Neutral Citation Number: [2018] EWHC 95 (Comm)

CL-2016-000553

Case No: CL-2016-000553

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/01/2018

Before :

NICHOLAS VINEALL QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

(1) RECOVERY PARTNERS GB LTD
(2) REVOKER LLP — **Claimants**

- and -

(1) IRAKLI RUKHADZE
(2) IGOR ALEXEEV
(3) BENJAMIN MARSON
(4) HUNNEWELL PARTNERS (UK) LLP
(5) HUNNEWELL PARTNERS (BVI) LTD
(6) PARK STREET (GP) LTD
(7) PARK STREET (BR) LTD
(8) PARK STREET (GS) LTD
(9) PARK STREET (L) LTD

Defendants

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TOM WEISSELBERG QC AND TOM CLEAVER (instructed by Brown Rudnick LLP) for the Claimants
JONATHAN ADKIN QC (instructed by Signature Litigation LLP) for the Defendants

Hearing dates: 19 December 2017

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Approved Judgment

NICHOLAS VINEALL QC:

1. In February and again in April 2017 the Claimants' solicitors gave undertakings to hold sums of money as security for certain costs of the First to Fourth Defendants. By this application the Claimants seek an order permitting those undertakings to be released, in exchange for the provision of security for those same costs by way of a Deed of Indemnity from an insurance company which has provided the Claimants with ATE Insurance.

2. This slightly unusual application raises two issues. The first is whether this particular Deed of Indemnity (taken with the ATE policy) provides an acceptable form of security in the sense that, if this were a normal security for costs application, the court would be satisfied with the form of the security offered. I treat this as the first issue since the parties proceeded on the basis that, if the Deed did not provide adequate security, the application would fail, and also because this issue is in my view amenable to a relatively short answer. The parties, mindful of the possibility of future contested security for costs applications raising similar issues, invited me to decide this issue whatever view I ultimately took on the application as a whole.

3. The second issue, which might fairly be said to be the logically prior issue, is this: What approach should the court take in circumstances such as these where a party seeks to be released from an undertaking given in lieu of an order for security for costs? In particular, is it enough that the deed offered provides adequate security in the sense I have just described, or is some different approach required where security has already been given and the Claimant wants to substitute a new form of security for the security already given? If so, what is the proper approach and what is the appropriate outcome on the facts of this case?

Background

4. The underlying claim concerns allegations by the Claimants of breaches of duty by D1-3 arising out of the alleged diversion of an opportunity to provide lucrative services to the family of the deceased Georgian billionaire Arkadi Patarkatsishvili. Mr Patarkatsishvili died unexpectedly in February 2008. Prior to his death, he had owned assets in various jurisdictions, many of which assets were held through structures which meant that they were not readily identifiable as the property of his estate and/or which left the estate's ownership of those assets under threat. The family therefore needed assistance in identifying and protecting those assets.

5. The Claimants' position is that the Claimants and Salford Capital Partners Inc (SCPI) provided the family with those recovery services for several years after Mr Patarkatsishvili died, but that the first three Defendants (who are individuals), in conjunction with some or all of the Fourth to Ninth Defendants, then improperly diverted that work away from SCPI and for their own benefit.

6. The Claimants bring these proceedings in their own right and the First Claimant claims that it has taken an assignment of any cause of action from SCPI.

7. Proceedings were issued on 12 September 2016, and Particulars of Claim followed on 23 December 2016. A defence was served on 3 February 2017. At that stage there were only four defendants, and in the rest of this judgment by Defendants I mean Defendants 1 to 4.

8. On 6 February 2017, following requests by the Defendants for security, the Claimants' solicitors Brown Rudnick wrote a letter giving an undertaking. So far as material, it provided as follows

> *This firm holds the sum of £200,000 ("the Security") by way of security for the Defendants' costs of these proceedings (up to and including the Case Management Conference).*
>
> *Unless the parties agree and/or the Court orders otherwise, this firm irrevocably undertakes*
>
> *1. irrespective of any contrary instructions by the Claimants or any other person, to make payment from the Security of the amount of any award on costs relating to the period up to and including the first CMC ... to [the Defendants' solicitors].*
>
> *2. that the Security will not be used for any purpose other than that set out in paragraph 1 above.*

9. That undertaking having been given, no application for an order for security for costs was made.

10. The First CMC took place on 31 March 2017.

11. A second and similar undertaking was given by Brown Rudnick on 12 April 2017 but this time the sum held was (just short of) £366,000 and it was held "by way of security for the Defendants' costs in respect of disclosure and work on the witness statements in these proceedings". Again, having obtained the undertaking, the Defendants did not make the security for costs application that they had intimated.

