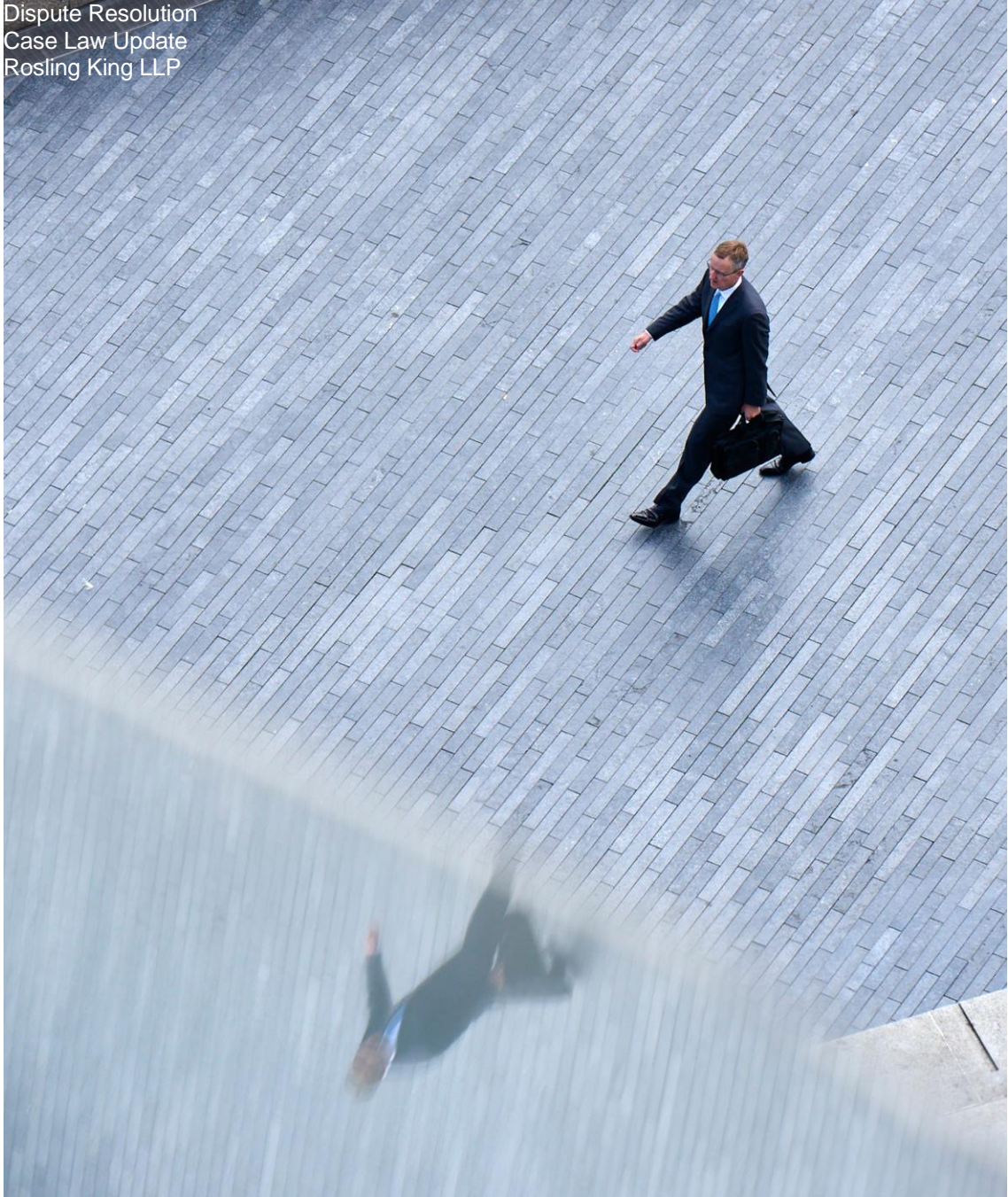


Dispute Resolution
Case Law Update
Rosling King LLP



Background

In 2007, the Claimant invested in two financial products issued by the Defendant for a minimum term of five years. The Claimant alleged the products were encashed early by the Defendant in breach of contract. The Claimant claimed damages for breach of contract, breach of statutory duty, negligence and fraud.

