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Case Nos: A3/2020/0483 & A3/2020/1165 &
A3/2020/1166 & A3/2020/1167 &
A3/2020/1168

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE NUGEE

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 15/01/2021

Before :

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LORD JUSTICE POPPLEWELL

Between :

MR NIGEL ROWE & ORS

Claimants /
Appellants

- and -

INGENIOUS MEDIA HOLDINGS PLC & ORS

Defendants /
Respondents

Andrew Hunter QC, Tom Cleaver and Gayatri Sarathy (instructed by **Stewarts Law LLP**)
for the **Funded Stewarts Claimants**

Simon Birt QC and Craig Morrison (instructed by **Reynolds Porter Chamberlain LLP**) for
the **Ingenious Defendants**

Richard Handyside QC and James Duffy (instructed by **Herbert Smith Freehills LLP**) for
UBS AG, London Branch

Carlo Taczalski and Frederick Simpson (instructed by **Kennedys Law LLP**) for **SRLV** (a
firm)

Simon Pritchard and Harry Adamson (instructed by **Eversheds Sutherland (International)**
LLP) for **HSBC UK Bank Plc**

PJ Kirby QC (instructed directly) for **Therium Litigation Finance AF IC** and **Therium Litigation Finance Atlas AFP IC**

Hearing date : 1 December 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30 a.m. on 15 January 2021.

Lord Justice Popplewell :

Introduction

1. These are appeals against two decisions of Nugee J when ordering security for costs against Therium Litigation Finance AF IC and Therium Litigation Finance Atlas AFP IC (together “Therium”), who provide litigation funding to certain of the Claimants. The appeals raise the question as to the circumstances in which a defendant seeking security for costs may be required to provide a cross-undertaking in damages as a condition of ordering security.
2. The issue arises in litigation involving over five hundred claimants pursuing claims in various actions in the Chancery Division. The claims are in respect of eight schemes for investment in financing films, and in one case video games, which were promoted and operated between 2002 and 2007 by entities in the Ingenious group. The schemes were promoted as tax-efficient vehicles through which individual taxpayers could contribute funds to a limited liability partnership (“LLP”) and set off their share of the LLP losses against other taxable income. For the schemes to have their intended tax consequences it was necessary that the LLPs should be trading with a view to profit, and that the losses should be of an income nature so that what is called sideways loss relief would be available to the individual investors as members of the relevant LLP. The schemes were later challenged by Her Majesty’s Revenue and Customs (“HMRC”) on various grounds, including that the relevant LLPs were not in fact trading with a view to profit. In August 2016, the First-tier Tribunal held that the entities were trading with a view to profit but on a much more limited basis than that on which the schemes had been promoted (*Ingenious Games LLP & ors v HMRC* [2016] UKFTT 0521). In July 2019, the Upper Tribunal dismissed the appeals against that decision, and allowed a cross-appeal by HMRC, holding that the LLPs had not been trading with a view to profit at all (*Ingenious Games LLP & ors v HMRC* [2019] UKUT 0226).
3. Most of the Claimants pursue a range of claims against companies in the Ingenious group and certain key individuals involved in the design and promotion of the schemes (together, the “Ingenious Defendants”). Claims are also advanced against those from whom Claimants received advice in respect of their investments, including UBS AG (“UBS”) and SRLV, a firm of accountants, and in one case HSBC UK Bank Plc (“HSBC”). HSBC also faces claims advanced on the basis of its involvement in financial arrangements connected with the design of the later schemes. The claims total approximately £200 million.
4. Of the total cohort of Claimants, 250 are directly relevant to these appeals. They are represented in the litigation by Stewarts Law LLP (“Stewarts”) and are funded in respect of the pursuit of their claims by Therium. They are referred to as the Funded Stewarts Claimants. There are three other relevant groups of Claimants:
 - (1) A further 110 Claimants are represented by Stewarts who are not funded by Therium.
 - (2) 115 Claimants are represented by Peters & Peters Solicitors LLP. These Claimants are also funded by Therium and security has been ordered against

Therium in respect of their claims, although they are not participating in these appeals.

- (3) 113 Claimants, who sue only the Ingenious Defendants, are represented by Mishcon de Reya LLP. These Claimants have funding from Harbour Fund III LLP, a member of the Harbour litigation funding group (“Harbour”). Arrangements for the provision of security for costs were agreed between Harbour and the Ingenious Defendants without the need for any court decision. Harbour agreed that it would offer a direct indemnity, up to an agreed limit, in respect of the Ingenious Defendants’ costs; and provided relevant financial information to confirm that the relevant entity would be able to meet its obligations under the indemnity; no cross-undertaking was requested or given.

Procedural history

5. Under an order made at a first case management hearing by Morgan J in March 2018, the various actions are being case managed together. A group of 28 Claimants have been selected to plead their claims, and the trial of test claims (to be selected from the 28) is to take place from 26 April 2022 with a trial estimate of 24 weeks.
6. Between May and October 2019, applications were made by the Ingenious Defendants, HSBC, UBS and SRLV (“the Security Defendants”) for security for costs against Therium pursuant to CPR 25.14.
7. Those applications were due to be heard by Nugee J, as he then was, at an interim hearing commencing on 19 November 2019, at which he decided amongst other things that any liability of the Claimants for an adverse costs order should be several, not joint and several. There were disclosed after the event (“ATE”) insurance policies indemnifying 280 of the Stewarts Claimants, and the Peters & Peters Claimants, against adverse costs orders up to specific limits.
8. Shortly before the hearing, on 12 November 2019, the Funded Stewarts Claimants disclosed redacted copies of three “Letter Agreements” to the other parties and the court which, subject to the formalities of execution, had been agreed between the Funded Stewarts Claimants and Therium in respect of the treatment of any security which Therium might be ordered to provide. Those Letter Agreements provided, in summary, that Therium would fund the security for costs, if ordered, and any additional costs of providing such security, including any costs of fortification (the “Security Costs”), unless there had been a material adverse decline in the merits of the claim and/or its commercial viability; and that, if the Funded Stewarts Claimants succeeded in their claims, they would be liable to pay to Therium the Security Costs and additionally a sum representing 2 ½ times the Security Costs, to be treated in accordance with the “waterfall” arrangements in the funding agreements. The amount of 2 ½ times the Security Costs was called “the Enhanced Return” and involved the Funded Stewarts Claimants giving up to Therium that amount out of any damages recovered from the Defendants in the litigation.
9. At the hearing before Nugee J in November 2019, Therium and the Funded Stewarts Claimants were represented by the same counsel and resisted the applications for security for costs. In the alternative it was submitted on their behalf that, in the event that security was ordered, it should be on the basis that the Security Defendants

provide a cross-undertaking in damages in respect of any loss suffered by Therium and/or the Funded Stewart's Claimants as a consequence of that order. One loss identified was the Enhanced Return.

10. At the conclusion of the third day of the hearing, on 21 November 2019, Nugee J gave a short oral judgment in respect of the various issues which had been argued. In respect of some issues he gave his decision and said that he would provide more detailed reasons in due course if desired. Others he reserved for further consideration, but gave an indication of his likely determination in order to assist the parties. In relation to the applications for security for costs, he said he would like to think further about much of the argument in the light of the oral submissions, but gave an indication that he was likely to find it was an appropriate case for Therium to provide security. In relation to the provision of a cross-undertaking he said:

“35. So far as a cross-undertaking in damages is concerned, on the footing that I order security, which, as I say, I think I am likely to do, I do not think that a cross-undertaking in damages should be required in relation to the losses which have been identified in Therium’s evidence. Those losses are the losses that will be sustained by the claimants in having to pay Therium a larger return out of the litigation than would otherwise be the case.

36. That seems to me to be a matter between Therium and the claimants. It does not amount to an external cost on Therium and the claimants together. It amounts to a reallocation of the recoveries between Therium and the claimants. Therium and the claimants together have financial interests in the success of this litigation. It is a matter for them and their commercial arrangements as to how they share those recoveries between themselves. I do not think that the proper function of a cross-undertaking in damages is to require the defendants to underwrite those arrangements.

37. On the other hand, if there are external costs of providing securities, if, for example, Therium proposed to provide security by obtaining a bank guarantee, then the case for a cross-undertaking against that extra cost, which is an extra cost imposed on the claimant pool as a whole, is a much stronger one.