12. After the undertakings were given, the Claimants obtained an after-the-event ("ATE") "Litigation Insurance Policy" which took effect from 12 May 2017. It indemnified the Claimants for the costs of the Defendants up to a limit of £2,000,000. There was no cover for anything else. The subscribing insurers were International Insurance Company of Hannover SE ("Hannover") and Elite Insurance Company Limited.

13. In order to head off any arguments about the adequacy of this ATE policy as a means of providing security for costs, on 5 July 2017 the Claimants obtained from Hannover a Deed of Indemnity. By clause 1 Hannover

> *unconditionally and irrevocably undertakes to pay to [the Defendants] within 14 days of receipt by [Hannover] of a written demand by or behalf*

of any of the Defendants for any sum or sums payable by Recovery Partners GP Limited and Revoker LLP ("the Claimants") following the issue of the Court Order, in respect of [this Claim] that finally determines the Claimants' liability for the Defendants' costs:

(i) by summary assessment of costs; or

(ii) where the Defendants' costs are to be assessed if not agreed by an Assessing Officer's Certificate for costs; or

(iii) where the Defendants' costs are to be assessed if not agreed, by agreement between the Claimants who are ordered to pay the costs and those of the Defendants who are to receive them providing always that [Hannover]'s prior written consent to any such agreement of the sum payable has been obtained, such consent not be unreasonably withheld; and/or

(iv) where the Defendants' costs are to be subject to detailed assessment and the Claimants are ordered to make a payment on account of costs pursuant to CPR r.44.2(8), by a Court Order for a payment on account of costs.

14. By clause 3 Hannover's total liability was not to exceed the sum of £1,000,000 less any sums paid by Hannover in respect of the Defendants' costs pursuant to the ATE policy.

15. Hannover was deemed to be principal debtor and not merely a surety (clause 8). The Deed was subject to English law and the exclusive jurisdiction of the English Courts (clause 11).

16. This application was issued on 1 September 2017. It was originally listed for 9 November but had to be adjourned. On 29 November 2017 the Defendants suggested that, the time estimate for the trial having increased from 12 to 16 days, and for other reasons, their total costs to trial would be £5m rather than the £1.9m estimated at the time of the first CMC, and in a letter of 11 December 2017 they said that their costs to the completion of witness statements was in fact just under £2.4m, in other words very much more than the sum for which security had been provided. On the evening before this hearing the Defendants issued an application for further security. I have not seen or considered that application.

The law as to adequate security

17. On an application for security for costs the court has a wide discretion not only as to whether, and in what sum, such security should be provided, but also as to the means by which it should be provided. Mr Weisselberg QC for the Claimants submitted, by analogy with the case of Rosengrens v Safe Deposit Ltd [1984] 1 WLR 1334 (which was a case of security pending an appeal) that if, on an application for security, two different forms of

security would provide equal protection to the Defendant, the Court should, all else being equal, order the form which is least onerous to the Claimant. I accept that submission.

18. In Harlequin v Kennedy [2015] EWHC 1122 (TCC) Coulson J reviewed the authorities on whether ATE policies might constitute adequate security. He concluded that

> (1) Adequate security for costs can be provided to a defendant by means other than a payment into court or a bank guarantee;
>
> (2) Depending on the terms of the insurance and the circumstances of the case, an ATE insurance policy may be capable of providing adequate security;
>
> (3) There may be provisions within the ATE policy which a defendant can point to and say that, on the happening of certain events, those provisions may reduce or obliterate the security otherwise provided;
>
> (4) In that event, the court should approach such objections with care: in order to amount to a valid objection that an ATE policy does not provide appropriate security, the defendant's concern must be realistic, not theoretical or fanciful.

19. The Court of Appeal in Premier Motorauctions Ltd (in liquidation) v PriceWaterhouseCoopers LLP [2017] EWCA Civ 1872 considered the extent to which the existence of ATE insurance was relevant in considering an application for security for costs. Longmore LJ, with whom Kitchin and Floyd LJJ agreed, said this:

> 19 It is, in a sense, unfortunate that the court's jurisdiction to order security for costs should depend on a detailed analysis of a claimant's ATE insurance policies into which the defendants have had no input and which they have no direct right to enforce. That is particularly so when the authorities discourage investigations into the merits of the proceedings and disapprove of security for costs applications being blown up "into a large interlocutory hearing involving great expenditure of both money and time," see *Porzelak v Porzelak [1987] 1 WLR 420* , 423e per Sir Nicholas Browne-Wilkinson V.-C.
>
> 20 But I fear that such analysis is inevitable. There is little appellate authority on the topic but such as there is does support the proposition that an appropriately framed ATE insurance policy can in theory be an answer to an application for security. In para 60 of *Nasser v United Bank of Kuwait [2002] 1 WLR 1868* , in which the claimant was resident abroad and security was refused on other grounds, Mance LJ with whom Simon Brown LJ agreed said in an obiter passage:-
>
> > "The interesting possibility was raised before us that a claimant or appellant who has insured against liability for the defendants' costs in

