CHANCERY BAR

James Pickering QC

Enterprise Chambers

- ATE policies - how they may help - how to avoid pitfalls
- Cross-undertakings – in the context of security for costs
- Stifling - how to walk the tightrope
- The decision in Manolete – progress or a step backwards?

- **Cross-undertakings – in the context of security for costs**

CROSS UNDERTAKINGS - IN CONTEXT OF SFC

- ***HPII v Ruhan & Stevens*** [2020] EWHC 233 (Comm)

- ***Rowe v Ingenious Media Holdings Plc*** [2021] EWCA Civ 29

- Whether a party seeking SFC should be required to provide a cross-undertaking in damages?

- If so, whether that party should have to fortify that cross-undertaking?

Commercial Court Guide, Appendix 10, paragraph 5:

Undertaking by the applicant

5. In appropriate cases an order for security for costs may only be made on terms that the applicant gives an undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant.

- ***HPII v Ruhan & Stevens*** [2020] EWHC 233 (Comm)

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29. There has also been an argument as to whether the order for security should be made conditional upon the provision of undertakings by the Defendants. The Commercial Court Guide in Appendix 10 para.5 recognises that in appropriate cases an order for security may be made only on terms that the applicant gives an undertaking to comply with any order that the court may make if the court subsequently finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss.

This seems to be an appropriate undertaking in this case. If there are additional costs of providing the security then they would in principle be claimable under the cross-undertaking. If there are not, then, of course, nothing could be claimed, but it seems to me to be better to deal with the principle of a cross-undertaking expressed in the usual terms now rather than saying that the Claimants should have liberty to come back to apply for a cross-undertaking when they know whether and what additional costs there will be.

- ***HPII v Ruhan & Stevens*** [2020] EWHC 233 (Comm)

30. As to fortification of the cross-undertakings … As for Mr Ruhan… During his matrimonial proceedings he asserted that he was potentially insolvent. Evidence has been put forward on information from Mr Ruhan that this position has improved, but no evidence from Mr Ruhan himself and no documentary evidence has been provided. I consider that Mr Ruhan should fortify his cross-undertaking…

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28. A statement in those terms has appeared in all versions of the [Commercial Court] Guide since it was introduced in 1997. There is no equivalent in the other guides to the specialist courts within the Queen's Bench Division or in the Chancery Division. It has not proved possible to identify the thinking which led to the introduction of this paragraph in 1997. The researches of counsel and the collective experience of members of this court suggest that until recently claimants rarely if ever suggested the imposition of a cross-undertaking as a condition of providing security for costs. Given the very large number of applications for security for costs which regularly come before the courts of the Queen's Bench and Chancery Divisions, this absence is striking, and might suggest that there was not perceived to be the need for such a requirement in the normal run of cases. It may be no coincidence that the very recent development of seeking a cross-undertaking in some cases coincides with the emergence of commercial litigation funding as a business venture.

- ***Rowe v Ingenious Media Holdings Plc*** [2021] EWCA Civ 29

67. If a cross-undertaking is to be required in most cases, it would be likely to have a number of unsatisfactory practical effects.

68. First it would likely lead to a significant increase in inquiries into damages under cross-undertakings. They are currently fairly rare, reflecting the relatively small proportion of cases which involve an interim injunction or freezing order. Where they take place, however, they can give rise to very substantial satellite litigation... If cross-undertakings as a condition for security for costs were to become the norm, there would likely be a substantial increase in such satellite litigation…

70. Secondly, if provision of a cross-undertaking became the norm, it would likely increase the scope, time and costs of security applications. If a defendant is to be required to provide a cross-undertaking, questions will often arise as to whether it should be fortified (as Butcher J required of Mr Ruhan in the *Hotel Portfolio II* case) necessitating an investigation into the defendant's financial position and prospects. And if fortification is required, should not a claimant have to give a cross-undertaking to cover losses caused to a defendant in funding the fortification?...

- ***Rowe v Ingenious Media Holdings Plc*** [2021] EWCA Civ 29

82. For all these reasons, I would hold that it should only be in a rare and exceptional case that the court should require a cross-undertaking in favour of a claimant as a condition of ordering security for costs, and only in even rarer and more exceptional cases that it should do so in favour of commercial litigation funders. There are no such rare and exceptional circumstances in the present case. Nor were there, so far as revealed by the reports, in ***In RBS***, ***Bailey***, ***Hotel Portfolio II*** or ***Pisante*** , which should no longer be followed.

TAKE HOME POINTS

- Jurisdiction to require a X-undertaking as a condition of SFC exists
- But only in rare and exceptional circumstances
- Jurisdiction to require fortification (security for SFC) also exists
- Likely to be only in even rarer and more exceptional circumstances

- ***Rowe v Ingenious Media Holdings Plc*** [2021] EWCA Civ 29

83. I would also suggest that if there is to be a new practice in this area, it would be preferable that it be considered and developed by primary or delegated legislation, rather than by way of individual judicial decision. A synoptic review could then be undertaken by the Law Commission or the Civil Procedure Rules Committee of its potential effect on civil litigation in a wider context than that which arises in the current appeals. That applies with particular force in light of the rival arguments in this case as to the beneficial or adverse effect of such a practice on litigation funding and access to justice.