38. I am not going to make any order at this stage, because I think that questions as to that would be better addressed once it has been identified after I have made any order for security, how that security is proposed to be provided, and that should be revisited at that stage.”

11. The Judge gave a further written reasoned judgment on 10 February 2020 (“the February Judgment”), in which he determined that Therium should provide security for costs. He rejected Therium’s arguments that there was no real risk that an order for costs against it under s. 51 of the Senior Courts Act 1981 would not be met, for the reasons he had articulated in his oral judgment in November. Therium had argued that three sources would be sufficient to meet any such liability, namely Therium’s own resources, the ATE policies taken out by the Claimants and the resources of individual Claimants. As to Therium’s own resources, the two relevant Therium companies were Jersey cell companies and no financial information was provided in respect of them or any other member of the Therium group. In relation to the ATE

policies, he held that there was a real risk that they would not respond in full, but treated a proportion of the cover as amenable to enforcement of a costs order against the Funded Stewarts Claimants, so as to reduce the amount of security he would order. He determined that the shortfall for which Therium should provide security was a total of £3.95m (split £1.85m in favour of the Ingenious Defendants; £600,000 for HSBC; £950,000 for UBS; and £550,000 SRLV). The sums were subsequently varied by paragraph 3 of a consent order dated 13 July 2020 to a total of £2.69 million.

12. The Judge's decision on the provision of security was reflected in paragraph 11 of his order of 13 February 2020 ("the February Order"). These figures were based on estimates of costs up to a third CMC, and the order provided that the Security Defendants should be entitled to apply for further security in the future. The February Order also gave the Security Defendants liberty to apply to vary the quantum of security if the Funded Stewarts Claimants did not provide certain written confirmations and make disclosure of other material which was relevant to the assumptions about the ATE policies upon which Nugee J had based his calculations. The February Order left the form of security to be agreed or referred back to the court in the event of disagreement.
13. In relation to the provision of a cross-undertaking, in his February Judgment Nugee J repeated the terms of his oral judgment of 21 November 2019 and added:
 - "151. ... As there appears, the basis for seeking a cross-undertaking in damages was that Therium had stipulated in its agreement with the funded Claimants that if it had to put up security, it would seek an enhanced return out of any recoveries by the Claimants. That obviously means that Therium will not suffer relevant damage by putting up security: the cross-undertaking would only fall to be enforced if the claims succeed, but if the claims succeed, Therium will be better off, not worse off.
 152. So far as the Claimants are concerned, it is true that if Therium puts up security, a greater share of the recoveries will go to Therium, and to that extent there will be a cost to the Claimants. But that is not a cost imposed on the Claimants' side as a whole, treating the Claimants and Therium together as being the parties interested in the claim. It is a reallocation of the recoveries as between the funded Claimants and their funder. The total cost of pursuing the claim is the same; it is just borne differently. As I said in my oral judgment, I do not think this is something that should be underwritten by the Defendants, and no authority was shown to me to suggest that it should."
14. The Judge refused permission to appeal. The Funded Stewarts Claimants sought permission to appeal from this court, which was subsequently granted by Lewison LJ on 12 June 2020.
15. Meanwhile, whilst that application was pending, the parties were seeking to agree the form of security to be provided by Therium under the February Order. On 4 March 2020, Stewarts wrote to the Security Defendants requesting that they agree to provide a cross-undertaking in damages in relation to certain "external costs" which were said to be likely to be incurred by the Funded Stewarts Claimants, in reliance on Nugee J's

comment that the argument in favour of a cross-undertaking in respect of such costs was stronger. Further information was provided by Stewarts on 17 April 2020, explaining that the external costs would include the costs involved in “bonding” the Funded Stewarts Claimants’ existing ATE policies up to the pro-rata amount of cover required. “Bonding” involves ATE insurers providing a direct indemnity in favour of the defendants in respect of a costs order in their favour. The costs identified comprised (i) the brokerage fees charged by the Funded Stewarts Claimants’ insurance brokers in relation to the bonding process; and (ii) the insurers’ fees for bonding the Funded Stewarts Claimants’ share of the ATE policies, with a total cost of approximately £1 million. The proposed bonding would increase the value of the ATE policies by about £1.8m. The remaining shortfall on the amount of security required was to be provided by securing additional ATE policies and making a relatively small payment into court. The cost of taking out further ATE policies was in addition to the £1m but was undisclosed in amount.

16. The third CMC commenced before Nugee J on 9 June 2020. The Funded Stewarts Claimants submitted that there was a prospect of some loss being caused by the provision of security, and so the correct course was for the court to require a cross-undertaking without further analysis of the likelihood or amount of the loss. In the alternative it was argued that the cross-undertaking should be for the external costs identified, namely the brokerage and insurers’ fees charged for bonding the existing ATE policies.
17. In a judgment delivered orally on 11 June 2020, the third day of the CMC, Nugee J required the Security Defendants, as a condition of obtaining security for their costs, to give a cross-undertaking in damages in favour of the Funded Stewarts Claimants and Therium in respect of “external costs” of providing security (“the June Judgment”). He gave the following reasons:

“Requiring a cross-undertaking in damages at this stage merely ... keep[s] a position open so that an argument can be had at a later date all arguments as to whether any payment should be made under the cross-undertaking, let alone whether the quantum sought is recoverable or not, could be put off until a later stage

Now that other types of cost have in principle been identified, namely, the costs of bonding the ATE policies and the costs of paying money into court, either by way of borrowing costs or by way of opportunities foregone, I can see that both those forms of providing security are ... matters where there is a prospect of a material external cost and in those circumstances, it does seem to me to be appropriate to keep the position open....

[The undertaking should extend to the Funded Stewarts Claimants because] “the claimants and Therium for these purposes, although not for other purposes, can be regarded as falling into a claimant pool who have put together their resources in order to bring this action and who will share the fruits of the action, and if there is a cost imposed on that claimant pool, ... it should be available to the claimants and Therium collectively to put forward a case that they should be compensated for that cost, wherever on the pool it happens to fall, and ... that requiring details over and above those that have been put forward to be given at this stage might

risk invading the confidentiality of the arrangements between the claimants and Therium, which it is not necessary to do at this stage.”

18. The Judge gave the Security Defendants permission to appeal against this ruling. His judgment was reflected in an Order dated 10 July 2020 (“the July Order”). Paragraph 1 recorded that it was a condition of the requirement for Therium to provide security for costs to any Security Defendant that the latter provide a cross-undertaking in damages. The form of the undertaking had by then been agreed between the parties and was set out in Annex 1 to the July order, the relevant part being in the following terms:

“If the court later finds that any order for security for costs made against [Therium] in respect of the costs of [the Security defendant] has caused loss to Therium or [the Funded Stewarts Claimants] arising from the external costs of putting in place such security...(but for the avoidance of doubt not including [the Enhanced Return]) and decides that Therium and/or the Funded Stewart Claimants should be compensated for that loss, [the Security Defendant] will comply with any order the court will make.”

19. Accordingly, there are two appeals before the court. The first is that of the Funded Stewarts Claimants against the February Order refusing their application for a cross-undertaking in relation to the Enhanced Return, brought with permission of Lewison LJ. The second is the appeal of the Security Defendants against the July Order, making it a condition of the provision of security for costs that they give a cross-undertaking in respect of the external costs of putting up security, brought with permission of the Judge.

Submissions in outline

20. The arguments of the Funded Stewarts Claimants may be summarised as follows:
- (1) A defendant should be required to provide a cross-undertaking in damages as a condition of an order for security against a litigation funder whenever there is some prospect that the claimant or a third party may suffer loss as a consequence of the order. This will usually be the case because loss of the use of capital has a cost which is well recognised as a recoverable head of damage, and the cost will usually be passed on to the claimant. A cross-undertaking should therefore be the usual requirement as a condition of ordering security. This is supported by the principle that a claimant’s rights of access to justice under article 6 of the European Convention on Human Rights should be trammelled to the least extent which is proportionate and necessary. The position is akin to that involved in an interim injunction or freezing order, where a cross-undertaking is almost invariably required, because an order for security for costs operates as a restraint on the use of assets in the same way.
 - (2) If there is such a prospect, then the court should not seek to analyse categories of recoverable loss or the likelihood of recoverable loss at the stage of ordering security and requiring the cross-undertaking: those are matters for consideration if and when a claim is subsequently advanced under the undertaking. The undertaking should be in the usual form required when granting an interim injunction or freezing order, namely an undertaking to

comply with any order that the court may make if the court later finds that the order has caused loss to the claimant or any third party affected by the order and decides that the party should be compensated for that loss. The purpose and effect of such a cross-undertaking is simply to preserve the court's power to make an order requiring payment of compensation if, on analysis at the appropriate time, it considers it right to do so, and so to ensure that the playing field remains a level one.