Prior to filing a Defence the Defendant issued an application for security for costs up to and including the filing of the Defence in sum of £38,023.85. In support of its application the Defendant confirmed that it intended to defend the claim and allege that the financial products were used to secure the Claimant's indebtedness to the Defendant in respect of a loan and overdraft facility.

Decision

In deciding whether to allow the application, the Court had to consider two questions:

1. Whether there was reason to believe that the Claimant would be unable to pay the Defendant's costs if ordered to do so; and
2. Whether it was just to order security for costs.

The Judge distinguished between circumstances where (i) the Court merely entertained a doubt as to whether the Claimant could pay a costs order, and (ii) the Court may have reason to believe that the Claimant is unable to pay a costs order even if its inability to pay could not be established on a balance of probabilities. The Judge held that the former would be insufficient for a successful security for costs application, whilst the latter was acceptable.

The Judge assessed the Claimant's balance sheet and its witness statement opposing the application and found "*that there is reason to believe that the Claimant would not be able to pay the [Defendant's] costs...if ordered to do so*". The Judge based his decision on the following:

- i) The Claimant's balance sheet included a current asset which was made up of the debt the Claimant alleged that the Defendant owed. If the Claimant failed in its claim and the debt was removed from the balance sheet, the Claimant would have significant net liabilities;
- ii) The solvency of the Claimant depended on it not being ordered to pay costs and its principal creditor not enforcing a debt the Claimant owed;
- iii) The Claimant accepted it would find it difficult to raise the sum sought for security if required to do so;
- iv) The Judge found there was some superficial evidence attached to an undertaking provided by the Claimant's principal creditor that it would not enforce the debt owed, including the lack of evidence pertaining to the debt;
- v) The existence of a debenture issued by the Claimant's principal creditor to the Claimant was not recorded on the Claimant's balance sheet and would not affect the

- vi) net liability position if the debt allegedly owed by the Defendant was removed; and Although the Claimant had fixed assets, these were not liquid assets and no evidence of their worth had been put forward.

Having concluded the Court had jurisdiction to order security for costs, the Judge then moved onto the second question to consider whether it would just to do so.

The Judge took into account the following circumstances to conclude it was just in all the circumstances to order security for costs against the Claimant:

- i) The allegations raised against the Defendant were serious and required intensive factual inquiry;
- ii) The Claimant had arranged for various offers of security to be made to the Defendant;
- iii) The Claimant had alleged the ordering of security for costs would prevent it from pursuing its claim against the Defendant. However, the Judge on review of the evidence did not believe it was probable that the Claimant could not procure security for costs from its own recourses or the resources of any interested party;
- iv) The provision of security would not interfere with the Claimant's operation as an investment company;
- v) There would be prejudice to the Defendant if the claim was to proceed without security for its costs in that it might be faced with the risk of being unable to recover a substantial element of its costs if no order as to security was made; and
- vi) The timing of the application was a relevant consideration. The Judge held it was a "*slightly unusual*" case as the application was made relatively early in the proceedings. The Judge noted that the Commercial Court Guide sets out that the first application for security for costs should be made no later than the first Case Management Conference. However, the Judge did not think the Defendant could be criticised on this point.

As to the amount of security to be ordered, the Judge held the "*amount of security ordered should be proportionate to the task.*" He noted the Defendant was claiming a "*substantial amount*" at an early stage of the proceedings and that the Particulars of Claim was only a 12 page document. He therefore ordered security for costs in the sum of £27,500.

As an aside, the Judge made an additional observation as to the appropriate timing of a security for costs application. He explained the appropriate time would be at a time when more is known about the parties' respective positions which would be revealed by their statements of case which would allow the Court a better sense of the direction of the case, the costs involved and, if relevant, the merits of the claim or defence. However, as the Judge had decided it was just in all the circumstances to order security for costs he did not see the purpose in delaying the provision of the order.

Commentary

This case serves as a reminder of the Court's approach when dealing with a security for costs application in that they will scrutinise the Respondent's financial circumstances and all the relevant circumstances of the case before deciding whether to order security for costs.

Whilst the Judge did not criticise the Defendant regarding the timing of its application, he did explain that alternative forms of the order had been contemplated, hinting of the possibility of an early application affecting the outcome of the security for costs order.

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