> the event of the action or appeal failing might be able to rely on the existence of such insurance as sufficient security in itself. I comment on this possibility only to the extent of saying that I would think that defendants would, at the least, be entitled to some assurance as to the scope of the cover, that it was not liable to be avoided for misrepresentation or non-disclosure (it may be that such policies have anti-avoidance provisions) and that its proceeds could not be diverted elsewhere."

21 In *Al-Koronky v Time-Life Entertainment Group Ltd [2006] EWCA Civ 1123; [2007] 1 Costs L.R. 57* where security was ordered against claimants resident out of the jurisdiction, Sedley LJ giving the judgment of the court said (para 35):-

> "A claimant who has satisfactory after-the-event insurance may be able to resist an order to put up security for the defendant's costs on the ground that his insurance cover gives the defendant sufficient protection.
>
> 36. In the present case, however, we are told that the claimants have after-the-event insurance, but that the policy is voidable or the cover ineffective if their eventual liability for costs is consequent upon their not having told the truth. We have not been told what the premium was, but since the outcome of this case will depend entirely upon which side is telling the truth, one wonders what use the insurance cover is. If the claimants win, they will have no call on their insurers. If they lose, it is overwhelmingly likely that it will be on grounds which render their insurance cover ineffective."

22 These authorities do not in terms touch on the question of jurisdiction but do give credence to Mr Sims' submissions that ATE insurance can, in principle, be taken into account at any rate if it gives the defendant "sufficient protection" to use Sedley LJ's words. If it does give that sufficient protection, then there will not be "reason to believe" that the company will be unable to pay the defendant's costs if ordered to do so and there will therefore be no jurisdiction to make an order.

23 Since it will be inevitable that the question whether ATE insurance gives sufficient protection to the defendant has to be decided at the discretionary stage in any event, it will not perhaps be too troubling to have to determine the question at the jurisdiction stage.

24 I would therefore reject the submissions of Mr Fenwick and Mr Zellick to the extent that they amounted to saying that the ATE insurance obtained by the Companies is not to be considered at all. Mr Zellick's contention (that merely because a claimant's asset is contingent that asset cannot be considered on an application for security) goes too far. If it is very probable that a contingent asset will mature before any order for costs is made, that asset cannot be excluded from consideration. It is therefore necessary to consider whether the particular ATE insurance in this case does give the defendants sufficient protection.

20. It is therefore now clearly established that the existence of ATE insurance can provide an answer to a security for costs application, and that the relevant question is whether the policy provides "sufficient protection".

21. In both Harlequin v Kennedy and the Premier Motorauctions case it was decided that the ATE policy did not in fact provide adequate security. In the Premier Motorauctions case the Court of Appeal noted that the ATE policy permitted the insurer to avoid for non-disclosure or misrepresentation, and held that the prospect of that happening could not be characterised as illusory.

22. If the Claimant is able to point not only to an ATE policy but also a deed of indemnity in favour of the Defendants, the test must similarly be whether, taken together, the ATE policy and deed of indemnity provide adequate security. If the deed taken alone provides adequate security there is no need to consider the ATE policy.

23. Accordingly I now consider whether or not the Deed of Indemnity would properly be regarded as providing adequate security in this case if this were an application for security for costs.

Would the Deed of Indemnity provide adequate security in the sense of sufficient protection?

24. Mr Adkin QC's skeleton argument took three points on the Deed of Indemnity. First, that on the face of the Deed it conferred no enforceable rights on the Defendants; second, that it was unclear when costs would be paid because the words "finally determined" in clause 1 were unclear; and third, that there was a risk that Hannover would have paid the Claimants under the ATE policy before any claim on the Deed could be made, in which case the Defendants might find themselves having to attempt to recover their costs in an insolvent winding up of the Claimants.

25. Mr Adkin did not pursue his first point in oral argument. The document is expressed to be a deed and it clearly identifies the Defendants as the beneficiaries of Hannover's promise.

26. As to the second point I can find no relevant ambiguity in the definition of when Hannover's liability to pay arises. Clause 1 of the Deed means that the undertaking to pay is triggered when a Court Order finally determines costs in one of the four ways contemplated. Even assuming that the reference to final determination means that such a liability does not arise unless and until the time for appealing an order has expired without an appeal being lodged, I do not consider that that would mean that the security was inadequate. It would only affect when, rather than whether, payment was made in discharge of a valid costs order.