- (3) Accordingly, the Judge erred in the February Judgment in:
 - (a) requiring the Funded Stewarts Claimants to prove, as a precondition to any cross-undertaking, that they were exposed or arguably exposed to particular losses which would be recoverable under such an undertaking; and/or
 - (b) seeking to determine at the interim stage whether particular categories of loss that might arise as a result of the order should or should not be the subject of any cross-undertaking.
- (4) Further or alternatively, the Judge erred in concluding that the Enhanced Return should not in any circumstances be recoverable. In particular, the Judge was wrong to treat the Funded Stewarts Claimants and Therium as indistinguishable as the "Claimant pool" when assessing whether any losses were suffered by reason of the order for security. The Funded Stewarts Claimants and Therium are separate economic entities with separate and potentially competing interests. To the extent that the Funded Stewarts Claimants were required to bear an additional cost as a result of the order and the commercial terms of their funding arrangements with Therium, that cost ought to be recoverable in the same way as if it were a cost of third-party borrowing or the bonding of ATE policies. The Judge failed properly to take account of the public policy in favour of promoting litigation funding in appropriate cases as a means of ensuring access to justice. In particular, the effect of his decision is that the question of whether the Funded Stewarts Claimants should be compensated has been determined at a stage when the Funded Stewarts Claimants cannot fairly be expected to disclose to their opponents the full details of the arrangements with their funder under which the relevant losses might arise, and the extent of the impact of the order (or any subsequent such orders) on their ability to pursue the claims to trial.
- (5) The Judge was correct in his June Judgment to require a cross-undertaking as a condition of providing security (albeit that it should not have been confined to "external costs"), for the reasons he gave, and the Security Defendants' appeal against that decision should be dismissed.

21. The Security Defendants make common cause in advancing arguments which can be summarised as follows:

- (1) An order for security for costs to be provided by a commercial litigation funder should never require a cross-undertaking, alternatively only in very exceptional circumstances which are absent from the present case. This is for two reasons in particular. First, a professional funder is in the business of raising capital to

invest in litigation with a view to securing a return by sharing the proceeds of successful claims. It is part of its business to incur the cost of putting up security, which is not therefore a cost which a defendant should be required to underwrite. It is a cost which is offset by its recovery of a share of the proceeds of the litigation, if successful, just like any other litigation cost incurred as part of its business. Secondly, a commercial litigation funder ought to be adequately capitalised, and therefore in a position to resist an order for security, such that if an order for security is made, it is the funder's own failure to have, or to show, adequate capital which causes any loss in the form of the cost of putting up security.

- (2) Protecting commercial funders by requiring cross-undertakings will have undesirable adverse effects. It will reduce the incentive for them to put in place adequate measures to meet costs orders which may be made against them. It will reduce the incentive for them to fund security for costs in the cheapest way. Conversely it will deter defendants from seeking the legitimate protection they should enjoy against impecunious claimants by exposing them to unknown and unquantifiable liabilities in the future.
- (3) Article 6 of the ECHR does not support imposing a cross-undertaking; the balance between the article 6 rights of the claimants and defendants has been settled by the "stifling" principle, namely that where a claimant can show that ordering security would on the balance of probabilities render the pursuit of the claim unaffordable, security will not be ordered.
- (4) The analogy with a cross-undertaking given in return for an interim injunction is unsound: in the latter case the injunction will be seen to have been wrongly granted if the claimant fails to secure a final injunction at trial; whereas an order for security for costs is not wrongly made if the claimant succeeds at trial.
- (5) Alternatively, the only losses which can be protected by a cross-undertaking, if otherwise available and appropriate, are those of Therium, not the Claimants themselves, because the security is sought from Therium under CPR 25.14.
- (6) Alternatively, if a cross-undertaking condition covering losses suffered by the Funded Stewarts Claimants was permissible in principle, the Judge was right to consider whether the Enhanced Return was a head of loss to which it should respond, since all the information was before him and deciding the question would provide certainty to the Security Defendants about their exposure when considering whether to give the undertaking as the price for security; and the Judge was right to hold that the Enhanced Return was not a loss which should be covered by a cross-undertaking; but the Judge was wrong to hold that the external losses identified at the June hearing should be the subject matter of a cross-undertaking.

22. SRLV advanced two additional arguments, namely that:

- (1) the court has no jurisdiction to require a cross-undertaking as a condition of ordering security for costs; and

- (2) the Judge should not have considered requiring a cross-undertaking at the third CMC because (a) he had already decided to order security in February without imposing a requirement for a cross-undertaking as a condition; and/or (b) there had been no application or exchange of evidence in relation to it; and it was fundamentally unfair to SRLV to address and decide the issue then.
23. Four principal issues may therefore be identified:
- (1) Does the court have jurisdiction to require a defendant to provide a cross-undertaking in damages as a condition of ordering security for costs in its favour?
 - (2) Should such a cross-undertaking be required in favour of a litigation funder and if so, in what circumstances?
 - (3) Should such a cross-undertaking extend to losses of the claimants themselves when the security sought and ordered is against a litigation funder under CPR 25.14?
 - (4) Should the court reverse the decisions made on the facts by the Judge that any cross-undertaking (a) should exclude from its scope the Enhanced Return and (b) should include “external losses”?
24. Before addressing these issues, it is convenient to identify the relevant features of the Civil Procedure Rules and previous practice in relation to cross-undertakings as a condition of ordering security for costs, including the few decided cases in this area.

The Civil Procedure Rules and previous practice

25. Orders for security for costs are governed by Section II of CPR Part 25. Rules 25.12 and 25.13 govern orders for security to be provided by claimants. Rule 25.14 governs orders for security to be provided by two categories of third parties, namely those to whom a claimant has assigned a claim with a view to avoiding a costs order; and those who fund the claimant’s claim, in whole or in part, in return for a share of the proceeds of litigation. Rule 25.15 applies to security for costs against appellants.
26. The jurisdiction to order security for costs against some claimants is of long standing, predating the fusion of the courts of equity and common law in the 19th century. The jurisdiction to order security to be provided by litigation funders is more recent. It follows the establishment of a jurisdiction to award costs against such funders which was developed first by the common law and then enshrined in s. 51 of the Senior Courts Act 1981. The Rules expressly provide in each case that the court may only make an order if satisfied that it is just to do so having regard to all the circumstances of the case (Rules 25.13(1)(a) and 25.14(1)(a)). In addition, only some categories of claimant are amenable to an order for security by reason of the “gateways” to jurisdiction in Rule 25.13. Generally individual claimants may not be ordered to provide security if they are resident within the UK or a member state of the European Union or EFTA. There are limited exceptions contained in Rule 25.13(d) to (g): where a claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation; where he has failed to give his

address in the claim form, or given an incorrect address; where the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so; and where the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. A corporate claimant may be ordered to provide security if there is reason to believe that it will be unable to pay the defendant's costs if so ordered. A corporate claimant, wherever incorporated, will not therefore be required to provide security if it is sufficiently capitalised and solvent such that there is no reason to believe it will be unable to meet an adverse costs order. In relation to litigation funders, Rule 25.14 does not have the gateways which apply to orders for security against claimants. Accordingly, an order for security from a litigation funder is potentially available in respect of a defendant's costs of meeting a claim from a claimant against whom no order for security could be made under parts 25.12 and 13, because, for example, the claimant is resident in this jurisdiction. Nor is Rule 25.14 in terms limited in the case of corporate funders to those who it is likely to believe will be unable to meet an adverse costs order. However, since it is only available by the express terms of Rule 25.14 if in all the circumstances of the case it is just to make an order, a corporate funder will not be required to provide security if it is sufficiently capitalised and solvent that there is no reason to believe it will be unable to meet an adverse costs order, in the same way as obtains for a corporate claimant.

