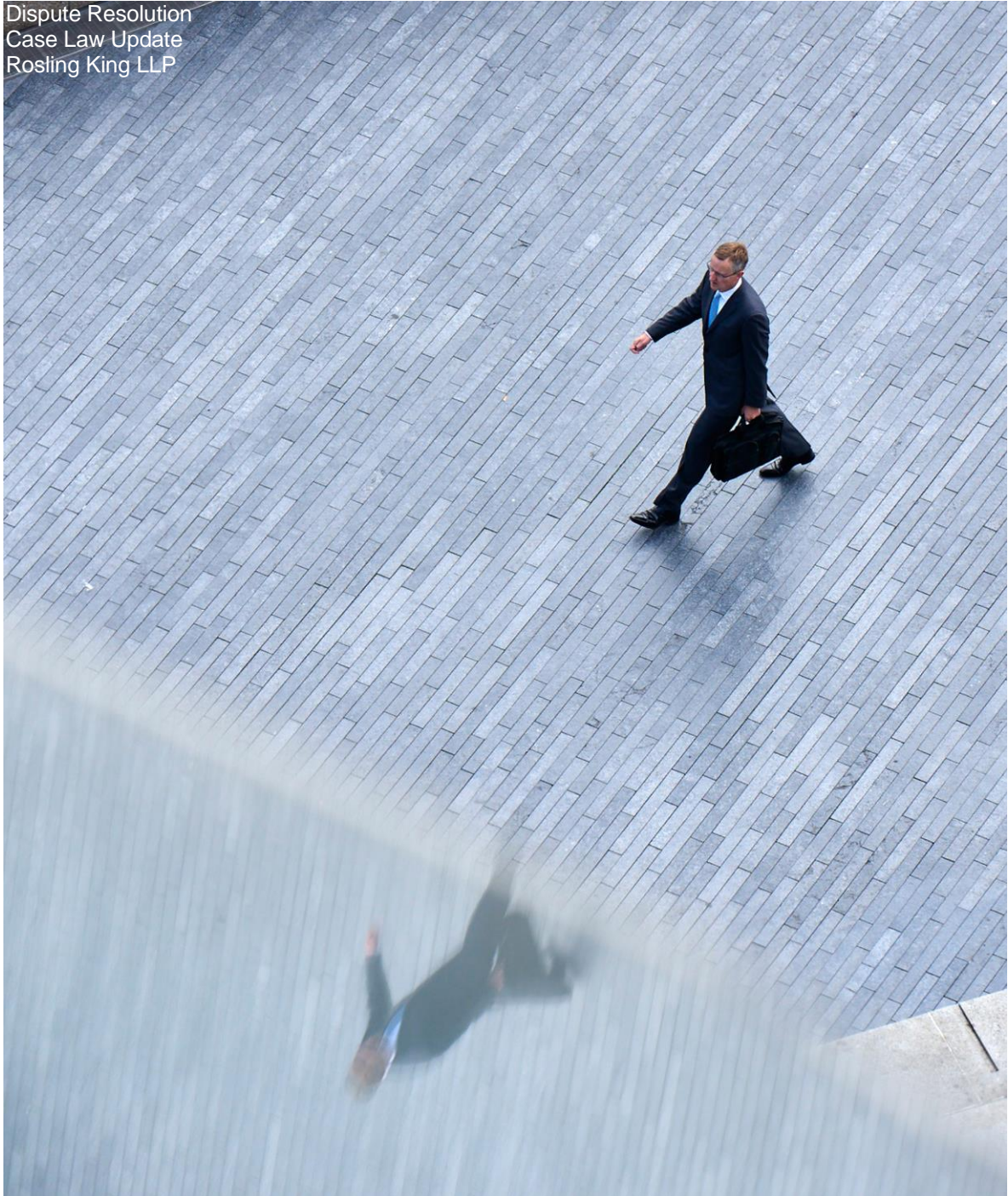


Dispute Resolution  
Case Law Update  
Rosling King LLP



## Background

The Courts have the power to make an Order for security for costs against a non-party to litigation. In making such an order the Court will have regard to whether the making of such an Order is just. The Court will also consider whether the non-party has assigned the right to the claim to the claimant, with a view to avoiding the possibility of a costs order being made against them, or has contributed to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings.

In this claim, the Defendants sought an Order for the disclosure of the identity of the funders of litigation brought against them. This was so that they could in turn consider issuing an application for security for costs against the non-party funders. The Claimants argued the Court was unable to order the disclosure of the identity of the funders because no express power in legislation or the Civil Procedure Rules ("CPR") existed, nor was there any implicit power to order security for costs against a non-party.

## Decision

The Court granted the Defendants' application on the basis that there was a power, inherent or implied, in the CPR to order disclosure of the identity of non-parties to enable an effective application for security for costs against a non-party. The Court's reasoning was that the power to make such an Order had to flow from the existence of an express provision in the CPR for an Order for security for costs to be made against non-parties. The Court held this power existed, notwithstanding that there was no pre-existing costs Order against any of the parties in the proceedings.

The Court then considered whether there were realistic grounds to make an application for security for costs and whether any application would have realistic prospects of success. On the facts, the Court determined that there was a realistic prospect of success. There was concern of material prejudice to the Claimant liquidators because they were, in effect, reliant upon the non-party funders, who included creditors of the company in liquidation, to pursue the litigation which could ultimately assist in the recovery of money for the non-party funders. The Court was aware that depending upon the identity of the funders, the Defendants may not issue an application for security for costs because of the view that the Defendants would take, for example, of the creditworthiness of the non-party funder. The Court held that it could craft a disclosure Order so as to ensure the identity of the funders could be preserved as far as possible. The Court subsequently required the identities of the non-party funders to be disclosed to named individuals of the Defendant, on the proviso of those named individuals giving confidentiality undertakings to not disclose the information to third parties, or use the information otherwise than for determining whether to make an application for security for costs against the non-party.

## Commentary

This decision will be of interest to litigants and to funders as an indication of the approach that



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the Courts will take when dealing with applications for security for costs when funders are involved.

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