27. As to the third point, Mr Weisselberg accepted Mr Adkin's contention that insurers might in theory be obliged to pay out, and might in fact have paid out, to the Claimants under the ATE policy before their liability to pay directly to the Defendants under the Deed had arisen, so that money

payable in respect of the Claimants' liability for the Defendant's costs was paid to the Claimants, rather than directly to the Defendants. That would (unsurprisingly) mean that Hannover's liability to pay the Defendants under the Deed was correspondingly reduced, by virtue of clause 3 of the Deed. And that, said Mr Adkin, created the possibility that the Defendants would have to pursue the Claimants for their costs, perhaps in a foreign insolvency.

28. Mr Weisselberg submitted that this possibility was remote and/or fanciful. He also pointed out that when this point was raised in correspondence by the Defendants' solicitors, Hannover had offered to endorse the ATE policy to the effect that all monies paid out under it would be paid to the Defendants' solicitors, and that the Claimants had offered to execute a deed of charge charging the ATE policy and its proceeds in favour of the Defendants.

29. I am not satisfied that the possibility identified by Mr Adkin is remote or fanciful: it seems to me clearly to be a possible outcome given that at least the first of the Claimants appears to be a SPV incorporated for the purposes of pursuing claims in litigation. But I am satisfied that the offer to endorse the policy and to execute a deed of charge neutralises Mr Adkin's complaint and means that it is impossible to say that, on this ground, the security provided by the Deed read together with the ATE policy would not provide sufficient protection.

30. Accordingly I find that on the facts of this case the Deed of Indemnity, taken together with the ATE policy (and in the light of the offer of a deed of charge and the endorsement which I have described), would provide adequate protection by way of security.

31. I am confirmed in this view by consideration of the recent decision of Mr Justice Andrew Baker in Mayr v CMS McKenna LLP. Only a short Lawtel report is as yet available but I am told that the terms of the deeds of indemnity in that case were similar to those offered by Hannover, and I note that Andrew Baker J held that the deeds provided adequate security, notwithstanding that (unlike the Deed offered by Hannover) they did not respond to an order for payment on account of costs.

32. The position is therefore that, had this been an application for security for costs, and one which I would otherwise have granted, I would have regarded the availability of the Deed of Indemnity, together with the ATE policy and the offer of an endorsement and a deed of charge, as providing sufficient security, so that no order for security was appropriate.

33. In those circumstances, and given that this is not an application for security but an application to be released from undertakings, I must decide the second issue raised by this application.

The right approach to an application to be released from an undertaking given in lieu of security for costs

34. Mr Weisselberg for the Claimants submitted that the fact that the Deed of Indemnity and ATE policy had become available since the undertakings were given constituted a material change of circumstance; that (relying on Gordano v Burgess [1988]1 WLR 890, CA) once such a material change of circumstance was shown the court had a discretion as to whether or not to release the undertakings; that the right approach then was to consider the matter as though this were an application for security for costs, so that, in the instant case, the only relevant question was whether the (replacement) security was adequate. As I noted above, and accept, he submitted that it was a general principle applicable to security for costs applications that security should be provided in the way least onerous to the provider. He submitted that the Deed was (as I have found) an adequate mode of providing security; that the Claimants would prefer to provide security by way of the ATE policy and the Deed; and that in all the circumstances, the proper exercise of discretion was to release the Claimant's solicitors from their undertaking so that they could then "use the cash for other things". However Mr Weisselberg expressly disclaimed any submission to the effect that the Claimants would suffer hardship or prejudice if their solicitors continued to hold the Claimant's £566,000; neither did he submit that, if I were to decline to release the Claimant's solicitors from their undertaking, that would prejudice the Claimants' ability to pursue their claim. Finally, he suggested that the Defendants had no genuine concern that the Deed would provide less good security than a London solicitors' undertaking backed by cash, and that the Defendants were taking the position they did simply in order to be difficult.

35. Mr Adkin agreed that there had to be a material change of circumstance before the discretion to release the undertakings could arise. He submitted that the undertakings were offered and accepted some time ago, and the Defendants had now incurred the costs in respect of which the undertakings were given, so that it would now be inappropriate for the undertakings to be discharged for anything less than security which was as good as that which the defendants currently enjoy.

36. Nothing in the wording of the undertakings gives any clue as to the circumstances in which, or basis on which, the parties intended that the undertaking might be released. In those circumstances I agree that there has to be a material change of circumstance in order to engage the Court's discretion in relation to a possible release of the undertaking.