27. Although there is nothing in the Civil Procedure Rules or Practice Directions about cross-undertakings as a condition of an order for security for costs, Paragraph 5 of Appendix 10 to the Commercial Court Guide states:

“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.”

28. A statement in those terms has appeared in all versions of the 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.
29. The first reported case in which a cross-undertaking was considered appears to be *Stokors SA v IG Markets Ltd* [2012] EWHC 1684 (Comm), a decision of mine in which the issue of whether a cross-undertaking should be given had been raised by the claimant in correspondence. I expressed the view that it would have been an

appropriate case for a cross-undertaking because two of the claimants were engaged in the business of trading in highly leveraged products, and their losses from having to pay money into court might be far greater than loss of interest on that sum. The defendant declined to proffer a cross-undertaking. That did not lead me to decline to order security; rather it was treated as a relevant factor in determining the amount to be ordered, by reference to its effect on the principle that doubts about the quantum of security are usually to be resolved in the defendant's favour because the balance of prejudice works against a defendant: if the defendant is undersecured, he risks suffering a loss in the amount of the shortfall; whereas the loss to a claimant in having to provide excessive security is not the excess, but the cost of providing that excess, which will normally be far less than the excess. I took the view that the refusal to provide a cross-undertaking in that case removed from the defendant the benefit of doubts about the amount of security, with the result that I had to do the best I could on disputed issues without resolving doubts in favour of either party. On appeal ([2012] EWCA Civ 1706), Tomlinson LJ referred at paragraph 34 to the balance of prejudice principle, and at paragraph 35 identified the relevant passage on cross-undertakings in the Commercial Court Guide. He noted that "such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant". He went on to record the defendant's submission that I had been in error in concluding that the claimants were parties who might suffer a greater loss than the mere loss of interest in paying money into court, and therefore in error in failing to give the defendant the benefit of doubts in resolving the amount of security ordered. The court concluded that the appeal should be dismissed because the defendant was unable to show that there were any matters of doubt which I would have resolved differently had I been resolving doubts in the defendant's favour. The case therefore recognises the availability of a cross-undertaking in appropriate circumstances, but contains no guidance as to when such an undertaking may be appropriate. It was not a case involving funders. This appears to be the only appellate decision to consider a cross-undertaking in the context of a security for costs application.

30. The first reported decision in which a cross-undertaking was required as a condition of ordering security for costs is *In re RBS Rights Issue Litigation* [2017] 1 WLR 4635. In that case the order was made in favour of a litigation funder as a condition of an order pursuant to CPR 25.14 for the funder to provide security for costs in the form of payment into court. It appears the point was raised by Hildyard J of his own initiative during argument (see paragraph 144). He referred to the Commercial Court Guide as showing that there was jurisdiction to attach such a condition. He went on to hold that such an undertaking was "not common-place or inevitable" (paragraph 150). He concluded that there was "no hard and fast rule or settled practice: each case must be assessed on its own facts", but that an undertaking should be required on the facts of that case "so that the court has some means to review and remedy any prejudice at the end of the day" (paragraph 151). He rejected the argument that a cross-undertaking was unjustified because the funder had not provided any specific evidence of potential losses which would be suffered by putting up security. He said that it was in the nature of business that such an opportunity cost might arise and the fact that a particular lost opportunity was not identified or quantified did not necessarily militate against protection (paragraph 148). He also rejected the objection that the provision of security for costs was simply part and parcel of a funder's business and a risk of doing business in this area. He said that whilst the provision of security for costs

might be a risk which should be anticipated by a funder, it did not follow that such risk should include a business loss occasioned by the order which the court should have power to attenuate or reverse (paragraph 149).

31. In *Bailey v. GlaxoSmithKline UK Ltd* [2018] 4 WLR 7, Foskett J was concerned with another case of security for costs sought from a litigation funder under CPR 25.14. At paragraph 82 he observed that on the evidence then available he had very considerable reservations about whether the funder could legitimately claim losses attributable to giving security, but he felt bound to follow *In re RBS* and require a cross-undertaking in damages.
32. In *Hotel Portfolio II v Ruhan* [2020] EWHC 233 the defendant sought security for costs pursuant to CPR 25.12 from the claimant itself, a company in liquidation, not from a funder. Butcher J made security for costs conditional upon the defendant giving a cross-undertaking (and in the case of one defendant, Mr Ruhan, fortifying that undertaking). Having referred to the passage in the Commercial Court Guide, he said at paragraph 29 that:

“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.”
33. A different approach was taken by Marcus Smith J in *TBD (Owen Holland) Ltd v. Simons* [2020] EWHC 2681 (Ch). This judgment was delivered between the February Judgment and June Judgment of Nugee J in this case. At the June CMC, Nugee J was referred to a digest of the decision, but a transcript was not available. We have had the benefit of seeing the transcript of Marcus Smith J’s ex tempore judgment. It refers to an order for security for costs against a claimant, so presumably under CPR 25.12, but is silent as to whether the claim had the benefit of commercial litigation funding. It is not clear whether the cross-undertaking sought was in the usual form required for an interim injunction: paragraph 1 of the judgment describes the issue as whether a defendant should be required to provide “an undertaking in damages to hold the claimant harmless against the costs or loss caused by the order requiring the claimant to provide security.” Marcus Smith J recorded that he had never seen an order requiring a cross-undertaking in his experience, but had been referred to the decision of Hildyard J in *In re RBS*. He saw two difficulties in the way of making such an order. The first was that it was extremely difficult to define the contingency which triggers the undertaking. The second was that it was extremely difficult to identify or “baseline” the consequences of the undertaking for a defendant. He expounded both points by drawing a distinction with a cross-undertaking given in return for an interlocutory injunction. As to the first he said that a defendant giving a cross-undertaking in return for an interlocutory injunction knows when he gives it that the triggering event will be a failure to secure a final injunction at trial which will mean that the interlocutory injunction was wrongly ordered; whereas even after the event it is difficult to say whether an order for security for costs has been wrongly granted. A security for costs order is justified whatever the outcome of proceedings because it simply makes provision for a contingency, namely that if a costs order is made in

favour of the defendant “it should have teeth”. As to the second, he said that the defendant who gives a cross-undertaking in return for an interlocutory injunction will generally have some idea of the losses he will be called upon to pay, whereas the consequences for a claimant of putting up security would be very difficult to “baseline”. He asked hypothetically whether the cross-undertaking would cover the consequences of a claimant being tipped into bankruptcy, and described it as a “very open-ended and dangerous jurisdiction” which he was being asked to exercise. He concluded that whilst there was jurisdiction to require a cross-undertaking, it should only be exercised if it were clear at the time of the making of the order that there are some special and unusual circumstances which suggest that the claimant providing security requires a degree of protection over and above receiving the security back if he wins the action. He held that there was nothing out of the ordinary in the case before him and so he declined to make his order for security for costs conditional upon the defendant giving a cross-undertaking.

34. Most recently, Henshaw J required a cross-undertaking when ordering security for costs against two corporate claimants in *Pisante v Logothetis* (10 December 2020). He identified the potential losses as the tying up of capital and the incurring of bank charges by the individual claimant in putting one of the corporate claimants in funds in order for the latter to obtain a bank guarantee in favour of the defendants. Having referred to Appendix 10 paragraph 5 of the Commercial Court Guide and the authorities I have cited above, he observed that the concerns of Marcus Smith J in *TBD* would not arise if the cross-undertaking were in the usual form, because it left it to the court to decide at a later stage whether compensation should be given if loss were caused, and the court need not concern itself when requiring the cross-undertaking as to whether the consequences might be severe: those were matters which could be determined at a later stage taking into account what was just in all the circumstances of the case. He rejected the submission that a cross-undertaking should only be required in exceptional cases and identified four factors which justified requiring one in that case. They were that there was evidence from which it was to be inferred that some loss would be suffered in putting up security for costs; that the claimants had identified some substantial assets but security was being ordered because of concerns as to whether they would be available to meet a costs order; that one of the factors leading to the ordering of security was the unwillingness of the individual claimant to provide information about his assets to defendants he was suing for fraud, which might be seen in a different light if the fraud claim succeeded; and that the case involved essentially individuals rather than large corporations, and that it was the individual claimant who would bear the cost of providing the security and ought therefore to have at least the possibility of being protected from such costs.

