

COURT ORDERS SECURITY FOR COSTS IN FAVOUR OF CHALLENGER TO A RESTRUCTURING PLAN

The English court has granted a security for costs order in favour of Tameside and Glossop Integrated Care NHS Foundation Trust in relation to its challenge against a restructuring plan for a Private Finance Initiative (PFI) Project related to Tameside hospital. The court has ordered 50% security for the Trust's legal costs, contingent upon the plan being sanctioned. This case represents the first application for security for costs in challenging an English restructuring plan.

A balancing exercise

The court held that it would have been disproportionate and risked stifling the plan to require security for all of the Trust's costs. Furthermore, the security will only be recoverable in the event the plan is ultimately sanctioned. The judge held that if the plan is not sanctioned, then the Trust will be able to exercise certain set off rights so that the security would not be required. The decision is to be supplemented by a reserved judgment to be published at a later date, the terms of which are to prevail over the judge's note issued prior to the hearing on 25 June.

Novelties of the case

This case is the first time an application has been made to secure costs in challenging an English restructuring plan. In this case the Trust sought £926k of costs which it said were involved in challenging the plan. The restructuring plan represents the first time the process has been used in relation to a PFI Project company and seeks to bind a dissenting NHS trust to the terms of the plan.

When can security for costs be ordered

Security for costs may be ordered against a company where (amongst other things) there is reason to believe that it will be unable to pay the opposing party's costs if ordered to do so.

Security is not ordered as of right

Even if there is reason to believe that the company would be unable to pay the costs; the court's power is discretionary and is to be exercised having regard to all the circumstances of the case.

Key issues

- First case to award security for costs to challenger of a restructuring plan
- Security for costs is a discretionary remedy
- Balance of awarding security and not stifling the plan meant 50% of costs awarded
- Nature of the plan and creditors affected are relevant in exercise of discretion
- Decision may embolden other challenges in the context of restructuring plans

Circumstances of this plan

The court acknowledged that restructuring plan proceedings are not like ordinary adversarial commercial litigation, i.e. plans seek the assistance of the court to implement a compromise or arrangement between a company and its stakeholders and the gateway to accessing the court's jurisdiction to approve a restructuring plan is triggered by a company being in financial difficulties and needing a restructuring plan to remedy those difficulties. However, the judge was influenced in the exercise of his discretion in this case by (i) the fact that the plan in this case could be perceived as a mechanism for allowing two other creditors to secure a more favourable outcome to the Trust's dispute with the PFI project company than had been arrived at already in separate adversarial proceedings; and (ii) the small number of creditors (3 in total including the Trust) affected by the plan.

What does this decision mean for other restructuring plans

It may embolden others wishing to challenge a restructuring plan to seek similar security for costs orders at an early stage in the process, however care needs to be taken in relation to such a strategy, as in other cases it may be inappropriate or disproportionate to do so or considered to be unfairly stifling attempts to restructure.

Next steps

The reserved judgment for the security for costs application is to be issued within 7 to 10 days. We understand that permission to appeal the order was declined, although it may be that a separate application for permission could be made to the Court of Appeal. Subject to any appeals, the case is due before the court on 15/16 July, scheduled to consider whether to sanction the restructuring plan itself.

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