37. The next question is therefore whether there has been a material change of circumstance in this case. In this case the material change of circumstance relied on is simply that the Claimants are now offering the ATE policy and the Deed by way of security. Nothing has changed in relation to the Claimant's solicitors who gave the undertaking – they still hold the cash to back the undertaking, and it is not suggested the Claimants themselves have a pressing or urgent need for that cash. In short all that has changed is that the Claimants now have available to them a different way of providing security and they would prefer to provide it by that alternative mechanism. There is no evidence as to whether or not they could have

provided the security by this alternative method at an earlier stage had they been minded to do so. I therefore have some doubt as to whether there has in fact been a material change of circumstance of the sort necessary at the threshold stage to permit consideration of an application of a release from an undertaking, but since the Defendants were content to proceed on the assumption that there had been, I will proceed on the same basis, without deciding the point.

38. In my view, once there is a material change of circumstance the Court has a broad discretion which should be exercised taking into account all relevant factors, but remembering that the burden is on the party who seeks to be released from his undertaking that it is appropriate to do so.

39. I therefore reject Mr Weisselberg's proposed approach. He submitted that once there is a material change of circumstance the question is to be approached simply as though this were a de novo application for security. But it is not. Here, two threatened applications for security were, in effect, compromised by providing security by a London solicitor's undertaking backed by cash, and, those deals having been struck, the Defendants incurred costs against the confidence that that security provided. What this application seeks to do is to wind back the clock and substitute for the security in fact given a different form of security. It does not seem to me to follow as a matter of logic that merely because the Court might have accepted the Deed and the ATE policy had they been available earlier this year, that it is therefore necessarily appropriate to allow them now to be substituted for the security previously given.

40. I accept Mr Adkin's submission that the security now proffered is not as good as the security it would replace. A London solicitor's undertaking backed by cash is at the very top of the range of types of security for cost. The Deed of Indemnity combined with the ATE policy now offered would, as I have found, be an acceptable form of security, but it is in my view clearly less attractive to the Defendants than cash in a solicitor's account. There is inevitably more scope for argument. One example will suffice: suppose the Claimants and Defendants were minded to agree costs, but Hannover would not agree. The Defendants would then be faced with the prospect of having to have to bring proceedings to show that the insurers' agreement had been unreasonably withheld, or alternatively going to the time and expense of having the costs determined.

41. But I reject Mr Adkin's submission that that is determinative of the application. It seems to me that there might well be circumstances in which it was appropriate to release an undertaking (or vary an order for security) despite the new security being marginally less attractive, because there was some compelling consideration going the other way, for instance significant hardship to the Claimant if the substitution were not made.

42. In my view, and remembering that the burden is on the party seeking release from an undertaking, the factors which might be material on an application of the present type, and which do arise and are material in this case, include the following:

(a) how long the old security has been in place and whether the costs which it secured have already been incurred;

(b) the extent of the difference (if any) between the quality of the old security and the quality of the new security;

(c) the strength of the explanation given for the Claimant's change of position;

(d) in particular, whether or not, and if so to what extent, declining to permit the change would cause hardship or prejudice to the Claimant or inhibit its ability to pursue its claim.

43. In weighing those factors I remind myself of Longmore LJ's observations in Premier Motorauctions about the authorities disapproving of security for costs applications being blown up into large interlocutory hearings involving great expenditure of both money and time. That must apply equally, perhaps even more strongly, to an application focussed not on whether to provide security, but on whether or not to permit the giver of security to be released from an undertaking and permitted to provide security in a different form. There is a similar concern in terms of the utilisation of the Court's resources. I think effect is best given to those concerns by remembering that the onus lies firmly on the party seeking to be released from its undertakings.

44. Applying those factors to this case: (1) the security has been in place for either 8 or 10 months and the costs it secures have all been incurred; (2) the new security offered is in a form which would be adequate to meet a security for costs application but is not, objectively, as attractive as a London solicitor's undertaking backed with cash; (3) it is unclear whether or not the ATE policy and Deed now offered could have been offered at an earlier stage: the reason given by the Claimants to justify their change of position is simply that they would prefer to have the cash available to them; and (4) the Claimants do not suggest that they would suffer hardship or prejudice if the existing security were to stay in place.

45. The fourth factor seems to me to carry particular weight. The security has been in place for some time and no strong reason is given for revisiting and changing the existing arrangements, after the event, to something less attractive to the Defendants.

46. Weighing these factors I find that the Claimants have not demonstrated that it is appropriate that their solicitors be released from their undertakings. I therefore dismiss the application.