Issue 1: Jurisdiction

35. None of the Security Defendants advanced an argument before Nugee J that he lacked jurisdiction to require a cross-undertaking in damages. The passage which has been in the Commercial Court Guide for over 20 years assumes that there is jurisdiction to require a cross-undertaking as a condition of ordering security for costs in an appropriate case, as do the decisions in *Stokors*, *In Re RBS*, *Bailey*, *Hotel Portfolio II*, *TBD* and *Pisante*. I have little doubt that they are correct to do so. The jurisdiction lies both in the discretionary nature of an order for security under CPR 25 itself, and in the express terms of CPR 3.1.

36. When the court requires a cross-undertaking, it does not order it to be given. An undertaking is something which can only be given voluntarily to the court. However, in determining whether to order security for costs the court is exercising a discretion. The Rules determine the circumstances in which the court *may* order security and provide that it may only do so if satisfied that in all the circumstances it is in the interests of justice (CPR 25.13(1)(a) and 25.14(1)(a)). The court may determine that in the absence of a cross-undertaking it is not just to exercise the discretion to order security, but that if a cross-undertaking is given a security order is just. In such circumstances the voluntary giving of the undertaking is the price a defendant must pay in order to obtain an order for security for costs.
37. That is also the nature of the jurisdiction which the court exercises in requiring a cross-undertaking, whether fortified or not, when asked to grant an interim injunction or freezing order. It is part of the inherent jurisdiction of the court when deciding whether or not to grant such discretionary relief. Although CPR PD 25.1 paragraphs 5.1 to 5.3 refer specifically to cross-undertakings in damages in such cases, that is not the source of the jurisdiction. Section 37(1) of the Senior Courts Act 1981 provides that a court may grant an injunction, interlocutory or final, in all cases in which it appears to the court to be just and convenient to do so. Cross-undertakings in damages are by no means the only conditions which a court may require in return for the grant of an injunction. There are many cases in which relief has only been granted by the court on condition that the applicant has undertaken to do something or refrain from doing something in terms which the court could not itself have ordered, for example when considering anti-suit injunctions or in the context of arbitration proceedings: see *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574 at [120] for a recent example.
38. CPR 3.1 (3)(a) provides that when the court takes a step or makes an order of the type enumerated in Rule 3.1(2), it may make it subject to conditions. Rule 3.1(2) includes any step or order taken or made for the purpose of managing the case and furthering the overriding objective, which embraces orders for security for costs under CPR 25.
39. Mr Taczalski submitted that the decision of this court in *Huscroft v P&O Ferries Ltd* [2011] 1 WLR 939 established that the power conferred by CPR 3.1(3) could only be exercised for the purposes of exerting control over the future conduct of the litigation. In my view that is to mischaracterise the decision.
40. In that case the defendant had obtained an order for security for costs against the claimant, not under CPR 25, but as an adjunct to a wide ranging group of relatively routine procedural directions given at a case management conference, as to which there was little controversy, by invoking CPR 3.1(3). The grounds for doing so were criticisms of the way the claimant had conducted the proceedings. The passages relied on by Mr Taczalski are in paragraph 17 of the judgment of Moore-Bick LJ, with which Elias LJ and Sedley LJ agreed, which I have identified in the quotation below by underlining them. They must, however, be read in the context of all that was said in that paragraph and elsewhere in the judgment. At paragraph 10 of his judgment Moore-Bick LJ said that the judges below appeared to have approached the matter on the basis that under rule 3.1(3) the court has the power when making an order of any kind to impose conditions on one or both parties, whether related to specific paragraphs of the order or not. He recorded the submission of counsel for the claimant that:

“this involves a misunderstanding of rule 3.1(3), which allows the court to attach a condition to a specific order granting relief as the price of doing so. The purpose of such a condition, in his submission, is to control the future conduct of the proceedings, not to punish previous misconduct.....”

41. Paragraph 17 was in the following terms:

“17. In both *Olatawura v Abiloye* [2003] 1 WLR 275 and *Ali v Hudson* [2004] CP Rep 15 the court appears to have been concentrating primarily on the court’s power to order a payment into court under rule 3.1(5), although it may be fair to say that in neither case was it at pains to draw a clear distinction between the two rules. However, they are distinct and directed to different situations. In particular, rule 3.1(3) is deliberately drafted in quite general terms and I think that this court should be reluctant to lay down any hard and fast rules about the circumstances or manner in which the power can be exercised. Experience shows that cases are infinitely variable and the rule does not place any limit on the nature of the conditions that may be imposed or the circumstances in which the power may be invoked, other than providing that a condition may be imposed as an adjunct to an order. However, two matters seem to me to provide support for the view that the power to attach conditions to an order is intended, as Mr Myerson submitted, to enable the court to exercise a degree of control over the future conduct of the litigation. The first is the existence of rule 3.1(5), which is clearly intended to give the court power to punish a party who without good reason fails to comply with the established procedural code, including the pre-action protocols. Although such an order may well have a beneficial influence on the future conduct of the litigation, it is directed more to what has gone on in the past than what will go on in the future. To that extent it is quite different in nature from a condition of the kind contemplated by rule 3.1(3) which, combined with a sanction for failure to comply, usually of a stringent nature, is designed to control the future conduct of the party on whom it is imposed. The second is the language of the rule itself. The very fact that it allows the court to make an order subject to conditions is sufficient to show that the rule is concerned with the basis on which the proceedings will be conducted in the future, and that remains the case even when the condition is imposed in order to make good the consequences of some kind of previous misconduct.”

42. Moore-Bick LJ went on to say the following in paragraph 18, to which I have added my emphasis in italics:

“18 Having said that, I think it is also necessary to recognise that rule 3.1(3) does not give the court a general power to impose conditions on one or other party whenever it happens to be making an order and if District Judge Babbington thought that it did, he was in my view wrong. When the rule speaks about the courts making an order it is referring to a direction that a party act in a certain way or that a certain state of affairs should exist, not to the instrument used to give effect to one or more such directions. The court has ample powers under rules 3.1(2)(m) and 3.3 to make whatever orders are needed for the proper management of the proceedings. *The purpose of rule 3.1(3) is to enable the court to grant relief on terms and when the power is exercised the condition ought properly to be expressed as part of the order granting the specific relief to which it relates.* The order in the present case did not do that. Para 1 was framed as a

free-standing order that Mr Huscroft pay money into court as security for costs; *it was not expressed as a condition of obtaining any relief that he was seeking*. Para 2 imposed the sanction of striking out his claim in default of compliance. *Those were orders of a kind that one might expect to see following an application for security for costs under Part 25 or even an unsuccessful application by one or other party for judgment under Part 24, but not as conditions attaching to a wide-ranging group of relatively routine procedural directions given at a case management conference*. I accept that, as Rimer LJ pointed out when refusing permission to appeal on this point, it would be wrong to elevate form over substance, but it seems to me that *expressing the relevant order as subject to the condition in question is the right way to exercise the power*. *It also has the advantage of requiring the court to focus attention on whether the condition (and any supporting sanction) is a proper price for the party to pay for the relief being granted*. That being so, I think it is unfortunate that in this case the district judge started by considering P & O's application for security for costs rather than by considering what directions the parties were seeking for the future conduct of the proceedings, because it tended to mask the fact that he could only make such an order as a condition of granting some other relief. I do not think that he can be strongly criticised for doing so, given that he was faced with what was in effect a straightforward (if inappropriate) application by P & O for an order for security for costs, but none the less it led him to approach the matter from what I consider to be the wrong direction."

43. It is clear that Moore-Bick LJ was not seeking to confine the power in rule 3.1(3) to cases where the condition is designed to exercise control over a person's future conduct of the litigation. He said in terms in paragraph 17 that he was not laying down any hard and fast rules as to when the power might be properly exercised. What was said at paragraph 18 contemplates that the power may properly be exercised to impose a condition of specific relief being granted, as a price for granting it. This reflected counsel's submission at paragraph 10 which was not confined to controlling the future conduct of the litigation. What was objectionable in that case was that the "condition" was not really a condition at all, being attached simply to general case management directions, and moreover that it was an order for security for costs which took no account of the requirements of CPR 25. In the present case the condition of a cross-undertaking is sought to be attached to a specific order, for security for costs, and as the price for the grant of such an order. As such it falls squarely within the scope of the power in rule 3.1(3) which was contemplated by Moore-Bick LJ in *Huscroft*.

