security for costs.

(2) The conditions are –
(a) 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, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982[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;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

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

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

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

Background

The claimants/respondents in this case were various entities associated with the government of Ras Al Khaimah. The claims arose out of dealings between them and Mr Mikadze, a citizen of Georgia, in respect of property developments in Georgia. It was alleged that Mr Mikadze misappropriated large sums, with the claim against him being for US $42 million.

Security for costs pursuant to CPR 25.13 had previously been sought and refused, with the Master holding that the appropriate test was that "the court needs to be satisfied that there is likely to be an obstacle, or burden, to enforcement, by which is meant, in accord with paragraph 62 of Nasser, that there is likely to be a substantial obstacle, or burden, to enforcement, and that a real possibility that such an obstacle or burden might exist is insufficient." This reasoning was upheld on an appeal to David Richards J.

The present proceedings before the Court of Appeal comprised one appeal and one application for security for costs.

- The appeal was made by certain of the defendants against previous orders and decisions which had the effect of refusing to require the claimants (all of which were incorporated and resident outside the jurisdiction and the EU, and whose only assets were in Ras Al-Khaimah (UAE) and Georgia) to provide security for the appellants' costs of proceedings brought by the respondents/claimants against them and others.
- The application by the appellants/defendants was for an order requiring the respondents/claimants to provide security in the sum of £208,014.56 for the appellants/defendants' costs of the respondents/claimants' appeal against an order of Rose J dated 30 November 2015 dismissing the section 25 proceedings "or otherwise for a like order under CPR r 52.9 that such security be provided as a condition of allowing [the respondents/claimants'] appeal to proceed" .

The defendants/appellants' position before the Court of Appeal was that the relevant test was whether there was a *real risk* that it would be difficult or impossible to enforce an English cost order against a respondent. Conversely, the claimants/respondents argued that the test for the exercise of the jurisdiction to award security for costs to a defendant under CPR r 25.13.2(a) was one of *likelihood of significant obstacles to, or burdens of, enforcement;* "likelihood" in this context meant a balance of probabilities test; whilst it was accepted that, in an interlocutory context, finality of proof could not be established,

nonetheless an applicant for security had to demonstrate that it had "much the better of the argument" that there were *significant obstacles to, or burdens of, enforcement;* in other words, that meant that an applicant had to show, on the material before the court, that there was more than a 50% probability of there being such significant obstacles; or "very cogent evidence of substantial difficulty in enforcing a judgment in that other" state.

Decision

The Court of Appeal (Lady Justice Black, Lady Justice Gloster and Lord Justice Briggs) allowed the appeal and also granted the order on the security for costs application.

Lady Justice Gloster (with whom the other members of the Court of Appeal agreed) held that the wrong test was applied when refusal to order security for costs was made. The evidence before the Court clearly showed that there was a real and serious risk that an order for costs might not be enforced in Georgia.

In reaching the Court of Appeal's decision, Lady Justice Gloster considered the impact of Article 14 (prohibition on discrimination based on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status) on CPR r 25.13(2)(a), which provided for security of costs where the claimant was resident outside the jurisdiction.

Lady Justice Gloster concluded that CPR r 25.13(2)(a) was prima facie discriminatory against claimants or potential claimants who are not resident in the UK or in another Convention state. The basis for the discrimination was based on residence, rather than nationality, and therefore all that was required is some objectively justifiable rationale.

According, the Court of Appeal was required to consider what the threshold test which the evidence in support of an application for security under CPR r 25.13 (2)(a) has to satisfy, in order to prevent the exercise of the court's discretion falling foul of article 14? Lady Justice Gloster concluded that it was sufficient for an applicant for security for costs simply to adduce evidence to show that "on objectively justified grounds relating to obstacles to or the burden of enforcement", there was a real risk that it would not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it was just to make an order for security. There must be "a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden" but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case.

On the facts of the present case, and applying that test, it was obvious on the evidence that an order for security was justified.

16th November 2016