

Cross-undertakings

How do you present or attack cross-undertakings and what counts as ‘material’ disclosure on ability to pay?

Paul Lowenstein KC



Overview of presentation

For discussion today:

1. Nature and basis
2. Discretion
3. For whose benefit
4. Unlimited or limited
5. Disclosure
6. Fortification

Not for today:

1. Enforcement
2. Assessment of loss

Reasons for the Undertaking

- The cross undertaking is required because **every interim injunction is granted before trial** and therefore before the merits of the case have been finally determined
 - justly balances the interests of C with the protection of D
 - and stops the court from having to go into the merits to protect D



Some fundamentals

- Undertaking – not order
- Given to court – not the respondent

Exercise of discretion

- A cross-undertaking is almost always required unless C is exempt
- Whether to require or dispense with the requirement is concerned with **fairness** in having **machinery in place giving the court jurisdiction over who is to bear losses caused by the injunction**
 - Not on whether the defendant shows any risk of loss
 - that is relevant to fortification

For whose benefit?

- **The Respondent:**

CPR 25.9(3)(a)

“(3) Unless the court orders otherwise, an order for an interim injunction must contain—

(a)subject to paragraph (6) [Aarhus Convention – injunction to prevent environmental damage], an undertaking by the applicant to the court to pay any damages which the respondent sustains and which the court considers the applicant should pay”

- **Third Parties:** any other person who may suffer loss in consequence of the order

Cross-undertakings for the benefit of third parties [1]

- Traditionally
 - Undertakings to pay the **costs** of third parties complying with the order
 - **May** also have required the undertaking in damages to extend to any person, other than the respondent, who may suffer loss as a consequence of the order
 - **JSC BTA Bank v Solodchenko** [2010] EWCA Civ 1436
 - **Harley Street Capital Ltd v Tchigirinski** [2005] EWHC 2471 (Ch) at [15]

Cross-undertakings for the benefit of third parties [2]

- **Now**

- Strong presumption that third parties will be covered by the cross-undertaking

- **CPR 25.9(5)** (6.4.2025)

- “(5) Subject to paragraph (6) [Aarhus Convention – injunction to prevent environmental damage], when the court makes an order for an interim injunction, it must consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, **including another party to the proceedings or any other person who may suffer loss as a consequence of the order.**”

- **Model Order for a Freezing Injunction**’ (April 2025)

- “**Schedule B - UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT**

- (1) If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make.

- (2) If the court later finds that this order has caused loss to anyone other than the Respondent, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.”

The cross-undertaking is usually unlimited – what limitations might be imposed? [1]

- Requirement for a cross-undertaking and the scope of the undertaking are both matters for the **discretion**
 - includes taking into account who stands behind a claimant and whether they can be expected to provide an indemnity to the claimant: **JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev** [2015] EWCA Civ 139 at [85]-[86]
- Default position: undertaking required; and unlimited: **Pugachev** at [68]-[70]
- Burden on applicant to justify change from default position
- Exceptions to the discretion are very rare – limited to narrow categories of Claimant

The cross-undertaking is usually unlimited – what limitations might be imposed? [2]

- Exceptions to the discretion
 - [1a] **Exemption from giving an undertaking**: crown and law enforcement cases
 - [1b] **Exemption from giving an undertaking**: impecuniosity (stifling) cases - exceptional
 - Where the court grants the injunction taking the risk that the cross undertaking may not be met by the impecunious claimant
 - Or where the claimant's inability to give an undertaking caused by alleged fraud of the defendants
 - [2a] **Limited undertaking**: liquidators and other applicants who have no personal interest in the litigation: e.g. **(i)** where litigation is being brought by liquidators on behalf of an insolvent company **(ii)** where there are no large creditors who can be expected to indemnify them and **(iii)** where it has proved impossible to obtain insurance against unlimited liability on the cross-undertaking
 - **Re DPR Futures Ltd** [1989] 1 WLR 778
 - **Re IAHP Group Holdings Limited (in Liquidation)** [2025] EWHC 2069 (Ch)
 - [2b] **Limited undertaking**: sanctions cases: e.g. 19.6 **CJSC Alfa Bank (Belarus) v Lek Securities UK Ltd** [2024] EWHC 804 (Comm) at [23]

Disclosure by the Claimant

- **Duties of disclosure**

- Importance of evidence

- Continuing obligation: **Staines v Walsh** [2003] EWHC 1486, Ch. D.