Issue 2: Should a cross-undertaking be required?

44. Although the parties in these appeals understandably developed their arguments by reference to applications for security against litigation funders under CPR 25.14, I find it convenient first to consider the position more generally, without reference to any specific factors arising out of commercial litigation funding.

The costs of funding litigation generally

45. The starting point is that generally claimants are not insulated from having to bear costs or losses incurred as a result of pursuing claims in civil litigation. That is so

both as regards the costs of conducting the litigation, and expenses or losses incurred by reason of funding those costs, as to which the law draws a distinction.

46. As to the first, although a successful claimant will generally be awarded costs against the defendant, it is well known that an assessment of costs on the standard basis usually results in a portion of the costs being irrecoverable from the defendant, typically something of the order of 70% being awarded, with the claimant left to bear the balance. Moreover, the claimant may not recover his recoverable costs, if, for example, the defendant does not have assets available to meet the costs order. Importantly, a claimant cannot generally obtain security in advance for a favourable costs award, just as he cannot obtain security for the amount of his claim, absent the special circumstances in which a freezing order is appropriate. It is not, therefore, the policy of the law to require a defendant to provide interlocutory protection for civil claimants against the risk of being unable to recover costs of conducting the litigation.
47. As to the second, most claimants will need to fund costs which are incurred, whether by way of legal fees or disbursements, for the period between advancing the claim and satisfaction of a final judgment. They may do so from their own resources; they may be funded in whole or in part by commercial loans or personal support which requires repayment with interest; they may contract with commercial litigation funders or others for funding in return for a share of the proceeds of the claim if and when successfully established. Commercial litigation funding is not confined to those who cannot afford other forms of funding. Some estimates suggest that as many as 50% of claimants who now take up commercial litigation funding would be able to finance their costs from other sources. Whatever method is adopted, there is usually a cost of funding which is additional to the costs of the litigation themselves. A claimant who is funding from his own resources loses the opportunity to employ that capital to earn money, whether by way of interest on investment or profit on a business venture. A claimant who borrows at interest incurs the cost of borrowing. A claimant who engages litigation funding will generally have to forgo a portion of the damages recovered in a successful claim to compensate the funder for the risks of the claim failing.
48. Similarly, a defendant will usually incur a cost of funding in defending the claim, whether through the opportunity cost of employing his own resources or an interest cost on financing.
49. Subject to certain statutory exceptions, these costs or losses involved in funding litigation costs, on both sides, are not recoverable from the other party. Section 51 of the Senior Courts Act 1981 provides the jurisdiction for an award of costs. It applies to “costs of or incidental to” the litigation. It has long been established that the costs of funding litigation are not within such a definition. In *Hunt v RM Douglas (Roofing) Ltd* (1987) NLJ 1133; (1987) 132 SJ 935 the Court of Appeal upheld the decision of a taxing master not to award as costs the “on-cost of funding disbursements during the currency of the action” based on bank overdraft interest rates. Purchas LJ said that “... by established practice and custom funding costs have never been included in the category of costs or disbursements envisaged by the statute and RSC Ord 62.” In *National Westminster Bank v Kotonou* [2009] EWHC 3309 (Ch); [2010] 2 Costs LR 193, Briggs J, as he then was, sitting with a Chancery master and a costs judge, said at paragraph 26: “...there is a general principle that the costs of a claim do not include costs incurred by a party in seeking funding either for the

prosecution or for the defence of that claim”. The principle was reaffirmed and applied in this court in *Motto v Trafigura* [2012] 1 WLR 657: see per Lord Neuberger MR at paragraphs 104 to 108.

50. There have been two specific exceptions made to this principle. The first is that there is a power under CPR 44.2(6)(g) to award interest on costs from a date prior to judgment. This is a power available under CPR 40.8 in relation to judgment debts more generally, which provides that a court may order interest to run on any judgment debt from a date prior to judgment. It is common for these provisions to be applied to award interest on costs to a successful party from the time he has actually had to make the expenditure by putting his solicitors in funds or to make disbursements. As the notes to the Civil Procedure Rules observe at paragraph 44.2.29, the jurisdiction in this respect does not derive from Rule 44.2(6)(g) as such, but from the statutory power to award interest on judgment debts contained in s. 17 of the Judgments Act 1838 and s. 34 of the County Courts Act 1984.
51. The second exception relates to premiums for ATE insurance. Apart from statute, these are costs of funding litigation and as such are irrecoverable: *McGraddie v McGraddie (No 2)* [2015] 1 WLR 560 per Lord Neuberger PSC at paragraphs 14 and 17-19. The Access to Justice Act 1999 provided that such premiums should be recoverable. The position was largely but not wholly reversed by s. 58C of the Courts and Legal Services Act 1990, introduced by s. 46(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which restricts recoveries of such premiums to clinical negligence cases.
52. Hence the background to the issues in these appeals is that losses caused to a claimant or defendant in funding litigation generally lie where they fall, with the party who incurs them bearing them, subject only to specific and limited statutory exceptions. What is involved in a cross-undertaking of the kind in issue in this case is a reallocation of this risk for a loss caused by funding one aspect of litigation, namely the funding of putting up security for costs. It is therefore itself an exceptional departure from general practice and the general principle that funding costs or losses lie where they fall.
53. This background suggests that to require a defendant to provide a claimant with the benefit of a cross-undertaking in damages in return for security for costs should at the very least be an exceptional remedy. A cross-undertaking is only relevant in respect of losses or costs which do not constitute costs which are recoverable under the jurisdiction conferred by s. 51 of the Senior Courts Act 1981; otherwise it is unnecessary. Statute regulates the extent to which funding costs are recoverable, and the general rule is that they are not, subject only to defined and limited exceptions.
54. That it would be an anomaly to extend the exceptions to the funding principle by way of a cross-undertaking is, to my mind, illustrated by the facts of the current case. The costs to the Funded Stewarts Claimants of putting in place the ATE policies are irrecoverable as costs. Yet if a cross-undertaking were required it would potentially make recoverable the additional costs of bonding those policies, and the cost of taking out further ATE policies. The Funded Stewarts Claimants’ retort that these are additional costs which are only incurred by reason of the discretionary order which the defendants are seeking for security provides no justification for the anomaly: such an order is made if, and because, it is just in all the circumstances of the case, and is

part of the fair procedural management of proceedings in accordance with the overriding objective; that does not distinguish it from any other discretionary case management order.

55. I would therefore require cogent and compelling reasons for what would amount to a significant departure from established principles on the recoverability of costs or losses incurred in funding litigation before I felt able to accept the submission advanced by the Funded Stewart's Claimants that a cross-undertaking should be the usual requirement as a condition of an order for security for costs.

Article 6

56. I find nothing in article 6 which points to a different approach. When the court is considering whether to make an order for security for costs, the article 6 rights of access of both claimants and defendants are engaged, as this court explained in *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123; [2007] 1 Costs LR 57 at paragraph 32:

“Nor did [Eady J] err in relation to article 6 of the Convention when he spoke in the same paragraph of “the parties' respective rights” under it. Mr Shaw submits that the only relevant right here is the claimants' right of access to the courts. But it is manifest that defendants too have entitlements under article 6, including a right not to have their access to a court rendered prohibitive by the prospect of irrecoverable costs or, as demonstrated by the judgment in *Tolstoy*, an entitlement to have claimants' access limited by relevant and proportionate conditions.”

