

Protecting Against the Costs of Litigation

Harminder Sandhu, managing partner and head of litigation at Hawkins Hatton, considers how to protect a party from the cost risks associated with litigation brought by an insolvent claimant.

The costs associated with bringing or defending a litigation claim can be substantial. The usual costs rule in litigation is that the winning party will recover a significant proportion of its legal fees from the losing party. Recently claims against our business clients where they feared the claimants lacked the financial means to pay the costs awarded against them. In those circumstances, our clients would have been left in the unfair position of having to bear their own costs, even if successful.

To protect against this risk, in certain circumstances a defendant can apply to court for an order that the claimant provide security for the legal costs it could be liable to pay its opponent. The order will usually require the claimant to pay money into court or provide some other form of security as a condition to continuing with the litigation.

When applying for security you should always do your homework on your opponent and have at hand the best evidence possible as to the inability of the claimant to discharge any adverse order for costs. This may include financial information including year end accounts. You also need to demonstrate to the court the likely estimate of the costs. We have found that an order for security may discourage the claim from proceeding further. For these reasons an order for security of costs is not only a prudent safeguard but can also be a tactical weapon to focus a claimant's mind on the merits of the claim. This can lead to early resolution of vindictive or nuisance claims. However, the court is always very keen to ensure that security is not used to oppress or stifle a genuine claimant.

An application for security should be made promptly, preferably before the first court hearing to obtain costs protection at the earliest opportunity. If you are faced with defending a claim and you have reservations about the solvency of the claimant, you should discuss with your solicitor whether the circumstances of your claim meet the conditions for an application for security for costs.

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