

Dispute Resolution
Case Law Update
Rosling King LLP



The Facts

Following the collapse of the Royal Bank of Scotland (“**RBS**”) share price in 2009 a substantial number of investors and shareholders initiated litigation proceedings against RBS as a result of the loss suffered.

Whilst a large number of claims settled in December 2016 the remaining claimants, known as the SG Group, did not. The SG Group sought funding from two third parties, Hunnewell Partners (“**Hunnewell**”), commercial litigation funders incorporated in the British Virgin Islands, and London Capital Partners (“**LNCP**”) incorporated in the Isle of Man (together “**the Litigation Funders**”).

The Application

Following the appointment of Hunnewell and LNCP, and in light of the vast number of claimants with unknown assets, RBS made an application for security for costs against the Litigation Funders for a total of £11.6 million.

There are a number of circumstances in which the Court can make an order for security for costs against a third party, including; if in all the circumstances it is just to do so; where a party assigns the right to the claim to the claimant with a view to avoiding a costs order; or where a party contributes (or agrees to contribute) to the claimant’s costs in return for a share of what the claimant recovers and that party is one against whom a costs order may be made.

The Decision

In making its decision the Court considered a number of factors, including:

The role of the Litigation Funders

A distinction was drawn between Hunnewell and LNCP in their roles as Litigation Funders. Hunnewell was a professional litigation funder, acting in the ordinary course of business with a view to profit. In contrast, LNCP did not ordinarily provide litigation funding and their primary motivation was not one of profit, but instead providing the SG Group with the resources to bring their claim against RBS. Hildyard J viewed LNCP as a ‘pure funder’, i.e. they were acting on a one-off basis as a funder in order to enable access to justice for the SG Group.

The financial situation and jurisdiction of the Litigation Funders

Hildyard J held concerns regarding the risk of non-payment by the Litigation Funders in the event they were ordered to pay costs because the SG Group’s After The Event insurance would not cover the potential adverse costs associated with the litigation.

It was noted that the financial positions of the Litigation Funders was unclear as they were

incorporated in countries which do not require the public filing of company documents, or that accounts are made available for public inspection. Hildyard J therefore held that “inferences [were] to be drawn from the deliberate reticence” of the Litigation Funders to disclose financial information. However, due to the vast number of claimants forming the SG Group and the fact that many of them were based abroad, Hildyard J felt that despite the “admittedly sparse [financial] evidence” of the Litigation Funders before him, he could not “underestimate the difficulties of recovering such comparatively small sums from so many” claimants. Hildyard J therefore held that this mitigated any risk of non-payment on behalf of the Litigation Funders.

Causation

Hildyard J recognised that it was unnecessary “to establish strict causation” but emphasised the importance that RBS “show at least some causal link between the non-party’s conduct and costs incurred”. Hildyard J held that causation had been satisfied in this case.

Risk of liability

Hildyard J considered whether an express warning, that an order for security of costs could be made against them, should have been given to the Litigation Funders. However, Hildyard J held that in the case of commercial litigation funders, such as Hunnewell, “it is not for the Court to protect a party from inherent business risks of which it should be well aware” and that Hunnewell should have appreciated the associated risks of providing litigation funding. In contrast, Hildyard J stated that LNCP were unlikely to be aware of the risks as they were not in the business of litigation funding.

Decision

Having weighed up the relevant factors it was ordered that Hunnewell, as an experienced commercial litigation funder, was to pay £7.5 million as security for costs, conditional on RBS providing a cross undertaking in damages. However, Hildyard J took the decision that LNCP acted as a ‘pure funder’, which was inexperienced and unaware of the inherent risks of litigation funding. A security for costs order was therefore not granted against LNCP. In closing Hildyard J emphasised that this decision did not set a hard and fast rule and that each individual case would need to be carefully considered and weighed on the facts before the Court.

Commentary

The decision is an important reminder for litigation funders of the risks associated with funding claims. However, litigation funders should take comfort from the fact that the Court will carefully consider the experience and financial situation of the funder when reaching a decision.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.