57. Sedley LJ made clear in that case that the balance was struck in English law conformably with the Convention by the established interpretation of CPR 25.13 and its predecessors, in particular in this court in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, 539-540 and *Kufaan Publishing Ltd v Al-Warrak Publishing Ltd* (1 March 2002 unreported), as precluding the ordering of security where the claimant showed on the balance of probabilities that he would not be able to raise the sum required as security, but not where all he could show was that there was a substantial risk of being unable to do so: see paragraphs 25 and 30-31. This is what is often referred to as the stifling principle, which is of long standing. However where an order for security will not stifle a claim, in the sense explained in *Al-Koronky*, there is no room for a more general application of article 6 to justify imposition of a cross-undertaking on the grounds that it would trammel a claimant's access to the minimum extent necessary, or remove an economic disincentive. If the claim will be stifled by the ordering of security, no order will be made. If not, it is the defendant's article 6 rights which prevail by requiring an order to be made; and there is no justification for an additional burden to be placed on a defendant by way of a cross-undertaking which will itself impose an economic disincentive to the defendant in seeking an order for security.
58. Mr Hunter QC relied in this context on passages in the judgment of Potter LJ in *Abraham v Thompson* [1997] 4 All ER 362 at 374e to 375b, and in particular his statements that an individual (who is not under a disability, a bankrupt or a vexatious litigant) is entitled to untrammelled access to a court of first instance in respect of a bona fide claim, which is to be contrasted with an interest which a defendant has for security for costs. However, the issue in that case was whether the court should

impose a stay of the claimant's action simply on the grounds that the claim was being funded by a third party who might not meet a costs order, in circumstances where there was no jurisdiction to order security for costs against either the claimant (who was resident in Portugal) or the funder (this being prior to the introduction of any rule equivalent to CPR 25.14). The claimant's right of access for his claim was held to trump the defendant's interest in enforcing a costs order after trial because the legislature and rule-making authority had not seen fit to provide the defendant with any entitlement to security, so that the imposition of a stay could only be justified if it were an abuse of process: see p375a-b. It was not therefore a case in which there were any access to justice considerations on the defendant's side to be taken into consideration. By contrast, in these appeals we are concerned with balancing the article 6 rights of claimants and defendants where CPR 25 specifically does grant to the defendants a right to seek security for their costs. The balance is struck by the stifling principle, as *Al-Koronky* explains. That determines the extent to which the claimant's article 6 rights are legitimately or illegitimately trammelled. There is nothing in that case which supports Mr Hunter's argument that article 6 should require additional protection for a claimant and an additional burden on a defendant in the form of a cross-undertaking.

59. In this case counsel appearing before Nugee J for both the Funded Stewarts Claimants and Therium expressly disavowed any argument that an order for security would stifle the claims as a ground for resisting an order, whether with or without the benefit of a cross-undertaking.

The suggested analogy with interim injunctions

60. The practice of requiring a cross-undertaking in damages as a condition for granting an interim injunction was addressed by Sir George Jessel MR in *Smith v Day* (1882) 21 Ch D 421 at 424 in these terms:

“I will first say a few words as to the history and meaning of this kind of undertaking. It was invented by Lord Justice Knight Bruce when Vice-Chancellor, and was originally inserted only in Ex parte orders for injunctions. Its object was, so to say, to protect the Court as well as the Defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as for instance, if the Judge was wrong in his law. I think this is shewn by the fact that such an undertaking is never inserted in a final order for an injunction.”

61. In *F. Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock described the justification more broadly as being that for this “temporary and exceptional remedy” the court could not be certain that a plaintiff would succeed at trial and that if a defendant were restrained in the meantime and the claim not made out at trial he would suffer a loss without a remedy if no cross-undertaking were required: see p360G to 361C.
62. The practice of requiring a cross-undertaking was extended to the grant of freezing orders following the establishment of the jurisdiction in *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1975] 2 Lloyd’s Rep 50. It is now reflected in paragraphs 5.1 and 5.2 of PD25A.
63. The Security Defendants argue that the analogy with an order for security for costs is inapposite because an order for security for costs is not wrongly made if the claimant’s claim succeeds; it is an order which provides for a contingency, namely an award of costs in favour of the defendant, and cannot be said to be wrongly made merely because that contingency does not eventuate. I do not find this a satisfactory distinction, and in my view it misunderstands what is meant when it is sometimes said by way of shorthand that the cross-undertaking is to compensate the defendant if it turns out that the interim injunction or freezing order was “wrongly granted”. The broad justification for the cross-undertaking given by Lord Diplock indicates that what this means is simply that when the trial is concluded the interlocutory relief can be seen to have been unjustified. In the case of an interim injunction, if the defendant succeeds at trial in defeating a claim for a final injunction, the cross-undertaking will potentially be engaged because the claimant will have failed to establish the right in protection of which interim relief was granted. For the same reason, the cross-undertaking given in support of a freezing order will potentially be engaged if the claimant’s claim fails at trial, because a freezing order can only be justified in protection of a claimant’s right of enforcement of a judgment on a valid claim, if and when established. In each case the interlocutory order is made on an assumption that the claimant’s claim is a good one, which is something which the court cannot finally determine at the interlocutory stage.
64. An order for security for costs proceeds on a comparable assumption, namely that the defendant will, following trial, be awarded its costs against the claimant, typically if the claim has failed. If the claim succeeds, it ought never to have been resisted by the defendant and the claimant should not have been put to the expense of incurring any litigation costs; and the defendant ought not therefore to have obtained an order for security for costs. In such a case the order for security would be seen to have been “wrongly made” in the same way as that shorthand is used for cross-undertakings given in support of an interim injunction or freezing order.
65. There is, however, a different and important point of distinction. An interim injunction or freezing order is an exceptional remedy whose purpose is to impose a restraint on the defendant in the use of his assets, or what are arguably his own assets. It is not aimed at the use of assets for litigation funding, and a freezing order is normally subject to an exception in relation to legal costs. Its rationale and principal purpose is to prevent dissipation of assets so as to defeat enforcement of the claimant’s substantive claim. Where the restraint on the use of such assets causes loss to a defendant, there are good policy reasons for allocating the risk of such losses to the claimant, in return for what are substantial interferences with the defendant’s way

of life and conduct of business which are not part of the normal run of litigation. In *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, Peter Gibson LJ said at p. 1554:

“This appeal raises an important point affecting the practice of the court on the enforcement of undertakings as to damages given by the successful applicant for an interlocutory injunction when subsequently the injunction is shown to have been wrongly granted. The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for its grant was originated by the Court of Chancery as an adjunct to the equitable remedy of an injunction. There is an obvious risk of unfairness to a respondent against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have not been ascertained. The order might subsequently prove to have been wrongly made but in the meantime the respondent by reason of compliance with the injunction may have suffered serious loss from which he will not be compensated by the relief sought in the proceedings. The risk of such injustice is the greater when the interlocutory injunction has been granted *ex parte*. The risk is particularly great with *Mareva* injunctions, granted as they are almost invariably *ex parte*, and frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets: such injunctions can have the effect of ruining a thriving business or of otherwise causing substantial loss to the respondent and were vividly described by Donaldson L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92 as being, with the *Anton Piller* order, one of the law's "two 'nuclear' weapons." The courts are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse.”

66. By contrast an order for security for costs is aimed solely at the costs of litigation and is an ordinary incident of the process of civil litigation, which arises as part of the fair procedural management of claims. It is this which makes the analogy which the Funded Stewart's Claimants seek to draw a false one. It is true that, as they submit, an order for security for costs will often operate to restrain the claimant from enjoyment of its assets in the sense that any order which causes a party to incur an expense impairs his ability to enjoy the assets which are used or forgone in order to meet the expenditure. But this is not the purpose of the order, and is no different in its effect from any case management order which requires a party to incur expenditure.

Practical considerations

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. A recent example is *Fiona Trust and Holding Company v Privalov* [2014] EWHC 3102 (Comm); [2016] EWHC 2163 (Comm); [2016] EWHC 2451 (Comm); [2016] EWHC 2657 (Comm), in which issues in relation to the inquiry took over 10 days to hear and the defendants' costs were of the order of £3m. 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.

