Article

Security for Costs, Foreign Claimants and Failure to Disclose Evidence of Assets

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A recent decision from the English High Court has highlighted the importance of disclosing details of assets when seeking to resist orders for security for costs against a non-resident claimant. In *Ras Al Khaimah Investment Authority v Azima* [2022] EWHC 1295 (Ch), Mr Justice Green considered the discretion to award security under English CPR 25.13(2)(a), which is broadly analogous to EC CPR 24.3(g).

A Summary of the Relevant Facts

The Ras Al Khaimah Investment Authority ("**RAKIA**") commenced proceedings against Mr Azima for fraudulent misrepresentation and conspiracy. As well as denying RAKIA's claims, Mr Azima alleged by way of defence and counterclaim against RAKIA and additional defendants that his email accounts had been unlawfully hacked by RAKIA and his data used against him in the case. At a CMC, RAKIA and the additional defendants applied for security for their costs of defending Mr Azima's counterclaim.

Each of the security for costs applications had been brought on the basis that Mr Azima was resident out of the jurisdiction, but not resident in a State bound by the 2005 Hague Convention (no such caveat exists in EC CPR 24.3(g)). There was no dispute that that condition was satisfied, as Mr Azima accepted that he was resident in Missouri, USA. Mr Azima, however, contested whether the court should exercise its discretion under CPR 25.13(1)(a) to order security (and also the quantum of the security sought).

The Relevant Legal Principles and the Parties' Submissions

Under the English CPR, the discretion to order security, once one or more of the pre-conditions are met, is a broad one, namely whether "*having regard to all the circumstances of the case"* it is "*just"* to make such an order. The same test applies in the BVI.

Among other things, Mr Azima had chosen not to provide evidence disclosing the location, nature and/or value of his assets, on the basis that he was under no obligation to do so. He submitted that where an applicant relied upon the gateway contained in CPR 25.13(2)(a) (the equivalent of our EC CPR 24.3(g)), a respondent was entitled to say nothing about their assets and could simply provide evidence that a costs order could be relatively easily enforced in the place of their residence. Moreover, he claimed that it would be discriminatory (and contrary to the *Nasser* principles) if he, as a non-resident, was obliged to provide such detail where there was no such obligation on a resident respondent.

Rejecting Mr Azima's submissions, the Judge held:

> "*[21] … It seems to me that, if that was the law, it would be virtually impossible for security for costs applications to succeed to the full extent if the respondent adopted that approach. I consider that a respondent needs to provide some evidence from which the court can assess whether a future costs order will be able to be enforced against the non-resident respondent, wherever their assets are located. If such a respondent decides not to disclose any details about their assets, the court is entitled to infer that there is a real risk of there being substantial obstacles in the way of enforcing a future costs order. "*

Mr Azima had provided a historical list of businesses that were partly or wholly owned by him. Of the 11 companies listed, only 3 were incorporated in Missouri; the rest were incorporated in Nevada, Delaware or offshore jurisdictions such as the Cayman Islands, BVI and Gibraltar, and no indication was given as to the nature, location or value of any assets held by such companies.

On the basis of Mr Azima's limited disclosure, the Judge also held that a non-resident claimant could not argue that security should not be provided merely by reference to the additional costs of enforcing a costs order in their place of residence (rather than the costs of the proceedings as a whole) unless they provide some evidence that they in fact have substantial assets in their place of residence.

> *"[41] … Merely because Mr Azima is resident in Missouri and he has said that his businesses are based there is wholly insufficient for the Defendants and the court to be satisfied that there are assets in Missouri against which the costs order can be*

> *enforced. […] If there are in fact no assets in Missouri, then the obstacles to enforcement that the Defendants may be faced with there are largely irrelevant."*

Absent information which would enable the Court to consider the obstacles to enforcement in the relevant jurisdictions (other than the respondent's place of residence) as well as the risk that assets could be moved to other jurisdictions to evade enforcement, it could not assess the difficulties in enforcing an adverse costs order against Mr Azima's assets and could, instead, infer that there would be obstacles to enforcement against valuable assets other than in Mr Azima's place of residence.

> *"[42] … Those obstacles arise to a certain extent in Missouri but more importantly, in my view, is that they stem from the fact that there is no relevant information about Mr Azima's assets and so no possibility of testing whether Mr Azima is indeed of substantial means or whether his assets are located in a place where they can be easily enforced against. I understand Mr Azima's reluctance to disclose such information to the Defendants; but the consequence of not doing so is that the Court is entitled to infer that there is a real risk that there will be substantial obstacles in the way of enforcing costs orders made against him."*

In the circumstances, the Judge had no doubt that it was just to make an order for security against Mr Azima on the grounds that there is a real risk that the Defendants would face substantial obstacles to enforcing a costs order against him. Tailoring the security to cater for the relevant risk found to be present (per *Danilina*), the Judge ordered security by reference to the costs of the proceedings as a whole, and awarded each of the Defendants security for 60% of their costs of defending Mr Azima's counterclaim.

A distinguishing feature of this decision is that Mr Azima had been found (in the earlier determination of RAKIA's claim against him, upheld on appeal) to have acted fraudulently and dishonestly. On the basis of those findings, the Court was satisfied that there was a real risk that Mr Azima would seek to diminish the assets available for the defendants to enforce against.

It is also interesting to note that Mr Azima's payment of previous adverse costs orders (and RAKIA's judgment) did not persuade the Court against awarding security.

> *"[34] … In my view there is a substantial qualitative difference between being ordered to pay a sum of money or costs as the price of continuing with the litigation and being willing to pay an adverse costs order at the end of the proceedings, having lost."*

Conclusion

Given that the English CPR provisions are materially identical to the relevant provisions in the EC CPR, and there are only a limited number of Eastern Caribbean decisions in relation to CPR 24.3(g), Mr Justice Green's decision is likely to be useful when considering future security for costs applications brought in this jurisdiction under that particular gateway.

A copy of ***Ras Al Khaimah Investment Authority v Azima*** [2022] EWHC 1295 (Ch) can be downloaded here.

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