# *Absolute Living Developments Ltd (in liquidation) v DS7 Ltd* [2018] EWHC 1432 (Ch) (24 May 2018)

**Sam Parsons, Guildhall Chambers**

Security for costs – CPR 25.13 – statutory interpretation – stiflement

## Practical implications

This case is the latest in a flurry of authorities relating to security for costs in the context of insolvent companies. However, the decision is notable in that, despite it being clear that the Claimant ("**ALD**") (or any of its creditors) was unable to fund the security or provide ATE insurance, security for costs was not ordered, and the claim was allowed to continue.

This was said to be a matter of public policy, and *Absolute Living* is therefore a demonstration of the fine balancing exercise the Court will become engaged in, in order to establish (i) whether or not a claim is genuine, without getting overly drawn into the merits; and (ii) whether to order security (and risk stopping the claim in its tracks), without allowing the Court's jurisdiction to order security to be used as an instrument of oppression.

While there are no easy answers to these issues, which must be considered on a case-by-case basis, *Absolute Living* does stand out against recent reported decisions on security for costs in the context of ATE cover, where a trend can be identified in the courts' recent decisions, tending toward the ordering of security, notwithstanding the existence of ATE insurance policies. Those decisions can be best understood in the context of the cases having the benefit of professional funders on board, and arguments as to stifling in that context being much harder to make out.

*Absolute Living* therefore reaffirms the ability of the Court to refuse to make an order for security where to do so would stifle a genuine claim, even where there is no ATE insurance in place and potentially provides insolvency practitioners with a solution to the litigation for the benefit of insolvent estates without any assets to assist in the recovery process.

## Background

The background to the case is not especially relevant. As Marcus Smith J pointed out, the merits of the underlying claim were not relevant to his decision, although that must be qualified, given the necessity for the Court to find that the claim was–at the very least–genuine.

In short, the proceedings related to various payments made by ALD, and a number of other entities, purportedly in respect of property developments. ALD's case was that the money was paid away by DS7 and the other Defendants ("**DS7**") in breach of duty.

The application was brought by the DS7 against ALD for security for costs in the amount of £500,000. It was accepted that the threshold test was met–ALD was in liquidation. Marcus Smith J was satisfied that there was no prospect of ALD being able to meet a costs order. Indeed, the witness statement of ALD's solicitor pointed out that, as far as was possible, all of the costs of bringing the claim were being incurred on a contingent and deferred basis. Insofar as costs had to be paid up front, payment had been made by the liquidator's office.

## Issues

The hearing focused on the point of law raised by CPR, r.25.13(2)(c), namely whether it was just that an order for security for costs should be made.

Marcus Smith J set out the test from *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609. In such circumstances, the Court must consider:

(1) *Whether the claim is bona fide and not a sham.*
(2) *Whether the application for security for costs is being used oppressively to stifle a serious or genuine claim.*
(3) *Whether the Claimant's want of means has been brought about by the conduct of the Defendants.*
(4) *Whether the application for security for costs has been brought too late.*
(5) *Other miscellaneous features.*

The application focused in particular on the second limb of the *Triplan* test; whether the claim would be stifled if security were to be ordered.

Connected to this is the principle that the court must take into account the ability or inability of the company to raise the money. As Fox LJ said in *Aquila Design GRB Products Ltd v Cornhill Insurance plc* [1988] BCLC 134 (CA) at 137:

> It is necessary for the court, in looking at the whole matter, to take into account the burden on the plaintiff of having to provide security, with the result that it may have to abandon the action altogether in consequence of impecuniosity and an inability to provide the amount ordered by the court. In such cases there is therefore a danger of oppression as a consequence of making an order for security. That is one of the matters which is recognised in particular in the judgment of Megarry V-C, to which I have referred. Of course, creditors can put up money themselves, but the jurisdiction is not against creditors; it is against the company.

This principle was affirmed in *Goldtrail Travel Ltd v. Onur Air Tasimacilik AS* [2017] UKSC 57 at [18].

Marcus Smith J also made reference to the speech of Peter Gibson LJ in *Keary Developments Ltd v Tarmac Constructions Ltd* [1995] 3 All ER 534, 539:

> (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…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…
>
> (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 of 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 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…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…"

The unavailability of an ATE insurance quote was also held to be irrelevant. As Marcus Smith J described it, the ultimate issue was "*one of principle, namely whether the claim would be stifled by reason of the Claimants' lack of assets.*" He concluded that the question of ATE insurance was a "*detail*" that could be "*ironed out later*" if he made an order for security. The real question was therefore one of "*stiflement*".[1]

[1] A noun apparently coined by Marcus Smith J, or at least introduced by him into the context of security for costs applications.

**Application to the facts**

The Court found that, if security were to be ordered, there were only three possible results: (a) the claim would not proceed any further; (b) the liquidator would have to pay the amount of security ordered; or (c) the liquidator would seek to persuade the creditors to put up some money to enable the security to be provided.

By analogy with common practice in relation to non-party costs orders, Marcus Smith J considered it would be inappropriate for the Court to make an order that, in reality, would either result in (a) the claim being stifled; or (b) the liquidator having to fund the security. Indeed, Marcus Smith J held (at [33(b)(c)] that such a result would be "*entirely contrary to the public interest in the insolvency regime that exists in this jurisdiction. It is critical in the public interest that liquidators proceed in a manner that is uninhibited in terms of deciding how to bring actions, including how those actions are framed and funded*."

Finally, by drawing on a line of reasoning more commonly found in authorities on the duties of a director being towards the company's creditors in situations of dubious solvency (such as *Re PV Solar* [2017] EWHC 3228 (Ch)), Marcus Smith J (at [35]) concluded that in balancing the interests of ALD and DS7, the interests of ALD to be borne in mind were really those of ALD's creditors. On that basis, and bearing in mind the risk of the claim otherwise being stifled, the application for security for costs was dismissed.

This authority therefore provides a useful decision on the facts for office holders who wish to cause the company in liquidation to bring meritorious claims against third parties but do not have professional funding or ATE in place: the Court will be reluctant to see a meritorious claim stifled in those circumstances and it is for the office-holder to make a judgment call as to how best to proceed with the litigation and having regard to the resources potentially available, and the Court will be slow to second guess the office-holder's decision in such a situation.