69. In this respect I am unable to draw comfort from the point made by Nugee J in his June Judgment, and by Henshaw J in *Pisante*, that all that was being done was to keep the position open, and that because requiring the cross-undertaking merely allows for the possibility of an inquiry at a later stage, the court need not concern itself with whether losses ought to be compensated or whether the consequences would be severe. Although of course all circumstances can be taken into account when deciding at the later stage whether the cross-undertaking is to be called on and whether to order an inquiry into damages, the initial decision to require an undertaking is a decision in principle that, subject to questions of remoteness, losses caused by putting up security should be compensated; and when the cross-undertaking is called on, providing some loss of that nature is shown, the normal course would be to order an inquiry. That is the position in relation to cross-undertakings offered in support of interim injunctions and freezing orders: see Gee on *Commercial Injunctions* 6th edition at para 11-041 and the cases there cited.
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? Moreover, there may well be cases in which it is appropriate to explore the losses which the claimant suggests merit protection. Although there is force in the submission by the Funded Stewart Claimants that the better course would often be to order a cross-undertaking in general terms with identification of losses postponed until the cross-undertaking is called on, that would leave a defendant in the invidious position of not knowing the nature or extent of liability to which an undertaking will expose him, at the time when he is asked to consider it as the price which he is asked to pay in return for obtaining security for costs. This case provides an example. I do not consider that there is any basis for interfering with the discretion exercised by Nugee J to decide whether the Enhanced Return was something to which a cross-undertaking should respond. That was a case management decision and was justifiable on the basis that the Security Defendants should know the position. However, if cross-undertakings are to become the norm, this kind of consideration will increase the scope and cost of applications.
71. Thirdly, there is also force in the submission of the Security Defendants that if a cross-undertaking is required, defendants will be discouraged from seeking security by the fact that an open-ended and unquantifiable liability is being undertaken. Any uncertainty as to the future position is an unsatisfactory disincentive to a defendant seeking an order for security for costs when endeavouring to assess whether the provision of a cross-undertaking is a price worth paying in return. This is so notwithstanding that principles of remoteness of damage are applicable to damages under a cross-undertaking: *Abbey Forwarding v Hone (No 3)* [2015] Ch 309. This is an unwarranted tilting of the balance of the article 6 rights of access to justice established in *Al-Koronky* and the cases there cited.

Litigation funders

72. The considerations so far identified would suggest that, without reference to any factors arising from commercial litigation funding, a cross-undertaking should not be required in return for an order for security for costs save in rare and exceptional cases. There are three factors which make that all the more so when claimants have the benefit of commercial litigation funding.
73. First, this court held in *Excalibur Ventures LLC v Texas Keystone Inc (No 2)* [2017] 1 WLR 2221 that the costs incurred by a litigation funder in providing a claimant with the money to put up security for costs are not to be treated any differently from any other costs incurred by the funder in funding the other costs of litigation: see per Tomlinson LJ at paragraphs 32 to 48. Far from the costs of putting up security being treated as an exception to the costs of funding litigation generally, they are to be treated in the same way. They are irrecoverable as costs save to the extent permitted by the statutory exceptions, and there is no principled distinction to be drawn with other costs of funding litigation which would justify them being recoverable by means of a cross-undertaking when other funding costs are not.
74. Secondly, as Tomlinson LJ observed at paragraphs 1 and 28 of his judgment in *Excalibur v Texas Keystone*, commercial funders are not motivated by considerations of access to justice, although the facilitation of access to justice may be an incidental by-product. The commercial funder is an investor who hopes to make a return on his investment. The return is a multiple of his funding obtained from the proceeds of a successful claim. The investment is the cost of funding the claim. If funding the pursuit of the claim requires security for costs to be provided, that is a normal and foreseeable aspect of the investment being made, and the funder can be expected to include it in his business model in determining the terms on which funding is provided.
75. Thirdly, commercial litigation funders ought to be properly capitalised, in order to be able to meet an adverse costs order if the claim fails. They should therefore be in a position to defeat any application for an order that security be provided by demonstrating an ability to meet an adverse costs order.
76. The importance of ensuring that commercial funders are properly capitalised was emphasised by Sir Rupert Jackson in Chapter 11 of his *Review of Civil Litigation Costs: Final Report*. It was his initial view that the capital adequacy of third party funder was a matter of such pre-eminent importance that it should be the subject of statutory regulation; but ultimately, in light of the (then) low-volume of third party funding, and with some hesitation, he considered that capital adequacy requirements could be dealt with by tightening the funders' self-regulatory code which was then in draft: see Chapter 11 paragraphs 3.1 to 3.4 of the Report.
77. Self-regulation in this jurisdiction takes the form of the Code of Conduct of the Association of Litigation Funders ("the ALF"), of which one of the companies in the Therium group, Therium Capital Management Ltd, is a member. It is fair to say that the Code is not a very long or detailed document. Under the Code, members of the ALF accept responsibility - but only to the ALF - to ensure that they (or their parent or subsidiary) have capacity to meet their debts when they become due; to maintain a minimum amount of capital; to comply with a continuous disclosure obligation in

respect of their capital adequacy (but only to the ALF and their clients); and to provide annual audit information (again, only to the ALF).

78. Accordingly, it is clear that, as the ALF itself accepts, it is a critical feature of the business of commercial litigation funding that funders should ensure that they have adequate resources to meet their potential liabilities arising out of the litigation that they choose to fund. It follows that a properly run commercial funder should rarely if ever need to be ordered to put up security. A funder should be structured, and operated, in such a way that there is little doubt that it will be able to satisfy any adverse costs order which may be made against it.
79. In those circumstances it is wrong that a commercial litigation funder such as Therium which is ordered to put up security, because it has failed to show that it has structured its business so that it is in a position to meet an adverse costs order, should be able to pass on the costs (by way of a cross-undertaking) of putting the necessary resources or security in place. The public interest, reflected in the key concern expressed by Sir Rupert Jackson, and the ALF Code itself, requires Therium to have in place adequate capital to discharge any adverse costs order that may be made. It is not appropriate or fair that Therium should seek to impose the cost of arranging that capital upon the Security Defendants through the mechanism of a cross-undertaking in damages.
80. Moreover, a principle that cross-undertakings will not be required where orders for security are made against under-capitalised commercial funders can be expected to incentivise improvements in the way in which the commercial litigation funding market operates. It would bring further pressure to bear on commercial funders, beyond the ALF Code (which only applies to entities which volunteer to join the ALF), to ensure that they are set up, operated and capitalised properly such that they can meet their potential obligations so that security for costs is simply not required from them. Well-advised claimants can be expected to seek to avoid funding from funders who are set up in such a way that orders for security for costs might be required against them (for example, where the funder is inadequately capitalised, or not transparent as to its financial standing, or is unwilling to provide defendants with an undertaking that it will meet their costs). Funders who choose to conduct their businesses in these sorts of ways, and who seek to recover the cost of putting in place security by charging their funded clients a multiple of the amount of the cash that they are ordered to put up, can be expected rapidly to lose market share to those funders who are properly capitalised (and demonstrably so) from the outset. If, on the other hand, commercial funders are potentially able to recover the costs of putting in place adequate security from defendants, this would create a positive incentive for funders to be deliberately reticent about their financial means, to retain less capital and obtain less ATE, since it would enable them – through the machinery of a cross-undertaking – to pass on to defendants part of the cost of capital of their own business and/or to maximise their profits in the process. That would be at odds with the policy goals elucidated by Sir Rupert Jackson, whose Report not only emphasised the importance of ensuring that third party funders satisfy capital adequacy requirements, but also observed at paragraph 1.2(iii) of Chapter 11 that one of the benefits of third party funding is that “the use of third party funding...does not impose additional financial burdens upon opposing parties.”

81. I am sceptical of the Claimants' submission that unless losses are potentially recoverable by way of a cross-undertaking, access to justice may be frustrated. The approach taken by Harbour demonstrates that there is no good reason why access to justice should require defendants to be exposed to the risk of having to pay such losses. The interests of justice are properly served by ensuring that commercial funders have already taken steps to be able to meet any costs orders that may be made against them in litigation in which they choose to invest for profit. Moreover, the balance between the access to justice rights of claimants and defendants has been set by reference to the stifling principle.

Conclusion on Issue 2

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 Re RBS, Bailey, Hotel Portfolio II* or *Pisante*, which should no longer be followed.
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.

Disposal

84. It follows that, in my view, Nugee J was correct to refuse to require a cross-undertaking in the February Order, albeit for different reasons from those he gave; and that he fell into error in requiring the cross-undertaking in the July Order. That renders it unnecessary to address Issues 3 or 4.
85. For my part, therefore, I would dismiss the Funded Stewart's Claimants' appeal, and allow the cross-appeal of the Security Defendants.

Lord Justice Henderson :

86. I agree.

Lord Justice Floyd :

87. I also agree.