- **Orders for disclosure of the Claimant's assets**

- An applicant for a worldwide freezing order (WFO) that did not have assets within the jurisdiction to meet any liability under its cross-undertaking or, on the available evidence, have sufficient liquid assets to fortify the cross-undertaking in one of the conventional forms, should be **required to provide some form of asset disclosure as a condition** of obtaining or maintaining the freezing order relief: **LAX SA v JBC SA** [2024] EWHC 2042 (Comm) Foxton J

Fortification of the Cross-Undertaking [1]

- Criteria for fortification:
 - **Energy Venture Partners Ltd v Malabu Oil And Gas Ltd [2014] EWCA Civ 1295**
 - **(1) intelligent estimate of the likely amount of loss or harm** which might result to a defendant by reason of the injunction
 - Onus of proof
 - approach is fairly rudimentary
 - **(2) sufficient level of risk of loss** to require fortification
 - **(3) contemplated loss would be caused by the grant of the injunction**
 - BUT NB Once a good arguable cause has been shown, if disproving the claimed causal link requires extensive contentious evidence and argument, that is not an exercise to be attempted at the interlocutory stage: **Energy Venture Partners** at [54]

Fortification of the Cross-Undertaking [2]

- **Approach to fortification in WFO cases:**
 - It may not be possible to predict what loss will be caused, although there must be **some real evidence of a general risk of loss** that justifies the fortification of the cross-undertaking: **Sinclair Investment Holdings v Cushnie [2004] EWHC 218 (Ch)**.
 - The test is whether D can show a good arguable case that they would suffer loss in consequence of the making of the freezing order:
 - **The Claimants set out In Schedule 1 To the Claim Form v Spence & Ors [2021] EWHC 925 (Comm)**
 - By reference to **Gee on Commercial Injunctions**, paragraph 11-029: “**Assertion of risk is insufficient**, there must be **some real evidence**, which objectively establishes that risk.”
 - Good arguable case test re-adopted in **Armeniakou v Thomson [2025] EWHC 505 (KB)**

Fortification of the Cross-Undertaking [3]

- (1) Approach to fortification in proprietary injunction cases:

- **Adeem Investment Holding Company KSCH v Al-Humaidhi and others** [2021] EWHC 1483 (Ch) at [7] and [12]

- Fortification of a cross-undertaking (£4 million) granted in connection with a **proprietary injunction** was obtained to cover the risk that the relevant share price would drop while the injunction prevented sale

- (2) Past and future losses

- **Alta Trading UK Ltd and others v Bosworth and others** [2021] EWHC 1126 (Comm)

- the court's jurisdiction to order the fortification (or further fortification) of an undertaking in damages **can relate to past losses, not just future ones**

- (3) Fortification following a change in circumstances

- Where a party has been ordered to fortify its undertaking in damages, the court may vary the fortified sum on the grounds that there have been a change of circumstances

- (4) Increasing the fortified sum

- In principle, the fortified sum can be increased, but there are reported examples of failures to obtain increases

- (5) No fortification after the relevant injunction has been discharged

- Fortification will **not be ordered** after the relevant injunction has been discharged: **Alta Trading UK Limited & Ors v Bosworth & Ors** [2025] EWHC 1097 (Comm) Henshaw J

Fortification of the Cross-Undertaking [4]

- **Manner of fortification:**

- The court may require either security or the payment of money into court to fortify the undertaking
- NB Many principles similar to SfC
- Commercial Court Guide **F.14.3**

- **Examples:**

- By insurance policy: **Candy and others v Holyoake and another** [2017] EWCA Civ 92
- From a third-party: **Brainbox Digital Ltd v Blackbord Media GmbH and another** [2017] EWHC 2465 (QB)
- By bank guarantee: **Crypto Open Patent Alliance v Wright** [2024] EWHC 743 (Ch)



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ESSEX

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Paul Lowenstein KC

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LONDON
20 Essex Street
London WC2R 3AL
T +44 (0)20 7842 1200
F +44 (0)207842 1270
E enquiries@twentyessex.com
W twentyessex.com

SINGAPORE
Maxwell Chambers
Suites #02-03
28 Maxwell Road
Singapore 069120
T +65 62257230
F +65 62249462
E singapore@twentyessex.com
W twentyessex.com